No. 19-428

In the Supreme Court of the United States

RYAN COURTADE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals applied the correct standard of review to the district court's determination, in rejecting petitioner's postconviction claim of actual innocence of possessing child pornography in violation of 18 U.S.C. 2252(a), that the video petitioner possessed of a nude minor included the "lascivious exhibition of the genitals or pubic area," 18 U.S.C. 2256(2)(A)(v).

2. Whether the court of appeals appropriately evaluated "the objective characteristics of the video," including petitioner's own conduct in the video, when determining that the video included the "lascivious exhibition of the genitals or pubic area."

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Va.):

United States v. *Courtade*, No. 15-cr-29 (Dec. 21, 2015)

Courtade v. *United States*, No. 16-cv-736 (Dec. 13, 2017)

United States Court of Appeals (4th Cir.):

United States v. *Courtade*, No. 18-6150 (July 3, 2019) (amended July 10, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 929 F.3d 186. The opinion of the district court (Pet. App. 21a-59a) is not reported in the Federal Supplement but is available at 2017 WL 6397105.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 2019. The petition for a writ of certiorari was filed on October 1, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Virginia, petitioner was convicted of possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2). C.A. App. A267. He was sentenced to 120 months of imprisonment, to be followed by lifetime supervised release. *Id.*

at A268-A269. Petitioner did not appeal his conviction or sentence. He later filed a motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence. See Pet. App. 21a. The district court denied his motion. *Id.* at 20a-59a. The court of appeals granted a certificate of appealability and affirmed. *Id.* at 1a-17a.

1. In August 2014, petitioner's wife called police after finding petitioner in the bedroom of his 14-year-old stepdaughter, Jane Doe, with his hands under her bedsheets.[1] Presentence Investigation Report (PSR) ¶ 8. When police arrived, they found petitioner inside his car breaking a compact disc. *Ibid.* Petitioner told police that the disc contained a video of Jane Doe naked in the shower. *Ibid.* Petitioner, a photographer with the U.S. Navy, claimed that he had told Jane Doe to take a video camera belonging to the Navy into the shower "to see if the camera was waterproof." Pet. App. 2a-3a. With petitioner's consent, police seized petitioner's computer, on which they found a 24-minute video of Jane Doe in the bathroom. *Id.* at 3a.

The video shows as follows: Petitioner turns on the camera and then positions it on the bathroom counter facing the shower. Pet. App. 3a. Petitioner tells Jane Doe that the camera is "off" and "can't record," and then leaves the bathroom, at which point Jane Doe undresses, enters the shower, and closes the shower curtain. *Id.* at 3a, 6a, 13a, 24a. Jane Doe then calls for petitioner, who enters the bathroom, hands Jane Doe the

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[1] According to an uncontested portion of the presentence report, Jane Doe told investigators that petitioner had been giving her sleeping pills at night, that she had previously woken up to find petitioner in her room at night, and that she occasionally woke up "feeling 'disgusting' in her private area." Presentence Investigation Report ¶ 10.

camera, and directs her to hold it under the water at arm's length with the back away from her. *Id.* at 3a, 26a. After doing so, Jane Doe returns the camera to petitioner, who looks at it and hands it back to Jane Doe with instructions to put it on the shower floor, which she does. *Id.* at 3a. About five minutes later, Jane Doe gives the camera back to petitioner, who asks her to rinse it off. *Id.* at 26a-27a. Each time petitioner passes the camera to Jane Doe over the shower curtain, he "angles the lens down toward Jane Doe, recording images of her entire nude body." *Id.* at 41a n.7.

Toward the end of the video, petitioner promises Jane Doe ice cream after her shower as a reward. Pet. App. 6a, 27a. Petitioner again positions the camera on the bathroom counter facing the shower before leaving the bathroom. *Id.* at 3a, 26a. Jane Doe "peeks out at the camera a few times," then gets out "at the far end of the shower, drops to the floor, and crawls out of the view of the camera below the countertop." *Id.* at 3a. She then reappears at the other side of the camera frame, dries off, and gets dressed. *Ibid.*

During the video, Jane Doe's "breasts and genitals are visible at various points." Pet. App. 3a.

2. A federal grand jury returned an indictment charging petitioner with production of child pornography, in violation of 18 U.S.C. 2251(a), and possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). Pet. App. 3a.

