No. _____

In The

SUPREME COURT OF THE UNITED STATES

♦

MICHAEL INZITARI,
Petitioner

v.

STATE OF CONNECTICUT,
Respondent

♦

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
CONNECTICUT SUPREME COURT

♦

APPENDIX

♦

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May 10, 2025

INDEX TO APPENDIX

STATE OF CONNECTICUT *v.* MICHAEL INZITARI (SC 21008)

McDonald, D'Auria, Mullins, Ecker, Alexander and Dannehy, Js.*

Syllabus

Pursuant to statute ((Rev. to 2019) § 53a-193 (13)), "child pornography" means "any visual depiction . . . of sexually explicit conduct, where the production of such visual depiction involves the use of a person under sixteen years of age engaging in sexually explicit conduct . . . ."

Pursuant further to statute ((Rev. to 2019) § 53a-193 (14)), "sexually explicit conduct" means "actual or simulated (A) sexual intercourse . . . (B) bestiality, (C) masturbation, (D) sadistic or masochistic abuse, or (E) lascivious exhibition of the genitals or pubic area of any person."

The defendant appealed from his conviction of possession of child pornography in the first degree. The defendant claimed, inter alia, that the evidence was insufficient to support his conviction because the state was required to prove under the applicable statute ((Rev. to 2019) § 53a-196d (a) (1)) that he had possessed fifty or more images of child pornography and thirteen of the fifty-seven images in evidence depicted child nudity that constituted protected expression under the first amendment to the United States constitution rather than sexually explicit conduct, as defined by § 53a-193 (14). The defendant also claimed, inter alia, that the trial court had improperly instructed the jury that it could consider the six factors articulated in *United States* v. *Dost* (636 F. Supp. 828) in determining whether the images in evidence depicted a lascivious exhibition of the genitals or pubic area for purposes of § 53a-193 (14) (E). *Held*:

*The listing of judges reflects their seniority status on this court as of the date of oral argument.

Appendix A

The evidence was sufficient to support the defendant's conviction of possessing fifty or more visual depictions of child pornography, this court having determined that at least eleven of the thirteen challenged images depicted a lascivious exhibition of a child's or children's genitals or pubic areas and, thus, constituted child pornography under § 53a-193 (13) and (14), and, accordingly, the state met its burden of proving that the defendant had possessed a total of fifty-five images of child pornography.

This court determined that the first five *Dost* factors—whether the focal point of the visual depiction is on the child's genitalia or pubic area; whether the setting of the visual depiction is sexually suggestive; whether the child is depicted in an unnatural pose or in inappropriate attire, considering the age of the child; whether the child is fully or partially clothed, or nude; and whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity—are helpful in assessing whether a depiction is a lascivious exhibition, but they should not be used to define the term "lascivious exhibition" and are simply nonexhaustive considerations that may help in assessing whether a depiction is a lascivious exhibition.

This court also determined that the sixth *Dost* factor, whether the visual depiction is intended or designed to elicit a sexual response in the viewer, should not be considered for the purpose of determining whether an image constitutes child pornography under this state's child pornography statutes, as Connecticut law does not make possession of child pornography turn on the subjective reaction of a particular viewer.

The trial court's instruction to the jury that it could consider the *Dost* factors, including the sixth factor, in determining whether an image depicted a lascivious exhibition of the genitals or pubic area was not improper, this court having determined that it was not reasonably probable that this instruction misled the jury when the court did not expressly instruct the jury to focus on the subjective response of the viewer and instructed the jury that it was not obligated to consider any of the *Dost* factors.

The trial court did not err in declining the defense's request for a specific unanimity instruction directing the jurors that they had to be unanimous as to which fifty images constituted child pornography and into which of the five categories of sexually explicit conduct set forth in § 53a-193 (14) each of those images fell.

The trial court did not abuse its discretion in admitting into evidence certain exhibits that showed the file names of two images that had been deleted from the defendant's cell phone and that were associated with the defendant's email address, as those exhibits were probative of the issue of whether the defendant had knowledge that he possessed child pornography on his phone, the defendant failed to demonstrate unfair prejudicial impact to

counter the substantial probative value of the exhibits, and the trial court took measures to mitigate any potential undue prejudice.

Argued September 18, 2024—officially released January 21, 2025

Procedural History

Two part substitute information charging the defendant, in the first part, with the crime of possession of child pornography in the first degree and, in the second part, with being a persistent felony offender, brought to the Superior Court in the judicial district of New Britain, where the first part of the information was tried to the jury before *Baldini, J.*; verdict and judgment of guilty of possession of child pornography in the first degree; thereafter, the state withdrew the second part of the information, and the defendant appealed. *Affirmed.*

Conrad Ost Seifert, assigned counsel, for the appellant (defendant).

Danielle Koch, assistant state's attorney, with whom, on the brief, were *Christian Watson*, state's attorney, *Gregory Borrelli*, assistant state's attorney, and *Melissa L. Streeto*, former senior assistant state's attorney, for the appellee (state).

Opinion

DANNEHY, J. The defendant, Michael Inzitari, was convicted, following a jury trial, of one count of possessing child pornography in the first degree in violation of General Statutes (Rev. to 2019) § 53a-196d (a) (1),[1] which requires proof that the accused possessed fifty or more visual depictions of child pornography. On appeal, the defendant claims that (1) the evidence was insufficient to support his conviction, (2) the court

[1] We note that references in this opinion to General Statutes §§ 53a-193 (13) and 53a-196d (a) (1) are to the 2019 revision of those statutes. Those statutes were recently amended by No. 24-118, § 4 of the 2024 Public Acts, effective October 1, 2024, which made technical changes to the statutes by changing the term "child pornography" to "child sexual abuse material."

improperly instructed the jury that it could consider the so-called *Dost*[2] factors in determining whether the images introduced by the state constituted a lascivious exhibition of the genitals or pubic area,[3] (3) the court erred in not giving a unanimity instruction, and (4) the court abused its discretion in admitting two of the state's exhibits. We disagree and affirm the judgment of the trial court.

The underlying facts of this case are straightforward. The New Britain Police Department obtained a search warrant for the defendant's cell phone. After locating the device, the state conducted a cell phone extraction and discovered images of suspected child pornography on the cell phone and the memory card within it. The defendant was subsequently charged with knowingly possessing fifty or more visual depictions of child pornography in violation of § 53a-196d (a) (1).

At trial, the state introduced fifty-seven images in support of its case. Each image was made an exhibit,

[2] *United States* v. *Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), aff'd, 813 F.2d 1231 (9th Cir. 1987), and aff'd sub nom. *United States* v. *Wiegand*, 812 F.2d 1239 (9th Cir.), cert. denied, 484 U.S. 856, 108 S. Ct. 164, 98 L. Ed. 2d 118 (1987).

[3] Whether an image constitutes child pornography under our possession of child pornography statutes turns, in part, on whether an image depicts a child engaging in "[s]exually explicit conduct," which our legislature has defined in relevant part as a "lascivious exhibition of the genitals or pubic area of any person." General Statutes (Rev. to 2019) § 53a-193 (14). As will be discussed in greater detail in this opinion, the so-called *Dost* factors stem from the decision of the United States District Court for the Southern District of California in *United States* v. *Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), aff'd, 813 F.2d 1231 (9th Cir. 1987), and aff'd sub nom. *United States* v. *Wiegand*, 812 F.2d 1239 (9th Cir.), cert. denied, 484 U.S. 856, 108 S. Ct. 164, 98 L. Ed. 2d 118 (1987), in which the court identified six nonexhaustive factors to help it evaluate whether a visual depiction was a "lascivious exhibition of the genitals or pubic area" under 18 U.S.C. § 2255 (2) (E) (1982), now codified at 18 U.S.C. § 2256 (2) (A) (v) (2018). Many courts around the country have used or approved these factors to help evaluate whether an image depicts a "lascivious exhibition" and, thus, constitutes child pornography.

and the images were collectively presented to the jury in a binder. After the prosecutor rested the state's case-in-chief, defense counsel moved for a judgment of acquittal, arguing that the state had failed to prove that the defendant possessed the fifty or more images of child pornography required to convict him under § 53a-196d (a) (1) because numerous images introduced by the state did not depict sexual activity. The court denied the motion, concluding that the jury reasonably could find that the state had proven all of the elements of the offense charged. Over defense counsel's objection, the court included in its instructions to the jury that it "may, but [was] not obligated to, consider" the six *Dost* factors. The jury later found the defendant guilty of the single charge against him, and the court sentenced him to eighteen and one-half years of incarceration, five of which were mandatory.[4] The defendant appealed from the judgment of conviction to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

I

The defendant first claims that there was insufficient evidence to support his conviction of possessing fifty or more visual depictions of child pornography under § 53a-196d (a) (1) because thirteen of the fifty-seven images introduced by the state at trial do not constitute child pornography.[5] He contends that, although the thirteen images depict nude children, they do not depict sexually explicit conduct. Nudity, without more, he argues, is protected expression under the first amend-

[4] The state initially charged the defendant, in a part B information, as being a persistent serious felony offender in violation of General Statutes § 53a-40 (c) and (k). Prior to sentencing, however, the state withdrew the part B information. The defendant, therefore, was sentenced solely for his conviction under § 53a-196d.

[5] Specifically, the defendant contends that state exhibits 33, 35, 36, 37, 46, 49, 50, 70, 71, 72, 75, 77, and 83 do not constitute child pornography.

ment to the United States constitution. In arguing that these images are protected expression under the first amendment, the defendant also challenges the legal framework employing the *Dost* factors used in many jurisdictions to assess whether a visual depiction constitutes child pornography. He argues that the jury should not have been instructed on the *Dost* factors because those factors should not be used to adjudicate whether an image depicts a lascivious exhibition of the genitals or pubic area. We address each of his arguments in turn.

A

For an image to constitute child pornography for purposes of § 53a-196d (a) (1), it must depict "sexually explicit conduct, where the production of such visual depiction involves the use of a person under sixteen years of age engaging in sexually explicit conduct . . . ." General Statutes (Rev. to 2019) § 53a-193 (13). The legislature defines "[s]exually explicit conduct" as "actual or simulated (A) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal physical contact, whether between persons of the same or opposite sex, or with an artificial genital, (B) bestiality, (C) masturbation, (D) sadistic or masochistic abuse, or (E) lascivious exhibition of the genitals or pubic area of any person." General Statutes (Rev. to 2019) § 53a-193 (14).

The defendant contends that the thirteen images in question clearly do not depict sexual intercourse, bestiality, masturbation, or sadistic or masochistic abuse. He argues that this case turns on the meaning of "lascivious exhibition of the genitals or pubic area" and that none of the thirteen images in question falls within that category. We agree with the defendant that the thirteen images clearly do not fall within the categories of sexual intercourse, bestiality, masturbation, or sadistic or masoch-

istic abuse.[6] The question of sufficiency, therefore, turns on whether the thirteen images each depict a "lascivious exhibition of the genitals or pubic area," and, thus, constitute child pornography.[7]

In reviewing a sufficiency of the evidence claim, we ordinarily apply a two part test. See, e.g., *State* v. *Cook*, 287 Conn. 237, 254, 947 A.2d 307, cert. denied, 555 U.S. 970, 129 S. Ct. 464, 172 L. Ed. 2d 328 (2008). We first "construe the evidence in the light most favorable to sustaining the verdict." (Internal quotation marks omitted.) *State* v. *Gary S.*, 345 Conn. 387, 398, 285 A.3d 29 (2022). We then "determine whether [on] the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Dawson*, 340 Conn. 136, 146, 263 A.3d 779 (2021).

In certain contexts, however, including those like the present case that implicate the first amendment, we are required to apply a de novo standard of review. See *DiMartino* v. *Richens*, 263 Conn. 639, 661–62, 822 A.2d 205 (2003). The presence of first amendment concerns obligates an appellate court "to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." (Internal quotation marks omitted.) *State* v. *Michael R.*, 346 Conn. 432, 463, 291 A.3d 567, cert. denied, U.S. , 144 S. Ct. 211,

[6] The state did not concede in its appellate briefing or at oral argument before this court that the thirteen images in question do not exhibit sexual intercourse, bestiality, masturbation, or sadistic or masochistic abuse. The state "declines to take a position on this matter because it is unnecessary to the resolution of this claim." We disagree that it is unnecessary. Whether the images in question exhibit sexual intercourse, bestiality, masturbation, or sadistic or masochistic abuse is part and parcel of the defendant's claim that none of the thirteen images contains sexually explicit conduct.

[7] The age of the victims is not at issue in this appeal.

217 L. Ed. 2d 89 (2023); see also, e.g., *Miller* v. *California*, 413 U.S. 15, 25, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973) (independent appellate review of finding of obscenity). This rule of "independent review" is in recognition that an appellate "[c]ourt's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied." (Internal quotation marks omitted.) *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 508, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984). When a defendant challenges certain images as falling outside the definition of child pornography, rendering them protected expression under the first amendment, our independent review requires us to examine the four corners of each image to determine whether each, in fact, constitutes child pornography. See, e.g., *State* v. *Sawyer*, 335 Conn. 29, 45, 225 A.3d 668 (2020) (reviewing "the descriptions of . . . two photographs" to determine whether there was probable cause that defendant possessed lascivious images of children); see also, e.g., *United States* v. *Villard*, 885 F.2d 117, 125 (3d Cir. 1989) (court must view photograph itself to determine whether it is child pornography).

With our standard of review in mind, we begin with our construction of the relevant law and then consider the defendant's challenge to the sufficiency of the evidence thereunder. We begin with the text of § 53a-193 (14), which defines "[s]exually explicit conduct" to include, inter alia, "lascivious exhibition of the genitals or pubic area of any person." See *State* v. *Dudley*, 332 Conn. 639, 645, 212 A.3d 1268 (2019) (explaining that General Statutes § 1-2z instructs that meaning of statute shall, in first instance, be ascertained from text of statute itself and its relationship to other statutes). We previously have explained that § 53a-193 (14) does not define "lascivious exhibition of the genitals or pubic

area" but that Black's Law Dictionary defines "lascivious" as " 'tending to excite lust; lewd; indecent; obscene.' " *State* v. *Sawyer*, supra, 335 Conn. 39, quoting Black's Law Dictionary (11th Ed. 2019) p. 1053. Other than providing this definition of "lascivious" and offering a few nonexhaustive factors to consider in determining whether an image depicts a "lascivious exhibition," we have not had further occasion, until now, to analyze the statutory provision to determine whether a more precise meaning of the phrase "lascivious exhibition" can be ascertained. See *State* v. *Sawyer*, supra, 39.

In analyzing this language, we observe that standard dictionaries are consistent with the Black's Law Dictionary definition of "lascivious," defining the term as "[g]iven to or expressing lust; lecherous" or "[e]xciting sexual desires; salacious"; The American Heritage College Dictionary (4th Ed. 2004) p. 781; or "lewd" or "lustful . . . ." Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 701. The term "lewd" means "[p]reoccupied with sex and sexual desire; lustful." The American Heritage College Dictionary, supra, p. 796. In other words, the term "lascivious" connotes something sexual in nature.

This meaning is reinforced by the fact that the word "lascivious" in § 53a-193 (14) modifies the "exhibition" of certain private parts. We recently explained that "exhibition" is defined as " 'an act or instance of exhibiting' and 'exhibit' as 'to present to view . . . to show or display outwardly [especially] by visible signs or actions . . . .' Merriam-Webster's Collegiate Dictionary [supra] pp. 437–38." *State* v. *Michael R.*, supra, 346 Conn. 459.

Reading the terms "lascivious" and "exhibition" together, and considering them within the context of the child pornography statute, they establish that an image depicts the use of a child engaged in a "lascivious exhibition"

under § 53a-193 (14) when the child's genitals or pubic area is displayed in a sexual manner. Indeed, under the definition of "child pornography" set forth in § 53a-193 (13), it is the photographed child who must be depicted as engaged in "[s]exually explicit conduct" and, thus, the child who must be depicted making a "lascivious exhibition . . . ." General Statutes (Rev. to 2019) § 53a-193 (13) and (14).

In evaluating whether an image depicts a "lascivious exhibition," many courts, including this court, have used or approved the nonexhaustive factors set forth in *United States* v. *Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), aff'd, 813 F.2d 1231 (9th Cir. 1987), and aff'd sub nom. *United States* v. *Wiegand*, 812 F.2d 1239 (9th Cir.), cert. denied, 484 U.S. 856, 108 S. Ct. 164, 98 L. Ed. 2d 118 (1987).[8] The *Dost* factors ask whether (1) the focal point of the visual depiction is on the child's genitalia or pubic area, (2) the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity, (3) the child is depicted

[8] The federal definition of "sexually explicit conduct" is substantially similar to Connecticut's statutory definition. Compare General Statutes (Rev. to 2019) § 53a-193 (13) and (14) with 18 U.S.C. § 2256 (2) (A) and (B) and (8) (2018). Many federal courts have used or approved the *Dost* factors to assist in determining whether a depiction is a "lascivious exhibition" within the meaning of the federal child pornography statutes. See, e.g., *United States* v. *Sanders*, 107 F.4th 234, 261 (4th Cir. 2024); *United States* v. *Petroske*, 928 F.3d 767, 773 (8th Cir. 2019), cert. denied, U.S. , 140 S. Ct. 973, 206 L. Ed. 2d 129 (2020); *United States* v. *Isabella*, 918 F.3d 816, 831 (10th Cir. 2019), cert. denied, U.S. , 140 S. Ct. 2586, 206 L. Ed. 2d 508 (2020); *United States* v. *Hunter*, 720 Fed. Appx. 991, 996 (11th Cir. 2017); *United States* v. *Perkins*, 850 F.3d 1109, 1121 (9th Cir. 2017); *United States* v. *Steen*, 634 F.3d 822, 826 (5th Cir. 2011); *United States* v. *Brown*, 579 F.3d 672, 680 (6th Cir. 2009), cert. denied, 558 U.S. 1133, 130 S. Ct. 1106, 175 L. Ed. 2d 920 (2010); *United States* v. *Rivera*, 546 F.3d 245, 250 (2d Cir. 2008), cert. denied, 555 U.S. 1204, 129 S. Ct. 1395, 173 L. Ed. 2d 644 (2009); *United States* v. *Amirault*, 173 F.3d 28, 31 (1st Cir. 1999); *United States* v. *Knox*, 32 F.3d 733, 745–46 (3d Cir. 1994), cert. denied, 513 U.S. 1109, 115 S. Ct. 897, 130 L. Ed. 2d 782 (1995). But see *United States* v. *Hillie*, 39 F.4th 674, 688 (D.C. Cir. 2022); *United States* v. *Price*, 775 F.3d 828, 840 (7th Cir. 2014).

in an unnatural pose, or in inappropriate attire, considering the age of the child, (4) the child is fully or partially clothed, or nude, (5) the visual depiction suggests sexual coyness or a willingness to engage in sexual activity, and (6) the visual depiction is intended or designed to elicit a sexual response in the viewer. Id., 832.

