No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

PHILIP M. CLOSE,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In 2019 a video camera was discovered hidden in the bathroom of the Close School of Music. The school's owner, Philip Close, was eventually charged in a 74-count indictment with 61 counts of producing child pornography, in violation of 18 U.S.C. §§ 2251(a) & (e), and 13 counts of possessing child pornography, in violation of 18 U.S.C. §§ 2252A(a)(5)(B) & (b)(2). The images he produced and some images he possessed were of children relieving themselves in the bathroom. Brief glimpses of the children's genital area could be seen on the recorded images. Mr. Close pleaded guilty to each charge in the indictment and received an aggregate sentence of 600 months imprisonment.

The question presented is whether Mr. Close's convictions under 18 U.S.C. § 2251(a), for producing child pornography, and 18 U.S.C. § 2252A(a)(5)(B), for possessing child pornography, can be sustained where the videos only showed brief glimpses of children's genital areas and did not depict minors engaging in sexually explicit conduct.

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PETITION FOR WRIT OF CERTIORARI

Philip Close respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Court of Appeals' summary order is reported at *United States v. Close,* No. 21-1962-cr, 2022 WL 17086495 (2d Cir. Nov. 21, 2022) (*see* App. at 19), 2022 U.S.App.Lexis 32016 (2d Cir. Nov. 21, 2022).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on November 21, 2022 (App. at 19). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18, section 2251(a), provides the following:

> (a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was

> produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

Section 2251(e) of Title 18 sets forth these penalties:

> (e) Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years, but if such person has one prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 25 years nor more than 50 years, but if such person has 2 or more prior convictions under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned not less than 35 years nor more than life. Any organization that violates, or attempts or conspires to violate, this section shall be fined under this title. Whoever, in the course of an offense under this section, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for not less than 30 years or for life.

Title 18, section 2252A(a)(5)(B) states:

> (a) Any person who—
>
> > (5) either--
> > (B) knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

Section 2252A(b)(2) sets for the following penalty provisions:

> (b)(2) Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 10 years, or both, but, if any image of child pornography involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

Title 18 section 2256(2)(A) defines "sexually explicit conduct" as follows:

> For the purposes of this chapter, the term--
>
> (2)(A) Except as provided in subparagraph (B), "sexually explicit conduct" means actual or simulated--
>
> > (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
> >
> > (ii) bestiality;
> >
> > (iii) masturbation;
> >
> > (iv) sadistic or masochistic abuse; or
> >
> > (v) lascivious exhibition of the anus, genitals, or pubic area of any person;

Section 2256(8) defines "child pornography":

> (8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where--
>
> > (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
> >
> > (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or
> >
> > (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

STATEMENT

Mr. Close was charged in a 74 Count indictment with 61 Counts of producing child pornography, in violation of 18 U.S.C. §§ 2251(a) & (e), and 13 counts of possessing child pornography, in violation of 18 U.S.C. §§ 2252A(a)(5)(B) & (b)(2). The 61 production Counts relate to images created by a camera hidden in a music school bathroom. Between 2012 and 2019, Mr. Close had been surreptitiously recording people using the bathroom in a music school in which he taught, and later doing the same in a music school that he owned. The remaining 13 Counts pertain to child pornography possessed on devices owned by Mr. Close, including some images recorded in the music schools' bathrooms and additional images of child pornography that he did not create.

Unable to come to an agreement with the government, Mr. Close appeared in the District Court (Siragusa, J.) and pleaded guilty to all 74 counts in the indictment. In calculating the Guidelines range at sentencing, the Court determined that Mr. Close's adjusted offense level for Counts 1 through 74 was 43. The Court also determined that Mr. Close's criminal history category is I. The Guidelines range for a

defendant with an offense level of 43 and a criminal history category of I is life. Given that the maximum sentence for each offense is not life, the recommended Guideline sentence was the statutory maximum sentence which was 25,080 months (2,090 years) imprisonment. The Court imposed an aggregate sentence of 600 months imprisonment; the District Court sentenced Mr. Close to 360-months imprisonment on Counts one through 61, to run concurrently, and 240-months imprisonment on Counts 62 through 74, to run concurrently with each other but consecutively to the sentences for Counts one though 61.

