Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

CURTIS JAMES MCGARVEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. The Constitution guarantees every criminal defendant the right to fair judicial proceedings under the Due Process Clauses, which includes the right to representation under the Sixth Amendment. The Sixth Amendment does not just guarantee a criminal defendant the right to counsel, but rather it guarantees the right to effective counsel. *Reece v. Georgia*, 350 U.S. 85, 90 (1955). The effectiveness-of-counsel test has two parts: (1) counsel performed deficiently and (2) that deficiency prejudiced the defendant.

The question presented is:

Where Supreme Court precedent has been usurped by a United States District Court decision regarding the lasciviousness standard applied in cases of (attempted) sexual exploitation of a minor, 18 U.S.C. §§ 2251(a), 2251(e), and 2256(2)(A), and the defendant's counsel failed to research and bring that precedent to the courts' attention, leading to a conviction, has counsel been deficient in his representation of the defendant?

II. The Eighth Amendment of the United States Constitution prohibits the infliction of cruel and unusual punishments, i.e., the punishment must fit the crime.

The question presented is:

Where the defendant engaged in voyeuristic behavior, recording a minor changing her clothes and going into and out of a shower, resulting in a charge and conviction of attempted sexual exploitation of a minor and receiving a sentence of 210 months, a significantly higher sentence than he would have received for voyeurism, has his Eighth Amendment right been violated?

III. Petitioner filed a motion pursuant to 28 U.S.C. § 2255 for a claim of ineffective assistance of counsel. The district court denied the petitioner a hearing on the motion for ineffectiveness of counsel but granted a Certificate of Appealability with regard to the legal correctness of that court's finding of lasciviousness related to recordings of a minor changing her clothes and going into and out of a shower. The district court's initial finding was based on the *Dost* factors. *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986). A more recent case in the United States Court of Appeals in the District of Columbia Circuit outlined the Supreme Court precedent defining the lasciviousness standard and disavowing the application of the *Dost* factors to these cases. *United States v. Hillie*, 39 F.4th 674 (D.C. Cir. 2021). Under that precedent, "lascivious exhibition . . . mean[s] that the minor displayed his or her anus, genitalia, or pubic area in a manner connoting that the minor or any person or thing appearing with the minor in the image, exhibits sexual desire or an inclination to engage in *any* type of sexual activity. . . . [T]he 'lascivious exhibition of the anus, genitals, or pubic area' must be performed in a manner that connotes the commission of a sexual act. . . . Nudity is prohibited only when it is accompanied by simulated sexual conduct, that is, the explicit depiction of the prohibited acts. . . . [T]he conduct prohibited by the terms 'sexual conduct' and 'sexually explicit conduct' in child

pornography statutes [is] 'hard core' sexual conduct." *Id.* at 685. The Eighth Circuit Court of Appeals affirmed the application of the *Dost* factors.

The question presented is:

Is application of the *Dost* factors appropriate in a determination of the lasciviousness standard related to charges of (attempted) sexual exploitation of a minor, or does the Supreme Court precedent requiring depictions of sexual conduct more properly meet the standard?

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption of this petition.

RELATED PROCEEDINGS

United States v. Curtis James McGarvey, Case No. 1:18-cr-130, United States District Court for the District of North Dakota. Judgment entered on June 25, 2020.

United States v. Curtis James McGarvey, Case No. 20-2324, United States Court of Appeals for the Eighth Circuit. Judgment affirmed on June 29, 2021.

Curtis James McGarvey v. United States, Case No. 21-6731, Supreme Court of the United States. Petition denied on February 22, 2022.

Curtis James McGarvey v. United States, Case No. 1:23-cv-056 and Case No. 1:18-cr-130, United States District Court for the District of North Dakota. Petition denied and Certificate of Appealability granted on September 18, 2023.

Curtis James McGarvey v. United States, Case No. 23-3236. United States Court of Appeals for the Eighth Circuit. Judgment affirmed on August 22, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Curtis James McGarvey respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-2a) is unpublished.

JURISDICTION

The court of appeals entered judgment on August 22, 2024. The court of appeals denied McGarvey's timely petition for rehearing *en banc* on October 25, 2024. This petition is timely filed pursuant to Sup. Ct. R. 13. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 2251(a) provides, in relevant part:

> **(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.

18 U.S.C. § 2251(e) provides, in relevant part:

> **(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 . . . .

