

No. 17-735

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IN THE

SUPREME COURT OF THE UNITED STATES

CHRISTOPHER G. LEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Third Circuit

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PETITIONER'S REPLY

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Christopher Lee's petition for certiorari squarely presents two important statutory construction issues concerning federal criminal laws on which the courts of appeals are divided. These issues warrant this Court's consideration. The Brief for the United States in Opposition ("BIO") denies the existence of a circuit split, but a fair reading of the case law does not bear out the government's analysis. Nor does the petition present two fact-bound questions of sufficiency of the evidence in petitioner's particular case. BIO i (counterstatement of Questions Presented), 5 (purported summary of petitioner's argument). The questions presented concern debatable issues about *what* had to be proven under each count, not whether the record evidence permitted a rational jury to find beyond a reasonable doubt the elements that all would agree must exist in order to convict. Of course, petitioner also claims that the evidence at trial was insufficient to convict him of either offense, properly construed. But it is the antecedent issues of statutory construction that this Court is asked to address, not the particulars of petitioner's case.

The reticence of the respondent to fully acknowledge the split in authority should not impede the Court's willingness to grant this petition. On a fair reading of the statutes involved and the pertinent precedent, none of the government's arguments affords a reason to deny review.

1. The Brief in Opposition fails to refute petitioner's showing that the circuits are divided on the important question of when, if ever, in federal criminal law, a solicitation can amount to an attempt.

The respondent admits, as elaborated in the petition for certiorari in this case, that the circuits are split on the first question presented, that is, whether solicitation alone can establish an attempt. “In some jurisdictions, attempt can never be based solely on a solicitation, but in others it can be.” BIO 8. This is enough reason to grant the petition. The issue is neither fresh and still percolating, nor stale and of no contemporary importance. Nothing in the facts, history or procedural posture of the case makes it an unsuitable vehicle. The petition should therefore be granted on the first Question Presented.

The government's suggestions for why the petition should nevertheless be denied are utterly unpersuasive. Despite the concession just quoted, the government emphasizes that the division of opinion does not happen to have manifested itself in appellate decisions concerning 18 U.S.C. § 1512(c), the particular attempt provision under which petitioner was convicted. BIO 8. But the government does not suggest any reason why this would matter to the resolution of the issue. It points to nothing in §1512(c) that would tend toward a different answer under that statute than would apply in federal criminal cases generally, nor is there anything. Indeed, all the statutory clues point the other way, *see* Pet. 10–12, none of which the BIO even tries to address. Compare *United States v. American Airlines, Inc.*, 743 F.2d 1114, 1120–21 (5th Cir. 1984) (discussing why, under

state of the law as of 1890, solicitation could not be excluded as a form of attempt under the Sherman Act). To the contrary, as a law enacted in 2002, the federal evidence tampering statute provides a particularly good vehicle for discussing the modern state of this long-festering issue in criminal law. And the several cases cited in the petition (at 16–18) and in the BIO (at 8–10) show that the problem recurs in a variety of related contexts.

The government asserts that petitioner took “several substantial steps to destroy evidence,” BIO 6 (echoing the court below, App. 17a), but can point to none that amounted to anything other than fruitless solicitation of his cousin. *See* Pet. 6 & n.1, 8 (detailing all pertinent evidence of record). Thus, the government’s claim that petitioner really just challenges the sufficiency of the evidence falls short, as petitioner’s sole argument regarding Count Six at this stage is that evidence of solicitation cannot amount to an attempt as a matter of law. This is not a “factbound determination” (BIO 7); it is a legal question about what sort of facts suffice to prove a federal offense of attempt. Must there be a “tangible act,” as the Tenth Circuit correctly holds (Pet. 17; BIO 9), or can it be mere words, as held below and by the Second Circuit?

