

No. 17-_____

IN THE SUPREME COURT OF THE UNITED STATES

JIMMY GORDON,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

- I. Does the Fifth Circuit's adoption of a non-statutory test for determining if an image contains sexually explicit conduct, which allows for a conviction based on the focus of the camera or the intent of the possessor of the image, and specifically does not require the government to prove that the image depicts a child engaged in sexually explicit conduct, violate this Court's holdings in *Ashcroft v. Free Speech Coal*, 535 U.S. 234, 250, (2002) and *New York v. Ferber*, 458 U.S. 747 (1982), which hold that, to survive the protections of the First Amendment, the images themselves must be the product of child sexual abuse, as well as the plain words of the statute, 18 U.S.C. § 2251(a) which requires that for there to be an offense the defendant must employ, use, persuade, induce, entice, or coerce any minor to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct?

PARTIES

Jimmy Gordon is the Petitioner; he was the defendant-appellant below.

The United States of America is the Respondent; it was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jimmy Gordon respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Jimmy Gordon*, No. 17-10312, and is provided in the Appendix to the Petition. [Appx. A]. The district court entered judgment on March 13, 2017, which judgment is attached as an Appendix. [Appx. B].

JURISDICTIONAL STATEMENT

The instant Petition is filed within 90 days of an opinion affirming the judgment, which was entered on January 26, 2018. *See* SUP. CT. R. 13.1. This Court's jurisdiction to grant *certiorari* is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, RULES, AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part, as follows:

Congress shall make no law . . . abridging the freedom of speech

Title 18 U.S.C. § 2251(a) of the United State Code provides, in pertinent part, as follows:

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct . . . shall be punished as provided under subsection (e) . . . if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

Title 18 U.S.C. § 2256(2)(A) of the United State Code provides, in pertinent part, as follows:

Except as provided in subparagraph (B), “sexually explicit conduct” means actual or simulated--

. . .

(v) lascivious exhibition of the genitals or pubic area of any person;

STATEMENT OF THE CASE

A. Trial Court Proceedings

An Information was filed on May 24, 2016, ostensibly charging Mr. Gordon with Sexual Exploitation of a Minor (Production of Child Pornography) in violation of 18 U.S.C. § 2251(a). Mr. Gordon pleaded guilty on June 30, 2016. A factual résumé purporting to establish a factual basis for the plea was filed on May 25, 2016. The factual résumé accurately described that one of the elements of the offense the government was required to prove was that the defendant used a minor to engage in sexually explicit conduct. However, there was no factual basis to support a finding that the child depicted in the photograph was engaged in sexually explicit conduct. Rather, the only basis to support the plea of guilty was that the image was a “[v]isual depiction of an approximate two-year old child, lying on his back, pictured nude from the belly button to the knees, with penis exposed.” The résumé described no conduct whatsoever on the part of the minor, and failed to describe any conduct that would fit the requirements of the statute. The factual résumé was the only factual basis for the plea submitted to and considered by the court.

B. Circuit Court Proceedings

On appeal, Petitioner argued that the plain words of the statute require, as an element of the offense, the “**minor to engage in . . . sexually explicit conduct . . .**” 18 U.S.C. 2251(a) (emphasis added). Petitioner further argued that the statute would be unconstitutional if it did not require the image to be of a minor engaged in sexually explicit conduct. As this Supreme Court has stated, if the image does not record sexual abuse of a minor, it is protected by the First Amendment. *See, Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 250, (2002) (striking down some provisions of the “Child Pornography Provision Act of 1996” because “[i]n contrast to the speech in *Ferber*, speech that itself is the record of sexual abuse, the CPPA prohibits speech

that records no crime and creates no victims by its production.”) In other words, to survive the protections of the First Amendment, “the images . . . themselves” must be “the product of child sexual abuse . . .” *Id.* at 249, (citing *New York v. Ferber*, 458 U.S. 747, 761 n.12 (1982)). In sum, Petitioner argued that, for an image to satisfy the statute and the Constitution, two things are necessary: the minor must engage in sexually explicit conduct, and the image must reflect that conduct.