In *State* v. *Sawyer*, supra, 335 Conn. 41, this court described the *Dost* factors as being "generally relevant" and providing "some guidance" in assessing whether a display is a lascivious exhibition. (Internal quotation marks omitted.) Although *Sawyer* used the *Dost* factors to determine whether descriptions of images contained in a search warrant affidavit were sufficient to establish probable cause that the defendant possessed child pornography, we signaled that the factors were helpful, more broadly, in determining whether a visual depiction is lascivious. See id.; see also *State* v. *Michael R.*, supra, 346 Conn. 467 ("[a]s a matter of first impression in *Sawyer*, we adopted a case specific approach to assessing whether a display is lascivious and stated that 'the *Dost* factors are generally relevant and provide some guidance' in this evaluation"). We made clear, however, that "these factors are neither comprehensive nor necessarily applicable in every situation" and that the "inquiry will always be [case specific]." (Internal quotation marks omitted.) *State* v. *Sawyer*, supra, 41, quoting *United States* v. *Amirault*, 173 F.3d 28, 32 (1st Cir. 1999).

Furthermore, and particularly relevant to the fourth *Dost* factor—whether the child is fully or partially clothed, or nude—we explained that "nudity alone, even when it comes to images of children, is not sufficient to constitute child pornography . . . ." *State* v. *Michael R.*, supra, 346 Conn. 467 n.29. That is because "depictions of nudity, without more, constitute protected expression" under the first amendment. *Osborne* v. *Ohio*, 495 U.S. 103, 112, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990). This caveat ensures that persons are not

penalized for viewing or possessing otherwise innocuous nude photographs, a classic example of which is a family snapshot of a child in a bathtub. See, e.g., *United States* v. *Hill*, 459 F.3d 966, 970 (9th Cir. 2006) ("Child pornography is a particularly repulsive crime, but not all images of nude children are pornographic. For example, 'a family snapshot of a nude child bathing presumably would not' be criminal."), cert. denied, 549 U.S. 1299, 127 S. Ct. 1863, 167 L. Ed. 2d 353 (2007); *United States* v. *Knox*, 32 F.3d 733, 750 (3d Cir. 1994) ("[n]o one seriously could think that . . . an innocuous family snapshot of a naked child in the bathtub violates the child pornography laws"), cert. denied, 513 U.S. 1109, 115 S. Ct. 897, 130 L. Ed. 2d 782 (1995). Although a "lascivious exhibition" under § 53a-193 (14) requires more than mere nudity, the fourth *Dost* factor is a relevant and helpful inquiry when considered together with the other factors in evaluating whether the exhibition of a child's genitals or pubic area is displayed in a sexual manner. See *State* v. *Michael R.*, supra, 461 (assuming that "nude performance" under § 53a-193 (4) requires sexual component to survive vagueness challenge).

The defendant contends that the *Dost* factors are "problematic" and should not be used to adjudicate lasciviousness. Although he argues in a conclusory manner that all six factors should not be considered, his primary objection is to the sixth *Dost* factor, which asks whether the visual depiction is intended or designed to elicit a sexual response in the viewer. He contends that the sixth factor improperly adds a subjective component to the evaluation of lasciviousness that requires a fact finder to determine whether the images in question were intended to elicit a sexual response in the viewer who is a pedophile.

The state argues that is precisely what is required of the final factor. It contends that lasciviousness is not a characteristic of the photographed child but of the

exhibition that the photographer sets up for an audience consisting of himself and like-minded pedophiles. It states that we must determine whether an image was intended or designed to elicit a sexual response in *the viewer*—the viewer being the pedophile viewer, not the average viewer. In other words, the state argues that a fact finder must step into the shoes—or, rather, into the mind—of a pedophile to make a lasciviousness determination.

We are cognizant that the sixth *Dost* factor has been the subject of some criticism over the years. One court has labeled it the "most confusing and contentious of the *Dost* factors," asking whether it is a "subjective or objective standard, and should we be evaluating the response of an average viewer or the specific defendant in this case? Moreover, is the intent to elicit a sexual response analyzed from the perspective of the photograph's composition, or from extrinsic evidence (such as where the photograph was obtained, who the photographer was, etc.)?" *United States* v. *Amirault*, supra, 173 F.3d 34. Another court has stated that it is the "most difficult [factor] to apply . . . ." *United States* v. *Steen*, 634 F.3d 822, 827–28 (5th Cir. 2011).

This lack of clarity has resulted in courts treating the sixth factor in markedly different ways. Some courts state that the sixth factor is a subjective consideration for the court in determining whether the visual depiction was intended to elicit a sexual response in the defendant himself or a like-minded pedophile. See, e.g., *United States* v. *Helton*, 302 Fed. Appx. 842, 849 (10th Cir. 2008) ("our task is simply to determine whether [the defendant] intended the videotape he produced to elicit a sexual response in the viewer—defined as himself and like-minded individuals"), cert. denied, 556 U.S. 1199, 129 S. Ct. 2029, 173 L. Ed. 2d 1116 (2009); *United States* v. *Wiegand*, 812 F.2d 1239, 1244 (9th Cir. 1987) ("[i]t was a lascivious exhibition because the photogra-

pher arrayed it to suit his peculiar lust"), cert. denied, 484 U.S. 856, 108 S. Ct. 164, 98 L. Ed. 2d 118 (1987). Other courts, including the United States Court of Appeals for the Second Circuit, have put a judicial gloss on the sixth factor by treating it as informing an objective inquiry. See, e.g., *United States* v. *Spoor*, 904 F.3d 141, 150 (2d Cir. 2018) ("[w]e . . . clarify that the sixth *Dost* factor . . . should be considered by the jury in a child pornography production case only to the extent that it is relevant to the jury's analysis of the five other factors and the objective elements of the image"), cert. denied, 586 U.S. 1120, 139 S. Ct. 931, 202 L. Ed. 2d 656 (2019); *United States* v. *Villard*, supra, 885 F.2d 125 ("[w]e believe that the sixth *Dost* factor, rather than being a separate substantive inquiry about the photographs, is useful as another way of inquiring into whether any of the other five *Dost* factors are met"). And other courts have taken their own unique approach or have outright rejected not only the sixth but all of the *Dost* factors. See, e.g., *United States* v. *Hillie*, 39 F.4th 674, 688–89 (D.C. Cir. 2022) (concluding that *Dost* factors are problematic and inconsistent with federal child pornography statutes); *United States* v. *Brown*, 579 F.3d 672, 683 (6th Cir. 2009) (adopting " 'limited context' " test), cert. denied, 558 U.S. 1133, 130 S. Ct. 1106, 175 L. Ed. 2d 920 (2010).

Although the sixth *Dost* factor, which asks whether the image "is intended or designed to elicit *a sexual response in the viewer*"; (emphasis added) *United States* v. *Dost*, supra, 636 F. Supp. 832; does not specify who the "viewer" is, it certainly implies that a pedophile viewer's subjective response to an image may be relevant. The court in *Dost* explained that it needed to look at the combined effect of the setting, attire, pose, and emphasis on the genitals to determine whether the photograph was "designed to elicit a sexual response in the viewer, albeit perhaps not the 'average viewer,' but perhaps in

the pedophile viewer." Id. We must therefore determine whether a pedophile viewer's subjective response to an image is relevant in considering whether an image is a lascivious exhibition under our possession of child pornography statutes.

In answering this question, we first look to the statute itself. As we previously explained, under the definition of "child pornography" set forth in § 53a-193 (13), it is the photographed child who must be depicted as engaged in "[s]exually explicit conduct," and thus the child who must be depicted making a "lascivious exhibition . . . ." General Statutes (Rev. to 2019) § 53a-193 (13) and (14). The focus therefore must be on the objective aspects of the photograph itself, not on the subjective reaction of a particular viewer. Indeed, a particular viewer may be sexually aroused "by photo[graphs] of children at a bus stop wearing winter coats, but these are not pornographic." *United States* v. *Steen*, supra, 634 F.3d 829 (Higginbotham, J., concurring). And, if subjective reaction were relevant, "a sexual deviant's quirks could turn a Sears catalog into pornography." *United States* v. *Amirault*, supra, 173 F.3d 34.

Second, it is not readily apparent how the sixth factor is relevant or helpful to a possession of child pornography case, like the present case, in which there is no allegation that the defendant himself located the victims, arranged or posed the scenes, or otherwise produced the images. See *United States* v. *Rivera*, 546 F.3d 245, 252 (2d Cir. 2008) ("[t]he sixth *Dost* factor is not easily adapted to a possession case"), cert. denied, 555 U.S. 1204, 129 S. Ct. 1395, 173 L. Ed. 2d 644 (2009). Notably, many of the federal cases that analyze the sixth factor do so in circumstances in which the defendant was charged with the *production* of child pornography, not solely *possession* of it, which may explain why those courts looked to the sixth factor. *Dost* itself

was a prosecution for the *production* of child pornography. *United States* v. *Dost*, supra, 636 F. Supp. 832.

Taking this all into account, we are persuaded that the sixth *Dost* factor should not be considered in determining whether an image is child pornography under our possession of child pornography statutes. Connecticut law does not make possession of child pornography turn on the subjective reaction of a particular viewer. And, although some courts have attempted to make the sixth factor relevant to a possession case by putting a judicial gloss on it that would make it an objective inquiry relevant to an analysis of the other five factors, we think this approach complicates, rather than elucidates, what is required under our law.

Although we conclude that the sixth *Dost* factor is not an appropriate consideration in a possession of child pornography case, we still believe that the first five factors can be helpful in assessing whether a depiction is a lascivious exhibition. They provide jurors and judges with neutral references and considerations for making that determination. As the United States Court of Appeals for the Second Circuit has aptly explained, neutral considerations "avoid decisions based on individual values or the revulsion potentially raised in a child pornography prosecution," and they "mitigate the risk that jurors will react to raw images in a visceral way . . . ." *United States* v. *Rivera*, supra, 546 F.3d 252–53. Nevertheless, the first five *Dost* factors do not define the term "lascivious exhibition" and should not be used in that manner. See *State* v. *Sawyer*, supra, 335 Conn. 41 (*Dost* factors "should not be rigidly or mechanically applied"). They simply are nonexhaustive considerations that may help the fact finder evaluate whether the image depicts a "lascivious exhibition," that is, whether a child's genitals or pubic area is displayed in a sexual manner.

With those clarifications in mind, we turn our attention to the defendant's sufficiency claim. In the present case, for the defendant's sufficiency challenge to succeed, we must agree with him that at least eight of the thirteen challenged images do not constitute a lascivious exhibition of the genitals or pubic area and, thus, are protected expression under the first amendment. That would bring the state's evidence to fewer than fifty visual depictions, as required by § 53a-196d (a) (1).

Each of the images depicts one or more nude male children, with nearly all of the images prominently depicting the children's genitals or pubic areas. At least eight of the images depict a child lying on a bed or mattress. See *United States* v. *Villard*, supra, 885 F.2d 124 ("[b]eds and mattresses are often associated with sexual activity"). Many of the images depict multiple nude children, with those children located or positioned in close proximity to one another. At least one photograph depicts a child with an erection, with the child being the focal point of the image.

Although there are two images that we think are a relatively close call—specifically, exhibits 37 and 50—we have little difficulty concluding that there was sufficient evidence to support the defendant's conviction of possessing fifty or more visual depictions of child pornography. Indeed, even if we assume that those two images constitute protected expression, at least eleven of the thirteen images challenged by the defendant clearly go beyond the mere depiction of nudity and constitute a "lascivious exhibition" under § 53a-193 (14). Because that brings the number of visual depictions of child pornography to more than fifty, the defendant's sufficiency claim fails.[9]

[9] The defendant does not challenge forty-four of the images introduced by the state. See footnote 4 of this opinion. Because we conclude that a total of fifty-five images in evidence support the defendant's conviction under § 53a-196d (a) (1), the quantity element is satisfied.

B

The defendant next claims that the court improperly instructed the jury that it could consider the *Dost* factors in determining whether an image depicted a lascivious exhibition of the genitals or pubic area. He contends that the *Dost* factors are improper considerations for the reasons that he raised in the context of his sufficiency challenge, but he adds that the *Dost* factors, like many multifactor tests, take the depth and complexity of human thought and perspective away from the jury and replace those considerations with a rote and simplistic "recipe" to follow. He also suggests that the *Dost* factors confuse or mislead juries. We are not persuaded.[10]

Our standard of review concerning claims of nonconstitutional instructional error is well settled.[11] "When reviewing the challenged jury instruction . . . we must adhere to the well settled rule that a charge to the jury is to be considered in its entirety, read as a whole, and

[10] The defendant objected to the state's request to charge on the *Dost* factors and defense counsel reiterated this objection at the charge conference The court ultimately granted the state's request and instructed the jury on the *Dost* factors.

[11] The defendant, without elaboration, contends that the trial court committed constitutional error by instructing the jury on the *Dost* factors. This court previously has held that instructions on the elements of an offense, a defendant's defense, the burden of proof, and the presumption of innocence implicate a defendant's constitutional rights. *State* v. *Teruwilliger*, 294 Conn. 399, 411, 984 A.2d 721 (2009); *State* v. *LaBrec*, 270 Conn. 548, 557, 854 A.2d 1 (2004). The *Dost* factors, however, do not implicate these categories. Indeed, the *Dost* factors are neither elements of the offense nor are they definitional of an element. And they should not be used in such a manner. See *State* v. *Sawyer*, supra, 335 Conn. 41 (*Dost* factors "should not be rigidly or mechanically applied"). They are merely a list of potentially relevant considerations that a jury may consider in evaluating whether a particular image depicts a lascivious exhibition of the genitals or pubic area, as that element is defined. See *United States* v. *Rivera*, supra, 546 F.3d 252 (*Dost* factors are merely "neutral references and considerations to avoid decisions based on individual values or the revulsion potentially raised in a child pornography prosecution"). Accordingly, the defendant's claimed instructional error is not constitutional in nature.

judged by its total effect rather than by its individual component parts. . . . [T]he test of a court's charge is not whether it is as accurate [on] legal principles as the opinions of a court of last resort but whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper." (Internal quotation marks omitted.) *State* v. *Denby*, 235 Conn. 477, 484–85, 668 A.2d 682 (1995). To the extent an error has been made, the defendant has the burden of establishing that it is reasonably *probable* that the jury was misled. *State* v. *Gomes*, 337 Conn. 826, 849, 256 A.3d 131 (2021).

The trial court in the present case adopted—nearly verbatim—the *Dost* factors in its lascivious exhibition instruction. The court instructed that "[l]ascivious exhibition of the genitals or pubic area is an exhibition that is lewd or lustful. In considering whether an image constitutes lascivious exhibition of the genitals or pubic area, you may, but are not obligated to, consider the following: Whether the genitals or pubic area [is] the focal point of the image; whether the setting of the image is sexually suggestive, for example, a location generally associated with sexual activity; whether the child is depicted in an unnatural pose or inappropriate attire considering his or her age; whether the child is fully or partially clothed, or nude; whether the image suggests sexual coyness or willingness to engage in sexual activity; and whether the image is intended or designed to elicit a sexual response in the viewer." In defining "[s]exually explicit conduct," which includes a "lascivious exhibition of the genitals or pubic area"; General Statutes (Rev. to 2019) § 53a-193 (14); the trial court expressly instructed the jury that "[n]udity, without more, is pro-

tected expression and does not constitute sexually explicit conduct."

In part I A of this opinion, we provided some further clarification and refinement of the statutory language and the *Dost* factors that was not available to the trial court in this case, insofar as we have concluded that the first five factors are still generally relevant and helpful to juries in determining whether an image in a possession of child pornography case depicts a lascivious exhibition but that the sixth factor should not be considered in possession of child pornography cases. We nevertheless conclude that it is not reasonably probable that the trial court's lascivious exhibition instruction, including its instruction of the sixth *Dost* factor, misled the jury. First, the court explicitly instructed the jury that it was not obligated to consider any of the *Dost* factors, much less any single factor, such as the sixth factor, by making clear that the jury "may, but [was] not obligated to, consider the following" factors. The court's instruction, instead, appropriately focused the jury on the statutory definition of child pornography and whether the images in question depicted a lascivious exhibition of the genitals or pubic area. Second, although the trial court listed the sixth *Dost* factor, it did not expressly instruct the jury to consider the subjective response of the viewer. Rather, the instruction directed the jury to "the image" itself. It is therefore not reasonably probable that the jury was misled on this point.

Although we recognize that there are legitimate criticisms of the *Dost* factors, we think instructing jurors on the first five *Dost* factors can be helpful in possession of child pornography cases because, as we explained in part I A of this opinion, they can help mitigate the risk that jurors will react to raw images in a visceral way. The starting point for trial courts in a possession of child pornography case, however, should be on the

definition of what constitutes a lascivious exhibition, and courts should instruct jurors that an image depicts the use of a child engaged in a "lascivious exhibition" under § 53a-193 (14) when the child's genitals or pubic area is displayed in a sexual manner. See part I A of this opinion. Trial courts then should determine, on a case-by-case basis, whether the factors are helpful and, to the extent they are used, ensure that the jury is instructed that the five approved *Dost* factors (1) are merely a guide, (2) are nonexhaustive and that other considerations may be relevant to the determination of whether an image depicts a lascivious exhibition, and (3) should not be applied in a rigid or mechanistic manner.

II

The defendant next claims that his right to a unanimous jury verdict under the sixth amendment to the United States constitution required the court to instruct the jury that it needed to be unanimous as to which fifty of the fifty-seven images in evidence fit the definition of child pornography and on precisely which category of sexually explicit conduct that each of the fifty or more images fell within. In addition, the defendant claims that, because there was a general verdict in this case, we cannot determine whether his conviction was predicated on the images that we concluded in part I A of this opinion did not depict a lascivious exhibition of the genitals or pubic area. He argues that the United States Supreme Court's decision in *Stromberg* v. *California*, 283 U.S. 359, 368, 51 S. Ct. 532, 75 L. Ed. 1117 (1931), requires that his conviction be set aside. Because the defendant's claims are premised on a claimed infringement of his constitutional rights, our review is plenary. *State* v. *Douglas C.*, supra, 345 Conn. 435.

A

The following additional procedural history is relevant to the defendant's claim. The defendant requested

a specific unanimity instruction. His written request provided: "The state has alleged that the defendant has committed the offense of possession of child pornography by possessing fifty or more visual depictions of child pornography. You may find the defendant guilty of the offense only if you all unanimously agree on which of the fifty visual depictions fit the definition of child pornography as defined in these instructions. This means you may not find the defendant guilty unless you all agree that the state has proved beyond a reasonable doubt which visual depictions are child pornography and that those add up to fifty or more."