The assertion that petitioner did not advance the same argument in the court of appeals (BIO 7) fails on similar grounds. It is undeniable – as is no doubt true in most of this Court’s cases – that the version of petitioner’s present argument that was advanced below was not as sophisticated in its formulation or researched in the same depth as that presented in the petition. But while framed below as an argument that petitioner had not taken any “substantial step,” the

substance of the argument before the court of appeals was the same: that petitioner's mere words, that is, petitioner's bootless solicitation of his cousin to retrieve a cell phone from the police and "wipe" its memory, could not as a matter of law amount to a prosecutable attempt. The court below rejected this argument. To say that the same "contention was never raised below and has therefore not been preserved," BIO 7, is not accurate in any meaningful way.

Closely related is the government's suggestion that the writ should not be granted on the basis that petitioner's claim would be subject only to plain error review. BIO 7, 14. While it is true that petitioner did not move for judgment of acquittal on these grounds in the trial court, and was therefore subject to plain error review on appeal, *see* Fed.R.Crim.P. 52(b), the government does not deny what the petition says on this point: that the standard of review in a criminal appeal for legal insufficiency of evidence ordinarily produces the same result, whether or not a proper motion for acquittal was lodged. Pet. 7 n.2. This Court has long acknowledged that if the record of trial, viewed in the light most favorable to the jury's verdict, could not establish the charged offense as a matter of law, then the error is plain and necessarily reversible. *See United States v. Olano*, 507 U.S. 725, 736 (1993), citing *Wiborg v. United States*, 163 U.S. 632, 659–60 (1896); accord, *Clyatt v. United States*, 197 U.S. 207, 221–22 (1905).

To the extent that the "clear or obvious" aspect of this Court's gloss on the plain error rule (*see Marcus v. United States*, 560 U.S. 258, 262 (2010), quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009))

applies to questions of federal statutory construction (BIO 14), neither of petitioner's arguments is dependent on resolving the sort of ambiguity that is "subject to reasonable dispute." *Id.* Once each statute is carefully read and dispassionately applied, the errors in the decision below will be clear. For this reason, the failure of trial counsel to make the right motion under Fed.R.Crim.P. 29 at the right time is not a good reason to pass over either of the important issues presented in the petition.

The government does not dispute a single word of petitioner's argument on the merits of his Point 1. *Compare* Pet. 10–16 *with* BIO 6–10. As Professor LaFave makes clear, by 2002 (when § 1512(c) was enacted) it was "generally accepted" in American criminal law "that a bare solicitation is not an attempt[,] because completion of the crime requires action by the person solicited." 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 11.4(b), at 221 (2d ed. 2003). *See* Pet. 14–15 (citing also the pertinent Model Penal Code discussion).¹ In light of this rule, under a statutory scheme where attempt is an offense and solicitation is not, petitioner did not commit the "attempt" crime charged in Count Six. This Court should grant the petition to ensure national uniformity and a correct application of statutory construction rules to the long-festering question of

¹ The just-issued Third Edition of the treatise reaffirms this analysis without change. *See* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 11.1(b), at 268–69 & n.38; § 11.1(c), at 274 (discussing solicitation); § 11.1(f), at 283–85 (discussing solicitation as attempt); § 11.4(b), at 307 (corresponding discussion of "proximity" in law of attempt) (3d ed. 2018).

whether an unsuccessful solicitation can amount to an “attempt” under modern federal criminal law.

- 2. This case also squarely presents the recurring issue of federal criminal statutory construction of what constitutes “using” an unwitting minor “to engage” in certain conduct “for the purpose of producing a depiction” of that conduct.**

This Court has firmly held that the First Amendment protects against enforcement of any criminal statute predicated purely on manipulating or altering a depiction of a minor for the purpose of creating the appearance of child pornography. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). The *Ashcroft* holding rests both on principles of statutory construction and on the First Amendment’s freedom of expression. The court below construed 18 U.S.C. § 2251(a), one of the statutes involved in *Ashcroft* and under which petitioner was convicted and sentenced to 15 years’ imprisonment, in a manner that undercuts if not disregards that seminal decision. Yet the BIO, like the opinion of the court below, does not even cite the *Ashcroft* precedent. This, even though petitioner was prosecuted for creating, for his own use, stories illustrated with manipulations of stills taken from otherwise lawful videos. See *United States v. Williams*, 553 U.S. 285, 288–89 (2008) (likewise uncited on this point); Pet. 20–21 (setting First Amendment context).