Petitioner argued that there is no factual basis in this record to find that the **minor** was engaged in sexually explicit conduct in the image alleged in the indictment and that the district court plainly erred in not requiring a sufficient factual basis for the plea of guilty.

Despite the plain words of the statute and the limits of the First Amendment, the Fifth Circuit specifically did NOT find that there was evidence sufficient to support a finding that the image depicted a child engaged in sexually explicit conduct. Rather it determined the image sufficed to support the conviction because “the focal point of the image in question was the child’s uncovered genitalia” and because “the image was created to be sent to a third party to elicit a sexual response from the viewer.” *United States v. Jimmy Gordon*, No. 17-10312, Appx. A., p.2.

REASONS FOR GRANTING THE WRIT

This Court should use this case to solve the confusion and conflict in the circuits over the recurring, important question regarding the meaning of “lascivious,” whether courts can look beyond the four corners of an image to determine lasciviousness, and the adoption of a non-statutory test for determining if an image contains sexually explicit conduct, which allows for a conviction based on the focus of the camera or the intent of the possessor of the image, and specifically does not require the government to prove that the image depicts a child engaged in sexually explicit conduct, and which violates this Court’s holdings in *Ashcroft v. Free Speech Coal*, 535 U.S. 234, 250, (2002) and *New York v. Ferber*, 458 U.S. 747 (1982), which hold that, to survive the protections of the First Amendment, the images themselves must be the product of child sexual abuse, as well as the plain words of the statute, 18 U.S.C. § 2251(a) which in turn requires that for there to be an offense the defendant must employ, use, persuade, induce, entice, or coerce any minor to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct.

The plain words of the statute require, as an element of the offense, the “**minor to engage in . . . sexually explicit conduct . . .**” 18 U.S.C. 2251(a) (emphasis

added). The statute would be unconstitutional if it did not require the image to be of a minor engaged in sexually explicit conduct. This Court has held that if the image does not record sexual abuse of a minor, it is protected by the First Amendment. *See, Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 250, (2002) (striking down some provisions of the “Child Pornography Provision Act of 1996” because “[i]n contrast to the speech in *Ferber*, speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production.”) In other words, to survive the protections of the First Amendment, “the images . . . themselves” must be “the product of child sexual abuse . . .” *Id.* at 249, (citing *New York v. Ferber*, 458 U.S. 747, 761 n.12 (1982)). In sum, for an image to satisfy the statute and the Constitution, two things are necessary: the minor must engage in sexually explicit conduct, and the image must reflect that conduct.

But the Courts below have strayed from the plain words of the statute and the holdings in *Free Speech Coalition* and *Ferber*. Many courts apply what is known as the six factor *Dost* test. *See, e.g., United States v. Steen*, 634 F.3d 822, 826–27 (5th Cir. 2011); Kieran Dowling, *A Call to Rewrite America's Child Pornography Test: The Dost Factor Test*, 24 Seton Hall J. Sports & Ent. L. 151 (2014); *Courtade v. United States*, No. 2:15CR29, 2017 WL 6397105, at *5 (E.D. Va. Dec. 13, 2017) (listing the courts that follow the *Dost* test). Many parts of that test are not designed to help determine what the actions of the child are nor whether those actions amount to engagement in sexually explicit conduct. Rather, they look to the intent of the producer or recipient of the image. The 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 suggests 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.**

Steen, id. (emphasis added).

This Court should review this case to solve the disarray in the courts below regarding what is the test and how it should be applied. As Judge Higginbotham advised in a concurring opinion in the *Steen* case, “[t]here are many reasons to be cautious of the *Dost* factors, several of which other courts have previously identified.” *id.* at 828. As the Second Circuit stated, “[t]he term “lascivious” is not self-defining.” *United States v. Rivera*, 546 F.3d 245, 249 (2d Cir. 2008). Another court adds: “w[h]atever the exact parameters of ‘lascivious exhibition,’ we find it less readily discernable than the other, more concrete types of sexually explicit conduct listed in section 2256(2).” *United States v. Villard*, 885 F.2d 117, 121 (3d Cir.1989). And still another: “Lasciviousness is an elusive concept, and courts have struggled to develop a test for identifying it.” *United States v. Hill*, 322 F.Supp.2d 1081, 1084 (C.D.Cal.2004). The second circuit explained the confusion in the courts regarding the *Dost* test:

the *Dost* factors has provoked misgivings. *See, e.g., [United States v. Frabizio*, 459 F.3d [80,] at 88 [(1st. Cir. 2006)] (“[T]he *Dost* factors have fostered myriad disputes that have led courts far afield from the statutory language.... [T]here is a risk that the *Dost* factors will be used to inappropriately limit the scope of the statutory definition.”); *Hill*, 322 F.Supp.2d at 1085 (“While the *Dost* factors attempt to bring order and predictability to the lasciviousness inquiry, they are highly malleable and subjective in their application.”). *But see Villard*, 885 F.2d at 122 (“[T]he *Dost* factors provide specific, sensible meaning to the term ‘lascivious,’ a term which is less than crystal clear.”).

Rivera, 546 F.3d at 250–51.

The *Rivera* court explained that courts have particularly struggled with the fifth and sixth of the *Dost* factors. With regard to the sixth factor, the First Circuit has

labeled it “the most confusing and contentious of the *Dost* factors,” suggesting that it invites more questions than it answers.” *id.* citing *United States v. Amirault*, 173 F.3d 28, 34 (1st Cir.1999). The questions created by the test include:

Is this 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.)?

id., citing *Amirault*, *id.* The *Rivera* court continued:

After all, if the sixth factor were to focus on the defendant's “subjective reaction” to the photograph, as opposed to the photograph's “intended effect,” “a sexual deviant's quirks could turn a Sears catalog into pornography.” *Id.*; see also *Wiegand*, 812 F.2d at 1245 (“Private fantasies are not within the statute's ambit.”). The First Circuit has further questioned whether the inquiry should be limited to “the four corners of the image” or extend to evidence of the sexual exploitation involved in making the image. *Frabizio*, 459 F.3d at 89–90; see also *Amirault*, 173 F.3d at 34 (expressing doubt that a fact-finder should consider “the context surrounding the creation and acquisition of the photograph”).

Id., at 252.

In addition to the confusion over the *Dorst* factor themselves, there is confusion over whether it matters if the image was produced or merely possessed. *Id.*

As one commentator has noted: “[w]hile the *Dost* Factor Test is widely implemented by different circuits and supported by scholars, it has been subject to extensive criticism for its vague terms, its unintentional promotion of the sexualization of children, and its misapplication among the courts.” Dowling, *A Call to Rewrite America's Child Pornography Test: The Dost Factor Test*, 24 Seton Hall J. Sports & Ent. L. at 165. “Even worse, the circuit courts' inconsistent applications of § 2251 and the term lascivious provide little guidance for applying this statute's terms.” *Id.*

The courts have strayed so far from the plain words of the statute and the holding in *Ferber* and *Free Speech*, that the Third Circuit has held “that lascivious has nothing to do with the actions of the child, but centers on whether the photographs

serve to satisfy the sexual cravings of a voyeur.” *Id.*, citing *United States v. Knox*, 32 F.3d 733, 750 (3d Cir. 1994).

In sum:

in applying § 2251 one is left to ponder whether lascivious should be limited to describing the child (as held in [United States v. Kemmerling, 285 F.3d 644, 646 (8th Cir. 2002)]), the conduct of the child (as held *in Ferber* and argued by Days in *Knox*), or the filmmaker's intent. **Such variances in defining lasciviousness demonstrate the need for circuit courts to adopt a more cohesive and reliable standard for proscribing child pornography and prosecuting those who violate § 2251.**

Dowling, 24 Seton Hall J. Sports & Ent. L. at 167 (footnote omitted) (emphasis added).

This Court should grant certiorari in this case to provide that cohesive and reliable standard, to provide uniformity in the circuits, and to ensure the statutory and Constitutional requirements are adhered to. Therefore, this Court should grant review to correct this error.

Conclusion

Petitioner asks that this Honorable Court correct this ongoing error by granting a writ of *certiorari* in this case.

Respectfully submitted this April 26, 2018

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