Shortly after Mr. Close timely filed his notice of appeal the D.C. Circuit handed down its decision in *United States v. Hillie*, 14 F.4th 667 (D.C. Cir. 2021), *amended*, 37 F.4th 680 (D.C. Cir. 2022) (per curiam), *denying r'hrg en banc*, 38 F.4th 235 (2022), *reissued*, 39 F.4th 674 (D.C. Cir. 2022).[1] The defendant in *Hillie* was found guilty following a jury trial of several counts of sexual exploitation and attempted sexual exploitation of a minor and of possessing images of a minor engaging in

[1] Page references to *Hillie* are being made to the original panel opinion found in 14 F.4th 667.

sexually explicit conduct. 14 F.4th at 680. A search of a camera and laptop computer revealed six videos. *Id*. One of the videos in *Hillie*, which is just under 30 minutes, was of a minor girl, taken with a camera hidden in her bedroom, depicting the girl undressing, bending over and exposing her genitals, and then cleaning her genitals with a towel. *Id.* at 680-681. The second video, taken with a camera secreted in a bathroom, depicted two minor girls who sit on a toilet, one after another, briefly displaying their buttocks in the process. *Id.*

The majority of the panel in *Hillie*, following a line of Supreme Court cases beginning with *Miller v. California*, 413 U.S. 15 (1973), and *United States v. 12,200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123 (1973), and going through *New York v. Ferber*, 458 U.S. 747 (1982), *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), and *United States v. Williams*, 553 U.S. 285 (2008), held that the definition of "lascivious exhibition" of the anus, genitals, or pubic area, must go beyond mere nudity. 14 F.4th at 684-687. The panel went on to explain that it construed,

> lascivious exhibition of the anus, genitals, or pubic area of any person' in 18 U.S.C. § 2256(2)(A)(v) 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 sexual intercourse, bestiality, masturbation, or sadistic or masochistic abuse. This construction is consistent with the phrase 'sexually explicit conduct,' of which the 'lascivious exhibition of the genitals' is one form.

Id. at 687. The panel rejected the government's arguments that § 2256(2)(A) should be construed in accordance with the factors set forth in *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), *aff'd*, 813 F.2d 1231 (9th Cir. 1987)(table), concluding that the *Dost* Court misinterpreted Congress's intent when it amended the definition of "sexually explicit conduct." *Hillie*, 14 F.4th at 689.

Mr. Close appealed the reasonableness of his 600-month sentence and whether his convictions under 18 U.S.C. § 2251(a), and his convictions on Counts 62 through 67, under 18 U.S.C. § 2252A(a)(5)(B), could be sustained when the videos did not depict minors engaging in sexually explicit conduct. In a Summary Order, the Second Circuit panel (Level, Raggi & Perez, JJ.) held that the District Court did not abuse its discretion when it imposed the 600-month sentence. *Close*, 2022 WL 17086495, at *3. Relying on Second Circuit precedent in

United States v. Spoor, 904 F.3d 141 (2d Cir. 2018), the panel determined that the evidence was sufficient to conclude that there was a factual basis for Mr. Close's plea. *Id.* at 2.

