ORIGINAL

No. 23-5566

IN THE

SUPREME COURT OF THE UNITED STATES

Scott Anthony — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Third Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Scott Anthony 35937-068
(Your Name)

FCI Loretto, Po Box 1000
(Address)

Cresson, PA 16630
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

The Child Abuse Victims Right Act of 1986 led to the passage of 18 USC § 2251(a) which prohibits the knowing possession of videos and any other matter containing a visual depiction produced using materials mailed or transported in interstate commerce if (i) the producing of such visual depiction involves the use of a minor engaging in **sexually explicit conduct**; and (ii) such visual depiction is of such conduct.

The question presented, on which the 3rd Circuit split with the 4th and 8th Circuits, is what actually defines sexually explicit conduct.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

United States v Anthony, Third Circuit Court of Appeals; Case No. 21-2343

United States v Anthony, US District Court, Western District PA, Case No. 1:15-cr-28

TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[X] reported at Case No. 21-2343; Third Circuit ; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[X] reported at Case No. 1:15-cr-28; W.D. Pa. ; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was November 30, 2022.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: February 1, 2023, and a copy of the order denying rehearing appears at Appendix Doc.160.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

JURISDICTION

The District Court for the Western District of Pennsylvania entered judgment and sentence on July 12, 2021. The Third Circuit Court of Appeals affirmed on November 30, 2022 (see Case No. 21-2343). There was a petition for re-hearing and it was denied on February 1, 2023.

This Court has jurisdiction under 28 USC 1254(1).

REASONS FOR GRANTING THE PETITION

In two cases, United States v Scott Anthony, and United States v McCoy, you have almost identical circumstances. Yet due to differences in how to interpret Section 2251(a) and 2256(2)(A)(v), McCoy is free to walk the street while Anthony goes to prison for sixteen years. The Fourth and DC Circuits align their reasoning with the Eighth Circuit while the Third Circuit and to a lesser degree the Fifth Circuit take opposing views. To avoid further injustice, and to right a wrong, this split needs to be resolved.

STATEMENT OF THE CASE

Counts One through Eight of the Superseding Indictment charged the Petitioner with the actual and attempted Sexual Exploitation of Children. Each count was based on one specific video clip that was admitted at trial. "Sexual Exploitation of Children" is defined at 18 USC § 2251(a) as follows:

> (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 (emphasis supplied).

As set forth in 18 USC § 2256(2)(A), sexually explicit conduct" is specifically defined as:

> (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;

It is undisputed that the video depictions involving the two minor girls admitted at trial **do not** depict sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse. Germane to this appeal, the relevant inquiry

before the Third Circuit should have been whether the video clips contained "lascivious exhibition of the anus, genitals, or pubic area" of the females. The district court acknowledged this point at trial and confined the argument on the motion for judgment of acquittal to this specific issue. The Petitioner submits that the district court erred in denying his motion for judgment of acquittal because the evidence at trial was simply legally insufficient to establish lascivious exhibition of the genitals or pubic area.

As the Third Circuit has recognized in United States v Knox, 32 F.2d 733, 746 (3rd Cir 1994), in order to determine whether a depiction constitutes a lascivious exhibition of the genitals or pubic area, courts must make an objective inquiry under the multi-factored test established in United States v Dost, 636 F.Supp 828, 832 (SD Ca 1986). These factors have become known as the "Dost factors" and 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 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 willingness to engage in sexual activity; 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

See also United States v Larkin, 629 F.3d 177, 183 (3rd Cir 2010); United States v Villard, 885 F.2d 117, 122 (3rd Cir 1989). The Dost factors are not dispositive but only serve as a guide. Larkin, 629 F.3d at 183; Knox, 32 F.3d at 746, n.10. Moreover, "[a]ll six factors should be presented to the jury for consideration. Although more than one factor must be present in order to establish "lasciviousness," all six factors need not be present." Villard,

885 F.2d at 122.

"Sexually explicit conduct" connotes actual depiction of the sex act rather than merely the suggestion that it is occurring. The portrayal must cause a reasonable viewer to believe that the actors actually engaged in that conduct on camera. For purposes of 18 USC 2256(2)(A)(v), because "lascivious exhibition of the anus, genitals, or pubic area" appears in a list with "sexual intercourse," "bestiality," "masturbation," and "sadistic or masochistic abuse," its meaning is narrowed by the common sense canon of noscitur a sociis - which counsels that a word is given more precise content by the neighboring words with which it is associated.

