No. 21-6934

IN THE SUPREME COURT OF THE UNITED STATES

DONNIE BARNES, SR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court committed legal error in providing the jury with non-exhaustive factors that it could consider in determining whether images produced by petitioner featured a "lascivious exhibition of the genitals or pubic area" of the victim, 18 U.S.C. 2256(2)(A)(v) (2012), and thus constituted child pornography under 18 U.S.C. 2251(a).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Wash.):

United States v. Barnes, Sr., No. 18-cr-5141 (Mar. 2, 2020)

United States Court of Appeals (9th Cir.):

United States v. Barnes, Sr., No. 20-30059 (Oct. 22, 2021)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the Federal Reporter but is available at 2021 WL 4938126.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 2021. The petition for a writ of certiorari was filed on January 19, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Washington, petitioner was convicted of producing child pornography, in violation of 18 U.S.C. 2251(a) and (e); distributing child pornography, in violation of 18 U.S.C. 2252(a)(2) and (b)(1); and possessing child pornography, in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2). Judgment 1. He was sentenced to 180 months of imprisonment, to be followed by a lifetime term of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-5a.

1. In February 2018, a law enforcement officer in Queensland, Australia specializing in internet child-exploitation crimes discovered several pictures of a young girl posted on an image-sharing site by a user named TICK10TO12TOCK, who was later revealed to be petitioner. Gov't C.A. Br. 2. One of the photos showed the girl's underwear "being pulled aside to reveal her genitals." Ibid. The officer commented on the photo in an effort to learn whether TICK10TO12TOCK had taken it, and petitioner responded via e-mail that the girl was his "sweet little toy." Id. at 2, 9. In subsequent e-mails, petitioner informed the officer that the girl, referred to as J.T., was his 11-year-old stepdaughter and was "very sexy," "very flirty," and "fun to play with." Ibid. (citation omitted).

Following additional investigation, the officer determined that TICK10TO12TOCK was located in the United States. At that

point, he contacted U.S. Homeland Security Investigations, and federal authorities assumed control of the investigation. Gov't C.A. Br. 2-3. On March 6, 2018, U.S. law enforcement conducted a warrant-authorized search of the home that petitioner shared with a woman and her two children, including J.T. Id. at 4-5, 12. In an interview with law enforcement, petitioner admitted that he took nude videos and photos of J.T. and that agents would find those materials on his iPhone. Id. at 5; see 2019 WL 2515317, at *2 ("During the interrogation [petitioner] admitted possessing incriminating depictions of K.T.'s minor daughter.").

Petitioner further admitted that his username was TICK10TO12TOCK and that the photos he posted to the foreign image-sharing site were of J.T. Gov't C.A. Br. 5. At least some of those images appeared to have been still shots from videos that petitioner took of J.T. in her bedroom while she was sleeping. Id. at 11. In one video, petitioner pulled back J.T.'s underwear to expose her genitals, and brought the camera in for a close-up view of her genitals. Ibid. In two others, petitioner pulled back clothing to expose J.T.'s breast and nipple. Ibid.

Petitioner also told the agents that he had a USB drive in his home containing three videos of children being sexually abused. Gov't C.A. Br. 6. One video showed an adult male having sex with a young child; a second video showed a young girl performing oral sex on an adult male; and a third video showed an adult male having sex with and ejaculating in the face of a young child. Id. at 12.

Petitioner told the authorities that in order to obtain those videos, he had given away two pairs of J.T.'s underwear, which he had taken from her dirty laundry. Ibid.

2. In April 2018, a federal grand jury returned an indictment charging petitioner with producing child pornography, in violation of 18 U.S.C. 2251(a) and (e); distributing child pornography, in violation of 18 U.S.C. 2252(a)(2) and (b)(1); and possessing child pornography, in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2). Indictment 1-2. The production and distribution counts were premised on the pictures of J.T.'s genitals that petitioner took while she was sleeping; the possession count was premised on the videos found on petitioner's USB drive. See 10/30/19 Trial Tr. (Tr.) 97-111 (government's closing argument).