Petitioner initially moved to dismiss the indictment, contending that the video of Jane Doe showering did not depict a minor engaging in "sexually explicit conduct" because it did not involve, as relevant here, the "lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. 2256(2)(A)(v). Petitioner asserted that

the video "merely depicts nudity, and not sexually explicit conduct," because Jane Doe was "never involved in any provocative or sexually-themed poses or actions," and the camera was "never adjusted to aim for a specific portion or private region of [her] body." Pet. App. 4a (brackets in original). After additional legal research, however, petitioner's counsel determined that the motion to dismiss was unlikely to succeed and advised petitioner to accept a plea deal. *Id.* at 4a-5a; see C.A. App. A576-A577. Petitioner pleaded guilty to the possession charge, which had a statutory sentencing range of zero to ten years of imprisonment, in exchange for dismissal of the production charge, which had a statutory sentencing range of 15 to 30 years of imprisonment. Pet. App. 3a-5a. In his plea agreement, petitioner waived the right to appeal his conviction and any sentence within the statutory range. *Id.* at 5a.

Petitioner's advisory Sentencing Guidelines range would have been 210 to 262 months of imprisonment, but was capped by the 120-month statutory maximum that applied to the possession charge. Pet. App. 5a. The district court sentenced petitioner to 120 months of imprisonment, to be followed by supervised release for life. *Ibid.* Petitioner did not appeal his conviction or sentence. *Ibid.*

3. In December 2016, petitioner collaterally attacked his conviction in a motion under 28 U.S.C. 2255. C.A. App. A276-A288. He contended that (1) the conduct to which he pleaded guilty was not a crime because the video did not show a minor engaged in "sexually explicit conduct"; (2) his guilty plea was not voluntary and intelligent because he did not understand that his conduct was not criminal; (3) the district court violated Federal Rule of Criminal Procedure 11(b)(3) by failing

to determine the existence of a factual basis for the plea; and (4) his counsel rendered ineffective assistance by failing to explain that he had a valid defense and to consult him about an appeal. Pet. App. 5a-6a (citation omitted); see C.A. App. A279-A283.

The district court denied petitioner's motion. Pet. App. 21a-59a. The court determined that petitioner's first three grounds for relief were procedurally defaulted because petitioner had failed to file a direct appeal. *Id.* at 28a-48a. And it explained that petitioner could not satisfy the "actual innocence" exception to the procedural-default rule because the video of Jane Doe in fact depicted "sexually explicit conduct." *Id.* at 47a. Although petitioner withdrew his claim of ineffective assistance of counsel at an evidentiary hearing, the court rejected that claim anyway because it "relate[d] to the court's analysis regarding the criminality of the charged conduct." *Id.* at 50a; see *id.* at 50a-58a.

4. The court of appeals granted a certificate of appealability and affirmed. Pet. App. 1a-19a. The court concluded that petitioner could attempt to raise an actual-innocence claim, even though his guilty plea contained an appellate waiver and no intervening change in the law applied to the statute of conviction. *Id.* at 8a-9a. On the merits, however, the court rejected petitioner's argument that he was actually innocent, determining that petitioner had "failed to show that 'it is more likely than not that no reasonable juror would have convicted him.'" *Id.* at 14a (quoting *Bousley* v. *United States*, 523 U.S. 614, 623 (1998)).

The court of appeals explained that the relevant question was "whether the video of Jane Doe depicts a 'lascivious exhibition of the anus, genitals, or pubic area'" within the meaning of Section 2256(2)(A). Pet.

App. 10a. The court observed that the statute "requires more than mere nudity, because the phrase 'exhibition of the genitals or public area' . . . is qualified by the word 'lascivious.'" *Ibid.* (quoting *United States* v. *Villard*, 885 F.2d 117, 124 (3d Cir. 1989)). The court defined the term "lascivious exhibition" in 18 U.S.C. 2256(2)(A)(v) to mean "a depiction which displays or brings forth to view in order to attract notice to the genitals or pubic area of children, in order to excite lustfulness or sexual stimulation in the viewer." Pet. App. 11a (quoting *United States* v. *Knox*, 32 F.3d 733, 745 (3d Cir. 1994), cert. denied, 513 U.S. 1109 (1995)).

The court of appeals noted that many courts, when determining whether an image involves a lascivious exhibition of the genitals or pubic area, have looked to the factors outlined in *United States* v. *Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986). Pet. App. 11a. Those 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; [and]

> (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Dost, 636 F. Supp. at 832. The court stated that "the *Dost* factors have been subject to criticism over the years," particularly the "sixth factor, which potentially implicates subjective intent and asks whether the depiction is intended or designed to elicit a sexual response in the viewer." Pet. App. 11a. But the court determined that it did not need to resolve that question because it could "dispose of this case based on the objective characteristics of the video alone." *Id.* at 12a.