18 U.S.C. § 2256(2)(A), provides, in relevant part:

> **(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; (ii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the anus, genitals, or pubic area of any person.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. V provides, in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. VI provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VIII provides, in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

INTRODUCTION

Petitioner Curtis James McGarvey ("McGarvey") was convicted of two counts of attempted sexual exploitation of a minor. This case raises three important questions worthy of review by this Court. First, McGarvey filed a motion pursuant to 28 U.S.C. § 2255 asserting that his counsel had been ineffective in his representation at the district court and appellate court level. Filing *pro se,* McGarvey outlined various deficiencies in his counsel's performance, which ultimately resulted in his conviction of attempted sexual exploitation of a minor and a sentence of 210 months. Of greatest significance, McGarvey's prior counsel failed to properly research and present Supreme Court precedent to both the district court and the appellate court in relation to McGarvey's case.

The district court found certain recordings of a minor changing her clothes, stepping into and out of a shower, and stills from these recordings to meet the lasciviousness standard under 18 U.S.C. § 2256(2)(A) by applying the *Dost* factors.[1] *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986). None of the recordings or stills showed sexual conduct, nor were they sexual in nature, as would be required under longstanding Supreme Court precedent. *See United States v. Hillie*, 39 F.4th 674 (D.C. Cir. 2021). All the images collected by McGarvey would be more fairly characterized as voyeuristic and nothing more. Not only were the images not lascivious, but there was nothing in the images or McGarvey's conduct to support an attempt conviction. McGarvey was essentially advised to do an open plea and let the appellate court sort it out. But again,

[1] The six *Dost* criteria include " 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; [and] 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer. The Eighth Circuit has included 1) "whether the image portrays a minor as a sexual object" and 2) "any captions on the images" as two additional factors to consider in a lasciviousness determination. *United States v. Petroske*, 928 F.3d 767, 773 (8th Cir. 2019) (referring to Eighth Circuit model criminal jury instructions).

McGarvey's prior counsel failed to provide the salient Supreme Court precedent to that court or to address the attempt issue.

Second, a conviction of (attempted) sexual exploitation of a minor has a mandatory minimum sentence of 15 years. 18 U.S.C. § 2251(e). McGarvey received a sentence of 210 months, i.e., 17.5 years. The penalty is harsh, especially when the conviction is based on an attempt theory. There is nothing in this case to support the assertion that McGarvey was attempting to capture imagery of the minor female engaging in any sort of sexual conduct. Apart from placing cameras, his own conduct was purely passive. He never instructed the minor female where to change clothes or what bathroom to use. He never attempted to direct the minor female to pose in a sexual manner or engage in sexual activity. McGarvey was a voyeur who captured some images of nudity and nothing more. A sentence of 17.5 years is cruel and unusual for the conduct in this case and violates McGarvey's rights under the Eighth Amendment.

Third, the district court denied McGarvey's 2255 motion concerning ineffectiveness of counsel but granted him a Certificate of Appealability on the legal correctness of its lasciviousness determination concerning the images McGarvey had captured of the minor female in connection with his case. McGarvey presented the longstanding Supreme Court precedent, *see United States v. Hillie*, 39 F.4th 674 (D.C. Cir. 2021), to the appellate court, to no avail. It is incredibly important that this Court clarify the standard to be applied when defendants are faced with charges of (attempted) sexual exploitation of a minor. The current *Dost* factors are so broad and subjective that they hardly come close to the precedent outlined by this Court. In short, both district and appellate courts are applying the wrong law, and they need to be corrected.

STATEMENT OF THE CASE

McGarvey was charged in federal court with two counts of attempted sexual exploitation of a minor, one count of possession of materials involving the sexual exploitation of a minor, one count of cyberstalking, and one count of transfer of obscene materials to minors. McGarvey's prior counsel moved for an evidentiary hearing pursuant to *United States v. Rayl*, 270 F.3d 709 (8th Cir. 2001), to conduct a preliminary review of whether the images McGarvey captured depict "sexually explicit conduct." McGarvey's prior counsel filed a memorandum to support his motion, indicating that the lasciviousness standard was at issue, citing to only one Eighth Circuit case regarding how that standard should be defined and failing to provide incredibly salient and determinative Supreme Court caselaw to demonstrate that the standard has not been met.

The district court, rather than grant an evidentiary hearing, undertook an *in camera* review of the images in dispute. That court applied the *Dost* factors in its assessment, determining that the images captured by McGarvey met the lasciviousness standard. *See United States v. Dost*, 636 F.Supp. 828 (S.D. Cal. 1986). Upon this finding, McGarvey's prior counsel advised him to do an open plea in order to preserve his right to appeal. McGarvey pleaded guilty to two counts of attempted sexual exploitation of a minor and one count of cyberstalking. The government dismissed the remaining charges. He was sentenced to 210 months on the two counts of attempted sexual exploitation of a minor with a consecutive 30-month sentence on the cyberstalking count.