The production statute makes it a crime, inter alia, to "employ[]" or "use[]" a "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). The distribution statute makes it a crime to "knowingly * * * distribute[] any visual depiction" if "the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct" and "such visual depiction is of such conduct." 18 U.S.C. 2252(a)(2). The term "'sexually explicit conduct'" is defined to include "sexual intercourse," "bestiality," "masturbation," "sadistic or

masochistic abuse," or "lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. 2256(2)(A) (2012).

The district court advised the jury that, "[i]n determining whether an exhibition of the genitals or pubic area of a minor is lascivious," it "may consider the following factors": (1) "[w]hether the focal point of the visual depiction is on the minor's genitals or pubic area"; (2) "[w]hether the setting of the visual depiction is sexually suggestive, that is, a place or pose generally associated with sexual activity"; (3) "[w]hether the minor is depicted in an unnatural pose, or in inappropriate attire considering the age of the minor"; (4) "[w]hether the minor is fully or partially clothed, or nude"; (5) "[w]hether the visual depiction suggests coyness or a willingness to engage in sexual activity"; and (6) "[w]hether the visual depiction is intended or designed to elicit a sexual response in the viewer." Final Jury Instructions 24 (Jury Instructions). And the court made clear that:

> A visual depiction must visually depict the minor's genitals or pubic area, but a visual depiction need not involve all of these factors to be a lascivious exhibition of the genitals or pubic area. Nor is this list exhaustive. It is for you to decide the weight or lack of weight to be given to any of these factors or others. Nudity alone is not sufficient to render an image lascivious. Ultimately, you must determine whether the visual depiction constitutes a lascivious exhibition of the genitals or pubic area based on its overall content.

Id. at 24-25.

The jury found petitioner guilty on all counts. Pet. App. 1a.

3. The court of appeals affirmed in an unpublished decision. Pet. App. 1a-5a. It rejected petitioner's challenge to the district court's instruction on the meaning of "lascivious exhibition." Id. at 2a (quoting 18 U.S.C. 2256(2)(A)(v) (2012)). The court of appeals noted that the six factors articulated by the district court were drawn from United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986), aff'd sub nom. United States v. Wiegand, 812 F.2d 1239 (9th Cir.), cert. denied, 484 U.S. 856 (1987), and that it had "repeatedly looked to the Dost factors as a starting point for analy[sis]." Pet. App. 2a (citing United States v. Perkins, 850 F.3d 1109, 1122 (9th Cir. 2017), and United States v. Overton, 573 F.3d 679, 686-687 (9th Cir.), cert. denied, 558 U.S. 977 (2009)). The court of appeals found that the instructions "adequately conveyed that the factors are neither exhaustive nor conclusive." Ibid. And the court reaffirmed that "consideration of the image from the photographer's perspective * * * is appropriate, particularly in a case, as here, involving a charge of production of child pornography." Ibid. (citing Overton, 573 F.3d at 688; United States v. Arvin, 900 F.2d 1385, 1389 (9th Cir. 1990), cert. denied, 498 U.S. 1024 (1991)).

ARGUMENT

Petitioner renews his contention (Pet. 20-21) that the district court erred in instructing the jury on the meaning of

"lascivious exhibition," 18 U.S.C. 2256(2)(A)(v) (2012). That contention lacks merit; this Court has repeatedly denied writs of certiorari in cases challenging the use of factors like the ones that the district court identified here;* and any disagreement in the lower courts is narrow, nascent, and may resolve itself. Further review is unwarranted.