Defense counsel raised his proposed instruction again at the charge conference. He argued that, because the state is required to prove the quantity of fifty or more visual depictions beyond a reasonable doubt, the constitution required jury unanimity regarding which specific depictions the jury found to be child pornography. He argued that his requested charge mirrored the specific unanimity charge in the form jury instructions.[12] The prosecutor objected to this request, arguing that the model instructions regarding unanimity of elements apply only when a statute provides, and the state proves, alternative ways of committing a single offense. The

[12] It appears that defense counsel was referencing the specific unanimity instruction regarding unanimity of elements, set forth in § 2.11-6 of the Connecticut Judicial Branch Criminal Jury Instructions, available at https://jud.ct.gov/JI/Criminal/Criminal.pdf (last visited January 10, 2025), which provides: "The state has alleged that the defendant has committed the offense of *<insert name of offense>* in two different ways, *<identify the two way[s] of committing the offense>*. You may find the defendant guilty of the offense only if you all unanimously agree on which of the two ways the defendant committed the offense. This means you may not find the defendant guilty unless you all agree that the state has proved beyond a reasonable doubt that the defendant *<insert first theory of culpability>* or you all agree that the state has proved beyond a reasonable doubt that the defendant *<insert second theory of culpability>*. Thus, in order for you to find the defendant guilty of *<insert name of offense>*, you must be unanimous as to which of the alternative ways the defendant is alleged to have committed it."

prosecutor explained that the state had neither charged nor adduced evidence of alternative ways by which the defendant had committed the offense. The court agreed with the prosecutor and denied the requested unanimity charge.

In the defendant's motion for a new trial, he renewed his arguments that a specific unanimity charge was required. He pointed to additional case law, including the Appellate Court's decision in *State* v. *Joseph V.*, 196 Conn. App. 712, 740, 230 A.3d 644 (2020), rev'd in part on other grounds, 345 Conn. 516, 285 A.3d 1018 (2022), arguing that a specific unanimity instruction is required even if the offense is premised on one offense, if there are multiple statutory subsections or elements of an offense. He argued that the jury was required to be unanimous as to which fifty of the fifty-seven images constituted child pornography and which definition of sexually explicit conduct, set forth in § 53a-193 (14), each image fell within. Otherwise, the defendant argued, a jury could find him guilty under several alternative theories of liability. The court denied his motion for a new trial.

It is beyond dispute that the jury verdict in a criminal trial must be unanimous. See, e.g., *Ramos* v. *Louisiana*, 590 U.S. 83, 92, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020); see also id., 93 (jury unanimity applies to states via fourteenth amendment). The constitution ensures that a jury "cannot convict unless it unanimously finds that the [g]overnment has proved each *element*" of the charged crime. (Emphasis added.) *Richardson* v. *United States*, 526 U.S. 813, 817, 119 S. Ct. 1707, 143 L. Ed. 2d 985 (1999). Although a general instruction that the verdict must be unanimous will often suffice, a specific unanimity instruction can be required when, for example, an information is duplicitous. We recently explained that an information is duplicitous when it combines two or more offenses in one count and may raise unanimity

concerns that generally fall into two categories: unanimity as to elements and unanimity as to instances of conduct. *State* v. *Douglas C.*, supra, 345 Conn. 425 n.1, 432–33; *State* v. *Joseph V.*, 345 Conn. 516, 530–31, 285 A.3d 1018 (2022).

The defendant contends that the charge of possessing fifty or more visual depictions of child pornography requires the jury to be unanimous on precisely which category of "sexually explicit conduct"—sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse, or lascivious exhibition of the genitals or pubic area of any person—that each one of the fifty images fell within for purposes of determining whether they constituted child pornography. He essentially argues that the charge was duplicitous because these categories constitute elements of the offense, which require jury unanimity. See *State* v. *Douglas C.*, supra, 345 Conn. 433, 432–33; *State* v. *Joseph V.*, supra, 345 Conn. 531. We therefore must determine whether each image and category of sexually explicit conduct are facts that are elements of the crime or, instead, constitute the means to the commission of an element. See *State* v. *Joseph V.*, supra, 563.

We have recognized that " 'different jurors may be persuaded by different pieces of evidence, even when they agree [on] the bottom line,' " and " 'there is no general requirement that the jury reach agreement on the preliminary factual issues [that] underlie the verdict.' " Id., 530, quoting *Schad* v. *Arizona*, 501 U.S. 624, 631–32, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (opinion announcing judgment). In other words, "a . . . jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime." *Richardson* v. *United States*, supra, 526 U.S. 817. To determine whether multiple statutes, statutory provi-

sions, or statutory clauses constitute separate elements or alternative means of committing a single element, we adopted the *Schad* approach, pursuant to which we consider the statutory language, its legislative history, the overall structure of the statute at issue, relevant legal traditions and practices, moral and practical equivalence between the alternative actus rei or mentes reae, and any other implications for unfairness associated with the absence of a specific unanimity instruction. *State* v. *Joseph V.*, supra, 345 Conn. 567–68; see also *Schad* v. *Arizona*, supra, 637.

Section 53a-196d (a) provides in relevant part that "[a] person is guilty of possessing child pornography in the first degree when such person knowingly possesses (1) fifty or more visual depictions of child pornography . . . ." As previously explained, "child pornography" is defined in relevant part in § 53a-193 (13) as "any visual depiction . . . of sexually explicit conduct, where the production of such visual depiction involves the use of a person under sixteen years of age engaging in sexually explicit conduct . . . ." "Sexually explicit conduct" is further defined as "actual or simulated (A) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal physical contact, whether between persons of the same or opposite sex, or with an artificial genital, (B) bestiality, (C) masturbation, (D) sadistic or masochistic abuse, or (E) lascivious exhibition of the genitals or pubic area of any person." General Statutes (Rev. to 2019) § 53a-193 (14).

The plain language of § 53a-196d reveals that the provision under which the defendant was charged has three elements—possession of child pornography (actus reus), knowledge (mens rea), and quantity (fifty or more). It is clear that the five categories of "sexually explicit conduct" go directly to the element of whether the defendant possessed *child pornography*. The language and structure of the statute, which separately

lists the different sexual conduct that must be depicted in order for an image to constitute child pornography, strongly suggest that the enumerated list simply spells out the factual means of committing that element of the offense.

An example in *Mathis* v. *United States*, 579 U.S. 500, 506, 136 S. Ct. 2243, 195 L. Ed. 2d 604 (2016), helps illustrate the point. "[S]uppose a statute requires use of a 'deadly weapon' as an element of a crime and further provides that the use of a 'knife, gun, bat, or similar weapon' would all qualify. . . . Because that kind of list merely specifies diverse means of satisfying a single element of a single crime—or otherwise said, spells out various factual ways of committing some component of the offense—a jury need not find (or a defendant admit) any particular item: A jury could convict even if some jurors 'conclude[d] that the defendant used a knife' while others 'conclude[d] he used a gun,' so long as all agreed that the defendant used a 'deadly weapon.' " (Citation omitted.) Id.

The same is true with whether a particular image constitutes child pornography. The listed definitions of "sexually explicit conduct" are merely diverse means of satisfying an element of the offense, in this case, whether the defendant possessed *child pornography*. It does not matter whether one juror concluded that a particular visual depiction constituted child pornography because it depicted a lascivious exhibition and another concluded it depicted masturbation, so long as all jurors agreed that each visual depiction that the defendant possessed was child pornography. Further, the jury was not required to be unanimous as to which fifty images were relied on to satisfy the quantity element of the offense because, like the categories of sexually explicit conduct, different images are merely the means of proving the elements of the offense. See *United States* v. *Kearn*, 863 F.3d 1299, 1303 (10th Cir. 2017) ("[d]ifferent

images satisfying the statutory criteria are merely different means"). Although the jury was required to be unanimous on the bottom line—that the defendant possessed a minimum of fifty visual depictions of child pornography—it need not have been unanimous as to the exact fifty images or category of sexually explicit conduct depicted in those images. See, e.g., *State* v. *Joseph V.*, supra, 345 Conn. 530 ("[A] jury must come to agreement on the principal facts underlying its verdict—what courts have tended to call the elements of the offense. But that requirement does not extend to subsidiary facts—what the [United States Supreme] Court has called brute facts." (Internal quotation marks omitted.)).

In the present case, the trial court made clear to the jury multiple times during its charge that its decision must be unanimous. The court explained that, "[w]hen you reach a verdict, it must be *unanimous*; that is, one with which all of you agree." (Emphasis added.) At a different time, it explained, "[i]f you unanimously find that the state has proved all the elements of possession of child pornography in the first degree as I've instructed you beyond a reasonable doubt, your verdict would be guilty to count one, possession of child pornography in the first degree." This was sufficient for present purposes. Although the defendant further argues that fundamental fairness warrants treating each image and the definitions of sexually explicit conduct as separate elements, none of the *Schad* considerations weighs in favor of treating them in that manner. We therefore conclude that the sole count against him provided alternative ways to violate the statute and was not duplicitous. A specific unanimity instruction was not required.[13]

[13] The defendant appears to argue that his claim is also one of unanimity as to instances of conduct. Unanimity as to instances of conduct occurs when a defendant is charged in a single count with having violated a single statutory provision, subsection, or clause on multiple, separate occasions. *State* v. *Joseph V.*, supra, 345 Conn. 531. The charge against the defendant, however, was not premised on multiple, separate instances of conduct. Rather, the state charged and adduced evidence that the defendant possessed

B

Relying on *Stromberg* v. *California*, supra, 283 U.S. 359, the defendant next claims that, in failing to give the requested unanimity instruction as to the fifty images and accepting a general verdict, the trial court committed reversible constitutional error. The defendant argues that, if this court concludes that any of the fifty-seven images do not meet the definition of child pornography, "there [would be] no way of knowing if all or some of the six jurors counted those images to be included in the [fifty] or more images their verdict was based on" and that *Stromberg* would mandate that his conviction be set aside. We disagree.

In *Stromberg*, the United States Supreme Court addressed the validity of a general verdict that rested on an instruction that the defendant could be found guilty of displaying a red flag as "a sign, symbol, or emblem of opposition to organized government, or [as] an invitation or stimulus to anarchistic action, or as an aid to propaganda that is of a seditious character . . . ." (Internal quotation marks omitted.) *Stromberg* v. *California*, supra, 283 U.S. 363. After concluding that the first clause of the instruction proscribed constitutionally protected conduct, the court concluded that the defendant's conviction must be reversed because "it [was] impossible to say under which clause of the [instruction] the conviction was obtained." Id., 368–70. In *Yates* v. *United States*, 354 U.S. 298, 312, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1957), overruled on other grounds by *Burks* v. *United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978), the court extended this reasoning

fifty or more images of child pornography on one single date. The state's substitute information provided that, "on or about July 29, 2020, in the city of New Britain, [the defendant] did knowingly possess fifty . . . or more visual depictions of child pornography, in violation of . . . § 53a-196d (a) (1)." Therefore, the defendant's purported unanimity as to instances of conduct claim lacks merit.

to a conviction resting on multiple theories of guilt when one of those theories is not unconstitutional but is otherwise legally flawed. See, e.g., *State* v. *Carter*, 350 Conn. 43, 54–55, 323 A.3d 297 (2024) (court's legal error in instructing jury on definition of deadly weapon precluded application of general verdict rule).[14]

Following *Stromberg* and *Yates*, however, the United States Supreme Court has explained that, "[w]hen . . . jurors have been left the option of relying [on] a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying [on] a factually inadequate theory, since jurors *are* well equipped to analyze the evidence . . . ." (Citation omitted; emphasis in original.) *Griffin* v. *United States*, 502 U.S. 46, 59, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991). The court added, "[i]t is one thing to negate a verdict that, while supported by evidence, may have been based on an erroneous view of the law; it is another to do so merely on the chance—remote, it seems to us—that the jury convicted on a ground that was not supported by adequate evidence when there existed alternative grounds for which the evidence was sufficient." (Internal quotation marks omitted.) Id. 59–60; see also, e.g., *State* v. *Turner*, 340 Conn. 447, 457, 264 A.3d 551 (2021) ("[t]he inclusion of a legally valid but factually unsupported theory of liability in the instructions does not implicate the due process rights of the defendant because a jury is well equipped to differentiate between factually supported and factually unsupported theories of guilt"); *State* v. *Chapman*, 229 Conn. 529, 540, 643 A.2d 1213 (1994) ("[t]he jurors . . . were in a position to be able to evaluate the testimony presented and to assess

[14] Notably, *Stromberg* and *Yates* were decided before the United States Supreme Court concluded, in *Chapman* v. *California*, 386 U.S. 18, 21–22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), that constitutional errors can be harmless.

whether the charged theory was supported by the evidence").

In the present case, neither the statute nor the legal theory presented to the jury was unconstitutional or otherwise legally infirm. The trial court's instruction on the definition of child pornography, including its definition of sexually explicit conduct, was correct under Connecticut law. And the state's theory was simply that the defendant possessed fifty or more still images of child pornography. We concluded in part I A of this opinion that two images likely did not depict a lascivious exhibition and, therefore, could not be used to support the defendant's conviction, not that the statute or legal theory was constitutionally or legally flawed.

In light of *Griffin*, we conclude that a conviction by general verdict for the possession of fifty or more visual depictions of child pornography need not be set aside if a court determines that some images considered by the jury do not depict sexually explicit conduct (in this case, a lascivious exhibition of the genitals or pubic area), so long as the evidence is ultimately sufficient to support the conviction. The jury in this case was required to determine whether *fifty or more* of the fifty-seven images introduced by the state constituted sexually explicit conduct on the basis of the definitions and explanation given by the trial court. The evidence was legally and factually sufficient with respect to at least fifty-five of the fifty-seven images, bringing the number of visual depictions of child pornography over the threshold of fifty or more. The fact that two of the images did not sufficiently depict a lascivious exhibition does not provide a proper basis for setting aside the defendant's conviction.

III

The defendant's final claim is that the trial court abused its discretion in admitting two of the state's

exhibits that showed the file names of two images that had been deleted from the defendant's cell phone. He argues that any probative value of those exhibits was outweighed by their prejudicial effect. We are not persuaded.

The following additional procedural history is relevant to the defendant's claim. During the state's case-in-chief, the prosecutor introduced testimony from Elizabeth Arpin, a forensic science examiner in the state's computer crimes unit. She testified that she used Cellebrite software to extract data files, including deleted data, from the defendant's cell phone.[15] The fifty-seven images of alleged child pornography were admitted through Arpin, who testified that the images were found in a "download" folder in the internal memory of the phone.

After defense counsel's cross-examination of Arpin, the prosecutor sought to offer, on redirect examination, exhibits 107 through 111 as other acts of the defendant to prove knowledge, possession, and identity. Outside the presence of the jury, the prosecutor explained that the proffered exhibits were not images, as those had been deleted but, rather, were file names of deleted images that had been on the phone associated with the defendant's email address. Defense counsel objected to their admission on the grounds that they were highly prejudicial to the defendant and offered no probative value. He further argued that the exhibits were cumulative of other evidence already introduced by the state.

The trial court ruled that the proffered exhibits were relevant and material to proving identity, knowledge, and possession. The court further acknowledged that

[15] "[A] Cellebrite [e]xtraction [r]eport lists all call logs, contacts, text messages, and data files on a [cell] phone at the time of the extraction, which is conducted using Cellebrite technology." (Internal quotation marks omitted.) *State* v. *Michael R.*, supra, 346 Conn. 441 n.9.

the exhibits were relevant to rebutting a claim of mistake, or lack of knowledge, that defense counsel raised during cross-examination by asking questions regarding the chain of custody and the ability of third parties to alter data on the phone. Nevertheless, the court only permitted the state to introduce exhibits 108 and 109 into evidence. The court determined that those two images were sufficient to enable the state to present its case, while reducing any chance that the exhibits would unduly arouse the emotions of the jurors.

The prosecutor proceeded to introduce exhibits 108 and 109 through Arpin. She testified that exhibits 108 and 109 were printouts of a portion of the Cellebrite report that showed information about two images that were deleted from the defendant's phone. The information contained in exhibit 108 shows that the deleted image was named "(Toddlerboy) Raamat 2Yo Boy Toddler Pedo 1 With Sound" and located in the "Google Photos" application on the phone associated with the defendant's email address. As to exhibit 109, the deleted image was named "(Toddlerboy) Raamat 2Yo Boy Toddler Pedo 2 With Sound" and again located in the Google Photos application on the phone associated with the defendant's email address.

Turning to the relevant legal principles and our standard of review, we have explained that, in general, "evidence of prior misconduct is inadmissible to prove that a criminal defendant is guilty of the crime of which the defendant is accused." (Internal quotation marks omitted.) *State* v. *Raynor*, 337 Conn. 527, 561, 254 A.3d 874 (2020). "Such evidence cannot be used to suggest that the defendant has a bad character or a propensity for criminal behavior." (Internal quotation marks omitted.) *State* v. *Delacruz-Gomez*, 350 Conn. 19, 27, 323 A.3d 308 (2024). "We have developed a two part test to determine the admissibility of such evidence. First, the evidence must be relevant and material to at least

one of the circumstances encompassed by the exceptions [set forth in § 4-5 (c) of the Connecticut Code of Evidence]." (Internal quotation marks omitted.) Id. Section 4-5 (c) provides that evidence of other crimes, wrongs or acts is admissible "to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony." "Second, the probative value of the evidence must outweigh its prejudicial effect." (Internal quotation marks omitted.) *State* v. *Delacruz-Gomez*, supra, 27. "Because of the difficulties inherent in this balancing process, the trial court's decision will be reversed only whe[n] abuse of discretion is manifest or whe[n] an injustice appears to have been done. . . . On review by this court, therefore, every reasonable presumption should be given in favor of the trial court's ruling." (Internal quotation marks omitted.) *State* v. *Patterson*, 344 Conn. 281, 291, 278 A.3d 1044 (2022).

The evidence of the names of the deleted images and the evidence that the images were associated with the defendant's personal email address were clearly relevant to and probative of the issue of whether the defendant knew that he possessed child pornography on his phone. Defense counsel repeatedly questioned the defendant's knowledge by suggesting that the defendant's phone had been tampered with and that someone else had put the images on the phone. Specifically, defense counsel elicited testimony from Edward G. Wolcott, the defendant's friend, with whom the defendant had left his phone just before his arrest, about Wolcott's accessing the defendant's cell phone and downloading a special utility program to view images on the phone.[16] Defense counsel also elicited testimony from

[16] The evidence adduced at trial reveals that the defendant and Wolcott were running errands on July 29, 2020. Wolcott dropped the defendant off at a meeting and waited for him in the car. Wolcott testified that the defendant

Wolcott about others in Wolcott's household having access to the phone at certain times until he turned the phone over to the police. This questioning was in addition to the questioning of Arpin, who testified that third parties could potentially add, alter, or delete files from the phone.[17]

Although the defendant maintains that the admission of the two deleted file names was prejudicial, he has not demonstrated unfair prejudicial impact to counter the substantial probative value of the exhibits. The deleted files associated with the defendant's personal email address, which are indicative that the defendant had knowingly possessed child pornography, cannot be said to be unduly prejudicial in the context of this case, in which the jury had to view actual images of child pornography. See, e.g., *State* v. *Campbell*, 328 Conn. 444, 522–23, 180 A.3d 882 (2018) ("prejudicial impact of uncharged misconduct evidence is assessed in light of its relative 'viciousness' in comparison with the charged conduct").