Thus, the lascivious exhibition of the anus, genitals, or pubic area must[1] be performed in a manner that connotes the commission of one of the four sexual acts in the list, which is consistent with how the lewd exhibition of the genitals was construed by the Supreme Court in New York v Ferber, 458 US 747 (1982). Likewise, the activity contained in the Movant's case does not involve the commission of one of the four above-mentioned sexual acts.

A conviction under 18 USC 2251(a) requires the government to prove beyond a reasonable doubt three elements: (1) the victim was less than 18 years old; (2) the defendant used, employed, persuaded, induced, enticed, or coerced the minor to take part in sexually explicit conduct for the purpose of producing a visual depiction of that conduct; and (3) the visual depiction was produced using materials that had been transported in interstate or foreign commerce. But the language "the purpose" under 18 USC 2251 requires that the

1 Language of command, Alabama v Bozeman, 533 US 146 (2001)

filming be at the very least a significant purpose in the sexual conduct itself, not merely incidental. Accordingly, 18 USC 2251(a) does not criminalize a spontaneous decision to create a visual depiction in the middle of sexual activity without some sufficient pause or other evidence to demonstrate that the production of child pornography was at least a significant purpose. Adducing "a purpose" arising only at the moment the depiction is created erroneously allows the fact of taking an explicit video of a minor to stand in for motivation that animated the decision to do so. It is for this reason that while the image itself can be probative of intent if the prosecution makes a sufficient connection, it cannot be the only evidence. That would impermissibly reduce the statute to a strict liability offense. See United States v McCauley, 983 F.3d 690 (4th Cir 2020).

In construing the federal promotion of child pornography, the defendant must believe that the picture contains certain material, and that material in fact (and not merely in his estimation) must meet the statutory definition. Where the material at issue is a harmless picture of a child in a bathtub and the defendant, knowing that material, erroneously believes that it constitutes a lascivious exhibition of the genitals, the statute has no application. This is because the statutory terms "visual depiction"-18 USC 2251(a) and 18 USC 2252(a)(4)(B)-and "lascivious exhibition"-in 18 USC 2256(2)(A)(v)-refer to different things. Sections 2251(a) and 2252(a)(4)B) require the defendant to have produced or possessed a visual depiction of a minor or any minor engaging in sexually explicit conduct, with sexually explicit conduct defined as, among other things, a lascivious exhibition of the genitals, §2256(2)(A)-(v). The statutory term "lascivious exhibition" therefore refers to the minor's

conduct that the visual depiction depicts, and not the visual depiction itself. See United States v Hillie, 14 F4th 677 (DC Cir 2021).[2]

In a recent case the Eighth Circuit examines a situation where the factors in that case did not align themselves to be child pornography, United States v McCoy, 2022 US App LEXIS 34588 (8th Cir 2022), and the circumstances are identical to the Movant's case. The Eighth Circuit noted the standard for when the statute is violated, making clear that any display of the genitals must be "lascivious," and went on to say, "Consequently, we have repeatedly explained "mere nudity" is not enough to convict. United States v Petroske, 928 F.3d 767, 772 (8th Cir 2019); United States v Wallenfeng, 568 F.3d 649, 657 (8th Cir 2009); United States v Kemmerling, 285 F.3d 644, 645 (8th Cir 2002). We have also explained that a visual depiction "is 'lascivious' only if it is sexual in nature." Wallenfeng, 568 F.3d at 657 (quoting Kemmerling, 285 F.3d at 646)."

