No. 24A

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL INZITARI,

Applicant,

v.

STATE OF CONNECTICUT,

Respondent,

APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

TO: Justice Sonia Sotomayor, Circuit Justice for the United States Court of Appeals for the Second Circuit:

Under this Court's Rules 13.5, 22 and 30, Applicant Michael Inzitari requests an extension of twenty-one (21) days in which to file a petition for a writ of certiorari seeking review of the Connecticut Supreme Court's decision issued on January 21, 2025. *State v. Inzitari,* 351Conn. 86, 329 A.3d 215 (2025). It is attached as Appendix A, pages 1a-36a.

The applicant was convicted of possessing fifty or more images of child pornography in violation of Connecticut General Statutes §53a-196(d)(a)(1). He was

sentenced to eighteen years of incarceration. Unless extended, the time to file a petition for certiorari will expire on April 21, 2025. With the requested extension, the applicant's petition will be due on May 12, 2025. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

The State of Connecticut *does not object* to this application for extension of time being granted.

1. Following a jury trial, the applicant was convicted of possessing fifty or more visual depictions of child pornography under C.G.S § 53a-196(d)(a)(1).The Connecticut Supreme Court noted that whether an image depicts child pornography under this statute, "turns in part, on whether [it] depicts a child engaging in 'sexually explicit conduct' which [is] defined in relevant part as a 'lascivious exhibition of the genitals or pubic area of any person.'" 351 Conn. 86, n.3. At trial, one asserted defense was that at least thirteen of the fifty-seven images did not contain sexually explicit conduct because they do not depict any sexual contact and were not lascivious exhibitions.

Over defense objection, the trial court instructed the jury on the six *Dost* factors regarding "lascivious exhibitions of the genitals...." On appeal, the defendant argued that thirteen of the images failed to constitute "lascivious exhibition" and thus the evidence was insufficient to sustain the judgment. *United States v. Dost's* six factors ask:

> "Whether (1) the focal point of the visual depiction is on the child's genitalia or pubic area, (2) the setting ... is sexually suggestive,... (3) the child is

depicted in an unnatural pose, or is inappropriate attire... (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." 636 F. Supp.828, 832 (SD. Cal. 1986).

The defendant also argued that the jury should have been given specific unanimity instructions, requiring the jury to identify which of the 50-57 images it found to depict sexually explicit conduct.

2. The Connecticut Supreme Court held that "the sixth *Dost* factor is not an appropriate consideration in a possession of child pornography case" but also stated "that the first five factors can be helpful" in deciding if an image is a lascivious exhibition. After applying independent appellate review to the thirteen images in accordance with state precedent and *Miller v. California*, 413 U.S. 15, 25 (1973), it held that although two exhibits could be assumed to "constitute protected expression, at least eleven of the thirteen images... clearly go beyond the mere depiction of nudity and constitute a 'lascivious exhibition'" under the statute. *Id.*, at 102. It further stated: "Because we conclude that a total of fifty-five images in evidence support the conviction under § 53a.-196d(a)(1), the quantity element is satisfied." n.9.

Connecticut's highest court agreed with the defendant that the thirteen challenged images "clearly do not fall within" the other statutory categories of sexually explicit conduct. Connecticut's statutory definition of "sexually explicit

conduct" is "substantially similar" to the federal definition in "18 U.S.C. § 2256(2)(A) and (B) and (C) (2018)." 351 Conn. 86, n.8. After reviewing the differing approaches the federal courts have taken, it acknowledged that: [O]ther courts ... 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....)" *Inzitari*, supra, at 99 (emphasis added).

3. This case raises an important issue of constitutional law. Is Connecticut's possession of child pornography statute unconstitutional as applied when "sexually explicit conduct" can only be proven by an image being a "lascivious exhibition" and the jury is instructed on the *Dost* factors? Because the Connecticut statute appears to have been modeled on the federal statute, possession convictions based on all six of the *Dost* factors are regularly challenged in federal courts. The issue is not restricted to one state's precedent. First Amendment and Due Process Clause concerns are implicated. In 2021 the U.S. Sentencing Commission noted that over 1,900 federal defendants were sentenced for offenses entailing the definition of "sexually explicit conduct." *U.S. Sentencing Comm., Federal Sentencing of Child Pornography: Production Offenses* 17 (2021). Presently, in state or federal child pornography prosecutions where "lascivious exhibition of the genitals" is the sole means of proving "sexually explicit conduct," there is no uniformity regarding how to apply the *Dost* factors or if whether they should be applied at all. They are

disfavored in Tennessee. See, e.g., *State v. Whited*, 506 S.W.3d 516 (Tenn. 2016). In *United States v. Donoho*, 76 F.4th 588 at 601-02, Judge Easterbrook stated:

> "Laws are supposed to give notice so that people know what they may and may not do. Yet 18 U.S.C. § 2251(a), as understood [applying *Dost*], leaves everything to a jury's sensibilities. That is not how criminal law should work. A conclusion that someone is a scoundrel... is not enough for criminal liability."

In *Williams v. United States,* 5S3 U.S.285 at 296-97 (2008) Justice Scalia stated that the phrase "sexually explicit conduct" "connotes actual depiction of the sex act."

The split among the circuits and the conflicting interpretations state courts have applied strongly suggest that a petition for certiorari should be granted.

4. The applicant, Michael Inzitari, is indigent. He is incarcerated, serving the eighteen year sentence after being found guilty of possession of child pornography. The undersigned counsel is a private practitioner who has devoted much of his career to representing indigent defendants via court-appointment. Counsel is assigned counsel for his appeal. In the past two months, counsel had and continues to have, very heavy appellate and trial obligations. Most of these are assigned counsel cases. Counsel has completed much, but not all, of the legal research on the *Dost* petition issue and has not yet been able to begin researching the jury unanimity issue. In the past three weeks, counsel has declined to accept new cases in order to devote more time to researching, preparing and filing Mr.

Inzitari's petition for a writ of certiorari. Despite dedicating long hours to this project, counsel represents that the additional time is needed.

For the foregoing reasons, the applicant requests that a 21-day extension of time, to and including Monday, May 12, 2025 be granted within which he may file a petition for a writ of certiorari.

Respectfully submitted,

/s/ *Conrad Ost Seifert*
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