Furthermore, the trial court exhibited appropriate sensitivity to the potential for unfair prejudice when it allowed the state to introduce only two of its five proposed exhibits. The court endeavored to balance the interests by excluding the state's exhibits that contained

had left his cell phone on the center console of Wolcott's car when the defendant went into the meeting. Shortly thereafter, the defendant called Wolcott and informed him that he had been arrested, that the police had searched his house with a warrant, and that the police wanted to search the center console of Wolcott's car. The defendant asked Wolcott to hold onto his cell phone, which Wolcott did, until the police contacted him and asked him to turn over the phone.

[17] During closing arguments, defense counsel argued that Wolcott possessed the phone for approximately ten days before the police obtained the phone from him and, during that time, removed the SD card from the phone and used a special utility program to open files on it. He argued that there was no evidence of how the images got on the phone and that anyone could have put them there.

arguably more provocative file names than the ones admitted into evidence.[18] The court's limiting instruction also mitigated any potential for undue prejudice from the admission of the two exhibits. It made clear that the jury could not consider the two exhibits as establishing a predisposition on the part of the defendant to commit the crime charged or to demonstrate a criminal propensity. The exhibits could be considered, the court instructed, only for the purposes for which they were admitted, "knowledge, possession and identity."

In sum, because the probative value of the evidence was strong and the trial court took considerable measures to mitigate any potential undue prejudice, we conclude that the trial court did not abuse its discretion in admitting the two exhibits.

The judgment is affirmed.

In this opinion the other justices concurred.

MITTIMUS JD-CR-38 Rev. 1-15
C.G.S. §§ 18-69, 18-85, 18-85a, 18-73, 18-76, 18-82, 54-2a, 54-85, 54-92a, 54-96b, 54-97, 54-98
P.B. §§ 43-17 to 43-20, 44-10, 44-10A

☒ Judgment ☐ Continuance
☐ Failure to meet conditions of release under § 54-2a

INSTRUCTIONS TO CLERK
Prepare a separate Mittimus for each file.
TO OFFICER
Original to receiving facility; return copy to court.

STATE OF CONNECTICUT
SUPERIOR COURT
www.jud.ct.gov

TO: Any Proper Officer

Date of disposition: 9-7-2022

Docket number	Name of defendant	Date of birth	Date sentence to begin (if different)
HHB-CR21-0183945-T	Mitchell Alan Ingram	11/27/1978	

Name and location of receiving facility	Inmate number (if available)	Name and location of Court
CHCI Unit I	284450	Superior Ct. Hartford Judicial District

	1st Count - Statute number	Date of offense	2nd Count - Statute number	Date of offense
☒ Crime(s) Convicted	53a-191a(a)(1)	7-29-20		
	3rd Count - Statute number	Date of offense	4th Count - Statute number	Date of offense
☐ Crime(s) Charged				
	5th Count - Statute number	Date of offense	6th Count - Statute number	Date of offense

Judgment Mittimus

Whereas by a judgment of said court, said defendant was convicted of the above crime(s) and sentenced to imprisonment as follows:

Counts and Terms (If execution of portion of sentence is suspended, show only time to be served.)						Total Effective Sentence
First	Second	Third	Fourth	Fifth	Sixth	
18 1/2 yrs						18 1/2 yrs.

Specify here any pertinent conditions, if sentences are consecutive and if probation was ordered.

Count 1: 18 1/2 yrs (5 yrs m/m) sex offender enhancement lifetime

TES: 18 1/2 yrs. (5 yrs m/m)

(If a person under the age of 21 receives a reformatory sentence in accordance with section 18-65a or 18-73 of the General Statutes, in no event shall the term be longer than either the maximum term of imprisonment for the crime(s) committed or for a term of more than five (5) years.)

☐ And said defendant pay to the State of Connecticut the amount of fines now unpaid as shown below and be committed to the above facility in default of payment of said fines. *(A defendant may not be incarcerated for failing to pay fees or costs.)*

Counts and Fines (Show only unpaid portion of fines)						Total Unpaid Balance
First	Second	Third	Fourth	Fifth	Sixth	

☒ The Defendant is entitled to sentence credit of From 3/23/21 to present

☐ The foregoing credit includes ____ days of credit for pretrial confinement at a police or courthouse lockup.

Transfer or Continuance

Whereas it is ordered that said case be continued and/or transferred for future proceedings before said court.

☐ Defendant to appear by interactive audiovisual device. (As permitted by Practice Book §§ 44-10 and 44-10A.)

To be held at (Name and address of court)	☐ Judicial District ☐ Geographical Area	On (Date)	Surety bond amount

Order

BY AUTHORITY OF THE STATE OF CONNECTICUT, you are hereby commanded to deliver said defendant to the custody of the Commissioner of Correction and/or the Warden or Administrator at the above facility and said Commissioner and/or Warden or Administrator is hereby commanded to receive and keep said defendant for the period fixed by said order or judgment of the court or until legally discharged, provided that when a defendant has been sentenced to a term of imprisonment and ordered to pay a fine, if the fine has not been paid by the time the sentence has been served, the defendant may not continue to be incarcerated unless the judicial authority has found that the defendant is able to pay the fine and that the defendant's nonpayment is wilful.

Receiving facility time stamp

Signed (Assistant Clerk) [signature] By Order of the Court On (Date) 9.7.22

Acknowledgment of Delivery of Defendant

I delivered said defendant into the custody of the Commissioner of Correction and/or his agent and left this mittimus with him.

Name and location of receiving facility

8.

Title of delivering officer	Signature of delivering officer	Signature of receiving officer

APPLICATION FOR WAIVER OF FEES, COSTS AND EXPENSES AND APPOINTMENT OF COUNSEL ON APPEAL
JD-CR-73 Rev. 1-19
C.G.S. § 52-259b; P.B. §§ 60-9, 63-1, 63-6, 63-7, 80-1

STATE OF CONNECTICUT
SUPERIOR COURT
www.jud.ct.gov

FOR COURT USE ONLY

2022 SEP -9 A 11:

☒ **Appeal From Judgment of Conviction Notice** - Unless the court extends the time limit, this application must be completed, signed and filed with the clerk of the Superior Court named below within twenty (20) days from the Date of Judgment. (Show date below.)

Date of Judgment: September 07, 2022

☐ **Appeal From Decision In Habeas Corpus Notice** - Unless the court extends the time limit, this application must be completed, signed and filed with the clerk of the Superior Court named below within twenty (20) days from the date the notice was issued of the ruling on your request for certification to appeal. (Show date below.)

Date notice issued *(Granting your request for certification)*:

Instructions ➡ **To Applicant:** Fill out this form and make 2 copies. File the original and 1 copy with the clerk. Keep 1 copy for your records.
Notice: You must sign this form under oath.
To Clerk: Stamp form on filing. File original as a pending matter and give 1 copy to the Public Defender's Office. Judicial Authority is to assign for hearing within 20 days after filing. Forward written notice of hearing to (1) trial counsel or applicant, if self-represented, (2) Public Defender's Office to which application was sent, and (3) Chief of Legal Services, Public Defender's Office.

Name and address of court
New Britain J.D. 20 Franklin Square New Britain CT 06051

Docket number	Name of case
HHB-CR21-0330945-T	State of Connecticut vs. Michael Inzitari

1. I cannot pay the fees, costs and expenses of an appeal (I am indigent), and I cannot afford to hire an attorney.
2. The grounds on which I propose to appeal are:

a. Sufficiency of the evidence

b. Whether the trial court erred when it admitted certain uncharged misconduct/other acts evidence

c. Whether the trial court erred when it refused to give a specific unanimity jury instruction, and failed to require unanimity as to each of the visual depictions necessary to convict the defendant under C.G.S. §53a-196d(a)(1)

d. Whether the statutory definition of "sexually explicit conduct" under C.G.S. §53a-193(14) is unconstitutionally vague

e. Whether the trial court or prosecutor committed other error(s)

(If more space is needed, attach an affidavit (a sworn statement) saying the grounds on which you propose to appeal.)

3. The facts about my financial status are:

a. The defendant has been incarcerated since July 29, 2020

b. The defendant has less than $500.00 in assets

c. The defendant was represented at trial by a special public defender

(If more space is needed, attach an affidavit (a sworn statement) saying the facts about your financial status.)

THEREFORE, I ask that the court (1) waive the payment by me of (not require that I pay) the fees specified by statute, taxable costs, and the furnishing of security for costs upon appeal, if security has been ordered under Section 60-9 of the Connecticut Practice Book; (2) appoint counsel to represent me in my appeal without expense to me and permit the withdrawal of the trial attorney's appearance, if any; and (3) order that the necessary expenses of prosecuting the appeal be paid by the State, Sections 63-6 and 63-7 of the Connecticut Practice Book.

Applicant's signature ➡	Subscribed and sworn to before me on (Date) 8/24/22	Signed (Notary Public, Commissioner of the Superior Court) ➡ 10/3/24

Docket number	Name of case
HHB-CR21-0330945-T	State of Connecticut vs. Michael Inzitari

ORDER

The court, having found the applicant ☒ Indigent ☐ Not Indigent, hereby orders the application:

☒ Granted as follows:

1. The following fees are waived:

☒ Appellate filing fee (Supreme or Appellate Court) ☐ Cost of the transcript for filing appeal.

☐ Other *(Specify)*: _____

2. Taxable costs are ☐ Waived ☐ Not Waived

3. Security for costs is ☐ Waived ☐ Not Waived

4. Necessary expenses of prosecuting the appeal ☐ Shall ☐ Shall not be paid by the State.

If necessary expenses are paid by the State, attorneys in private practice representing the applicant shall obtain the approval of the judicial authority who presided at the trial before incurring any expense in excess of $100, including the expense of obtaining a transcript. The judicial authority shall authorize a transcript at State expense only of the portions or proceedings or testimony which may be pertinent to the issues on appeal.

5. ☒ All fees and costs are waived and the State shall pay all necessary expenses. See paragraph 4 for limits on necessary expenses.

6. Counsel ☒ is ~~is not~~ appointed. Name of Counsel, If Appointed: dc of Chief Public Defender

7. Permission for the withdrawal of the trial attorney's appearance is ☐ Granted ☐ Denied.

(The judicial authority must be satisfied that trial counsel has cooperated fully with appellate counsel in the preparation of the defendant's appeal prior to granting permission.)

☐ Denied.

☐ Denied. The application for the payment of fees, costs and expenses of an appeal is DENIED because the applicant has repeatedly filed actions with respect to the same or similar matters, such filings establish an extended pattern of frivolous filings that have been without merit, the application sought is in connection with an action before the court that is consistent with the applicant's previous pattern of frivolous filings, and the granting of such application would constitute a flagrant misuse of Judicial Branch resources.

By the Court *(Print or type name of judge)*	On *(Date)*	Signed *(Judge/Asst. Clerk)*	Date signed
Keegan	11/22/22		11/22/22

ADA NOTICE

The Judicial Branch of the State of Connecticut complies with the Americans with Disabilities Act (ADA). If you need a reasonable accommodation in accordance with the ADA, contact a court clerk or an ADA contact person listed at *www.jud.ct.gov/ADA*.

APPEARANCE
JD-SC-36 Rev. 1-23
P.B. §§ 60-8, 62-7, 69-3, 70-1

Instructions - *See page 2*
ADA Notice - *See page 2*

STATE OF CONNECTICUT
SUPREME COURT
APPELLATE COURT
www.jud.ct.gov

Notice to Self-Represented Parties
A self-represented party is a person who represents himself or herself. If you are a self-represented party and you filed an appearance before and you have since changed your address, you must let the court and all attorneys and self-represented parties of record know that you have changed your address by selecting the box below:

☐ *I am filing this appearance to let the court and all attorneys and self-represented parties of record know that I have changed my address. My new address is listed below.*

Note: Attorneys or firms who list a change of address on this form must first contact the Statewide Grievance Committee to effectuate the change.
Note: An appearance filed after the case is ready pursuant to Practice Book Section 62-8 requires permission of the court.

Trial Court docket number	Appeal docket number
HHBCR210330945T	AC 46089

Appeal caption(s) (*Full name of Plaintiff vs. Full name of Defendant*)
State of Connecticut v. Michael Inzitari

Enter the appearance of

Name of self-represented party (*See "Notice to Self-Represented Parties" at top*), or name of official, firm, professional corporation, or individual attorney	Juris number of attorney or firm
Conrad Ost Seifert	**101448**

Mailing Address (*Notice to attorneys and law firms - The address to which papers will be mailed from the court is the one registered or affiliated with your juris number. This address cannot be changed in this form.*)	Post Office Box	Telephone number (*Area code first*)
	576	**(860)434-2097**

City/Town	State	Zip Code	Fax number (*Area code first*)	E-mail address
Old Lyme	**CT**	**06371**	**(860)434-3657**	**conradlaw@aol.com**

In the case named above for:

☒ Appellant(s) (party filing the appeal): ☐ Appellee(s) (party responding to the appeal):

☐ Plaintiff in Error (party filing the Writ of Error): ☐ Defendant in Error (party responding to the Writ of Error): ☐ Other:

Note: If other counsel or a self-represented party has already filed an appearance for the party or parties selected above, select box 1 or 2 below:

1. ☒ This is in place of the appearance of the following attorney, firm, or self-represented party on file (Practice Book Section 3-8):

Name and juris number
Chief Public Defender-LSU-Hartford Juris No. 401721

2. ☐ This appearance is in addition to an appearance already on file.

I agree to accept papers (service) electronically in this case pursuant to Practice Book Section 62-7. ☒ **Yes** ☐ No

Signed (*Individual attorney or self-represented party*)	Name of person signing at left (*Print or type*)	Date signed
Conrad Ost Seifert	**Conrad Ost Seifert**	**3/14/2023**

Certification

I certify that a copy of the document(s) that I am filing has been delivered on **3/14/2023** to each other counsel of record and I have included their names, addresses, e-mail addresses and telephone and facsimile numbers; the document(s) have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and comply with all applicable rules of appellate procedure in accordance with Practice Book Section 62-7.

If you have an exemption from e-filing under Practice Book Section 60-8, attach a list with the name, address, e-mail address, telephone number, and facsimile number of each counsel of record and the address where the copy was delivered.

Name and address of each party and attorney that copy was or will be mailed or delivered to*

Chief Public Defender at Tina.Nelson@pds.ct.gov and Jennifer.Bourn@pds.ct.gov
State of Connecticut Chief State's Attorney- Appellate 401795 at dcj.ocsa.appellate@ct.gov
Mr. Michael Inzitari, 287450, Legal Correspondence, Cheshire CI, 900 Highland Avenue, Cheshire, CT 06410

Signed (*Counsel of record*)		Date signed
▶ Conrad Ost Seifert	**Conrad Ost Seifert**	**3/14/2023**

☐ *Names, addresses and numbers included on separate page.*

Filed Under the Electronic Briefing Rules

SUPREME COURT
OF THE
STATE OF CONNECTICUT

SC 21008

STATE OF CONNECTICUT
v.
MICHAEL INZITARI

BRIEF OF THE DEFENDANT-APPELLANT WITH ATTACHED APPENDIX

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COUNSEL OF RECORD
AND
ARGUING ATTORNEY

1. TABLE OF CONTENTS

2. TABLE OF AUTHORITIES

A. Cases

Cases (State)

Cases (Federal)

B. Connecticut and Federal Statutes

C. Other Authorities

3. NOTE CONCERNING ABBREVIATIONS

Clerk's Appendix ..... CA[page]
Defendant's Appendix ..... A[page]
Court's Exhibits ..... CtEx:[number]
Exhibits ..... Ex:[number]
Transcript ..... [date]T[page]
Subsequent Transcript Page from
Transcript with Identical Date ..... *Id.*T[page]

4. STATEMENT OF THE ISSUES

SHOULD THE DEFENDANT'S JUDGMENT OF CONVICTION BE VACATED BECAUSE THE STATE FAILED TO PROVE "SEXUALLY EXPLICIT CONDUCT" IN AT LEAST 13 OF THE 57 IMAGES? (Pages 18-33)

DID THE TRIAL COURT COMMIT CONSTITUTIONAL ERROR WHEN IT FAILED TO GIVE A SPECIFIC UNANIMITY INSTRUCTION? (Pages 34-44)

DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT ADMITTED STATE'S EXHIBITS 108 AND 109? (Pages 45-49)

6. NATURE OF THE PROCEEDINGS

The defendant was charged with and convicted of possession of child pornography. The Information submitted to the jury alleged the defendant "on or about July 29, 2020, in ... New Britain ... did knowingly possess fifty (50) or more visual depictions of child pornography, in violation of General Statutes §53a-196d(a)(1)." CA15. Over defense objection, at trial the state had 57 cell phone images of alleged child pornography admitted as full exhibits. The case was tried to the jury on April 4-8, 2022 and April 11, 2022. The jury rendered its verdict on April 11, 2022. On June 6, 2022 the court held a hearing on the defendant's motion for new trial and permitted the parties to submit post-hearing briefs. On July 8, 2022 the defendant's motion was denied. CA93. On September 7, 2022 he was sentenced to eighteen years, six months in prison. 9-7-22T49A156. This appeal was timely filed.

7. STATEMENT OF FACTS

On July 29, 2020 the defendant was riding in co-worker Edward Wolcott's vehicle. Wolcott testified he drove the defendant to a meeting the defendant had and Wolcott stayed in his car. 4-4-22T49A82. When the defendant got out of the car he left behind a blue Motorola cell phone "on the center console." 4-4-22T51A83. It was similar to Wolcott's. *Id.* The defendant never returned. Hours later the defendant called him while in police custody and told Wolcott he was arrested. *Id.*T55A84. Police video of the defendant's telephone call was admitted and played to the jury where the defendant tells Wolcott to give his belongings, including the cell phone, to Ismael Mercado. Ex.1A. Wolcott admitted during cross-examination that the cell phone was "activated under Ismael's account." 4-4-22T121A95. "Ismael" was Ismael Mercado, the defendant's spouse. Ex.28A59. When asked if he

"[held] onto the phone" he admitted that instead of giving it to Mercado, "I did." 4-4-22T58A85. Wolcott testified he put the phone in the "side pockets of the truck. *Id.* He admitted he had possession of it "in my truck, it was on my person, or it was on my nightstand at home." *Id* T59A86. He testified no one else had access to the phone until he gave it to the police. When it was on his nightstand, two other people lived in his home. When asked if he "looked into the phone" he said "it was password protected." 4-4-22T59A86. He denied having the password. *Id.* He testified he learned that "the police may have been searching for that phone." *Id.*T60A87. He said that a "Reverend Boddie" told him and that Boddie was a landlord. *Id.* He admitted that on August 2, 2020 he attempted to access the phone's contents and repeated he did not have the password. In response to the question from the state regarding what he did with the cell phone, this ensued:

> So, my brain at one point said, ... he might have a memory chip in there. So I ... removed his memory card from his phone and inserted it in my phone.
>
> Q Because were your phones similar?
>
> A Yes. ... *but basically the same phone.*
>
> Q Mr. Wolcott, I'm handing you State's 8 for identification. Can you take a look at that?
>
> A Yes. ...
>
> Q What is that?
>
> A Um, that's Michaels phone and its SIM slot slash memory chip holding mechanism.
>
> Q ... [I]s that a fair and accurate representation of how the phone looked on August 2nd when you removed [the memory chip]?
>
> A. Yes. 4-4-22T62A88 (emphasis added).