The McCoy court noted that the test to determine this is found in United States v Dost, 636 F. Supp. 828 (SD Cal 1986) and considers the six Dost factors found therein (as discussed supra; see p.2). The Eighth Circuit with respect to McCoy noted that the videos depicted the youth from a distance as the hidden camera was inside the connecting closet. Similarly, the videos display innocent daily tasks in a bathroom such as getting in and out of the shower, drying off and using the toilet. The videos did not suggest a sexual coyness or a willingness to engage in sexual activity. The Court also noted that the videos were not, on their face, of a sexual character. Finally, the videos were not intended or designed to elicit a sexaul response in the viewer,

2 Here it depicts a person taking a shower, no more and no less.

and more importantly, unlike Hillie and McCoy, the Movant has no history of sexual deviance.

The purpose becomes a factor because the Movant's original intent was to capture his girlfriend's infidelity and not a minor child using the shower or toilet. The video itself is hygienic and not sexual, simply depicing two nude teenage girls. If a Dost factor is properly framed to focus on whether the conduct depicted in the video suggests coyness, or the willingness to engage in sexual activity, it sheds light on whether an exhibition of the genitals is conducted in a lustful manner that connotes the commission of sexual intercourse, and is therefore a lascivious exhibition. These elements, coyness and willingness, are missing in the case at hand.

The sufficiency of the evidence in the Petitioner's case warrants particular scrutiny as the evidence strongly indicates that although he may be guilty of a lesser crime, he is not guilty of the crime for which he was convicted. The jury in this case found the essential elements through speculation rather than evidence and the statute's text. The evidence shows there were no other recordings, the videos were on a thumb drive, not stored on a computer or 'cloud', there was no use of the internet, distribution, sale, or trading going on, and the camera in question was focused on the sink area[3] and not the girls' genitalia. There are no unnatural poses or attire, and there was no evidence of an intention to elicit a sexual response from a viewer. In short, other than nudity, evidence does not meet one single Dost factor.

In conclusion, these factors were ignored by the government but are recognized as an important yardstick by this Circuit. See United States v Heinrich,

3 On a mirror above the sink, not on the genitalia.

2021 US Dist 30559 (WD Pa 2021); United States v Lee, 2020 US Dist LEXIS 4142 (MD Pa 2020); and United States v Strausbaugh, 2019 US Dist LEXIS 85715 (MD Pa 2019). As stated before, the Movant may have committed a crime but it doesn't meet the Dost requirements, it doesn't fall under 18 USC 2251(a) and (e), and it does not support the resulting 16 year sentence.

If a Dost factor is properly framed to focus on whether the conduct depicted in the visual depiction suggests coyness or a willingeness to engage in sexual activity, it may indeed shed light on whether an exhibition of the genitals is conducted in a lustful manner that connotes the commission of sexual intercourse, and is therefore a lascivious exhibition. The crime of attempt consists of (1) an intent to do an act to bring about certain consequences which the defendant is charged with attempting; and (2) an act in furtherance of that intent which goes beyond mere preparation. Courts must take particular care not to require any lower showing of intent than mandated by the statute or the Constitution. Hillie at n.27

If a defendant pays a minor to allow him to film her masturbating, then he induces a minor to engage in sexually explicit conduct with the intent that she engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct. 18 USC 2251(a). Likewise, if a defendant, knowing that a minor masturbates in her bedroom, surreptitiously hides a video camera in the bedroom and films her doing so, then he uses or employs, i.e., avails himself of, a minor to engage in sexually explicit conduct (with herself) with the intent that she engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct. When causing a particular

result is an element of the crime, the defendant is guilty of attempt when he intended to cause such a result and did or committed to do anything with the purpose of causing or with the belief that it would cause such a result without further conduct on his part. The sufficiency of the evidence warrants particular scrutiny when the evidence strongly indicates that a defendant is guilty of a crime other than for which he was convicted, but for which he was not charged. Under such circumstances, a trier of fact, particularly a jury, may convict a defendant of a crime for which there is insufficient evidence to vindicate its judgment that the defendant is blameworthy. Compelling evidence that a defendant is guilty of some crime is not, however, a cognizable reason for finding a defendant guilty of another crime.

A number of the government's statements, and the Court's responses during trial[5], are inconsistent with the charge (18 USC 2251(a), 2251(e)).

