

No.

IN THE
Supreme Court of the United States

SHANNON R. DONOHO,
Applicant,

v.

UNITED STATES OF AMERICA,
Respondent.

**APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

Application to the Honorable Amy Coney Barrett,
as Circuit Justice for the Seventh Circuit

Pursuant to Supreme Court Rule 13.5, Applicant Shannon R. Donoho requests a 14-day extension of time, to and including January 25, 2024, within which to file a petition for a writ of certiorari.

1. The decision below is *United States v. Donoho*, No. 21-2489 (7th Cir. 2023). The Seventh Circuit issued its opinion on August 4, 2023, *see* App. A, and denied rehearing en banc on October 13, 2023, *see* App. B. Unless extended, Mr. Donoho's time to seek certiorari in this Court expires January 11, 2024. Mr. Donoho is filing this application at least ten days before that date. *See* S. Ct. R. 13.5. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1).

2. This is a federal criminal case. It concerns the interpretation of an important statute proscribing the production of child pornography, 18 U.S.C. § 2251(a). A person violates this provision if he “employs, uses, persuades, induces, entices, or coerces any minor to engage in ... any sexually explicit conduct for the purpose of producing any visual depiction of such conduct.” A separate provision defines “sexually explicit conduct” to mean “sexual intercourse,” “bestiality,” “masturbation,” “sadistic or masochistic abuse,” or “lascivious exhibition of the anus, genitals, or pubic area.” *Id.* § 2256(2)(A)(i)–(v). The question in this case is whether surreptitiously recorded videos and images of minors in a bathroom depict those minors engaging in “sexually explicit conduct”—namely, the “lascivious exhibition” of genitals—when the recordings depict nudity but do not show the minor (or anyone else) engaging in sexual or sexually suggestive activity of any kind.

There is a clear split in the courts of appeals on this question. Most courts, including the Seventh Circuit, hold that videos and images of this nature can be deemed to depict “sexually explicit conduct” based on the lascivious intent of the person who secretly recorded the minors’ activities, even when the videos do not depict sexual conduct of any kind. But the D.C. Circuit has expressly rejected that reading, heeding the statutory requirement that the videos themselves must depict minors engaging in sexual or sexually suggestive conduct. *United States v. Hillie*, 39 F.4th 674 (D.C. Cir. 2022), *aff’g on reh’g*, 14 F.4th 677 (D.C. Cir. 2021).

Mr. Donoho’s convictions arise from a series of videos and still images he surreptitiously obtained that depict nude or partially nude minors engaging in

activities like entering and exiting the shower and using the toilet. While the videos and images at issue contain nudity, they do not show the minors or anyone else engaging in sexual or sexually suggestive activity. A central question at trial was whether Mr. Donoho produced or attempted to produce visual depictions of “sexually explicit conduct” in the form of “lascivious exhibition[s] of the anus, genitals, or pubic area” of the minors. *See* App. A. at 9. The district court instructed the jury to consider “the photographer's state of mind,” not just “the aspects of the image itself.” *Id.* at 10. Based on the videos and images in question, the jury convicted Mr. Donoho on one count of attempted production of child pornography and seven counts of production of child pornography in violation of 18 U.S.C. § 2251(a). The district court sentenced Mr. Donoho to 210 months’ imprisonment. Mr. Donoho appealed.

The Seventh Circuit affirmed, holding that there was sufficient evidence to support Mr. Donoho’s convictions and rejecting his challenge to the jury instructions on the statutory term “lascivious.” Expressly disagreeing with *Hillie*, the panel held that it was proper for the jury to consider Mr. Donoho’s intent and disagreed with the notion that “lascivious exhibition” requires “conduct connoting the commission of a sex act.” App. A. at 20, 22. Judge Easterbrook concurred on the basis of circuit precedent but wrote separately to explain that the Seventh Circuit’s caselaw was incoherent, that “[t]he law in some other circuits . . . is more favorable” to defendants like Mr. Donoho, and that the plain meaning of “lascivious exhibition” is “depicting the genitals in a sexually suggestive way.” *Id.* at 26. Judge Easterbrook noted his

agreement with views expressed by Judge Katsas concurring in the denial of rehearing en banc in *Hillie*: “A child who uncovers her private parts to change clothes, use the toilet, clean herself, or bathe does not *lasciviously* exhibit them.” *Id.* at 27 (quoting 38 F.4th 235, 237 (D.C. Cir. 2022)).

The Seventh Circuit subsequently denied a petition for rehearing en banc without comment. *See* App. B.

3. The question presented is of exceptional importance. The panel majority ignored the clear command of the statutory text: “sexually explicit conduct” turns on characteristics of the conduct depicted in the images or videos and not on the photographer’s subjective sensibilities. The issue is consequential. Every year, federal courts sentence close to 2,000 defendants for offenses incorporating the relevant definition of “sexually explicit conduct.” U.S. Sent’g Comm’n, *Federal Sentencing of Child Pornography: Production Offenses* 17 (2021). And sentences for this category of offense are severe. Mr. Donoho was sentenced to over 17 years of imprisonment—and his sentence is no aberration.

4. A 14-day extension of time within which to file a certiorari petition is reasonable and necessary.

a. Additional time is needed because undersigned counsel was only recently retained to represent Mr. Donoho. The extension will allow counsel to become fully familiar with the issues, the record, and relevant case law, and to best present the issues for this Court’s review.

b. The request is further justified by undersigned counsel’s press of business

on other pending matters. Among other things, counsel in this case has an oral argument in *Reid v. Doe Run Resources Corp.*, No. 23-1625 (8th Cir.) on January 9, and an opposition to a petition for rehearing en banc in *United States v. Perez-Greaux*, No. 21-1699 (1st Cir.) due on January 17.

The requested 14-day extension would cause no prejudice to Respondent.

For the foregoing reasons, Mr. Donoho hereby requests that an extension of time be granted, up to and including January 25, 2024, within which to file a petition for certiorari.

Respectfully submitted,

/s/ E. Joshua Rosenkranz

E. Joshua Rosenkranz

Counsel of Record

ORRICK, HERRINGTON & SUTCLIFFE LLP

51 West 52nd Street

New York, NY 10019

(212) 506-5000

jrosenkranz@orrick.com

December 28, 2023