Wolcott was asked questions about all phone parts he removed. He identified the "Subscriber Identity Module, SIM." ... He defined it as "the chip that all the cell phone carriers insert in there so that they know it's this phone on their network." *Id.*T64A89. He was shown another chip he removed from the phone and stated it was "the SD card ... a memory card." *Id.* He testified the SD memory card he received from what he called Michael's phone he inserted into his cell phone. He testified that the memory card was compatible with his card and that he was able to access the contents of it on his cell phone *Id.*T66A90. He testified that using a special utility program he saw "lots of photographs" of young males with "a few of them" engaged in sexual acts. *Id.* He testified that after "about 20 minutes" of looking at these images, he removed the memory card he took from the phone that Inzitari left in Wolcott's truck and re-installed it. *Id.*T67A91. Wolcott denied under oath having this cell phone's password, denied changing phone settings and denied installing programs on it. 4-4-22T69-70A92-93.

On cross-examination, Wolcott admitted he had the phone for "10 days, 12 days, or something like that before [police] called me up asking for it." *Id.*T114A95. He testified he had seen the defendant use this phone prior to July 29, 2020 and admitted the defendant "unlock[ed] it in front of [Wolcott]." *Id.*T122A96. He admitted he used to work for a cell phone company and that he used "a special utility program that can open files from SD cards." *Id.*T123A97. He also explained he used "a little SD card removal tool" to remove it. *Id.*T129A98. Wolcott denied being "offered a deal for testifying" and denied being offered "any kind of immunity from prosecution." 4-4-22T131A99.

On redirect examination Wolcott testified that he "didn't download [the special utility program] ... just for - to look at Michael's SIM ...". *Id.*T132A100.

The state's next witness was Frank Boddie. He testified he was a landlord and a pastor. The defendant was a tenant of his on Spring Street in New Britain. *Id.*T138-139A101-102. He was shown a screenshot of an image on his phone and identified the defendant's phone number on it. *Id.*T141A103. He read a text message from the defendant's cell phone wherein he asked the defendant for his email address and the texted reply was wiredmike78@gmail.com. *Id.*T144A103. He testified that while he was the defendant's landlord, the defendant's apartment was "searched with a search warrant." Boddie was asked regarding "all of the photos we've been looking at with texts of the defendant, have you ever altered the time settings on your phone?" He replied, "never." *Id.*T149A104. He testified that the dates and times on his phone were accurate. *Id.*

On cross-examination, when asked if he told Wolcott that the police were looking for a phone, Boddie replied, "I could have." 4-4-22T152A105. The next question was, "[w]ere you aware that the police were looking for a phone?" Boddie replied "no." "He elaborated that he and Wolcott talked about the day that the defendant left his phone on Ed's seat of his car." *Id.*T153A106. He explained without objection:

> [I]n the meantime, Mike's unit got ransacked by the police. So they were looking for something. And then Ed ... said hey, maybe that's what they're looking for. Maybe they're looking for the phone. And he says, Mike left his phone right here on the seat. I says, can you open the phone up? He says, let me try. And he couldn't open it.
>
> ...
>
> Q. Do you recall ... [w]hat date that was?

A. ... No, I don't remember ...

Q. Do you recall offering to take the phone from Eddy and turn it into the police department?

A. Yes.

Q. And what was his reaction?

A. He said he's going to look into it to see what the best thing to do with the phone. *Id.*T153A106.

The state's next witness was Detective Lisa Steeves. She was "part of the team that executed the search warrant" and she authenticated a photograph of 76 Spring Street. *Id.*T162A107. She testified she found "six smartphones" in the defendant's bedroom and "pieces of mail" which were addressed to him. 4-4-22T164-166A108-110. She identified State's Exhibit 20 as an envelope they found in the bedroom with the defendant's "name, address and phone number on the mailing label." *Id.*T165A109. She then read to the jury that phone number as being "860-890-3490." *Id.*T166A110. She also testified that she spoke with Wolcott because she "was told that he had the phone we were specifically looking for." *Id.*T169A111. She called and reached him on August 7, 2020 and Wolcott "[agreed] to give it up." *Id.* She met him after that conversation and received a Motorola cell phone from him. *Id.*T169-170A111-112. She identified State's Exhibit 24 as the phone. When asked if the phone contained anything she replied "Yes ... A SIM card and a SD Card." 4-5-2022T140. Exhibit 8 was a photograph of both the "SIM card and the 32 gigabyte SD card." *Id.* She was asked about the Motorola cell phone, her initials, how she removed it and "personally delivered it to the State Forensic Lab." 4-5-22T16A114. Asked about State's Exhibit 27 for ID she identified it as "the copy that the forensic lab made, the thumb drive." It contained, "[t]he images in question." *Id.* She was asked, "[c]an you briefly describe what you viewed?" The following occurred:

> THE WITNESS: Your Honor, ... based on the rules yesterday, I don't know as far as wording.
>
> THE COURT: ... I'm going to hand the witness what has been marked Court Exhibit 5 and that will provide you with information previously given by the Court. *Id.*T17A115.

Court Exhibit 5 was the trial court's advisement read to all testifying witnesses outside the jury's presence that among another wording, no witness could use the phrase "child pornography." CtEx5A71. After the detective presumably read this advisement to herself while on the witness stand, she replied: "I viewed numerous images of child pornography. 4-5-22T17A115. The prosecutor then said, "No" and the detective then said, "No. I'm sorry. I don't know how to answer this question." Defense counsel objected. The judge ordered the response "stricken from the record" and excused the jury. There was further discussion about what she could testify to regarding Exhibit 27 (which was still an ID exhibit only). Ultimately she was not asked to describe any of the images in this ID exhibit and the state concluded its direct examination by asking her, "how many images did you observe" to which she replied "numerous." *Id*T24A116. She was then asked, "Were there more than 500?" She replied: "Well over, yes." *Id.*

On cross-examination the defense elicited Steeves had been a detective for a couple years and asked her numerous questions about police chain of custody protocols. IdT24-28A116-120. She admitted that "every minute is accounted for relative to the subject phone." *Id.*T28A120. She was also asked if she "did a subscriber inquiry to determine whose phone it was?" She replied, "no."

Late on the afternoon of April 5th the State informed the court about a voice message from Boddie. It stated that Boddie and Wolcott were talking prior to either of them testifying. The message said that

Wolcott told Boddie that the defendant told Wolcott that Boddie and the defendant "a month and a half ago" talked "about images and [Boddie] never did." *Id.*T103A121. The prosecutor then stated, "[t]his alarmed me, as the witnesses were instructed regarding the sequestration order and ... they were ... together for some ... time in the State's Attorney's office." *Id.*T103-104A121-122.

The morning of April 6th, before court opened, the defendant filed a motion for mistrial or "in the alternative to strike testimony of Boddie and Wolcott ..." CA55-59. The motion claimed that Boddie's statement to Wolcott severely prejudiced the defendant "because Boddie is trying to make it look to Wolcott that defendant made a false statement in Exhibit 3B in an effort to affect the defendant's credibility, in Wolcott's mind on the eve of Wolcott testifying." CA58. The motion also alleged prejudice based on the prosecutor's office "set[ting] up a close quarter meeting ... that facilitated a violation of the sequestration order." *Id.* The judge stated that she would hear it later.

The state then called its expert witness to the stand, Elizabeth Arpin, a Connecticut employee. She was "a forensic examiner in computer crimes." 4-6-22T9A124. After stating her training and qualifications to do Cellebrite cell phone extractions she explained "standard practices when conducting them." *Id.*T14A. Exhibit 89 was a redacted version of her "conclusions regarding this case," signed by her. *Id.*T21A126. Before the redaction, Exhibit 89 had a reference that it was "used for sexual assaults" and the defense objected to it for that reason. *Id.*T23A127. It was redacted and Exhibit 89 was then admitted. *Id.*T29A128. She then testified about the eight page Cellebrite extraction report. She explained Cellebrite programs extract different categories found on a phone, "and that it breaks out data files" into categories. *Id.*T32-33A127-136. She testified the

mobile phone's "subscriber information" was determined within the exhibit to be "860-890-3490." *Id.*T33A130. The time zone the phone was set to was "Eastern Standard Time." *Id.*T34A131. She testified that computer crime forensic examiners "don't necessarily testify specifically to dates and times because they can come from many different sources." *Id.*T35A132. That referred to a disclaimer that the forensic lab publishes in its reports regarding dates and times.

The afternoon of April 6th Arpin was asked about "chats" extracted from the phone. 4-6-22T7A134. Exhibits 92-95 were admitted and one referred to the email address previously attributed to the defendant. She testified about call logs and search terms and then was asked if "Cellebrite reports deleted data as well?" *Id.*T23A135. She answered "yes." *Id.* The state then attempted to introduce State's Exhibits 107-111 for *ID.* The defendant objected. *Id.* The jury was excused. After brief argument it was agreed they would not be introduced at that point. It was represented they were deleted files.

When the jury returned Arpin explained how the phone's password was cracked.

> Q. When you did the extraction, how does Cellebrite break a password?
>
> A. It brute forces all possible passcodes until the correct one works.
>
> Q. And what ... does brute force mean?
>
> A. It tries from 0000 all the way to 9999 continuous.
>
> Q. And did ... Cellebrite successfully determine the password in this?
>
> A. Yes. *Id.*T32A136.

The password contained partial seriatim numbers of the defendant's social security number.

Arpin testified that she looked for "[i]mages related to the search warrant." *Id.* She searched for "nudity" and "young people." *Id.*T33A157. On the SD card there were "680 total." She testified the phone password would be needed "to access the SD card if it's inserted in the phone." *Id.*T34A138. She testified it was possible to transfer data from the SD card to a cell phone without the original phone's password, "[d]epending on what application is being used." *Id.*T35A139. Exhibit 112 was admitted. This was a different extraction report "taken from the images portion on the original Cellebrite report." *Id.*T36A140. When asked what the timestamp names mean she explained: "A. Modified is where it was modified at some point, accessed was when the file was accessed by some force, and changed is when it was changed or created." *Id.*T38A141. When asked how the access date is set she stated: "A. That's when some force either a user *or a system accessed the phone.*" *Id.*T39A142. (emphasis added. There were 57 images on Exhibit 112 and they corresponded to State's Exhibits 32-88. These are the 57 images the verdict was based on. All were admitted.

The morning of April 7th, Arpin was cross-examined. She read a disclaimer from her extraction report: "The specified date and timestamps reflected are based upon user applied settings of the subject's computer, and do not necessarily indicate the accurate dates and times." 4-7-22T26A146. She noted that the dates and times in the Cellebrite report "may not be accurate" but reflected the times in the phone. She added "but they are whatever the phone says, so they are accurate of wherever they came from." *Id.*T27A147. She testified that "if someone else had possession of a phone and a P.I.N." they would "be able to change the date and time." *Id.* When asked if she checked with the cell phone company who the subscriber was, she replied: "A. That is the job of the submitting officer, not myself." *Id*T32A149. She said

checking subscriber information was, "outside of our job duties" and admitted it would be helpful to have had it. *Id.*

Arpin was asked if the extraction report indicated *a browsing history ... to show searches for the images in that binder?* Specifically, *was there a browsing history that showed any of those images from the binder?* And she replied, "A. The images had very generic file names, so, ..." *Id.*T29A148. (emphasis added). This then occurred:

Q. Did the phone have a browsing history?

A. It did, yes.

Q. And were any of those images found in that browsing history?

A. Not to my recollection.

Q. Was there any indication of how the files may have been downloaded to that phone?

A. I did not notice any.

Id. (emphasis added).

On April 7th the court denied the defendant's motion for mistrial dated April 6th and ruled the two witnesses' testimonies "were on ... different subject areas" using "different exhibits." 4-7-22T6-7A141-142(A.M. Session).

The afternoon of April 7th the state rested its case. The defendant's motion for judgment of acquittal was denied. The defense called one witness, Trevor Sides, who was the defendant's expert. He testified the extraction dates and times were unreliable. *Id.*T35A151.

On April 8th the case was submitted to the jury. On April 11th the verdict was guilty. On April 25th the defendant filed a motion for new trial. On July 8th the court denied the new trial motion. On September 7, 2022 the defendant was sentenced to "18 and a half years to serve, five years of which is mandatory." 9-7-22T49A156.

8. ARGUMENT

A. The Quantity Element of 50 Images or More Was Not Proven Beyond a Reasonable Doubt.

1. The Standard of Review.

Recently in *State v. Michael R.*, 346 Conn. 432 at 463-64 (2023) it was noted:

> "[I]n cases raising [f]irst [a]mendment issues [the United States Supreme Court has] repeatedly held that an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression ... Therefore, *even though, ordinarily ... findings of fact ... shall not be set aside unless clearly erroneous, [appellate courts] are obliged to make a fresh examination of crucial facts under the rule of independent review." ... DiMartino v. Richens*, 263 Conn. 639, 661-62, 822 A.2d 205 (2003), (emphasis added).

In the instant case, quantity of alleged child pornography images is an element of the crime. C.G.S. §53a-196d(a)(1) states in pertinent part:

> "A person is guilty of possessing child pornography in the first degree when such person knowingly possesses (1) fifty or more visual depictions of child pornography ...."

2. The *Dost* Factors Should Not Be Relied on To Adjudicate Lasciviousness.

The "fresh examination" the defendant seeks applies to thirteen photographs in which there is no sexual touching or arousal of any nature depicted. These are all sealed states' exhibits:

Exhibit 33. It shows a naked smiling boy wearing a jacket, sitting alone in the lotus position facing the camera. His genitals are visible and he is not sexually aroused.

Exhibit 35. It shows a naked blonde haired boy standing up facing the camera with his arm against what appears to be part of a large wooden door as there is a piece of hardware on the wooden door. The boy is smiling and his knees and legs are not visible. His genitals are visible.

Exhibit 36. It shows two boys standing next to each other. The one on the right is wearing pants. He is holding a camera which he is looking at. The boy on the left is naked except for some underpants which he is wearing while holding the top down while exposing his penis. He is looking towards the camera.

Exhibit 37. It is a photograph of a naked boy standing in a shower stall. He is holding a towel over part of his face, covering his mouth.

Exhibit 46. It is a photograph of a naked boy lying alone on a bed.

Exhibit 49. It is a photograph of two naked boys on a bed.

Exhibit 50. It is a photograph of two boys on a bed. One is naked, is smiling and is sitting up. Only the face, hands and part of the chest of the other boy are shown. Nothing of a sexual nature is shown.

Exhibit 70. It is a photograph of a smiling young naked boy sitting on a bed or a couch. The photograph has been altered because the boy's left arm appears to be missing as though it had been amputated because only the left shoulder remains. There is also a strange looking thin white line that appears etched along the boy's right knee.

Exhibit 71. It appears to be a photograph of the same boy depicted in Exhibit 70 except now his left arm is fully restored. He is sitting, facing the camera.

Exhibit 72. It appears to be a partial photograph of the same naked boy in Exhibits 70 and 71 but the image appears altered because now, instead of his left arm being missing most of the boy's right arm is missing. The image only shows six or seven inches of his arm making it look as though most of his right arm was amputated. In Exhibits 70-71 his right arm was intact. In Exhibit 72 it is not intact. Also, other parts of the image are not clear. It does appear to be the same naked boy alone.

Exhibit 75. It shows two naked young boys lying on their backs. Nothing of a sexual nature is occurring.

Exhibit 77. It shows the same naked boys shown in Exhibit 75. One boy is lying on the chest of the other boy but there is no sexual touching shown.

Exhibit 83. It shows a naked young boy outdoors, alone in a tree.

Upon examining these thirteen sealed exhibits pursuant to independent appellate review as required under the First Amendment, because no sexual conduct and no sexual touching is depicted, the only way any of these thirteen images can be deemed child pornography is if any are determined to be "lascivious exhibition of the genitals" of an underage child. C.G.S. §53a-193(13) defines "child pornography" to mean "any visual depiction ... of sexually explicit conduct where the production of such visual depiction involves the use of a person under sixteen years of age engaging in sexually explicit conduct, ..." A55. "Sexually explicit conduct" is statutorily defined in C.G.S.§53a-193(14). It states in full:

> (14)"Sexually explicit conduct" means actual or simulated (A) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal physical contact, whether between persons of the same or opposite sex, or with an artificial genital, (B) bestiality, (C) masturbation, (D) sadistic or masochistic abuse, or

(E) lascivious exhibition of the genitals or pubic area of any person.

Because the thirteen exhibits do not depict sexual intercourse, bestiality, masturbation or sadistic or masochistic abuse and because there is no sexual arousal and no sexual touching depicted in these exhibits, the only possible way any can be an image of child pornography is if any depict a "lascivious exhibition of the genitals or pubic area" of an underage child.

Over the defendant's objection, for the first time in Connecticut appellate history, the trial court instructed the jury that it could consider the so-called "*Dost* factors."

The *Dost* 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 suggest 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. Dost*, 636 F. Supp. 828, 832 (SD at 1986), *aff'd sub nom United States v. Wiegand*, 812 F.2d 1239 (9th Cir 1987), *and aff'd*, 813 F.2d 1231 (9th Cir 1987).

Before reading the six factors to the jury verbatim, the trial judge charged:

> "'Lascivious exhibition of the genitals or pubic area' is an exhibition that is lewd or lustful. In considering whether an image constitutes 'lascivious exhibition of the genitals or pubic

area' you may, but are not obligated to, consider the following ..." A78.

Relying on *State v. Sawyer*, 335 Conn. 29 (2020), the state had filed a written request to charge which quoted the six *Dost* factors for, "[t]he definition of lascivious (sic) as applied to the term "sexually explicit conduct." CA44. The defendant filed an objection. CA46-50. The defense argued in reference to *Sawyer:*

> Our Supreme Court gave no indication that the *Dost* factors should become part of the child pornography jury instructions in the future. It found that the factors may "*provide some guidance*" in evaluating lasciviousness on appeal in the context of determining probable cause in a search warrant. *Sawyer*, supra at 42. It also found that the factors were "helpful in a case like this one, in which probable cause depends in part on whether the description in a search warrant affidavit of *possibly* lascivious images supports, as part of the totality of the circumstances, a reasonable inference that evidence of a crime will be found in the place to be searched. *Id., (emphasis added.)*" CA47.