- Sexual Exploitation of a Minor. For example:

  - Appx 057; Lines 12-14: Defense counsel points out that previously the government admitted that photos 1 and 2 "are not depictions of child pornography
  - Appx 057; Line 15: Court responds "They're not bad acts"
  - Appx 057 Line 4-5: Discusses a photo where one girl is dressed in a "workout outfit," gym shorts and a sports bra
  - Appx 061: Line 5-6: The Court states "You want to introduce non-lascivious photographs to prove that the video is lascivious. Really-

With respect to the statute, 18 USC 2251, the government claims:
  - Appx 62, Line 7-8:"These are photographs - it doesn't have to be illegal in and of itself to be relevant

This causes the Court to question:
  - Appx 063: "and you're introducing photographs that are legal...isn't that something that can confuse the jury?"

The photographs in question are photographs no.1 and no.2 which show a girl

5 See Trial Transcripts; Case No. 21-2343; Appendix Vol II; 11/19/19

in a workout outfit and another in a bikini respectively. There was no nudity involved and it begs the question as to why they would be admitted into evidence to prove a crime pursuant to a statute that should have never been charged in the first place. This case is at best a voyeurism case that should have been charged in a state court.

Since the Defendant's sentencing in July of 2021 the Eighth Circuit Court of Appeals reversed a lower court decision in a case that mirrors the case at hand, holding that voyeurism is not necessarily child pornography. In United States v McCoy, 2022 US App LEXIS 34588 (8th Cir. Dec. 15, 2022) the defendant was convicted on two counts of producing child pornography, a 15-year mandatory minimum offense. Using a video camera hidden in a bathroom closet, the defendant recorded his young niece taking a shower. The Court of Appeals reversed the conviction.

The defendant was convicted under 18 USC § 2251(a), which prohibits using a "minor to engage in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct." For the conduct to be "sexually explicit" it must be "lascivious." The Eighth Circuit held that while the child was unclothed, the camera was fixed and uncontrolled. Thus the camera could not pan back and forth on any particular body part. Nothing the child, unaware she was being recorded, did in showering constitutes suggestive posing. The fact that the defendant intended the video depiction "to elicit a sexual response in the viewer" was irrelevant. "Instead," the Eighth Circuit said, "the inquiry is whether the video, on their face, are of a sexual character."

"Congress defined sexually explicit conduct as the lascivious exhibition of genitals, not mere nudity," the Circuit said. "We conclude no reasonable jury could have found McCoy guilty." Notice how this case did not turn on the Dost factors, United States v Dost, 636 F. Supp. 828 (S.D. Cal. 1986) and neither did the aforementioned Hillie case, United States v Hillie, 2022 US App LEXIS 17793 (DC Court of Appeals, 2022). Other courts have begun to distance themselves from the Dost factors as well. In the case at hand the defendant was sentenced to 16 years in a federal prison for something the Eighth Circuit said no reasonable jury would convict a man of. You can't support the contrary decision in the case at hand with the decisions in the DC and Eighth Circuit, and in fairness to the defendant it warrants a second look at his sentencing court. He has a voyeurism case, not an 18 USC § 2251(a) case, and it needs to be reviewed.

In the case at hand, the prosecution focused on the Dost factors even though they didn't apply, and eventually forced a square peg into a round hole with little or no objection from defense counsel. Furthermore, the Hillie Court does not put weight on the "so-called Dost factors." See United States v Hillie, 2021 US App LEXIS 40263, no.26. Specifically, the Hillie Court stated how "the Dost court misinterpreted a single floor statement of a single Senator, Dost at 831 (erroneously referring to Senator Specter as "Rep. Specter"), to conclude that when Congress amended the definition of "sexually explicit conduct" in 1984, substituting "lascivious" for "lewd."