1. The court of appeals correctly rejected petitioner's challenge to the district court's instructions regarding the phrase "lascivious exhibition," 18 U.S.C. 2256(2)(A)(v) (2012). The statute does not define the term "lascivious," ibid., which accordingly takes its ordinary meaning. See, e.g., Perrin v. United States, 444 U.S. 37, 42 (1979). The word "lascivious" means "[i]nciting to lust or wantonness." 8 The Oxford English Dictionary 666-667 (2d ed. 1989) (emphasis omitted); see Webster's Third New International Dictionary 1274 (2002) ("tending to arouse sexual desire") (emphasis omitted); see also, e.g., United States v. Al-Awadi, 873 F.3d 592, 600 (7th Cir. 2017) ("We have said that a lascivious exhibition 'is one that calls attention to the genitals or pubic area for the purpose of eliciting a sexual response in the viewer.'") (citation omitted); United States v. Courtade, 929 F.3d 186, 191-192 (4th Cir. 2019) (as amended July

* See, e.g., Fernandez v. United States, 141 S. Ct. 2865 (2021) (No. 20-7460); Courtade v. United States, 140 S. Ct. 907 (2020) (No. 19-428); Rockett v. United States, 140 S. Ct. 484 (2019) (No. 18-9411); Wells v. United States, 138 S. Ct. 61 (2017) (No. 16-8379); Miller v. United States, 137 S. Ct. 2291 (2017) (No. 16-6925); Holmes v. United States, 137 S. Ct. 294 (2016) (No. 15-9571).

10, 2019) (examining definitions), cert. denied, 140 S. Ct. 907 (2020). And the district court's instruction was fully consistent with that plain meaning.

The district court made clear that "[n]udity alone is not sufficient to render an image lascivious." Jury Instructions 24-25. And it informed jurors that they "may consider" several commonsense factors, including "[w]hether the focal point of the visual depiction is on the minor's genitals or pubic area" and "[w]hether the visual depiction is intended or designed to elicit a sexual response in the viewer." Id. at 24. As the court of appeals explained, those factors simply provided "guidance" and a "starting point" for analyzing whether an image satisfied the statutory definition. Pet. App. 2a; see, e.g., United States v. Rivera, 546 F.3d 245, 252-253 (2d Cir. 2008) (explaining that such factors "impose useful discipline on the jury's deliberations"), cert. denied, 555 U.S. 1204 (2009). The district court clarified that "a visual depiction need not involve all of these factors to be a lascivious exhibition"; that the list is not "exhaustive"; and that it was for the jury "to decide the weight or lack of weight to be given to any of these factors or others." Jury Instructions 24. Ultimately, "the 'lascivious exhibition' determination must be made on a case-by-case basis using general principles as guides for analysis," United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986), aff'd sub nom. United States v. Wiegand, 812 F.2d 1239 (9th Cir.), cert. denied, 484 U.S. 856

(1987), and the district court here appropriately left it to the jury to "determine whether the visual depiction constitute[d] a lascivious exhibition of the genitals or pubic area based on its overall content," Jury Instructions 25. See, e.g., United States v. Amirault, 173 F.3d 28, 32 (1st Cir. 1999) ("The inquiry will always be case-specific.").

Petitioner contends that the decision below conflicts with this Court's interpretation of the "same or similar phrasing" in prior decisions. Pet. 21 (citation omitted). But petitioner does not identify any respect in which the non-exhaustive considerations provided by the district court diverge from this Court's precedents. Indeed, the factors interpret the phrase "lascivious exhibition," 18 U.S.C. 2256(2)(A)(v) (2012), in light of the Court's decision in New York v. Ferber, 458 U.S. 747 (1982), see Dost, 636 F. Supp. 2d at 832, on which petitioner relies, see Pet. 4, 21. Petitioner also contends that the noscitur a sociis canon necessarily limits "lascivious exhibition," 18 U.S.C. 2256(2)(A)(v) (2012), to conduct "connot[ing] the commission of" the other four activities listed in the statute -- namely, "sexual intercourse, bestiality, masturbation, or sadistic or masochistic abuse," Pet. 10 (quoting United States v. Hillie, 14 F.4th 677, 687 (D.C. Cir. 2021)). But "lascivious exhibition" is not a catchall clause; instead, it is one of five, independent kinds of "'sexually explicit conduct'" listed in the statute. 18 U.S.C. 2256(2)(A)(i)-(v). It makes no more sense to limit "lascivious

exhibition" to conduct connoting the other list items than it would to limit those other list items in the same way -- for example, by limiting "sexual intercourse" to "sexual intercourse" "connot[ing]" "bestiality." Pet. 10 (citation omitted).