The defense argued, "it would be a quantum leap to incorporate the *Dost* factors into our ... child pornography jury instructions based on the *Sawyer* dicta." *Id.*

3. The *Dost* Jury Instruction Should Not Have Been Given.

The court heard argument on April 8th. The state admitted that there was "a federal circuit split" regarding the *Dost* factors being used in jury instructions and that the *Sawyer* court had "cited the *Dost* factors with jurors ...." 4-8-2022T8A153. In support of arguing the *Dost factors* should not become a jury instruction, the defendant referred to

the recent District of Columbia Circuit Court opinion of *United States v. Hillie,* 14 F.4th 677 (D.C. Civ. 2021) amended 39 F.4th 674 (2022), rehearing en banc denied, 38 F.4th 235 (2022).

> On January 29, 2018, then U.S. District Court Judge Ketanji Brown Jackson relied heavily, if not exclusively, on the *Dost* factors to deny the defendant's motion to dismiss the defendant's federal child pornography charges. Judge Jackson held: "[I]n this Court's view, the *Dost* factors easily support a finding that the conduct of Hillie's at issue here constitutes . . . possession of child pornography for the purpose of 18 U.S.C. . . .§ 2252(a)(4)(B)." *United States v. Hillie* (No. 1:16-cr-00030-KBJ, Doc. 81, p. 21, 01/0/18.) Hillie went to trial and was convicted as charged. On appeal to the District of Columbia Circuit Court of Appeals, the convictions were reversed.
>
> The evidence against *Hillie* showed no sexual conduct or coyness by JAA nor anyone else. Accordingly, we hold that no rational trier of fact could find JAA's conduct depicted in the videos to be a "lascivious exhibition of the genitals" as defined by §2256(2)(A). We therefore vacate Hillie's convictions and direct the District Court to enter a judgment of acquittal on those counts. In reaching this conclusion, we reject the Government's argument . . . that "lascivious exhibition of the genitals," as defined in §2256(2)(A), should be construed in accordance with the so-called *Dost* factors.
>
> *Hillie, supra* at 689 (emphasis added). CA47-48.

The defendant's First Request to Charge dated April 7th stated in part:

> I instruct you that nudity *without more* is protected expression and does not constitute sexually explicit conduct. By "nudity without more" I mean nudity without sexual activity. If you determine that in this case, there are ... images of children and

> they are naked with their genitals showing but they are not engaged in any sexual activity, the mere nudity of a child without any sexual activity is not "sexually explicit conduct" which is required under the statute. CA77.

The defendant's proposed and requested instruction defining "lascivious exhibition of the genitals or pubic area" defined this phrase to "[mean] a visual depiction of a minor, or someone interacting with a minor [who] engages in conduct displaying their genitals or pubic area in a lustful manner that connotes the commission of sexual intercourse, bestiality, masturbation, or sadistic or masochistic abuse." *Id.*

The court's instruction defined "sexually explicit conduct" by reading C.G.S. §53a-193(14) and thereafter adding the sentence, "*Nudity without more is protected exclusion and does not constitute sexually explicit conduct"* and this language was similar to what the defendant proposed in his request to charge. CA78. The court omitted "sexual activity" after "without" and kept the word "more."[1] And, if the paragraph defining "lascivious exhibition of the genital or pubic area" had stopped defining it after that first sentence, the instruction would not have been objectionable. Instead the court continued to charge all six of the *Dost* factors. CtExVA78.

Because independent appellate review requires this reviewing court to look at each of the thirteen challenged images to decide if they do not constitute "lascivious exhibition," the defendant argues these images should be viewed through a First Amendment prism which admonishes that nudity of a child "without more" is constitutionally protected expression. When the "more" excludes all sexual conduct

[1] *State v. Sawyer,* 335 Conn. 29 (2020), footnote 4: "It is well established that nudity alone, is not pornographic, even when it comes to children."

described in C.G.S. § 53a-193(14)(A)-(C) and excludes the abuse described in (D), then to be "lascivious" the "sexually explicit conduct" must at minimum evoke lustfulness. The word "lascivious" "signifies conduct which is *lewd and lustful, and tending to produce voluptuous or lewd emotions.*" *Zeiner v. Zeiner,* 120 Conn. 161 at 166 (1935) (emphasis added). In 1962, Judge Reynolds stated: "'Lewd' means *given to unlawful indulgence of lust, eager for sexual indulgence.*" *State v. Dallaire,* 23 Conn. Supp. 299 at 301, 182 A.2d 341 at 342, (1962) (emphasis added). In 2023 the word "lascivious" strikes one as quaint but jurors know what the phrase "lewd or lustful" means. Importantly, this reviewing court is not obligated to independently review the thirteen images using any of the *Dost* factors as a guide. The jurors were instructed that they "*may, but are not obligated to consider them*" A78. (emphasis added). Because the standard of review prohibits considering the thirteen images in the light most favorable to sustaining the verdict and because there is a significant split within the federal circuits and among several state appellate courts regarding the constitutionality of juries being instructed on the *Dost* factors to determine lascivious exhibition of the genitals, the standard of review is not deferential. Thus, "even though, ordinarily ... [findings of fact . . . shall not be set aside unless clearly erroneous, [appellate courts] are obliged to make a fresh examination of crucial facts under the rule of independent review" ... *State v. Michael R. supra, at 463-64.*

Exhibit 33 shows a naked boy sitting in the lotus position. There is nothing lustful about it. It could be considered artistic. Exhibit 37 is a boy holding a towel over part of his face and his genitals are not visible. It also conveys no lustfulness. Exhibits 49 and 50 depict two naked boys lying on a bed. No sexual touching or arousal is shown. These images are not lustful. Exhibits 70 and 71 are photographs of a naked boy on a bed. There is nothing sexual or

lustful shown. Exhibit 72 shows the same boy as in 70 and 71 but the image is altered because part of his arm is missing. It is not lustful. Exhibit 74 shows two naked boys but nothing sexual or lustful is shown. Exhibit 75 shows two young naked boys lying on their backs and nothing is lustful. Exhibit 77 shows the same boys and one boy is lying on the chest of the other but nothing sexual is occurring. Exhibit 83 shows a naked young boy outdoors on a limb of a tree. Nothing evocative of lust is depicted. These thirteen images do not depict sexually explicit conduct and therefore are not images of child pornography. The judgment of conviction should be ordered vacated.

The defendant also argues that the use of the six-factored *Dost* jury instruction to define "lascivious exhibition" constituted constitutional error. Prior to 2020, no Connecticut appellate decision mentions *Dost*. Then in *Sawyer* its factors were relied on to establish probable cause regarding two images. Most recently, in *Michael R.*, *Dost* was partially relied on to affirm a defendant's conviction for employing a minor in an obscene performance although the decision does not mention which of the six factors applied.[2] To elevate the six factors to the status of a jury instruction is problematic.

Ashcroft v. Free Speech Coalition, 535 U.S. 234 at 251 (2002) declares: "where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment. In *New York v. Ferber* a unanimous Supreme Court stated that "nudity, without more is protected expression." 458 U.S. 747 at 759 (1982). This is one of the few bright lines. Nudity is not the boundary line between child pornography and freedom of expression.

[2] *State v. Michael R.*, 346 Conn. 432 (2023), pages 467-69.

Thus far, the Supreme Court has not opined if the *Dost* factors can be utilized to define "lascivious exhibition of the genitals." [3]

4. The Division Among Federal and State Courts Is Significant.

There is a burgeoning division among federal and state courts regarding the use and import of the *Dost* factors to determine if images are lascivious when a child is not engaged in any sexual activity. The most recent federal decision disapproving of *Dost* is *United States v. Hillie,* 39 F.4th 674 (D.C. Cir. 2022). The *Hillie* court rejected the use of *Dost* for three reasons. All of the six factors are problematic. For example all forms of pornography usually depict images of adult or child nudity, yet nudity is one of the *Dost* factors. The sixth factor is particularly questionable. The *Hillie* court's criticism of it was its third ground for rejecting *Dost.*

> Third: the *Dost* court erroneously concluded that whether a photo or video depicts "a minor engaged in sexually explicit activity" depends in part on whether the photo or video "is designed to elicit a sexual response in the viewer, albeit perhaps not the 'average viewer, 'but perhaps in the pedophile viewer." 636 F. Supp. at 832.
>
> . . .
>
> The Supreme Court expressly rejected this line of reasoning in *Williams.* When construing the federal promotion of child pornography offense, the Court explained that *the statute cannot "apply to someone who subjectively believes that an innocuous picture of a child is 'lascivious.' Williams*, 553 U.S. at 301, 128 S.Ct. 1830.

[3] See *Michael R. v. Connecticut,* No. 23-5087 (S.Ct) (petition for certiorari pending).

> Instead, "[t]he 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.
>
> . . .
>
> *The statutory term "lascivious exhibition" therefore refers to the minor's conduct that the visual depiction depicts, and not the visual depiction itself. That is why the Supreme Court describes "lascivious exhibition of the genitals; to mean depictions showing a minor engaged in "hard core" sexual conduct, not visual depictions that "elicit a sexual response in the viewer," as the Dost court concluded. Hillie* at 688 (emphasis added).

Other federal circuit courts of appeal rely on *Dost's* sixth factor and allow jurors to step into the minds of defendants to consider if a defendant is part of "an audience that consists of himself or likeminded pedophiles." *United States v. Wiegand,* 812 F2d 1239 at 1244 (9th Cir. 1987).

A few state appellate courts have outright rejected *Dost's* sixth factor. See *State v. Whited*, supra. Others attempt to impose an objective standard divorced from having jurors consider an image from the perspective of a pedophile. *State v. Parra-Sanchez* is an example of this approach. 324 Or. App. 712, 527 P.3d 1008 (2023.)

In *Parra-Sanchez,* a divided en banc court overruled its prior precedent which held that "a 'lewd exhibition' of the genitals or anus," as stated in the Oregon child pornography statutes meant "*exhibition with the intent of stimulating the lust or sexual desires of the person who views it.*" 527 P.3d *at* ___. (emphasis added). It disavowed this case law and imposed an objective standard. It held that "lewd exhibition of a child's sexual or other intimate parts" means that the

showing of these sexual parts *must be "itself salacious or focused on sex."* *Id.* at 736 (emphasis added).

The defendant in *Parra-Sanchez* viewed the child's body "for the purpose of his own sexual gratification" but, it was "not determinative of whether there had been a lewd exhibition." *Id.* at 737. His five convictions for the creation of pornography "using a child in display of sexually explicit conduct were reversed and it was held that the trial court erred when it denied the defendant's motion for judgment of acquittal. *Id.* at 738.

It is interesting that the *Parra-Sanchez* court nevertheless endorsed the *Dost* factors "[t]o assist fact finders and trial courts in making those objective determinations." *Id.* at 733. It referred, inter alia, to the Connecticut Supreme Court's decision in *Sawyer,* supra, wherein the use of the *Dost* factors was approved of while "*cautioning against applying the Dost factors 'rigidly or mechanistically.'*" *Parra-Sanchez* at 735 (emphasis added). Justice James concurred in the result but objected to the use of the *Dost* factors. He voiced criticism of factors tests. A factors test can interfere with critical thinking. Instead of deep thinking and considered analysis, people tend to follow the recipe they are given.

> Factor tests take the depth and complexity of human thought and perspective and replace it with a checkbox form. Although often couched in language of "non-exhaustive factors," or "guideposts," factor tests naturally encourage parties to follow a script: consider A, then consider B, finally consider C, then decide. Parties wanting to preserve their issue, will naturally follow the script, even though it purports to only be a guide. Id.

Justice James' dissent suggests that "soon the complex issue that spawned the factor test is lost to time, replaced only with a

jurisprudence of the test itself. The forest is gone; only trees remain." *Id.* at 751-752. The *Dost* six-factor definition of "lascivious exhibition of the genitals" elevated to the status of a jury instruction in the instant case is an example of such a factors test. Justice James singled out the sixth *Dost* factor as being particularly inappropriate. Id. at 752.

If despite the defendant's arguments, this court decides that there was no error in the trial court charging the jury with the *Dost* factors definition **and** also decides that this court may use or rely on them in performing its independent appellate review of the thirteen images, the defendant urges this court to not evaluate lasciviousness subjectively from the alleged perspective of a pedophile. The defendant also urges this Court to not consider factors (1)-(5) mechanistically.

When the *Dost* factors are considered as though they are a checklist, then a parent whose family are members of a nudist colony can surprisingly end up arrested and convicted of a felony possession of child pornography for having photographs of prepubescent naked children participating in a child beauty contest. This happened to the defendant in *State v. Hansen*, 272 A.3d 1040 (R.I. 2022). The facts were not in dispute.

> "In the case at bar, all of the children in the images are completely naked, with the exception of sneakers, sandals, or jewelry, and their pubic areas are clearly visible and genitals are partially visible; the images capture the full frontal nude body of each child. There is no question in this case that the genitals or pubic areas of the prepubescent girls in the images are on display, or in other words, that there is an exhibition of the genitals or pubic areas. Thus, the only issue before us is

whether those exhibitions of the genitals and pubic areas are lascivious." *Id.* at 1051.

The images are of naked young children. The children held numbered cards in their hands. Some images had naked middle-aged adults appearing along with "nine naked children." *Id.* at 1054. There was no sexual conduct or sexual touching in the six images. In a split opinion, four of the five justices affirmed the conviction. The majority and the one dissenting justice algorithmically evaluated the *Dost* factors. The majority held that the images contained lascivious exhibitions of the genitals with all six factors being satisfied.

The dissenting justice *also* algorithmically evaluated the *Dost* factors. After performing the same independent examination of the images as is required here, he found the fourth *Dost* factor to be satisfied, i.e. nudity. *Id.* at 1062. The dissent reluctantly conceded the third factor was satisfied. That factor requires an "unnatural pose, or inappropriate attire . . . ." But the dissent gave this factor very little weight, noting that "these poses are natural in the context of a beauty pageant" among naked children and their naked parents. *Id.*

Regarding the fifth *Dost* factor, "sexual coyness or a willingness to engage in sexual activity," the dissent summarily explained why this factor was absent.

> –I differ from the majority because I do not perceive actual sexual coyness or sexual suggestiveness in these images. *Dost,* 636 F.Supp. at 832. *The majority suggests that the depiction of what it characterizes as the "girls' vulnerability and availability" somehow translates into sexual coyness to the viewer.* In my opinion, that is *an enormous inferential leap,* and it is one that I, on the basis of my independent review, am unable to make. *Id.,* (emphasis added).

In analyzing *Dost's* second factor, the sexual suggestiveness of the setting, the dissent stated:

> [I]t can fairly be inferred that the images depict girls participating in a sort of beauty pageant in the presence of a group ..., including adults, who are engaging in a nudist lifestyle ... *I simply do not detect anything overtly sexual about the setting of the images or about the images themselves aside from the nudity; and that nudity is not, in and of itself, enough to render them lascivious. See Osborne v. Ohio, 495 U.S. 103, 112 (1990) ("We have stated that depictions of nudity without more, constitute protected expression.") (citing New York v. Ferber, 458 U.S. 747, 765 n.18 (1982)).* *Id.* at 1061-62 (emphasis added).

Regarding the first factor, "whether the focal point of the visual depiction is on the child's genitalia or pubic area," the dissent opined that they did not so focus. The images "display virtually the entirety of the children's bodies; they do not ... particularly draw attention to the genitalia in their design or composition." *Id.* The dissent relied on *United States v. Amirault*, 173 F. 3d 28 at 33 (1st Cir. 1999) which held "that an image *did not* significantly focus upon the genitalia when it showed a girl's pubic area ... on clear display, *where there is no close-up view of the groin*" and "the genitals are not featured in the center of the composition." *Id.*, (emphasis added). In the instant case none of the thirteen images significantly focus upon the boys' genitalia.

The *Hansen* majority claims to apply an objective analysis to the fifth and sixth *Dost* factors but directly quotes that lasciviousness is a characteristic "of the exhibition set up for an audience that consists of himself or likeminded pedophiles." The majority then states that the

composition of images "depicts prepubescent girls who are completely exposed and identifiable by number, *for whatever reason the viewer may wish to believe or fantasize.*" *Id.* at 1059 (emphasis added). This is a subjective criterion, not an objective one. *The majority held the images "were designed to elicit a sexual response in the viewer." Id. This obviously refers not to any viewer but to a pedophilic viewer.* It also stated "it is not ordinary for the fully nude bodies of young girls to be the subject of scrutiny; this factor . . . promotes sexual exploitation and intrusion on the privacy and dignity of the children depicted therein . . . ." *Id.*

> *The fact that the majority and I consider these images to be inappropriate does not make these images sexual*; it does not mean that the images were designed to elicit a sexual response in the viewer. *Id.* (emphasis added).

This court is not required to utilize or rely on any of the six *Dost* factors. Nothing evokes lust in the thirteen images. Exhibit 33 is similar to paintings and photographs of naked people calmly sitting in the yoga lotus position. Exhibit 37 is a naked boy in a shower stall. Exhibit 83 is a naked boy on a tree limb. There may be human beings who have sexual fantasies involving a naked child in a tree, or in a shower or sitting in a lotus position but that would be construing sexually explicit conduct very subjectively from the perspective of such people. The same applies to images of the non-sexually aroused boys in the other challenged images. The images are inappropriate *but not objectively lascivious.*

Upon exercising independent appellate review of the thirteen images, it should be held that they are not child pornography. Thus the defendant's conviction must be vacated.

B. The Trial Court Committed Constitutional Error When It Failed to Give a Specific Unanimity Instruction.

The defendant's specific unanimity instruction stated:
The state has alleged that the defendant has committed the offense of possession of child pornography by possessing fifty or more visual depictions of child pornography. *You may find the defendant guilty of the offense only if you all unanimously agree on which of the fifty visual depictions fit the definition of child pornography* as defined in the instructions: This means you may not find the defendant guilty unless all of you agree that the state has proved beyond a reasonable doubt *which visual depictions are child pornography and that those add up to fifty or more.* (emphasis added.) CA19.

1. The Standard of Review.

The standard of review is de novo appellate review regarding the violation of a constitutional right. In *Ramos v. Louisiana*, 140 S. Ct. (2020), the Supreme Court held that the Sixth Amendment right to a jury trial requires that jury verdicts in state court criminal trials must be unanimous. De novo review is also required because freedom of speech under the First Amendment is a liberty safeguarded by the Due Process Clause under the Fifth Amendment. *Stromberg v. California,* 283 U.S. 359, 368 (1931).