Congress's intent "was to broaden the scope of the existing 'kiddie porn' laws." Id. Even while acknowledging that "lewd" and 'lascivious' have frequently been

used interchangeably," the Dost court nonetheless concluded that "Congress believed that the term 'lewd'...was too restrictive since it had been closely associated with the more stringent standard of obscenity." Id. at 831 & n.4. This reasoning has been rejected by the Supreme Court, because "'lascivious' is no different in its meaning than 'lewd,'" X-Citement Video, 982 F.2d at 1288 (internal quotation marks and citations ommitted); X-Citement Video, 513 US at 78-79 (adopting the reasoning on the Court of Appeals), so this 1984 wording change did not affect the scope of the statute. See also Roth v United States, 354 US 476, 487 n.20 (1957)(equating "lascivious" with "lewd"). Consequently, the fundamental premise of Dost, that the 1984 amendment of the definition of "sexually explicit conduct" broadened the reach of the federal statute, is fatally flawed. Hillie at n.27[7]

Second, because of its erroneous premise that "lascivious" had a broader meaning than "lewd," the Dost court completely ignored the holdings of Miller, 413 US at 27, and 12 200-Foot Reels of Super 8mm. Film, 413 US at 130 n.7, that "lewd exhibition of the genitals" refers to "hardcore" sexual conduct. Indeed, rather than relying upon the authoritative construction of "lewd exhibition" in these Supreme Court cases, the Dost court approvingly cited a district court opinion that concluded that "there are no cases interpreting the word 'lewd' as used in this [the federal child pornography] statute," 636 F. Supp. at 831-32 (citing United States v Nemuras, 567 F. Supp. 87, 89 (D. Md. 1983), aff'd 740 F.2d 286 (4th Cir. 1984)), and crafted its own definition.

7 With respect to Hillie, 8 out of the 11 Appeals Court judges denied the government's request for a hearing en banc.

In conclusion, it's important to note that Congress defined the sexual exploitation and possession of child pornography offenses as applying to videos that depict "a minor engaging in sexually explicit conduct." Congress also provided a definition of "sexually explicit conduct," which, as relevant for our purposes, states as follows:

> (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-genital, whether between persons of the same of 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 described in 18 USC 2256(2)(A)

The videos in the Movant's case, no matter how much the government tried to spin it, do not meet any part of these definitions. The truth is that the Movant was sentenced to 16 years in prison for what, worse case scenario, should have been a much lesser charge of voyeurism. The jury succumbed to a combination of the salesmanship of the prosecution, a lack of participation on the part of the defense counsel, and a failure to correctly understand the statute being charged. Therefore, the sentence should be vacated and an evidentiary hearing held.

This case was decided on the government's ability to sell a crime that doesn't exist to the jury.[6] The statute, 18 USC § 2251(a) was designed to stop "hard-core" production of child pornography, yet there is nothing hardcore about the photos in this case. "Lascivious" behavior would be hardcore. A child engages in "lascivious exhibition" under section 2256(2)(A)(v) if, but only if, she revelas her anus, genitals, or pubic area in a sexually suggestive manner. Start with the adjective "lascivious." It is commonly defined as "lust-

6 See also Salamanca, 990 F.2d 638 (DC Cir 1993) where the Court held a defendant was sentenced to a greater crime while evidence only supported a lesser crime. (See Exhibit 2)

ful" or "tending to arouse sexual desire." Lascivious, Webster's Third New International Dictionary (1961); see also Lascivious, The American Heritage Dictionary (2d college ed. 1982)("arousing or exciting sexual desire"; "expressing lust or lewdness"); Lascivious, Black's Law Dictionary (6th ed. 1990) ("Tending to excite lust; lewd; indecent; obscene"); Lascivious, Oxford English Dictionary (2d ed. 1989)("Inclined to lust, lewd, wanton";"inciting to lust or wantonness"); Lascivious, Random House College Dictionary (rev. ed. 1980) ("inclined to lustfulness; wanton; lewd"; "arousing or inciting sexual desire"; "expressing lust or lewdness"). In other words, a lascivious action is one that is "sexaul in nature," United States v Hensley, 982 F.3d 1147, 1156 (8th Cir 2020), or "sexually suggestive," United States v Schenck, 3 F.4th 943, 949 (7th Cir 2021). Next consider the phrase "lascivious exhibition." In section 2256(2)(A)(v), "lascivious" modifies the "exhibition" of private parts, and it does so to define one category of sexually explicit conduct. "Lascivious" does not modify the "visual depiction" of the exhibition, which is what other provisions make unlawful to produce or possess. See 18 USC 2251(a), 2252(a)(4)(B). Section 2256(2)(A)(v) thus requires the exhibition itself to be sexually suggestive. A child who uncovers her private parts to change clothes, use the toilet, clean herself, or bathe does not lasciviously exhibit them. To be sure, a voyeur who secretly films a child engaged in such tasks may do so for his own sexual gratification, or for the gratification of others who will see the depiction. But the definition turns on whether the exhibition itself is lascivious, not whether the photographer has a lustful motive in in visually depicting the exhibition or whether other viewers have a lustful motive in watching the depiction. Hillie, 2022 US App LEXIS 17793 (DC Cir App 2022).