The court of appeals then found that "the video's objective characteristics," "irrespective of [petitioner's] private subjective intentions[,] reveal the video's purpose of exciting lust or arousing sexual desire within the plain meaning of 'lascivious exhibition.'" Pet. App. 12a. The court explained that the video depicted "not simply a young girl nude in the shower," but rather "a young girl deceived and manipulated by an adult man into filming herself nude in the shower, and methodically directed to do so in a way that ensures she records her breasts and genitals." *Id.* at 13a-14a. The court noted that petitioner directed Jane Doe "on how to hold and position" the camera and took "an active role in filming Jane Doe's nude body, at one point holding the wide-angle camera above the shower rod * * * and deliberately angling the camera lens down in such a way as to capture even more footage of Jane Doe's breasts and genitals." *Id.* at 13a. The court accordingly found that the video's objective characteristics "make clear that the video's purpose was to excite lust or arouse sexual desire in the viewer." *Id.* at 14a.

ARGUMENT

Petitioner asserts (Pet. 10-11) that the court of appeals should have excused his procedural default because he is actually innocent of the possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). In particular, he contends (Pet. 12-31) that the court erred in applying a deferential standard of review to the district court's finding that the video of Jane Doe included a "lascivious exhibition" under 18 U.S.C. 2256(2)(A)(v), and in considering evidence of subjective intent to support a finding of lasciviousness. The court of appeals did not expressly resolve either issue that petitioner raises, and it correctly rejected petitioner's claim of actual innocence. And although petitioner identifies some disagreement among the courts of appeals on the questions that the petition purports to present, he significantly overstates the extent of any disagreement. In any event, this case would be a poor vehicle for considering either question, both because the court of appeals did not resolve those questions and because they were not outcome-determinative.

1. a. Where a defendant fails to raise a claim on direct review, he may not raise that claim on collateral review unless he shows both "cause" and "actual prejudice" or shows that he is "actually innocent" of the offense. *Bousley* v. *United States*, 523 U.S. 614, 622-623 (1998) (citations and internal quotation marks omitted). To establish actual innocence, a defendant "must demonstrate that, 'in light of all the evidence,' 'it is more likely than not that no reasonable juror would have convicted him.'" *Id.* at 623 (quoting *Schlup* v. *Delo*, 513 U.S. 298, 327-328 (1995)). The prisoner must prove his "factual innocence, not [the] mere legal insufficiency" of his conviction. *Ibid.*; see *House* v. *Bell*, 547 U.S. 518, 538

(2006) (emphasizing that the *Schlup* standard is demanding and seldom met). And "where the Government has forgone more serious charges in the course of plea bargaining, petitioner's showing of actual innocence must also extend to those charges." *Bousley*, 523 U.S. at 624.

When considering a claim of actual innocence, the courts of appeals review the district court's underlying factual findings for clear error and its ultimate conclusion regarding actual innocence de novo. See, *e.g.*, *Nooner* v. *Hobbs*, 689 F.3d 921, 933 (8th Cir. 2012), cert. denied, 571 U.S. 831 (2013); *Doe* v. *Menefee*, 391 F.3d 147, 163 (2d Cir. 2004), cert. denied, 546 U.S. 961 (2005); *United States ex rel. Bell* v. *Pierson*, 267 F.3d 544, 551-552 (7th Cir. 2001), cert. denied, 535 U.S. 999 (2002); *O'Dell* v. *Netherland*, 95 F.3d 1214, 1250 (4th Cir. 1996) (en banc), aff'd on other grounds, 521 U.S. 151 (1997).

b. Petitioner's "actual innocence" claim relates to his guilty plea to possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). Pet. App. 3a, 5a. Section 2252(a)(4)(B) punishes "knowingly possess[ing]" any visual depiction produced using materials that have been transported in interstate commerce that depicts "a minor engaging in sexually explicit conduct." 18 U.S.C. 2252(a)(4)(B). The statute defines the term "sexually explicit conduct" to include "actual or simulated * * * (i) sexual intercourse * * * ; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area" of a minor. 18 U.S.C. 2256(2)(A).[2]

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[2] In December 2018, Congress added the word "anus" to the definition of sexually explicit conduct in Section 2256(2)(A)(v). Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299, § 7, 132 Stat. 4389.

This case involves the last category: "lascivious exhibition of the genitals or pubic area" of a minor. 18 U.S.C. 2256(2)(A)(v). The word "lascivious" means "[i]nciting to lust or wantonness." 8 *Oxford English Dictionary* 667 (2d ed. 1989) (def. b); see *Webster's Third New International Dictionary* 1274 (2002) (def. 2) ("tending to arouse sexual desire"); Pet. App. 10a (citing similar definitions). The courts of appeals generally agree that whether an image includes a lascivious exhibition is a question for the factfinder, to be determined under an objective standard through the application of common sense. See *United States* v. *Frabizio*, 459 F.3d 80, 85 (1st Cir. 2006) ("Lascivious is a 'commonsensical term,' and whether a given depiction is lascivious is a question of fact for the jury.") (citation omitted); see also, *e.g.*, *United States* v. *Amirault*, 173 F.3d 28, 34 (1st Cir. 1999); *United States* v. *Wiegand*, 812 F.2d 1239, 1244 (9th Cir.), cert. denied, 484 U.S. 856 (1987). And where a jury has found a visual depiction to be lascivious, the courts of appeals review the legal question of "whether a rational jury could have found beyond a reasonable doubt" that the materials depicted a "lascivious exhibition" of the genitals or pubic area. *United States* v. *Wells*, 843 F.3d 1251, 1253 (10th Cir. 2016), cert. denied, 138 S. Ct. 61 (2017); see *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979).