2. The Specific Unanimity Instruction Was Constitutionally Required.

Upon independent appellate review, as a matter of First Amendment law, if it is found that *eight or more* of the thirteen challenged exhibits do *not* depict "lascivious exhibition of the genitals or pubic area," then 57 – 8 = 49 and the conviction must be vacated per the prior argument. Of the unchallenged forty-four images, some depict sexual activity between a child and an adult or a child and a

child, some depict masturbation, and some show a naked child who is sexually aroused. None show "bestiality" and none show "sadistic or masochistic abuse." Thus, under C.G.S.§ 53a-193(14), within the universe of the fifty-seven images, there are three different ways some of the six jurors might find some of the fifty-seven exhibits to depict "sexual intercourse" as is defined in C.G.S.§53a-(14). Some of the six jurors might find some of the exhibits depict masturbation. Some of the six jurors *must* have found at least six of the thirteen challenged exhibits constitute "lascivious exhibition of the genitals or pubic area" because with a minimum of six of the thirteen being lascivious, then seven of the thirteen would not be lascivious and 57 – 7 = 50. Assuming the same six jurors unanimously agreed on the unchallenged 44 being child pornography, 44 + 6 = 50 and that satisfies the statute. Again, *if six jurors found 8 (or more) of the challenged 13 images to be non-lascivious, that would not satisfy the statute* because 49 images (or less) required a verdict of not guilty.

If this specific unanimity argument is being considered, it means that after reviewing each of the thirteen challenged images pursuant to the required independent appellate review, this court did not find that at least eight were held to be non-lascivious.

Under the charged statute, possession of child pornography in the first degree, quantity is a statutory element, i.e. *50 or more images* are required. C.G.S.§ 53a-196d(a)(1) is a Class B felony. Section 53a-196e requires a minimum of 20 but less than 50 images and is a Class C felony. Section 53a-196f requires a minimum of one image and "fewer than 20." If less than eight of the thirteen challenged images are held to be protected by the First Amendment, in the absence of a specific unanimity instruction there is no way of knowing if all or some of the six jurors counted those images to be included in the 50 or more images their verdict was based on. In this scenario the failure to give

the requested specific unanimity instruction constitutes reversible error.

In *Stromberg v. California*, 283 U.S. 359, 367-68 (1931) the Supreme Court held that a general verdict which *may have rested* on a constitutionally invalid ground must be set aside. Stromberg was a 19-year-old member of the Young Communist League. A California statute criminalized display of a flag for any of three specified purposes. Two of the purposes were not protected by the First Amendment but one was protected, i.e., the display of a flag "as, symbol or emblem of opposition to organized government." *Id.* at 361. The state appellate court opined that there was no error because the other two grounds were not protected. The Supreme Court reversed. "As there were three purposes set forth in the statute, and the jury was instructed that their verdict might be given with respect to any one of them, independently considered, it [was] impossible to say under which clause of the statute the conviction was obtained." *Id.* at 368. The Court concluded, "if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld." *Id.*

In the instant case it is argued that all 13 of the challenged images are not child pornography and are protected by the First Amendment. As noted, as few as 8 out of 13 can be held to be protected images because then the total number of unprotected images would be less than 50 and reversal is required. But if only 7 (or less images) are held to be protected out of the 13 then 57 – 13 = 44 + 6 = 50 and the verdict is guilty. There is no way of knowing if all six jurors stopped deliberating when they agreed they had found 50 sexually explicit images. The risk is that they may have stopped when they agreed there were 50 and in the absence of the specific unanimity instruction, there is the serious risk that they found some of the protected images to count towards the 50 they chose. In fact, even in

the extremely unlikely scenario it is held upon independent appellate review that all 57 images constitute child pornography, without a specific unanimity instruction, there is no way of knowing if the six jurors stopped when they found 50 and whether six out of six found the *same* 50 images. Although in a binder, the images were not statutorily categorized and were randomly presented.

In *State v. Joseph V.,* 345 Conn. 516 at 521 (2022) our State Supreme Court stated:

> Today, in *State v. Douglas C.,* 345 Conn. 421 (2022), we held that a single count of an information that charges a defendant with a single statutory violation is duplicitous when evidence at trial supports multiple, separate incidents of conduct, each of which would independently establish a violation of the charged statute. *In the absence of a specific unanimity instruction to the jury or a bill of particulars, such a count violates a defendant's constitutional right to jury unanimity and requires the reversal of the judgment of conviction if it creates* ***the risk*** *that the defendant's conviction occurred as the result of different jurors concluding that the defendant committed different criminal acts.* (emphasis added).

The evidence at this trial "supported separate instances" of the charged conduct because each one of at least 50 of the separate images contributed to quantity and each one, standing alone, constitutes a crime of possession of child pornography, albeit a lesser offense, i.e. C.G.S.§53a-196f. That makes the statute duplicitous. *Douglas C.* at 445-447. A count is "duplicitous [only when] the policy considerations underlying the doctrine are implicated, . . ." *Id.* at 433. "These . . . include avoiding the uncertainty of whether a general verdict of guilty conceals a finding of guilty as to one crime and a finding of not guilty

as to another" *and*, inter alia, "avoiding the risk that jurors may not have been unanimous as to any one of the crimes charged ..."

The general verdict of guilty in the case at bar conceals whether all six jurors unanimously chose the same fifty (or more) images. Of the 57 images, perhaps 18-19 depict sexual intercourse involving at least one child and would be child pornography. Several potentially depict masturbatory conduct. At least 13 are not "lewd and lustful." Three of the challenged 13 exhibits are somewhat artistic in nature. These are: the child sitting naked in the yoga position, Exhibit 33; a smiling boy standing naked touching a wooden door-like object, Exhibit 36; and the naked boy outdoors on the tree trunk, Exhibit 83.

The state could have avoided many of the constitutional issues involved in this appeal by only proffering 50 images. To convict, the jury would have had to find all 50 depicted sexually explicit conduct. And, if the state had doubts that several of the 50 images might not show any sexually explicit conduct, it could have submitted a lesser included offense instruction under C.G.S.§53a-196e or §53a-106f. The defendant argues that there are 19 or less exhibits depicting "sexual intercourse, 7 or less exhibits depicting masturbatory conduct, 0 exhibits depicting bestiality, 0 exhibits depicting sado-masochistic conduct and, at least 13 images which unquestionably do not violate any of the statute's sub-elements described in C.G.S. §53a-193(14)(A)-(D).

The state should concede that the 13 challenged images do not depict any of the forms of sexual intercourse which are criminalized in §53a-193(14)(A) which defines sexual intercourse; they do not depict "bestiality" which is criminalized in §53a-193(14)(B); they do not depict masturbation which is criminalized in §53a-193(14)(C); and they do not depict "sadistic or masochistic abuse" which is criminalized in §53a-193(14)(D). Thus, to prove quantity of 50 or more images out of the 57,

by process of elimination the jury could not find more than 7 *of these 13 images* to not be child pornography. (57-7 = 50). Sub-elements of §53a-193(14(A)-(C) have in common sexual touching. §53a-193(14)(D) requires "sadistic or masochistic abuse" and none of the 57 images show this.

The foregoing explanation is important because it demonstrates that the defendant was prejudiced. The jury, acting as one unit, found 50 or more images constituted child pornography. To reach the minimum of 50 out of 57 it had to find images that depicted a *combination* of all three categories - sexual intercourse, masturbation and lascivious exhibition of the genitals.

Upon independent appellate review, all or some of the 13 images may be held to be protected by the First Amendment. This risk of a non-unanimous verdict is not constitutionally acceptable. All the trial court had to do to prevent it was give the requested specific unanimity instruction. CA79.

3. There Are Two Specific Unanimity Tests.

In *Douglas C.*, supra and in *JosephV.*, supra, our supreme court partially relied on *Schad v. Arizona,* 501 U.S. 624 (1991) and *United States v. Correa-Ventura*, 6 F.3d 1070 (1993) in creating two different tests. One applies "to a claim of unanimity of elements" and another applies to "a claim of unanimity as to instances of conduct." *Joseph V.* at 531, citing *Douglas C.* at 441.

a. The First Unanimity Test, Elements.

Unanimity of elements requires a jury to "agree on *the principal facts underlying its verdict* – what courts have tended to call the elements of the offense." *Douglas C.,* supra at 438, citing *United States v. Lee,* 317 F.3d 26, 36 (1st. Cir.) . . .(2003). Prior to *Douglas C.,* there was only one test, the *State v. Gipson,* test, 553 F.2d 453 (5th Cir. 1977). The *Douglas C.* court explained:

> If instructions at trial can be read to have sanctioned such a non-unanimous verdict, however, we will remand for a new trial only if *1) there is a conceptual distinction between the alternative presented evidence to support* ***each*** *alternative act with which the defendant has been charged, and (2) the state has presented evidence to support each alternative act with which the defendant has been charged." State v. Reddick,* 224 Conn. 445 (1993) (emphasis added).

Regarding the first requirement, there is a conceptual distinction between sexual intercourse and masturbation. There is a conceptual distinction between "lewd or lustful" exhibition of the genitals and the overt sexual physicality of intercourse or masturbation. Regarding the second requirement, it has already been shown that the state presented evidence in support of these three different acts. Under the *Gipson* test and as adopted by *State v. Famiglietti,* 219 Conn. 605, 619-20 (1991), if a trial court in its instructions did not affirmatively sanction a non-unanimous verdict, "that ends the matter." Thus, when the Appellate Court first decided *State v. Joseph V.* it unanimously held that a reviewing court cannot conclude that a trial court "implicitly sanctioned non-unanimous verdict . . ." 196 Conn. App. 712 at 748 (2020). Even though the information was duplicitous regarding two counts, it was held that the defendant "failed to demonstrate that the risk of a non-unanimous verdict existed . . ." *Id.* In the certified appeal our Supreme Court held "that the *Gipson* test is no longer applicable to claims of unanimity as to elements." 345 Conn. at 570. This means that even though the trial court did not sanction a non-unanimous verdict, *Gipson and Familglietti* no longer prohibit appellate review.

The new elements test heavily relies on *Schad v. Arizona*, 501 U.S.624 (1991). After an in-depth analysis, our supreme court summarized the "*Schad* test" by stating:

> Federal courts of appeals have taken their cues from *Schad* and considered the statutory language, relevant legal traditions and practices, the overall structure of the statute at issue, its legislative history, moral and practical equivalence between the alternative actus rei or mentes reae, *and any other implications for unfairness associated with the absence of a specific unanimity instruction. Joseph V.*, 345 Conn. at 567 (emphasis added).

Interpreting the statutory language requires reading C.G.S. §53a-196(d)(a)(1) by incorporating its critical definitions found in C.G.S. 53a-193 (13) and (14). The defendant suggests reading the statute as follows:

> (a) A person is guilty of possessing child pornography in the first degree when such person knowingly possesses (1) fifty or more visual depictions of *any photograph, film, videotape, picture or computer generated image or picture, whether made or produced by electronic, digital, mechanical or other means, of sexually explicit conduct, where the production of such visual depiction involves the use of a person under sixteen years of age engaging in sexually explicit conduct [and] "Sexually explicit conduct" means actual or simulated (A) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal physical conduct, whether between persons of the same or opposite sex, or with an artificial genital, (B) bestiality, (C) masturbation, (D) sadistic or masochistic abuse, or (E) lascivious exhibition of the genitals or pubic area or any person.*

The italicized excerpt substitutes "child pornography" with its definition in §53a-193(13) and adds the definition of the phrase "sexually explicit conduct" after the phrase appears. The statutory language requires possession of visual depictions of children "under sixteen years of age engaging in sexually explicit conduct." As was mentioned, C.G.S. §53a-193(14)'s sub-elements define "sexually explicit conduct" very explicitly. (A) (B) and (C) require sexual touching. (D) is further defined in C.G.S. §53a-193(7) to mean the "flagellation or torture by or upon a person clad in undergarments ..." and also requires touching. C.G.S. §53a-193(14)(E) "lascivious exhibition of the genitals or pubic area of any person" does not require any touching and the word "lascivious" is not statutorily defined. The statutory definition of child pornography tracks the federal statute. (E) is an alternative basis of liability and it is conceptually distinct from the other four elements, three of which require sexual touching and one requires touching. Thus (E) is an element. It was stated in *State v. Niemeyer*, 258 Conn. 510 at 525 (2000) that "[a]lternative bases of liability are not conceptually distinct if the two ways of [committing the crime] are practically indistinguishable. The basis of (E) is blatantly distinguishable, there is no touching of any nature required.

The word "lascivious" is itself vague and regarding an older and different statute it meant "lewd and lustful." *Zeiner*, supra at 166. It was stated in *State v. Shields*, 308 Conn. 678 at 6 (2013), in the context of deciding if probable cause supported a warrant, that the federal law definitions of "child pornography" and "sexually explicit conduct" are "similar or identical to" Connecticut's definitions. Thus, looking at this history, §53a-193(14)(E)'s operative word, "lascivious" is ambiguous. The *Shields* court noted:

> As the court explained in *United States v. Genin*, supra, 594 F.Supp.2d 412: "As a consequence of the interpretative ambiguity inherent in the term 'lascivious,' many courts have held that, in the probable-cause context, a magistrate may not issue a search warrant based solely on a law enforcement officer's conclusion that the target of the warrant is in possession of 'lascivious' photographs or videos." *Id.*,at 421.

This is pointed out because in the absence of the requested specific unanimity instruction, there is no way of knowing how many of the 13 challenged images the jury found to be lascivious exhibitions. Obviously, they found seven but absent specificity we do not know *which* seven. We also do not know if the six jurors picked the same seven. We do not know if all six jurors picked 7 or more, of which some should be held to not constitute "lascivious exhibitions of the genitals."

b. The Second Test Is Incidents of Conduct.

There are three prongs to the second test. "The first prong of the test adopted in *Douglas C* requires the reviewing court to "first look at the allegations in the charge and the evidence admitted in support thereof to determine if [the] count was premised on multiple, separate incidents of conduct." *Joseph C.*, supra at 543. The "incidents of conduct" in this case entail possession of images criminalized by the sub-elements of sexual intercourse, masturbation and lascivious exhibition where the precise quantity of each sub-element counts toward the final minimum required of 50. In this regard the statutory elements of "50 or more" is intertwined with the different instances of conduct which act as informing sub-elements.

In the instant case there was no bill or particulars and the trial court did not remove C.G.S. §53a-193 (14)(B) and (D) from its jury instruction. Doing so would have conformed the instruction to the provable evidence. Because the child pornography statute requires

"sexually explicit conduct" which was defined via five different subsections which the jury was instructed on, the defendant was accused of "multiple separate instances of conduct" via three different forms.

The second prong asks, assuming the criterion of the first prong is satisfied, "does each instance of conduct establish a separate violation of the statute?" *Joseph V.* at 532. In the instant case, whether one labels these elements or instances of conduct, separate violations of the statute inhere and they are duplicitous. And the third prong is self-evident, the duplicity was not "cured by a bill of particulars or a specific unanimity instruction." *Id.*

The defendant has argued that both of the new tests established in *Douglas C.* are satisfied. He only needs one but argues both. Because the defendant was prosecuted under the most serious of our three child pornography statutes, the one which carries a five year mandatory minimum sentence and a twenty year maximum, the state needed images of naked children which might be found to be lascivious in order to attempt to prove 50 or more images. In deciding which test applies, the defendant asks this court to keep in mind Justice Souter's remarks in *Schad,* supra, which were quoted with approval in *United States v. Correa-Ventura,* and which suggests that the global concern of fundamental fairness should be paramount:

> Instead of "deriv[ing] any single test for the level of definitional and verdict specificity permitted by the Constitution," the court should instead focus upon "a distillate of the concept of due process with its demands for fundamental fairness ... and for the rationality that is an essential component of that fairness." *Correa-Ventura,* supra at 6 F.3d 1070 at 1080.

C. The Trial Court Abused Its Discretion When It Admitted State's Exhibits 108 And 109.

1. The Standard of Review.

The standard of review is abuse of discretion. "Every reasonable presumption should be given in a favor of the trial court ruling ... [the trial court's decision will be reversed only when abuse of discretion is manifest or [when] an injustice appears to have been done." *State v. Patrick M.*, 344 Conn. 565 at 598 (2022).

2. Factual Background.

During the morning of April 7th the state sought to re-introduce Exhibits 107 through 111. 4-7-22T54A157. The defense objected. Outside the jury's presence Arpin testified these exhibits were "deleted images." She said that meant, "[t]he information for the file is still here, but the file itself is missing." *Id.* This information is known as "artifacts" and although deleted, references appear in the "images section" of the extraction. Arpin testified the "file path" was "tied to email address wiredmike78@gmail.com. Id.T55A158. Unlike extracted data which had "hash values," no extraction "MD 5 hash value" was assigned to these deleted images. When asked: "Why is that," Arpin replied "A. *Because it's not an actual file, it's just file information.*" *Id.* (emphasis added.) The state said it was offering the five exhibits for "identity and knowledge." Id.T57A159. Defense counsel stated that evidence of the email address being "associated with the phone, ... would be cumulative." *Id.* The defense also argued the probative value of these exhibits would be outweighed by their highly prejudicial impact. *Id.*T57A159. The court denied the state's request to admit all five. *Id.* Over objection it granted it as to exhibits 108 and 109. *Id.*T61A160. Both exhibits 108 and 109 have wording which says: *"(Toddlerboy) Raamat 2 Yo Boy Toddler Pedo."* Ex 108, 109 A60-61. The defendant was not charged with possessing the two

alleged deleted videos. Both exhibits had the defendant's email address and stated "size (bytes): 0." The court stated they were admissible because "when someone sees those exhibits ... they can make a determination on whether ... he had knowledge or possession of something that relates to the . . . issue in this case." *Id.*65A156. The defense attorney replied: "so, uncharged misconduct." The response was: THE COURT: Yes, that's what I issued my ruling on." *Id.* The judge offered to read her limiting instruction to counsel before summoning the jury and began it by saying: "The State intends to offer evidence of other acts of misconduct of the defendant." *Id.* The prosecutor then requested "that the Court alter the instruction – "and the judge asked, "[to] not indicate misconduct?" The prosecutor replied: "Yes, other acts." Ultimately the court's limiting instruction that was read to the jury referred to "other alleged acts of the defendant" and that it was admitted solely to show or establish, knowledge, possession and identity." A9.

Exhibits 108 and 109 consist of two horizontal rectangles containing words. A60-61. They look identical. Upon close scrutiny Exhibit 108 says adjacent to 'name": "*[Toddler-boy] Raamat 2Yo Boy Toddler Pedo 1 with Sound.avi.jpg.avi.jpg*" and Exhibit 109 says the same thing except after "Pedo" there is a "2." Ex.108-109A60-61. On each exhibit "Toddlerboy" appears three times, "Toddler Pedo" three times and "2YoBoy" three times. Each image says "With Sound" and "Sound." The word "Sound" implies the deleted imagery may have been videos. The word "pedo" is short for pedophile. This extracted information says in red on the right of the rectangle, "deleted." These exhibits are undated.