REASONS FOR GRANTING THE PETITION

I. There is a need to clarify what constitutes "sexually explicit conduct" under 18 U.S.C. §§ 2251 and 2252A.

The issue in Mr. Close's case is whether the videos he produced and possessed of minors relieving themselves in the bathroom depict sexually explicit conduct. The production charge prohibits any person to use, persuade, induce, entice, or coerce any minor to engage in sexually explicit conduct for producing any visual depiction of such conduct. 18 U.S.C. § 2251(a). Sexually explicit conduct is defined, in pertinent part, as the "lascivious exhibition of the anus, genitals, or pubic area of any person." *Id.* § 2256(2)(A)(v). The possession charge prohibits the knowing possession of "any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography." *Id.* § 2252A(a)(5)(B). Section 2252A(a)(5)(B) speaks of child pornography instead of sexually explicit conduct. Yet, "child

pornography" is defined as a visual depiction where "the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct." *Id*. § 2256(8)(A). This brings us back to the definition of "sexually explicit conduct" which involves the "lascivious exhibition of the anus, genitals, or pubic area of any person." *Id*. § 2256(2)(A)(v).

Is it enough that the anus, genitals, or pubic area are capture in a video to meet the definition of "lascivious exhibition?" The panel in *Hillie*, following a line of Supreme Court cases beginning with *Miller*, 413 U.S. 15, and *12,200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123, and going through *Ferber*, 458 U.S. 747, *X-Citement Video, Inc.*, 513 U.S. 64, and *Williams*, 553 U.S. 285, held that the definition of "lascivious exhibition" of the anus, genitals, or pubic area, must go beyond mere nudity. 14 F.4th at 684-688. The Second Circuit has come to a different conclusion.

In determining what is "lascivious exhibition," the Second Circuit relies on six factors that were first set forth in *Dost*, 636 F.Supp. at 832.

See United States v. Rivera, 546 F.3d 245, 249 (2d Cir. 2008). These 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.

Id. Relying on these factors, images of young children depicting brief nudity, or a child changing into a swimsuit and urinating, have met the definition of sexually explicit conduct. *See Spoor*, 904 F.3d at 148; *see also United States v. Holmes*, 814 F.3d 1246, 1252 (11th Cir. 2016) (holding "that depictions of otherwise innocent conduct may in fact constitute a lascivious exhibition of the genitals or pubic area of a minor based on the actions of the individual creating the depiction."); *United States v. Price*, 775 F3d 828, 838 (7th Cir. 2014) (holding that there is

no nudity requirement in the statutory definition of sexually explicit conduct); *United States v. Franz*, 772 F.3d 134, 157-158 (3d Cir. 2014) (evaluating an image based on the *Dost* factors); *United States v. Johnson*, 639 F.3d 433, 440 (8th Cir. 2011) (noting that, "even images of children acting innocently can be considered lascivious if they are intended to be sexual").

These cases point out that there is a question of law that needs to be addressed as to whether images need to be looked at objectively or based on the actions of the person who produced or viewed the images.

II. There is an acknowledged circuit split of authority about what constitutes "sexually explicit conduct."

There is an acknowledged split of authority over whether the *Dost* factors should control in determining what is lascivious exhibition of the anus, genitals, or pubic area in an image or video. *See Hillie*, 14 F.4th at 691-692 (citing cases); *see also Close*, 2022 WL 17086495, at *2 n. 2 (acknowledging the panel in *Hillie* found that similar videos did not constitute "lascivious exhibition").

In *Rivera*, the panel determined that the *Dost* factors "are useful for assessing the sufficiency of the evidence and pose questions that are . . . germane to the issue of lasciviousness." 546 F.3d at 250. Based on this, the panel determined that they could be used, as the jury in *Rivera* found, to elicit a sexual response in the viewer. *Id.* In *United States v. Villard*, 885 F.2d 117, 122 (3d Cir. 1989), the panel adopted the *Dost* factors as a way to determine whether the exhibition of the genitals is lascivious. Likewise, the Fifth, Sixth, Eighth, Ninth, and Tenth Circuits uses the *Dost* factors to assess lasciviousness. *United States v. Steen*, 634 F.3d 822, 826 (5th Cir. 2011)(per curiam); *United States v. Hodge*, 805 F.3d 675, 680 (6th Cir. 2015); *United States v. Petroske*, 928 F.3d 767, 773 (8th Cir. 2019); *United States v. Perkins*, 850 F.3d 1109, 1121 (9th Cir. 2017); *United States v. Isabella*, 918 F.3d 816, 831 (10th Cir. 2019).