2. Petitioner first contends (Pet. 12-21) that the court of appeals erred by not reviewing de novo the question whether the video of Jane Doe depicted a "lascivious exhibition" of the genitals. That contention is incorrect.

a. As an initial matter, petitioner errs by contending (Pet. 18-21) that the court of appeals applied clear-error review to the district court's determination that the

video of Jane Doe included a lascivious exhibition of her genitals. As petitioner recognizes (Pet. 12), although the court of appeals observed that it reviewed the district court's "factual findings" for clear error, Pet. App. 12a n.5, it never stated what standard of review it was applying to petitioner's overarching claim that he was actually innocent of possessing child pornography. But petitioner offers no reason to assume that the court of appeals failed to follow circuit precedent, which called for de novo review of the ultimate determination of actual innocence. See *O'Dell*, 95 F.3d at 1250. The court said nothing to suggest that it deferred to the district court's ultimate determination; rather, it found that "[o]n this record, * * * [petitioner] has failed to show that 'it is more likely than not that no reasonable juror would have convicted him.'" Pet. App. 14a (quoting *Bousley*, 523 U.S. at 623).

Petitioner asserts (Pet. 14) that the court of appeals must have conducted clear-error review because it did not "independently review the video." But the parties did not dispute what the video actually depicted. The record included both a detailed description of the video and a transcript that described in detail what actions were visible. See Pet. App. 23a-24a (description of video); *id.* at 24a-27a (transcript); see also *id.* at 6a (describing court of appeals' review of the transcript). The court's determination that the agreed-upon facts failed to establish petitioner's actual innocence was not inconsistent with de novo review. See *id.* at 9a-15a.

In any event, petitioner is mistaken that de novo review is "required" whenever an appellate court reviews whether a visual depiction shows a "lascivious exhibition." Pet. 19; see Pet. 18-21. Petitioner first contends (Pet. 19) that the lasciviousness determination is a

mixed question of law and fact that "requires a court to interpret statutory language to determine what kinds of acts Congress meant to include and exclude." That contention conflates the process of *interpreting* a statute with the need to *apply* the statutory standard to specific facts. Courts should review de novo the meaning of the term "lascivious exhibition." But the process of actually applying that term, as interpreted by the courts, to a particular set of facts is a factual determination that is ordinarily left to the finder of fact. Unlike, for example, probable cause and reasonable suspicion, which are "fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed," *Ornelas* v. *United States*, 517 U.S. 690, 696 (1996), "the term 'lascivious' is sufficiently well defined to provide persons 'of reasonable intelligence, guided by common understanding and practices,' notice of what is permissible and what is impermissible." *Frabizio*, 459 F.3d at 85 (quoting *United States* v. *Freeman*, 808 F.2d 1290, 1292 (8th Cir.), cert. denied, 480 U.S. 922 (1987)); see *New York* v. *Ferber*, 458 U.S. 747, 765 (1982) (observing that "[t]he term 'lewd exhibition of the genitals' is not unknown in this area"). Because the term does not require judges to constantly "expound on the law," *U.S. Bank Nat'l Ass'n* v. *Village at Lakeridge, LLC*, 138 S. Ct. 960, 967 (2018), de novo review is not required.

Petitioner also contends (Pet. 19) that de novo review is required because "this case implicates the First Amendment." That contention is likewise incorrect. In cases addressing First Amendment claims involving categories of unprotected speech, this Court has often "conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters

of any unprotected category within acceptably narrow limits." *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 505 (1984). Petitioner identifies (Pet. 19) a First Circuit decision, *United States* v. *Amirault*, *supra*, that relied on *Bose Corporation* to apply de novo review to a sentencing court's determination that a defendant trafficked in "sexually explicit conduct." 173 F.3d at 31. In that decision, the First Circuit stated that, "[i]n determining that the photograph contains a lascivious exhibition of the genitals, the district court helped define the limits of the largely unprotected category of child pornography." *Id.* at 33. The court concluded that it "must review the district court's determination *de novo* to ensure that the First Amendment has not been improperly infringed." *Ibid.* But to the extent *Amirault* concluded that de novo review is necessary even when the defendant has not raised an as-applied First Amendment challenge, it was incorrect.