3. Any Probative Value Was Outweighed by Prejudice.

The 57 images were all still photographs, not videos. By the afternoon of April 7th, the state had already introduced various and plentiful evidence linking the defendant to the cell phone he placed in Wolcott's car. Besides Wolcott's testimony that it was the defendant's cell phone, there was the password to the phone which was part of the defendant's social security number, the various text messages to and from the cell phone which identified him as the user, and the email address on the cell phone which was shown to be his. By that afternoon the state had proven the identity of the user of the phone was the defendant and had proven he possessed it, at least until Wolcott took sole possession of it later in the morning of July 29th. The defense was correct in arguing that these exhibits were cumulative regarding identity and possession of the phone. Unlike the 57 exhibits and the forensic extraction evidence which has one access date connected to many of the exhibits, "July 21, 2020," there are no dates whatsoever on Exhibits 108 and 109. These artifacts do link the inflammatory words with the defendant's email address. It is questionable to claim that these exhibits allowed the jurors to infer that "on or about July 29, 2020" the defendant knowingly possessed the 57 images. [See Information, CA15.] A user of the phone might have unknowingly received, never opened and then deleted these two files many years prior. The admission of Exhibits 108 and 109 allowed the jury to think and infer that the defendant was a pedophile who was interested in watching toddlers being abused. It was impermissible propensity evidence.

The Connecticut Code of Evidence §4-5a required exclusion. A58. It states: (a) General Rule: *"Evidence of other crimes, wrongs, or acts*

of a person is inadmissible to prove the bad character, propensity, or criminal tendencies of that person except as provided in subsection (b)."

The defendant understands that the bar of relevance is set quite low regarding the admission of evidence. To be relevant, evidence must have "any tendency to make the existence of any fact that is material ... more probable ... than it would be without the evidence." Connecticut Code of Evidence, Section 4-1.A58. And, "[a]ll relevant evidence is admissible, ... "subject to various exceptions. C.C.E.4-2A*Id.* "Relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice ... or needless presentation of cumulative evidence." C.C.E. 4-3*Id.* Prior to the court's ruling on April 7th, there was an abundance of admitted trial evidence proving that the cell phone's telephone number was the defendant's number, that the email address found in the phone was his email address and in light of its 5 digit password protection, that he was the possessor until Wolcott took it into his sole possession and tampered with it by removing its chip and opening up its contents and looking at it. Any further evidence of possession of the phone and the identity of its user was needlessly cumulative and violates C.C.E.'s Section 4-3's exclusionary rule. The fact that Exhibits 108 and 109 are virtually identical also underscores the "needless presentation of cumulative evidence" and is prejudicial. This constitutes the "unfair piling on of evidence." One example of this is found in a Ninth Circuit decision.

> "Once the government placed evidence of one of Breitkreutz's burglary convictions into the record, proof of the other two was cumulative and therefore likely to fail the Rule 403 test. . . . [P]roof of more prior felonies adds very little of probative value and amounts to unfair piling on. [T]he error here wasn't harmless under either "fair assurance or the "more probable

than not" standard. The government proceeded on a case of constructive possession. The evidence linking Breitkreutz to the firearm was limited to the rifle's presence behind the seat of the stolen car he was driving. No fingerprints or other indicia of ownership were introduced. To convict, the jury had to draw an inference from circumstantial evidence; this delicate judgment might well have been thrown off by its knowledge of Breitkreutz's extensive criminal history."

As in the case at bar, the jury had to draw several inferences. No one testified they saw the defendant looking at the images. No one testified that he downloaded any of the 57 images. Trial evidence proved the legal owner was Mercado. Wolcott admitted he removed the chip and put it in his cell phone and then accessed images. Although the court excluded 3 of 5 images proffered by the state, when it admitted *both* Exhibits 108 and 109, it improperly added cumulative evidence on top of cumulative evidence. It was inflammatory propensity evidence. The instruction (Jury Charge, p. 9 CA9) about what these exhibits could and could not be used for did not cure the unfair prejudice. Our most respected evidence treatise, *Tait's Handbook of Connecticut Evidence*, Fifth Ed., 2014 §4.81 "Unfair Prejudice" states:

> To be unfairly prejudicial, the evidence must "unduly arouse the jury's emotions of prejudice, hostility or sympathy." *State v. Wilson*, 180 Conn. 481, 490 . . . (1980); see *State v. Bitting*, 162 Conn. 1, 9-10 . . . (1971). Evidence is unfairly prejudicial if it has an adverse effect upon a party beyond its tendency to prove the fact for which it was offered. *State v. Graham*, 200 Conn. 9, 12 . . . (1986).

If this third issue is reached, it should be held that admission of the two exhibits had a hugely prejudicial impact on the jury, was unfair to

the defendant and that its adverse effect went well "beyond its tendency to prove" knowledge, possession or identity. Id.

9. CONCLUSION.

There are at least thirteen exhibits which do not depict lascivious exhibition of the genitals or pubic area. Independent appellate review regarding exhibits which are claimed to be protected by the First Amendment is not deferential. The error is not evidentiary, it is constitutional. This requires examining the images contained in each one of these thirteen challenged exhibits. The reason such heightened appellate review is required is because appellate courts "must assure [them]selves that the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times Co. v. Sullivan*, 376 U.S. 254 at 285 (1964) (internal quotation marks omitted). This heightened appellate review applies to child pornography. *New York v. Ferber*, 458 U.S. 747, 774 n.28 (1982).

The trial court should not have expanded our model jury instruction defining "lascivious exhibition" to include the six-factored *Dost* test simply because it was referred to in *State v. Sawyer*, supra. In *Sawyer* our supreme court stated:

> "We agree with the First Circuit that 'the *Dost* factors are generally relevant and *provide some guidance in evaluating whether the display in question is lascivious.* We emphasize however, that these factors are neither comprehensive nor necessarily applicable in every situation. . . . The inquiry will always be case-specific.'" 335 Conn. 29 at 41 (2020) (emphasis added).

The fact the *Dost* factors provide "some guidance" does not mean they should be enshrined in our jury instructions. The defendant objected

to the proposed *Dost* instruction and informed the court of the *United States v. Hillie* decision, 14 F.4th 677 (D.C. Cir. 2021). CA46-49. Hillie's conviction was reversed because the *Dost* factors were relied on. The fact there is a split among the federal circuits and among some of the state appellate court decisions strongly cautions against making the *Dost* factors part of Connecticut's jury instruction defining "lascivious exhibition of the genitals or pubic area." The jurors may very well have applied *Dost*'s sixth factor to all of the challenged images even though they simply show a naked prepubescent boy or boys whether they are lying on a bed, sitting down or standing up. This is because based on the sixth factor, they may have thought that such images incite lust in pedophiles. The sixth factor requires a subjective mind-reading approach and is wrong. To a non-pedophile, *none* of the thirteen images are sexually suggestive and do not incite lust.

If the specific unanimity instruction issue is reached, there are three uncertainties flowing from the general unanimity instruction: 1.) not knowing which images were chosen to be child pornography, and 2.) not knowing what the quantity of the 50 or more chosen images is, and, 3.) whether all six jurors chose the same 50 or more images. The risk of not giving the requested specific unanimity instruction is that if *any* of the 50 or more images the jurors chose is held to be protected by the First Amendment, then the minimum quantity of 50 to convict might not be met and this is a mathematical certainty if the jury stopped counting at 50. Also, some jurors may have a chosen a different subset of 50 than other jurors so that although each found 50 they were not the same 50. Because quantity is an element and there are 5 different forms of "sexually explicit conduct" each of which independently supports a conviction, it is argued that on these unique facts both of the two new specific unanimity tests may apply and thus they were argued in the conjunctive and the alternative. The

defendant's constitutional rights to due process and to a unanimous verdict were violated and his conviction must be vacated.

The court abused its discretion in admitting the nearly identical Exhibits 108 and 109. A60-61. Exhibit 109 was cumulative to Exhibit 108 and they both were cumulative to significant trial evidence that proved identity and possession. These two exhibits were artifacts which were undated and referred to previously deleted files. There was no evidence that these files were opened or accessed. They were of marginal probative value regarding the defendant's knowledge of the 57 images. The names of these deleted file artifacts and the words appearing on them were highly inflammatory. Their likely effect was to brand the defendant as a pedophile with a particular interest in toddlers and thus it was prohibited propensity evidence. Given the limited probative value and the likely enormous inflammatory impact on the emotions of the jury, it should be held that the limiting instruction given was inadequate to cure the prejudicial harm.

Respectfully submitted,

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§ 53a-193. Definitions

The following definitions are applicable to this section and sections 53a-194 to 53a-210, inclusive:

(1) Any material or performance is "obscene" if, (A) taken as a whole, it predominantly appeals to the prurient interest, (B) it depicts or describes in a patently offensive way a prohibited sexual act, and (C) taken as a whole, it lacks serious literary, artistic, educational, political or scientific value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or performance or the circumstances of its dissemination to be designed for some other specially susceptible audience. Whether a material or performance is obscene shall be judged by ordinary adults applying contemporary community standards. In applying contemporary community standards, the state of Connecticut is deemed to be the community.

(2) Material or a performance is "obscene as to minors" if it depicts a prohibited sexual act and, taken as a whole, it is harmful to minors. For purposes of this subdivision:

(A) "Minor" means any person less than seventeen years old as used in section 53a-196 and less than sixteen years old as used in sections 53a-196a and 53a-196b, and

(B) "harmful to minors" means that quality of any description or representation, in whatever form, of a prohibited sexual act, when (i) it predominantly appeals to the prurient, shameful or morbid interest of minors, (ii) it is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) taken as a whole, it lacks serious literary, artistic, educational, political or scientific value for minors.

(3) "Prohibited sexual act" means erotic fondling, nude performance, sexual excitement, sado-masochistic abuse, masturbation or sexual intercourse.

(4) "Nude performance" means the showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state in any play, motion picture, dance or other exhibition performed before an audience.

(5) "Erotic fondling" means touching a person's clothed or unclothed genitals, pubic area, buttocks, or if such person is a female, breast.

(6) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(7) "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(8) "Masturbation" means the real or simulated touching, rubbing or otherwise stimulating a person's own clothed or unclothed genitals, pubic area, buttocks, or, if the person is female, breast, either by manual manipulation or with an artificial instrument.

(9) "Sexual intercourse" means intercourse, real or simulated, whether genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex or between a human and an animal, or with an artificial genital.

(10) "Material" means anything tangible which is capable of being used or adapted to arouse prurient, shameful or morbid interest, whether through the medium of reading, observation, sound or in any other manner. Undeveloped photographs, molds, printing plates, and the like, may be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(11) "Performance" means any play, motion picture, dance or other exhibition performed before an audience.

(12) "Promote" means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, advertise, produce, direct or participate in.

(13) "Child pornography" means any visual depiction including any photograph, film, videotape, picture or computer-generated image or picture, whether made or produced by electronic, digital, mechanical or other means, of sexually explicit conduct, where the production of such visual depiction involves the use of a person under sixteen years of age engaging in sexually explicit conduct, provided whether the subject of a visual depiction was a person under sixteen years of age at the time the visual depiction was created is a question to be decided by the trier of fact.

(14) "Sexually explicit conduct" means actual or simulated (A) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal physical contact, whether between persons of the same or opposite sex, or with an artificial genital, (B) bestiality, (C) masturbation, (D) sadistic or

masochistic abuse, or (E) lascivious exhibition of the genitals or pubic area of any person.

(15) "Visual depiction" includes undeveloped film and videotape and data, as defined in subdivision (8) of section 53a-250, that is capable of conversion into a visual image and includes encrypted data.

§ 53a-196d. Possessing child pornography in the first degree: Class B felony

(a) A person is guilty of possessing child pornography in the first degree when such person knowingly possesses (1) fifty or more visual depictions of child pornography, or (2) one or more visual depictions of child pornography that depict the infliction or threatened infliction of serious physical injury, or (3) (A) a series of images in electronic, digital or other format, which is intended to be displayed continuously, consisting of two or more frames, or a film or videotape, consisting of two or more frames, that depicts (i) more than one child engaging in sexually explicit conduct, or (ii) more than one act of sexually explicit conduct by one or more children, or (B) any combination of a (i) series of images in electronic, digital or other format, which is intended to be displayed continuously, (ii) film, or (iii) videotape, which series, film or videotape each consists of two or more frames and depicts a single act of sexually explicit conduct by one child.

(b) In any prosecution for an offense under this section, it shall be an affirmative defense that the acts of the defendant, if proven, would constitute a violation of section 53a-196h.

(c) Possessing child pornography in the first degree is a class B felony and any person found guilty under this section shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court.

The Charge- In General

The defendant has been charged in the Information. The Information will be with you during your deliberations. As I have previously told you, the Information is not evidence, but only a statement of the charges against the defendant upon which the state proceeds to trial. It does contain some of the language from the statute that I will be defining and interpreting for you during my instructions of law.

There is one count against the defendant for you to consider. The crime charged in the Information is as follows:

Count One - Possession of Child Pornography in the First Degree - General Statutes § 53a-196d (a)(1)

You must determine if the State has proven beyond a reasonable doubt that the defendant is guilty of this offense. To the extent that there have been any changes regarding the content of the Information, it is of no concern to your deliberations. You are to consider only the specific charge submitted to you and not concern yourself with how the Information may have read when it was read to you at the start of the trial.

When you return to the courtroom, you will be asked whether the defendant is guilty or not guilty of the offense charged in the Information. You will be asked whether your verdict is unanimous.

I will now explain the substantive law that applies to the offense charged in the Information.

2.11-1/7.7-4 - Possession of Child Pornography in the First Degree

The defendant is charged in Count One with Possession of Child Pornography in the First Degree in the in violation of General Statutes § 53a-196d (a) (1). The statute defining this offense reads, in pertinent part, as follows:

> A person is guilty of possessing child pornography in the first degree when such person knowingly possesses fifty or more visual depictions of child pornography.

I will now instruct you on the elements of Possession of Child Pornography in the First Degree.

Elements of Possession of Child Pornography in the First Degree

For you to find the defendant guilty of this charge, the state must prove the following elements beyond a reasonable doubt:

Element I - Possession

The first element is that the defendant possessed child pornography.

"Child pornography" is any visual depiction, including any photograph, film, videotape, picture or computer-generated image or picture, whether made or produced by electronic, digital, mechanical or other means, of sexually explicit conduct, where the production of such visual depiction involves the use of a person under 16 years of age engaging in sexually explicit conduct, provided whether the subject of a visual depiction was a person under 16 years of age at the time the visual depiction was created is a question to be decided by the trier of fact.

"Sexually explicit conduct" means actual or simulated (A) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal physical contact, whether between persons of the same or opposite sex, or with an artificial genital, (B) bestiality, (C) masturbation, (D) sadistic or masochistic abuse, or (E) lascivious exhibition of the genitals or pubic area of any person. Nudity without more is protected expression and does not constitute sexually explicit conduct.

"Sexual intercourse" means intercourse, real or simulated, whether genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex or between a human and an animal, or with an artificial genital.

"Masturbation" means the real or simulated touching, rubbing or otherwise stimulating a person's own clothed or unclothed genitals, pubic area, buttocks, or, if the person is female, breast, either by manual manipulation or with an artificial instrument.

"Sadistic or masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

"Lascivious exhibition of the genitals or pubic area" is an exhibition that is lewd or lustful. In considering whether an image constitutes "lascivious exhibition of the genitals or pubic area" you may, but are not obligated to, consider the following: (1) whether the genitals or pubic area are the focal point of the image; (2) whether the setting of the image is sexually suggestive (i.e., a location generally associated with sexual activity); (3) whether the child is depicted in an unnatural pose or inappropriate attire considering his/her age; (4) whether the child is fully or partially clothed, or nude; (5) whether the image suggests sexual coyness or willingness to engage in sexual activity; and (6) whether the image is intended or designed to elicit a sexual response in the viewer.

A "visual depiction" includes undeveloped film and videotape and information of any kind in any form, including computer software, that is capable of conversion into a visual image and includes encrypted data. It does not matter whether the visual depictions are different images or multiple copies of the same image.

Furthermore, the state must prove beyond a reasonable doubt that the person depicted was or is an actual, real person. For example, a "virtual" or computer-generated image would not fall into this category.

The defendant must possess the child pornography; that means he must have physical possession of it or otherwise exercise dominion or control over it.

"Possession" means either having the images on one's person or otherwise having control over the images, that is, knowing where they are and being able to access them. Possession also requires knowledge. The defendant must have knowingly possessed the images. A person acts knowingly with respect to the possession of something when he is aware that he is in possession of it and is aware of the character of it. The state must prove beyond a reasonable doubt that the defendant knew that he was in possession of the images. You are referred to the Court's previous instruction entitled "Knowledge" which is incorporated here with the same force and effect.

"Possession" does not mean that one must have the illegal images upon one's person. Rather, a person who, although not in actual possession, knowingly has the power and the intention at a given time to exercise control over a thing is deemed to be in constructive possession of that item. As long as the images are or were in a place where the defendant could, if he wishes, go and get it, it is in his possession.

In this case, the state has alleged that the images that form the basis of the charge against the defendant were stored on a cell phone. If the defendant was the only person occupying the phone, then you may infer that he was in possession of the images, if such inference is reasonable under all the circumstances of the case.

If the defendant was not in exclusive possession of the phone where the illegal images were found, it may not be inferred that he knew of the presence of the illegal images and had control of them, unless there are other incriminating statements or circumstances tending to support that inference. If the evidence shows that more than one person had access to the phone, for example, that there was more than one user of the phone, then the defendant's knowledge and intent to possess the images must be established by evidence other than the mere fact that the defendant, along with others, had access to the phone where the images were found.

Element II - Knowingly

The second element is that the defendant knowingly possessed the child pornography. A person acts "knowingly" with respect to conduct or to a circumstance when he is aware that his conduct is of such nature or that such circumstance exists. You are referred to the Court's previous instruction entitled "Knowledge", which is incorporated here with the same force and effect.

The state must prove that the defendant was aware of the nature and content of the images.

Element III - Number of Depictions

The third element is that the defendant possessed fifty (50) or more still images of child pornography.

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Conclusion

In order for you to find the defendant guilty of this count, the state must prove beyond a reasonable doubt that:

1) The first element is that the defendant possessed child pornography.

and

2) The defendant knowingly possessed the child pornography.

and

2) The defendant possessed fifty or more still images of child pornography.

If you unanimously find that the state has proved all the elements of Possession of Child Pornography in the First Degree as I have instructed you beyond a reasonable doubt, your verdict would be guilty to Count One, Possession of Child Pornography in the First Degree.

If you unanimously find that the state has not proved all the elements of Possession of Child Pornography in the First Degree as I have instructed you beyond a reasonable doubt, your verdict would be not guilty to Count One, Possession of Child Pornography in the First Degree.

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