Petitioner also contends that the sixth factor, "[w]hether the visual depiction is intended or designed to elicit a sexual response in the viewer," Jury Instructions 24, improperly focuses "on the defendant's subjective intent, rather than the objective characteristics of the image," Pet. 15. But the district court instructed the jury that it "must determine whether the visual depiction constitutes a lascivious exhibition" based on the "overall content" of the depiction, Jury instructions 25, and this is not a case involving "no nudity or simply voyeurism," Pet. 17, of the sort on which petitioner premises his argument. Moreover, to the extent that petitioner's interpretation (ibid.) would apparently exclude clandestine photography of minors in compromising positions, it would be contrary to the statute's basic purpose. See, e.g., United States v. Petroske, 928 F.3d 767, 770-774 (8th Cir. 2019), cert. denied, 140 S. Ct. 973 (2020); United States v. Spoor, 904 F.3d 141, 146-150 (2d Cir. 2018), cert. denied, 139 S. Ct. 931 (2019); United States v. Holmes, 814 F.3d 1246, 1247, 1251-1253 (11th Cir.), cert. denied, 137 S. Ct. 294 (2016); see also United States v. Vallier, 711 Fed. Appx. 786, 788 (6th Cir.) (per curiam), cert. denied, 139 S. Ct. 442 (2018).

2. Petitioner asserts (Pet. 7-19) that the lower courts are divided regarding whether and how to apply the Dost factors. Petitioner overstates the tension in the lower courts, which does not warrant this Court's intervention.

a. Seven courts of appeals, including the court below, endorse the Dost factors as an aid in determining whether an image is lascivious. See, e.g., Spoor, 904 F.3d at 150-151 & n.9 (2d Cir.); Salmoran v. Attorney Gen., 909 F.3d 73, 80 n.11 (3d Cir. 2018); United States v. McCall, 833 F.3d 560, 563 (5th Cir. 2016), cert. denied, 137 S. Ct. 686 (2017); United States v. Hodge, 805 F.3d 675, 680 (6th Cir. 2015); Petroske, 928 F.3d at 773-774 (8th Cir.); United States v. Perkins, 850 F.3d 1109, 1121 (9th Cir. 2017); United States v. Isabella, 918 F.3d 816, 831 (10th Cir. 2019), cert. denied, 140 S. Ct. 2586 (2020).

Petitioner errs in contending (Pet. 12) that the images here are "arguably" non-lascivious under the Fifth Circuit's decisions in United States v. Romero, 558 Fed. Appx. 501, 503 (2014) (per curiam), and United States v. Steen, 634 F.3d 822, 828 (2011) (per curiam). The images in Romero (an unpublished decision) depicted a minor sleeping while clothed and playing while clothed on jungle-gym equipment; they did not show the minor's genitals at all. 558 Fed. Appx. at 502. And in Steen, unlike in this case, the "film did not accent the pubic area" and the setting was not "a sexually suggestive" one like "beds or bedrooms." 634 F.3d at 827.

Petitioner thus fails to show that any circuit would view the jury's determination here as unsupported by the Dost factors.

Four circuits have declined to take a definitive stance on the Dost factors. The Fourth and Eleventh Circuits have not decided whether to employ them. See Courtade, 929 F.3d at 192 (4th Cir.); United States v. Hunter, 720 Fed. Appx. 991, 996 (11th Cir. 2017) (per curiam) (noting that the court's published decisions had not resolved "whether Dost applies in this circuit," but nevertheless applying the Dost factors because "both Defendant and the Government use [them] in analyzing this question"). The Seventh Circuit, while "discourag[ing]" their "mechanical application," has similarly declined to decide whether to apply them. United States v. Miller, 829 F.3d 519, 525 n.1 (2016), cert. denied, 137 S. Ct. 2291 (2017); see United States v. Price, 775 F.3d 828, 838-840 (7th Cir. 2014) (no plain error in charging the jury as to the Dost factors but "discourag[ing] their routine use"). Consistent with that approach, the district court here made clear that the Dost factors are not "exhaustive" and that it was for the jury "to decide the weight or lack of weight to be given to any of these factors or others." Jury Instructions 24; see Tr. 102 (government closing argument emphasizing that factors are "not a checklist. * * * They are a guide. They are to help you make your assessment, if you find them helpful").