In *Ferber*, 458 U.S. at 761, this Court held that child pornography is not protected by the First Amendment, regardless of whether it is obscene under the standard set forth in *Miller* v. *California*, 413 U.S. 15 (1973). See *Ashcroft* v. *Free Speech Coal.*, 535 U.S. 234, 240 (2002) (observing that "under *Ferber*, pornography showing minors can be proscribed whether or not the images are obscene"). The Court explained that prohibitions on child pornography are constitutional so long as "the conduct to be prohibited [is] adequately defined by the applicable * * * law, as written or authoritatively construed"; the prohibited material "involve[s] live performance or photographic or other visual reproduction of live performances"; and criminal liability is not "imposed without some element of scienter on the part of the defendant." *Ferber*, 458 U.S. at 764-765.

The federal child-pornography statutes "adequately define[ ]" the "conduct to be prohibited." *Ferber*, 458 U.S. at 764. They define "sexually explicit conduct" to include, as relevant here, the "lascivious exhibition of the genitals or pubic area" of a minor. See 18 U.S.C. 2252(a)(4)(B) and 2256(2)(A)(v). That term is analogous to the term that *Ferber* found constitutionally sufficient —"lewd exhibition of the genitals." *Frabizio*, 459 F.3d at 84; see *id.* at 85 (noting that the courts of appeals "have uniformly treated the terms 'lewd' and 'lascivious' as materially equivalent"); see also *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 78-79 (1994) (rejecting as "insubstantial" the argument that that 18 U.S.C. 2256 (1994) is unconstitutionally vague because "Congress replaced the term 'lewd' with the term 'lascivious' in defining illegal exhibition of the genitals of children"). But *Ferber* did not hold that lewdness (or lasciviousness) serves as the dividing line between protected and unprotected speech and that any non-lascivious exhibitions of minors' genitalia constitute protected speech. As a result, the proper application of the term "lascivious exhibition" does not necessarily define the limits of the First Amendment.

Moreover, *Ferber* did not suggest that de novo review was required in the absence of a First Amendment challenge. To the contrary, *Ferber* observed that "no independent examination of the material [wa]s necessary" because the defendant made "no argument" that the films he sold did "not fall squarely within the category of activity we have defined as unprotected." 458 U.S. at 774 n.28. Consistent with *Ferber*, courts of appeals can ensure that First Amendment interests are adequately protected by reviewing de novo any as-applied First Amendment challenge to child-pornography

charges. But where the defendant has not raised a constitutional claim, de novo review is not required.

b. Petitioner contends (Pet. 12) that the decision below "deepens a longstanding, recognized conflict" regarding the standard of review that applies to a district court's determination that a visual depiction of a minor's genitals or pubic area is lascivious. But petitioner significantly overstates the extent of any conflict.

The courts of appeals generally agree that whether a given image includes a "lascivious exhibition" of the genitals or pubic area is a question of fact that must be submitted to the jury at trial. See, *e.g.*, *United States* v. *Russell*, 662 F.3d 831, 843 (7th Cir. 2011) ("[T]he question is left to the factfinder to resolve, on the facts of each case, applying common sense."), cert. denied, 566 U.S. 914 (2012); *Frabizio*, 459 F.3d at 85 ("[W]hether a given depiction is lascivious is a question of fact for the jury."); *United States* v. *Rayl*, 270 F.3d 709, 714 (8th Cir. 2001) ("[T]he question whether materials depict 'lascivious exhibition of the genitals,' an element of the crime, is for the finder of fact."); *United States* v. *Arvin*, 900 F.2d 1385, 1390 (9th Cir. 1990) ("There is a consensus among the courts that whether the item to be judged is lewd, lascivious, or obscene is a determination that lay persons can and should make."), cert. denied, 498 U.S. 1024 (1991). When reviewing the sufficiency of the evidence, the courts of appeals have accordingly asked "whether a rational jury could have found beyond a reasonable doubt" that the materials depicted a "lascivious exhibition" of the genitals or pubic area. *Wells*, 843 F.3d at 1253; see, *e.g.*, *United States* v. *Franz*, 772 F.3d 134, 157-158 (3d Cir. 2014); *United States* v. *Sheldon*, 755 F.3d 1047, 1051 (9th Cir.), cert. denied, 135 S. Ct. 203 (2014); *United States* v. *Grzybowicz*, 747 F.3d 1296,

1305-1306 (11th Cir. 2014); *United States* v. *Stewart*, 729 F.3d 517, 527 (6th Cir. 2013), cert. denied, 571 U.S. 1183 (2014); *United States* v. *Rivera*, 546 F.3d 245, 250 (2d Cir. 2008), cert. denied, 555 U.S. 1204 (2009); *United States* v. *Hill*, 142 Fed. Appx. 836, 837 (5th Cir. 2005) (per curiam).[3]