McGarvey's prior counsel filed an appeal. He again cited to a single Eighth Circuit case regarding the lasciviousness standard, the same one he had used in his memorandum to support his motion. His representation was less than thorough or vigorous. He made argumentation without citing to law to support those arguments. Most significantly, he completely failed to identify and cite to the longstanding Supreme Court precedent identifying the parameters of the lasciviousness

standard. The appellate court affirmed the convictions. Thus, McGarvey's prior counsel was ineffective not just at the district court level, but also at the appellate court level.

McGarvey petitioned the Supreme Court *pro se*. His petition was denied. McGarvey then filed a motion for ineffective assistance of counsel pursuant to 28 U.S.C. § 2255. The district court denied his motion regarding the ineffectiveness of his prior counsel but granted him a Certificate of Appealability on the legal correctness of its lasciviousness finding. McGarvey appealed that finding and also appealed the denial of his 2255 motion for a hearing to address his prior counsel's ineffectiveness. The appellate court only addressed the Certificate of Appealability granted by the district court and affirmed the court's finding.

McGarvey now petitions this Court because his due process, Sixth Amendment, and Eighth Amendment rights have been violated. He also petitions this Court to clarify the meaning of the lasciviousness standard, as the district and circuit courts, with the exception of the D.C. Circuit, have strayed far away from the longstanding Supreme Court precedent which has been set and clarified for decades already.

REASONS FOR GRANTING THE PETITION

This case involves important constitutional questions as well as questions of federal law. McGarvey recorded a minor female changing her clothes and going into and out of a shower. He did not direct the minor female's conduct in any way. Nor did he capture any sexual conduct. McGarvey's images included nudity and nothing more. However, McGarvey was advised by prior counsel to plead guilty to two counts of attempted sexual exploitation of a minor after the district court found that images captured by McGarvey met the lasciviousness standard under the *Dost* factors. *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986). There is, however, already Supreme Court precedent concerning the interpretation of the lasciviousness standard, which

appropriately defines that standard as involving sexual conduct of some form, that many district and appellate courts have chosen to disregard.

The *Dost* factors are fairly general, making their application highly subjective and ultimately overbroad. They go too far in the sense that they pull into the meaning of the statute conduct that would more properly be characterized as a lesser offense, e.g., voyeurism. And because of this subjective and overbroad interpretation, even purely passive voyeuristic conduct can be perceived as, if not sexual exploitation of a minor, then the attempt thereof. Given that there is no difference in the penalty for an attempted and a completed offense under the federal sentencing guidelines, and the starting point for any sentence is 15 years, this is deeply concerning and cannot be countenanced. The Court should address this important issue.

I. The question of whether prior counsel's failure to properly research and provide the lower courts with Supreme Court precedent regarding the proper standard to be applied to this case is an important question regarding due process of law and a defendant's Sixth Amendment right to effective counsel.

McGarvey's prior counsel failed to provide both the district court and the appellate court with salient and determinative Supreme Court precedent in the consideration of this case. Relatedly, McGarvey's prior counsel also failed to properly address the attempt issue. The images not only do not meet the lasciviousness standard, but there is no evidence to support the assertion that McGarvey was attempting to capture lascivious images. Had the prior attorney properly researched the law that applies to this case, there is reason to believe that the outcome would have been different.

The legal correctness of the lasciviousness standard is addressed in Section III below and demonstrates how proper research into the law would have uncovered longstanding Supreme Court precedent on how that standard is to be regarded. Here, we will focus on the fact that not even an attempt could be demonstrated under the law.

An attempt charge specifically requires a showing of intent. The elements of attempt include: "(1) an intent to engage in criminal conduct, and (2) conduct constituting a 'substantial step' towards the commission of the substantive offense which strongly corroborates the actor's criminal intent." *United States v. Crawford*, 837 F.2d 339, 340 (8th Cir. 1988) (emphasis added); *United States v. Carlisle*, 118 F.3d 1271, 1273 (8th Cir. 1997). Proof that a "substantial step" has been taken must include something more than "the preparation stage so that if it is not interrupted extraneously, it will result in a crime." *Id.* The step "must be of such an unequivocal nature that it is calculated to bring the desired result to fruition." *United States v. Villarreal*, 707 F.3d 942, 960 (8th Cir. 2013). There was insufficient evidence to show sexual exploitation of a minor or the attempt thereof in this case.