Instead, the government would disregard the act element of the offense, as written (“employs, uses, persuades, induces, entices, or coerces any minor to engage in, ... with the intent that such minor engage

in, any sexually explicit conduct”), and substitute bad intent alone, coupled with action taken at a later time which the charged statute does not address. *See* BIO 11–12. Thus, the government now says:

The act element of the crime was met in this case: petitioner repeatedly photographed the young docents at his museum engaging in conduct that *could be made to appear to be* lascivious, and he *then cropped some* of the photographs to emphasize the minors’ genitalia, buttocks or pubic areas, *thereby completing the creation* of sexually explicit depictions.

BIO 12 (emphasis added). This essentially accurate description of petitioner’s conduct is not encompassed by the statute, properly construed. It omits the requirement that the minors be “employ[ed]” or “use[d]” to engage in covered conduct, and also substitutes the appearance (or even *potential appearance*) of covered conduct on the part of the minor for the prohibited *actual* conduct (lascivious display *by the minor*, of which the government apparently concedes there was none). The holding of the court below, now endorsed by the government, that such misbehavior is a crime under § 2251(a), is what presents the second Question Presented in the petition.

Similarly, again as if to justify his conviction, the government asserts that “petitioner arranged for the minors to engage in conduct that allowed him to take the photographs that he cropped to create lascivious illustrations for his sexually explicit stories.” BIO 13. The government does not contend in that passage (or cite the record to show) that the “conduct” it refers to was “sexually explicit conduct” as prohibited by the

statute, because it was not. It is undisputed that the “conduct” that petitioner “arranged” for the minors to “engage in” was playing in and around a swimming pool (wearing bathing suits) in the summer. If the government claims that that conduct, coupled with an intent to manipulate depictions of the youngsters later, comes within the statute, then it is all the more clear that the petition should be granted.

Not only is the important question of statutory construction thus squarely presented in this case, but the government’s suggestions of vehicle problems are also tissue-thin. As already shown under Point 1 of this Reply (at 4–5), the failure to move for judgment of acquittal on the same grounds at trial (BIO 14) does not meaningfully detract from this Court’s ability to deal with the underlying statutory construction issue, where legal innocence of the charged offense is at issue.²

The government’s account of the conflicting case law from other Circuits (BIO 12–14) demonstrates nothing other than that any two cases can be distinguished from one another on their facts. In principle, on the other hand, the cases conflict with

² The government’s citation of *United States v. Williams*, 504 U.S. 36, 41 (1982), on this point is puzzling. See BIO 10–11, referring to BIO 7–8. In that case, the Court found that an issue not “pressed” below had nevertheless been sufficiently “passed upon” in the court of appeals to justify its full consideration and decision by this Court. The same is true here. Indeed, by carefully stating that petitioner “primarily argued” that the evidence did not establish his intent, BIO 10, and that his appellate argument “focused on intent,” BIO 11, the government effectively admits (as it must) that the issue of *actus reus* was also raised below.

the affirmance of petitioner's conviction by the court below, because the other circuits cited have reversed convictions for failure to establish that the prohibited intent coincided in time with a required act (the defendant's use of the minor to engage in sexual conduct, such as a "lascivious display of the genitals").

The Brief in Opposition fails in each of its attempts to defeat the reasons for issuing a writ of certiorari in this case. The Court should grant the petition.

CONCLUSION

For the foregoing reasons, petitioner Christopher Lee prays that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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