Several Circuits, while not outright rejecting the use of the *Dost* factors, "have appropriately cautioned against treating the *Dost* factors as a definition for 'lascivious exhibition.'" *Hillie*, 14 F.3d at 691-692. The

First Circuit has acknowledged that the *Dost* factors may be relevant, but caution that they "are neither comprehensive nor necessarily applicable in every situation." *United States v. Amiraulat*, 173 F.3d 28, 32 (1st Cir. 1999); *see also United States v. Frabizio*, 459 F.3d 80, 88 (1st Cir. 2006) (noting that "the *Dost* factors have fostered myriad disputes that have led courts far afield from the statutory language"). The Seventh Circuit has clearly not endorsed the *Dost* factors but has ruled that a district court did not commit error by including them in a jury instruction on lascivious exhibition. *Price*, 775 F.3d at 839. That said, the panel discouraged the routine use of the *Dost* factors. *Id*. at 840.

While the Fifth Circuit approved using the *Dost* factors to assess lasciviousness, not all members of the panel fully agreed. Judge Higginbotham noted that there are reasons to be cautious of the *Dost* factors." *Steen*, 634 F.3d at 828 (Higginbotham, J., concurring). This concern arises because "[t]he *Dost* factors are not definitionally equivalent to the statutory standard of 'lascivious exhibition of the genitals.'" *Id*. at 829. Special concern was noted over the sixth factor

that focuses on whether the depiction intended to elicit a response in the viewer. *Id.* Judge Higginbotham was concerned that "Congress did not make production of child pornography turn on whether the maker or view of an image was sexually aroused." *Id.* Similarly, the Second Circuit, which has also approved of the *Dost* factors, questioned the overreliance on the intent of the photographer, the sixth *Dost* factor. *Spoor*, 904 F.3d at 151.

These cases show that there is a split within the Circuit Courts on how to determine whether a video or image constitutes "lascivious exhibition." The majority of the Circuit Courts support the use of the *Dost* factors to make that determination. The First and Seventh Circuits have not endorsed the *Dost* factors, and cautions against their use, but have not reversed district courts when they factors have been used. The D.C. Circuit has clearly rejected use of the *Dost* factors. Thus, there is a question of law that needs to address lascivious exhibition.

CONCLUSION

For the reasons set forth above, the Court should grant the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Dated: Rochester, New York
February 21, 2023

Respectfully submitted,

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APPENDIX

2022 WL 17086495
Only the Westlaw citation is currently available.
United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee,
v.
Philip M. CLOSE, Defendant-Appellant.

No. 21-1962-cr
|
November 21, 2022

Appeal from a judgment of the United States District Court for the Western District of New York (Charles J. Siragusa, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the August 6, 2021 judgment of the district court is **AFFIRMED**.

Attorneys and Law Firms

FOR DEFENDANT-APPELLANT: Jay S. Ovsiovitch, Assistant Federal Public, Defender, Federal Public Defender's Office, Western District of New York

FOR APPELLEE: Katherine A. Gregory, Tiffany H. Lee, Assistant United States Attorneys, for Trini, E. Ross, United States Attorney for the, Western District of New York

PRESENT: PIERRE N. LEVAL, REENA RAGGI, MYRNA PÉREZ, Circuit Judges.

SUMMARY ORDER

***1** Defendant Philip Close pled guilty to 61 counts of production of child pornography and 13 counts of possession of child pornography. Most of the counts were based on recordings Close made of children's genitalia while the unsuspecting victims used the bathroom at his music school. The district court imposed sentences totaling 600 months of imprisonment and ten years of supervised release, a variance below the 25,080 months of imprisonment recommended under the Sentencing Guidelines. Close appeals certain of his convictions and his sentence, arguing that: (1) the recordings Close produced and some of the videos he possessed do not constitute child pornography under 18 U.S.C. §§ 2251(a) and 2256(2)(A)(v); and (2) Close's 50-year sentence of imprisonment is substantively unreasonable. We assume the parties' familiarity with the underlying facts, procedural history, and the issues for review, which we discuss only as necessary to explain our decision to affirm.