Any deviation from that general rule is limited. Contrary to petitioner's contention (Pet. 13), the Third Circuit does not apply de novo review to the question whether a particular image includes a "lascivious exhibition." Instead, that court has stated that "*the meaning of the statutory phrase* 'lascivious exhibition' * * * poses a pure question of law" over which it exercises "plenary" review. *Knox*, 32 F.3d at 744 (emphasis added). That statement is consistent with the ordinary principle that matters of statutory interpretation are reviewed de novo—a point on which the other courts of appeals agree. See, *e.g.*, *Rayl*, 270 F.3d at 714 ("[T]he meaning of 'lascivious exhibition of the genitals' is an issue of law."); *Frabizio*, 459 F.3d at 83 ("[O]ur review of the meaning of the statute is de novo.").

As petitioner notes (Pet. 13), the Tenth Circuit has stated in an unpublished decision that the "lascivious exhibition" question is a mixed question of law and fact that should be reviewed de novo on appeal from a bench trial. See *United States* v. *Helton*, 302 Fed. Appx. 842,

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[3] The Fifth Circuit has stated that it "appl[ies] the clear error standard to the jury's conviction so far as it indicates a factual finding that the image was a lascivious exhibition of the genitals." *United States* v. *Steen*, 634 F.3d 822, 826 (2011) (per curiam). The clear-error standard is ordinarily applied to findings of fact by a judge, not by a jury. But the Fifth Circuit's formulation nevertheless supports the broader rule that the question whether something is a "lascivious exhibition" is primarily a question for the finder of fact.

846 (2008), cert. denied, 556 U.S. 1199 (2009). But because that decision is unpublished, it is not binding precedent and cannot establish a circuit conflict.

That leaves only the First Circuit, which petitioner correctly observes (Pet. 12-13) has reviewed the issue of lasciviousness de novo when considering whether a search warrant application established probable cause and whether a sentencing court properly imposed a Sentencing Guidelines enhancement. See *United States* v. *Brunette*, 256 F.3d 14, 17 (1st Cir. 2001); *Amirault*, 173 F.3d at 30-33. Some tension exists between these decisions and decisions from the Seventh and Ninth Circuits, which have reviewed for clear error a determination that images were lascivious in similar contexts. See *United States* v. *Schuster*, 706 F.3d 800, 806 (7th Cir.), cert. denied, 569 U.S. 1036 (2013) (Sentencing Guidelines); *Wiegand*, 812 F.2d at 1244 (search warrant). But any disagreement is far narrower than petitioner suggests.

c. In any event, this case would be a poor vehicle for resolving any disagreement among the courts of appeals, for several reasons. First, as discussed above, the court of appeals never expressly discussed the applicable standard of review. See pp. 10-11, *supra*. Second, this case arises in the context of a claim of actual innocence, and none of the court of appeals decisions applying de novo review have arisen in that context, where the standard to establish a defendant's eligibility for relief is significantly more demanding. In particular, the burden is on the defendant to prove his factual innocence to the district court; the government need not reestablish the guilt found in the original proceedings. See Pet. App. 9a. Third, petitioner's claim that he is actually innocent of possessing child pornography would

fail under either a clear-error or de novo standard. The facts in this case—which petitioner does not dispute—demonstrate that the video of Jane Doe did not involve mere non-sexual nudity, but rather the "lascivious exhibition" of her genitals and pubic area. The video records petitioner tricking Jane Doe into recording herself, see *id.* at 6a, 25a-26a, directing her to place the camera in locations where it could capture her breasts and pubic area, see *id.* at 3a, 26a, 40a, and deliberately angling the camera to record her nude body, *id.* at 13a, 43a. Under any standard of review, the video includes a lascivious exhibition of Jane Doe's genitals and pubic area.

3. Petitioner separately contends (Pet. 22-31) that the court of appeals erred by analyzing petitioner's subjective intent in determining that the video of Jane Doe included a lascivious exhibition. That contention is also incorrect.[4]

a. Contrary to petitioner's claim (Pet. 28), the court of appeals did not rely on petitioner's "subjective" motive or "intent" in determining that the video of Jane Doe involved a lascivious exhibition of the genitals or pubic area. Indeed, the court specifically disclaimed any reliance on subjective intent. See Pet. App. 12a ("In this case, we need not venture into the thicket surrounding the *Dost* factors or define the parameters of any subjective-intent inquiry, because we can dispose of this case based on the objective characteristics of the video alone."). The court instead determined that "the video's

[4] This Court has recently denied certiorari to several petitions presenting similar issues. See *Wells* v. *United States*, 138 S. Ct. 61 (2017) (No. 16-8379); *Miller* v. *United States*, 137 S. Ct. 2291 (2017) (No. 16-6925); *Holmes* v. *United States*, 137 S. Ct. 294 (2016) (No. 15-9571). It should follow the same course here.