Nothing in the definitions listed above apply to this case so there can be no **hardcore** production of child pornography. Recall that section 2256(2)(A)(v) uses the phrase "lascivious exhibition" to define a category of "sexually explicit conduct." When a statutory definition contains an unclear term, the ordinary meaning "of the word actually being defined" can shed light on the term's meaning. A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 228 (2012); see Bond v United States, 572 US 844, 861-62, 134 S Ct 2077, 189 L Ed 2d 1 (2014); Johnson v United States, 559 US 133, 139-41, 130 S Ct 1265, 176 L Ed 2d 1 (2010). In everyday speech, nobody would say that it is sexually explicit to uncover private parts simply to change clothing, use the toilet, or take a shower. Nor would anybody say that a girl performing such acts is engaged in sexually explicit conduct just because someone else looks at her with lust. In contrast, the other four listed acts-intercourse, bestiality, masturbation, and sadistic or masochistic abuse-are all "sexually explicit conduct" in the ordinary sense of that phrase. No such conduct exists in this case.

In Miller v California, 413 US 15, 27 (1993) the Supreme Court held that lewd exhibition of the genitals refers to **hardcore** sexual conduct. Lewd and lascivious are interchangeable, and neither apply. In closing, there is the issue of "attempt," the government emphasizes the defendant made the attempt to commit a crime, but **an attempt isn't an issue if the supposed crime isn't a crime.** United States v Kemmerling, 285 F.3d 644 (8th Cir 2002).

In conclusion, the government relies heavily on the Dost factors but the Dost

factors are falling out of favor in a number of courts. In United States v Steen, 634 F.3d 822 (5th Cir 2011), Judge Higginbotham wrote in a concurring opinion "While I agree with the panel opinion, I write separately to note my misgivings about excessive reliance on the judicially created Dost factors that continue to pull courts away from the statutory language of 18 USC 2251. There are many reasons to be cautious of the Dost factors, several of which other courts have previously identified. As jurists, we have 'every reason to avoid importing unnecessary interpretive conundrums into a statute, especially where the statute employs terms that lay people are perfectly capable of understanding,' such as 'lascivious.' The Dost factors are not definitionally equivalent to the statutory standard of 'lascivious exhibition of the genitals,' but many courts have treated them as such, even requiring that a certain number of factors be present for pornography convictions. As a result, these factors often create more confusion than clarity. The sixth factor, which asks whether the visual depiction was intended to elicit a sexual response in the viewer, is especially troubling. Congress did not make production of child pornography turn on whether the maker or viewer of an image was sexually aroused, and this Dost factor encourages both judges and juries to improperly consider a non-statutory element. A pedophile may be aroused by photos of children at a bus stop wearing winter coats, but these are not pornographic. Conversely, a photographer may be guilty of child pornography even though he is not aroused by the images he produces purely for financial gain. Regardless of whether the photographer was aroused by the images he produced, to qualify under § 2251, the images must show a minor being used to engage in sexually explicit conduct." The standard for review for lascivious determinations requires explanation, as numerous courts of appeal are split on the issue. The Third, Eighth,