McGarvey's conduct was purely passive. He placed cameras that made recordings. He captured some nudity. He made some stills of the nude images. No images of sexual conduct were captured or created. McGarvey did not direct the minor female's conduct in any way before, during, or after the recordings were made. McGarvey was not carrying out a plan that was interrupted before he could actually capture sexual conduct. This was not an attempt to sexually exploit a minor. This was a completed offense of voyeurism.

II. The question of whether voyeuristic behavior may be charged and convicted as attempted sexual exploitation of a minor, significantly increasing the defendant's sentencing liability, is an important question under the Eighth Amendment of the Constitution.

McGarvey has received a sentence of 210 months incarceration because he captured images of a minor female changing clothes and stepping into and out of a shower. He also created some still shots from these recordings. In the videos where the minor female is changing her clothes, her breasts are the only part of her naked body exposed to the camera. In the single recording of the minor female stepping into and out of the shower, there is full frontal nudity for

approximately 2 or 3 seconds after she steps out of the shower and before she wraps herself with a towel and exits the bathroom. Her buttocks were exposed when she stepped into the shower. McGarvey did not direct the minor female in any way before, during, or after any of the footage was recorded.

The Eighth Amendment of the United States Constitution prohibits the infliction of cruel and unusual punishment. The subjective and overbroad application of the lasciviousness standard vis à vis the *Dost* factors is a violation of McGarvey's Eighth Amendment rights because the punishment does not fit the crime in this case. When harsh penalties loom large, a 15-year mandatory minimum sentence, it is essential that there be a showing of a specific intent to produce sexually explicit conduct, especially when no such production has been made. *Hillie*, 39 F.4th at 690 (stating that when the government wishes for its conviction to hold on an attempt theory, the concern for harsh punishment looms even larger); *see also Staples v. United States*, 511 U.S. 600, 615-18 (1994).

Overbreadth is found where the interpretation and/or application of a statute fails to properly distinguish the conduct legitimately falling within its purview. *Collins v. Lockhart*, 754 F.2d 258, 261 (8th Cir. 1985). Vagueness is found when the exact conduct to be punished by a statute is difficult to determine. *Williams*, 553 U.S. at 306. Due process is violated when a conviction is obtained under a law that "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Id.* at 304 (emphasis added). Under the current lasciviousness standard, it is difficult to know what conduct falls within its scope. More specifically, "the *Dost* factors stray too far [by] allowing a depiction that portrays sexually *implicit* conduct in the mind of the viewer to be caught

in the snare of a statute that prohibits creating a depiction of sexually *explicit* conduct performed by a minor." *Hillie*, 39 F.4th at 688.

In cases where "a serious doubt is raised as to the vagueness of the words obscene, lewd, lascivious, filthy, indecent, or immoral as used . . . in federal statutes, we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific *hard core sexual conduct* given as examples in *Miller v. California*.[2]" *Hillie*, 39 F4th at 682 (citations omitted) (quotations omitted). Criminal statutes are to be strictly construed "in favor of defendants where substantial rights are involved." *Smith v. United States*, 360 U.S. 1, 9 (1959). One's Eighth Amendment right to fair punishment is a substantial right. Ambiguity in the law "should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 811 (1971) (citation omitted).

III. The question of whether the lower courts may use the *Dost* factors, completely disregarding Supreme Court precedent, to make a lasciviousness determination for charges of (attempted) sexual exploitation of a minor is an important question of federal law.

McGarvey received a Certificate of Appealability on the legal correctness of the lasciviousness standard. The *Dost* factors fail to provide the legally correct standard for cases such as these. The *Dost* factors are highly subjective and overbroad in application, creating a danger of discriminatory enforcement. Regardless of that, they do not comport with longstanding Supreme Court precedent, which seems to have fallen into obscurity, though there is at least one circuit court that has made inroads to resurrect it. *See United States v. Hillie*, 39 F.4th 674 (D.C. Cir. 2021).

In *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78-79 (1994), the Supreme Court "expressly engrafted the 'hard core' characterization of the prohibited 'lascivious exhibition of the

[2] Referring to *Miller v. California*, 413 U.S. 15 (1973).

genitals' from *Miller*[3] onto the construction of the federal child pornography statute." *Id.* at 682 (noting that this occurred through adopting the lower court's interpretation of "lascivious" as equal in meaning to "lewd"). "Lewd exhibition of the genitals" had previously been defined as "the hard core of child pornography." *New York v. Ferber*, 458 U.S. 747, 773 (1982).