objective characteristics—the images and audio contained within its four corners, irrespective of [petitioner's] private subjective intentions—reveal the video's purpose of exciting lust or arousing sexual desire within the plain meaning of 'lascivious exhibition.'" *Ibid.*

Petitioner contends (Pet. 11) that, despite the court of appeals' representations to the contrary, the court in fact "examined [his] subjective intent" by "relying primarily on the parts of the video highlighting [his] motive." But the parts of the video that demonstrated petitioner's motive to viewers were directly relevant to show that the video was objectively lascivious—that is, "[i]nciting to lust or wantonness," 8 *Oxford English Dictionary* at 667, or "tending to arouse sexual desire," *Webster's Third New International Dictionary* at 1274. The video did not simply depict a teenager showering. Instead, it depicted an adult directing a minor to aim the camera at her genitals, tricking her into believing the camera was not on, actually aiming the camera at her genitals himself while separated from her by only a shower curtain, and promising her a reward of ice cream. See Pet. App. 12a-13a. Those objective facts were relevant to whether the video would tend to arouse lust or sexual desire, regardless of the extent to which they also showed petitioner's subjective intent. See *id.* at 12a (explaining that "the video contains extensive nudity—including shots of her breasts and genitals—that is entirely the product of an adult man's deceit, manipulation, and direction as captured in the video").

b. In any event, petitioner is mistaken in his contention that any consideration of the creator's intent is improper when determining whether a video or image includes a lascivious exhibition. The primary focus in

evaluating the legality of an image turns on the "overall content of the visual depiction." *Dost*, 636 F. Supp. at 832. But a factfinder may treat as relevant the surrounding circumstances and context to the extent that they provide evidence of a creator's intent to arouse sexual desire. The creation of an image or video for a particular purpose (here, sexual arousal) makes it more likely that the resulting image or video will be one that tends to achieve that purpose. Evidence of intent and surrounding circumstances can thus "help to place an image in context" and separate the production of innocent images from exploitative ones. *Russell*, 662 F.3d at 884. Such context is particularly useful because "the type of sexuality encountered in pictures of children * * * often is imposed upon [the images] by the attitude of the viewer or photographer," rather than the subject, as children "are not necessarily mature enough to project sexuality consciously." *Arvin*, 900 F.2d at 1391.

Permitting a factfinder to consider circumstances surrounding the creation of videos and a creator's intent in determining whether images of children's genitals or pubic areas fall under the statute accords with the purposes that Congress intended the child-pornography statute to serve. As this Court has explained, images and videos of children constitute "a permanent record of the child[]'s participation" in the production of sexually oriented material, and the harm from such images arises in part from "their circulation." *Ferber*, 458 U.S. at 759. Those injurious effects—the exploitation and later humiliation of the children depicted in pornographic productions—have long been a focus of congressional concern. See, *e.g.*, S. Rep. No. 169, 98th Cong., 1st Sess. 6-7 (1983); H.R. Rep. No. 536, 98th Cong., 1st Sess. 2-3 (1983). Where, as here, a child

learns that her stepfather has produced an image depicting her nude for the purpose of furthering a sexual desire, the child suffers all the psychological harm of being exploited as a sexual object. That concern is especially acute when the perpetrator is a member of the victim's family. In addition, images or videos of naked children created to satisfy a pedophile's sexual desires are more likely than innocent images to be circulated on child-pornography-distribution networks. That prospect, in turn, increases the likelihood of later humiliation for the child.

c. Petitioner contends (Pet. 22) that review is warranted to resolve disagreement among the courts of appeals about "whether and to what extent subjective intent may be considered" when determining whether an image contains a "lascivious exhibition." But even if the decision below implicated that issue, any disagreement is either immaterial or unclear.

At least seven circuits—including the Second, Third, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits—have determined that a factfinder may consider the context surrounding the creation of an image as bearing upon whether a depiction of a minor's genitals or pubic area is lascivious. See, *e.g.*, *Rivera*, 546 F.3d at 250 (2d Cir.) (stating that "these images have context that reinforces the lascivious impression" when the creator "composed the images in order to elicit a sexual response in a viewer"); *United States* v. *Larkin*, 629 F.3d 177, 184 (3d Cir. 2010) (finding images lascivious in part because the defendant "engineered [the image] for the purpose of eliciting a sexual response"), cert. denied, 565 U.S. 908 (2011); *United States* v. *Brown*, 579 F.3d 672, 683 (6th Cir. 2009) ("[W]e find that it is appropriate