and Tenth Circuits have held that the decision of whether an image is lascivious requires de novo review because it involves a legal standard. The Ninth Circuit calls for clear error review, noting that a district court's findings of lasciviousness should be upheld unless the appellate court has a "definite and firm conviction that a mistake has been committed." The Fifth Circuit has never stated a standard of review for lasciviousness in a case that challenged the sufficiency of the evidence. However, two sentencing cases in that circuit have applied a clear error standard to a district court's lasciviousness determination. Following that precedent, in Steen they apply the clear error standard to the jury's conviction so far as it indicates a factual finding that the image was a lascivious exhibition of the genitals. See United States v Steen, 634 F.3d 822 (5th Cir 2011). In Steen the Court stated how Section 2251(a) makes it unlawful to "use" a minor "to engage in...sexually explicit conduct" for the purpose of producing a visual depiction of that conduct. In assessing conduct under § 2251(a), the Court asked two questions: Did the production involve the use of a minor engaging in sexually explicit conduct, and was the visual depiction of such conduct? Steen clearly used the victim for the purposes of producing a nude video, but the statute requires more--**the film must depict sexually explicit conduct.** Accordingly, the court found, " a child could be used in the production of a photograph, but the image in the ultimate photograph could be one that did not capture the child engaging in sexually explicit conduct. If this were so, a defendant might be charged under a different statute--perhaps child molestation--but not child pornography." In that case, the parties focused on whether the video was a "lascivious exhibition" of the victim's genitals or pubic area.

In the case at hand, likewise the camera did not focus on the minors' pubic region, and it is interesting to note that the Court of Appeals determined that it did even though the Appeals Court never took the trouble to watch the videos. It begs the question of how you can rule on something you've never seen.

In the case at hand, the government stated how the first four Dost factors don't apply to the defendant's case (see Appx 177, Exhibit), choosing instead to focus all of the attention on the sixth factor. The sixth factor is the most difficult to apply--whether the visual depiction is intended or designed to elicit a sexual response in the viewer (see United States v Amiraült, 173 F.3d 28, 34 (1st Cir 1999)(describing this factor as "the most confusing and contentious of the Dost factors"). In the case at hand it becomes redundant since there never was a "viewer" involved so you can't elicit a response in someone or something that never existed. The videos were never transmitted to anyone indicating no intention to produce something with a "design" to arouse someone. To say whether or not the videos were designed by the producer to elicit a sexual response in himself also misses the mark as he never viewed them. Were the Court to engage in the analysis of whether or not the Petitioner, in producing the videos, had an intent to elicit a sexual response within himself crosses the boundary into Fifth Amendment protected territory. Finally, the Fifth Circuit has previously adopted the ordinary meaning of the phrase "lasciviousn exhibition," which was defined as "a depiction which displays or brings forth to view in order to attract notice to the genitals or pubic area of children, in order to excite lustfulness or

sexual stimulation in the viewer." Grimes, 244 F.3d at 381 (quoting United States v Knox, 32 F.3d 733, 746 (3rd Cir 1994)). In the case at hand, as in Steen, the government's evidence cannot meet this standard. In addition, as mentioned above, the analysis is inapplicable here to begin with.

CONCLUSION

In the Third Circuit the Petitioner was tried and sentenced to 192 months based on an application of the 'Dost factors'. While in the Eighth Circuit a defendant (McCoy), facing an identical situation, had his conviction vacated by the Court of Appeals. In the DC Circuit another defendant (Hillie), again in a similar case, also had his conviction vacated.

Perhaps the most telling interpretation of all comes from a Fifth Circuit Judge, Patrick E. Higginbotham, in a concerning opinion in United States v Steen, 634 F.3d 822 (5th Cir 2011). In his opinion he gives a scathing analysis of the Dost factors in general, and the sixth factor in particular. This is of considerable interest because it's the sixth factor that the prosecution in the case at hand hung their hat on.

This split between Circuits is what has one man in prison for 192 months while two others walk free and the Petitioner prayes the Court will devote time to resolve the split. The Circuits need a uniform definition for 'sexually explcit conduct' as well as a determination with regards to the usefulness of the Dost factors.

Dated: September 6, 2023
Cresson, PA

Submitted by,

x
Scott Anthony