Yet another Supreme Court case further supports this interpretation. Because the term "lascivious exhibition of the anus, genitals, or public area" is part of a list of other proscribed depictions, including "sexual intercourse," "bestiality," "masturbation," and "sadistic or masochistic abuse," the canon of *noscitur a sociis* applies. *Williams*, 553 U.S. at 294. This canon "counsels that a word is given more precise content by the neighboring words with which it is associated." *Id.* Therefore, the lasciviousness standard requires a depiction "that connotes the commission of a sexual act . . . consistent with . . . *Ferber*." *Hillie*, 39 F.4th at 685. The definition of "sexually explicit conduct" related to the statute at issue here, "is very similar to the definition of 'sexual conduct' in the New York statute" upheld in *Ferber*. *Williams*, 553 U.S. at 296. "[T]he fact that the defined term here is 'sexually explicit conduct,' rather than (as in *Ferber*) merely 'sexual conduct' . . . connotes actual depiction of the sex act." *Id.* at 296-97.

> In sum, *Ferber* explained that the Court had previously construed the phrase "lewd exhibition of the genitals" in *Miller*, and that the phrase referred to "the hard core of child pornography." *Ferber*, 458 U.S. at 764–65, 773, 102 S.Ct. 3348. In *X-Citement Video*, the Court found that the term "lascivious exhibition of the genitals" as currently used in § 2256(2)(A)(v), has the same meaning as "lewd exhibition of the genitals," as that phrase was construed in *Miller* and *Ferber*. *X-Citement Video*, 513 U.S. at 78–79, 115 S.Ct. 464. And in *Williams*, the Court reaffirmed that § 2256(2)(A)'s definition of "sexually explicit conduct" means essentially the same thing as the definition of "sexual conduct" at issue in *Ferber*, except that the conduct defined by § 2256(2)(A) must be, if anything, more "hard-core" than the conduct defined by the New York law at issue in *Ferber*, given that the federal statute prohibits "sexually explicit conduct" rather than merely "sexual conduct," as in the state law. *Williams*, 553 U.S. at 296, 128 S.Ct. 1830.

[3] Referring to *Miller v. California*, 413 U.S. 15 (1973).

Hillie, 39 F.4th at 683.

The change of the word "lewd" in the original statute to the current usage of "lascivious" does not change the analysis because "'[l]ascivious' is no different in its meaning than 'lewd'." *United States v. X-Citement Video, Inc.*, 982 F.2d 1285 (9th Cir. 1992); *X-Citement Video, Inc.*, 513 U.S. at 78-79 (adopting lower court's assertion giving equal meaning to the terms "lascivious" and "lewd"). This renders "the fundamental premise of *Dost*" and its factors as "fatally flawed." *Hillie*, 39 F.4th at 687. *Dost* ignored the holding in *Miller* "that 'lewd exhibition of the genitals' refers to 'hard core' sexual conduct." *Id.*

> It is this Court's responsibility to say what a [federal] statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law. A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.

Rivers v. Roadway Express, Inc., 511 U.S. 298, 312-13 (1994). "[T]he Court's authoritative construction of statutory language must be followed in subsequent prosecutions because it is that construction which provides fair notice to citizens of what conduct is proscribed." *Hillie*, 39 F.4th at 684 (emphasis added). This Court must disavow the *Dost* factors and reassert its prior holdings.

IV. This case is an ideal vehicle for the questions presented.

This case squarely presents constitutional issues and an issue of federal law. McGarvey has a valid ineffective assistance of counsel claim. His prior attorney failed to adequately research the law applicable to a lasciviousness determination in a (attempted) sexual exploitation of a minor case. He also failed to understand the complete parameters of an attempt charge. Because of these deficiencies, McGarvey's prior counsel failed to properly advocate for McGarvey at both the district court and the appellate court levels. There is Supreme Court precedent that would have changed the outcome of this case, and McGarvey's counsel failed to find it, assuming he even tried

to find it. McGarvey does not know because he was denied a 2255 hearing on the matter. On that basis his due process and Sixth Amendment rights have been violated.

McGarvey's conviction and sentence in this case violates the Eighth Amendment of the United States Constitution because he was engaging in voyeurism and was convicted of attempted sexual exploitation of a minor. The punishment is too high for the act that he committed.

Finally, McGarvey was granted a Certificate of Appealability on the legal correctness of the lasciviousness standard vis à vis the *Dost* factors. The appellate court affirmed the continued use of those factors. Because the *Dost* factors seem to have overridden Supreme Court precedent and have created differences of opinions among the circuit courts, this Court should clarify what law is to apply in these cases.

This case is an ideal vehicle for the questions presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated the 26th day of November 2024.

Respectfully submitted,

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