I. Close's Appeal of His Convictions

The basis for Close's challenge to his production convictions and several of his possession convictions is unclear. Although, in his briefs, Close characterizes his argument as an as-applied constitutional challenge, Close neither identifies the constitutional provision that was allegedly violated nor articulates a theory of violation. Although a "criminal defendant who enters an unconditional guilty plea may still appeal his conviction on the ground that the statute of conviction is unconstitutional," *United States v. Alarcon Sanchez*, 972 F.3d 156, 166 n.3 (2d Cir. 2020), Close's failure to identify the nature of any unconstitutionality makes it impossible to treat his argument as based on the Constitution.

Instead, Close's argument is properly construed as a challenge brought pursuant to Fed. R. Crim. P. 11(b)(3) and directed at the factual basis of his guilty plea. *See* Oral Arg. at 4:51–5:13 (Close's counsel acknowledging this claim as "possible challenge to his guilty plea"). So construed, we review Close's challenge for plain error, because, in the district court, Close did not withdraw or object to his plea, nor did he claim it lacked a factual basis. *See* *United States v. Balde*, 943 F.3d 73, 95–96 (2d Cir. 2019).

The district court did not err, let alone plainly err, in accepting Close's guilty plea because Close's recordings depicted sexually explicit conduct constituting child pornography within the meaning of the relevant statutes. Close pled guilty to crimes that prohibit the use of a minor to engage in "any sexually explicit conduct for the purpose of producing any visual depiction of such conduct" and the "knowing[ ] possess[ion]" of materials containing an image of "a minor engaging in sexually explicit conduct." 18

U.S.C. §§ 2251(a), 2251(e), 2252A(a)(5)(B), 2252A(b)(2), 2256(2)(A). "Sexually explicit conduct" is defined in the statute with five different categories of behavior, and the parties agree that only one is at issue here: "lascivious exhibition of the anus, genitals, or pubic area of any person." *Id.* § 2256(2)(A)(v). "Lascivious exhibition" is not defined, but this Court and several other circuit courts have applied the following six-factor test in determining whether a recording depicts a minor engaging in "lascivious exhibition":

> ***2** 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.

United States v. Rivera, 546 F.3d 245, 249 (2d Cir. 2008) (quoting *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986)); *cf. United States v. Spoor*, 904 F.3d 141, 149–51 (2d Cir. 2018) (approving use of the factors in jury instructions, but warning that additional instruction may be warranted to clarify that the sixth factor alone is insufficient to find a recording to be a "lascivious exhibition").

As Close acknowledges, this Court has squarely held that videos such as those Close produced and possessed can constitute child pornography. *See Spoor*, 904 F.3d at 149–51.[1] In *Spoor*, this Court concluded that a secret recording of children's genitalia and pubic areas while they use the bathroom—the exact type of videos at issue here—can be considered lascivious and, therefore, can constitute "sexually explicit conduct" within the scope of the statutes to which Close pled guilty. *Id.* at 149–50.[2] The Court explained that whether a video depicts "lascivious exhibition" depends on the overall content of the material and that "suggestive posing, sex acts, or inappropriate attire" are not necessary to conclude that a recording or image is child pornography. *Id.* at 149. Like the defendant in *Spoor*, Close here positioned the camera so the pubic area of the children would be the focus of the shot, he hid cameras in a bathroom setting that could be the subject of sexual fantasy, and he intended to create a video to elicit a sexual response from the viewer. *Id.* at 148–50. Close's intent is further demonstrated by his meticulous actions, including taking the cameras' memory cards home, cropping and editing the videos to remove unwanted content, and creating files with names corresponding to his victims. Authorities also found videos showing Close touching nine children inappropriately or masturbating behind others. Finally, at Close's plea hearing, he admitted facts supporting his guilty plea, including that every recording in his indictment constituted child pornography and that he had reviewed with his attorney the legal definition of child pornography and the meaning of "sexually explicit conduct." This evidence was sufficient to conclude, under *Spoor*, that there was a factual basis for Close's plea. *See id.*