Finally, while the First Circuit has observed that "lascivious is a 'commonsensical' term and that there is no

exclusive list of factors -- such as the so-called Dost factors -- that must be met for an image (or a film) to be 'lascivious,'" United States v. Silva, 794 F.3d 173, 181 (2015) (citation and emphasis omitted), it has elsewhere given a "qualified endorsement of the Dost factors, stating that they are 'generally relevant and provide some guidance,'" even if they "'are neither comprehensive nor necessarily applicable in every situation,'" United States v. Frabizio, 459 F.3d 80, 87 (1st Cir. 2006) (citation omitted). Thus, nothing indicates that the First Circuit would disapprove of their use as a flexible aid to the jury's specific consideration of the facts here.

b. Petitioner identifies only two decisions that supposedly conflict directly with the decision below. One of those is State v. Whited, 506 S.W.3d 416 (2016) (cited at Pet. 11-12), in which the Supreme Court of Tennessee concluded that "[l]ower courts should refrain from using the Dost factors as a test or an analytical framework in" determining whether an image is lascivious under state law. Id. at 438. Moreover, even as to state law, the court also made clear that it was not "preclud[ing] judges from using their good sense to consider these or any other features of a depiction that might tend to make it sexual or lascivious." Id. at 437. Whited accordingly cannot and does not conflict with the decision below.

In United States v. Hillie (cited at Pet. 8-11), a divided panel of the D.C. Circuit interpreted the phrase "lascivious

exhibition," 18 U.S.C. 2256(2)(A)(v) (2012), in light of the canon of noscitur a sociis "to cover visual depictions in which a minor, or someone interacting with a minor, engages in conduct displaying their anus, genitalia, or pubic area in a lustful manner that connotes the commission of" one of the other listed activities, namely, "sexual intercourse, bestiality, masturbation, or sadistic or masochistic abuse," 14 F.4th at 687-688. The majority clarified that it did not "mean to suggest that evidence concerning all matters described in the [Dost] factors is irrelevant or inadmissible at trial," but rather "simply reject[ed] the practice of instructing the jury on the Dost factors as a matter of course, or in a manner that suggests those factors are sufficient to determine whether given conduct" satisfies the statute. Id. at 692. In dissent, Judge Henderson "agree[d] with most circuits * * * that the Dost factors are an appropriate, non-exclusive set of factors." Id. at 699.

At the outset, any conflict between the decision below and Hillie would not warrant the Court's review at this time because the government's petition for panel and en banc rehearing is currently pending in that case. See Gov't C.A. Pet. for Reh'g, Hillie, supra (No. 19-3027) (Dec. 13, 2021). If the court of appeals grants the petition, it may eliminate the alleged conflict altogether. And in any event, the panel issued its opinion in Hillie just last year; the majority's view is an outlier; and it

is far from clear that the majority's view would ultimately preclude a conviction on the facts of petitioner's case.

c. Petitioner also asserts (Pet. 18) that the model jury instructions used in a variety of circuits confirm their inconsistent approach to the question presented. But given the Dost factors' status as a non-exhaustive guide, any such variations are not problematic. In any event, model jury instructions are not binding. See, e.g., United States v. Peterson, 977 F.3d 381, 390 n.2 (5th Cir. 2020); United States v. Burke, 781 F.2d 1234, 1239 n.2 (7th Cir. 1985); United States v. Asomani, 7 F.4th 749, 753 n.3 (8th Cir. 2021); United States v. Fourstar, 87 Fed. Appx. 62, 64-65 (9th Cir.), cert. denied, 541 U.S. 1092 (2004); United States v. Carter, 776 F.3d 1309, 1324 (11th Cir. 2015). The purported differences in the pattern instructions accordingly do not warrant this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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