II. Close's Appeal of His Sentence

***3** Close argues that his sentence is substantively unreasonable because a term of 50 years should be reserved for the worst child pornography defendants, which he is not. We consider "the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 51 (2008). We will " 'set aside a district court's *substantive* determination only in exceptional cases where the trial court's decision cannot be located within the range of permissible decisions.' " *United States v. Ingram*, 721 F.3d 35, 37 (2d Cir. 2013) (quoting *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc)). "Our review of a sentence for substantive reasonableness is governed by the factors set forth in 18 U.S.C. § 3553(a)." *United States v. Jenkins*, 854 F.3d 181, 187 (2d Cir. 2017). District courts are instructed to impose a sentence that is "sufficient, but not greater than

necessary," to effectuate the purposes of sentencing. *See* 18 U.S.C. § 3553(a). Applying these principles here, we identify no abuse of the district court's sentencing discretion.

The district court provided several reasons for its sentencing decision, following the factors of § 3553(a), and deemed the sentence sufficient, but not longer than necessary. The district court imposed concurrent 30-year sentences for all 61 production counts, to run consecutively with concurrent 20-year sentences for all 13 possession counts. The sentence accounted for the unusually high number of victims, as well as the seriousness of the offenses and their nature and circumstances. The district court considered the intentionality of Close's actions as to his 61 victims and the videos depicting Close abusing at least nine students, explaining the length of the sentence on the basis of the unusually large number of victims. Some of the victims he recorded were as young as four. The reasonableness of the sentence is also supported by Close's abuse of the trust of his victims and their parents. *See* *United States v. Broxmeyer*, 699 F.3d 265, 295 (2d Cir. 2012).

We recognize "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," as § 3553(a)(6) requires, but this is not an "exceptional case" where the district court's decision " 'cannot be located within the range of permissible decisions' " given the analysis of the remaining § 3553(a) factors. *See Ingram*, 721 F.3d at 37 (quoting *Cavera*, 550 F.3d at 188). We also do not accept Close's arguments distinguishing himself based on his purportedly limited physical contact with his victims, because the record demonstrates that Close did inappropriately touch his victims and the Court has previously rejected the notion "that non-contact production of child pornography is categorically less harmful than sexual abuse involving physical contact." *United States v. Muzio*, 966 F.3d 61, 66 (2d Cir. 2020).

Given our deferential standard of review and the district court's explanation of the § 3553(a) factors, Close's sentence falls within the range of reasonable sentences in this case. Accordingly, we conclude that the district court did not abuse its discretion.

We have considered Close's remaining arguments and find them to be without merit. Accordingly, the judgment of the district court is **AFFIRMED**.

All Citations

Not Reported in Fed. Rptr., 2022 WL 17086495

Footnotes

1 Close acknowledges that "[t]hese issues have previously been addressed by this Court in [*Spoor*] and are thus foreclosed from review by this panel." Appellant's Br. 34. He raises this issue to preserve it for further appeal.

2 We acknowledge that a recent D.C. Circuit case found similar videos not to constitute "lascivious exhibition." *See* *United States v. Hillie*, 14 F.4th 677, 680–692 (D.C. Cir. 2021), *amended by United States v. Hillie*, 39 F.4th 674, 677 (D.C. Cir. 2022). As the D.C. Circuit acknowledged, its analysis was inconsistent with our precedent and the precedent of numerous sister circuits. *Id.* at 689. We are bound by our prior precedent.