to apply a 'limited context' test that permits consideration of the context in which the images were taken."), cert. denied, 558 U.S. 1133 (2010); *Schuster*, 706 F.3d at 808 (7th Cir.) (noting that the defendant's "sexual interest sheds light on why [he] took the photograph of a nude boy's genitals, and whether the image is sexually suggestive"); *United States* v. *Johnson*, 639 F.3d 433, 441 (8th Cir. 2011) (relying on a defendant's confession about his purpose in assessing lasciviousness); *Arvin*, 900 F.2d at 1391 (9th Cir.) ("The motive of the photographer in taking the pictures * * * may be a factor which informs the meaning of 'lascivious.'"); *United States* v. *Wolf*, 890 F.2d 241, 247 (10th Cir. 1989) ("[L]asciviousness is not a characteristic of the child photographed but of the exhibition that the photographer sets up for an audience that consists of himself or likeminded individuals.").

Petitioner asserts (Pet. 23) that the Eighth Circuit has a different approach, under which it "look[s] only for objective indicia of intent." Petitioner relies on *United States* v. *Kemmerling*, 285 F.3d 644, 646, cert. denied, 537 U.S. 860 (2002), in which the Eighth Circuit stated that "the relevant factual inquiry * * * is not whether the pictures in issue appealed, or were intended to appeal, to [a defendant's] sexual interests but whether, on their face, they appear to be of a sexual character." But the Eighth Circuit has more recently clarified that *Kemmerling* does not prevent a factfinder from "consider[ing] whether [the defendant], as the producer or editor of the videos, intended for the depictions to be sexual." *United States* v. *Petroske*, 928 F.3d 767, 773 (2019). As *Kemmerling* recognized, the question is whether the visual depictions "are designed to appeal to the sexual appetite." *Kemmerling*, 285 F.3d

at 646. And "statements made by the producer about the images are relevant in determining whether the images were intended to elicit a sexual response in the viewer." *Johnson*, 639 F.3d at 441. As a result, no material difference exists between the Eighth Circuit's approach and that of the other courts of appeals discussed above.

Petitioner also relies (Pet. 23) on the First Circuit's decision in *Amirault*, which stated that "the focus should be on the objective criteria of the photograph's design" and expressed "serious doubts" about whether "focusing upon the intent of the deviant photographer is any more objective than focusing upon a pedophile-viewer's reaction" because, "in either case, a deviant's subjective response could turn innocuous images into pornography." 173 F.3d at 34-35. Those statements in *Amirault* do not create any conflict, as a subsequent First Circuit decision has made clear. To begin with, *Amirault* noted that its expression of doubt concerning the relevance of a creator's intent was dicta. See *id.* at 34 (observing that "the circumstances of the photograph's creation [we]re unknown" and that an inquiry into those circumstances accordingly "would not work in this case"); see also *Frabizio*, 459 F.3d at 89 n.15 (noting that in *Amirault* "the circumstances of the photograph's creation [were] unknown") (citation omitted). Moreover, the First Circuit has since explained in *United States* v. *Frabizio*, *supra*, that "*Amirault* did not express a general rule limiting the question of lasciviousness to the four corners of the photograph" and that "[t]he issue of the four corners rule, and even of what it means, has not been decided by this circuit." *Frabizio*, 459 F.3d at 89 & n.15. The court acknowledged "arguments going different ways" on the issue

and found it unnecessary to determine which side was correct. *Id.* at 89. *Frabizio* thus demonstrates that *Amirault* did not foreclose consideration of a creator's intent. Accordingly, petitioner has not demonstrated a disagreement among the courts of appeals.[5]

d. In any event, this case would be a poor vehicle for resolving the question. First, as already explained, the court of appeals expressly declined to weigh in on the issue. See Pet. App. 12a. Instead, it determined that the video of Jane Doe includes a "lascivious exhibition" even under an objective test. *Id.* at 12a-14a. That fact-specific determination does not warrant this Court's review.

Second, even if the court of appeals had applied an impermissibly subjective test, a favorable decision on the question presented would not affect petitioner's sentence because petitioner cannot satisfy the other threshold requirements for demonstrating actual innocence. In particular, he cannot show that he is actually innocent of the more serious charge of attempting to produce child pornography, which the government dismissed as part of his plea agreement. See *Bousley*, 523 U.S. at 624 ("[W]here the Government has forgone more serious charges in the course of plea bargaining, petitioner's showing of actual innocence must also extend to those charges."). The production-of-child-

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[5] Petitioner also contends (Pet. 24) that "state high courts have * * * disagreed about whether to consider motive or intent when applying state statutes using similar or identical language." But the proper interpretation of the term "lascivious exhibition" in a federal statute is not binding on state courts' interpretation of similarly worded state laws. As a result, even if this Court were to grant review in this case, its decision would not resolve the purported conflict in state courts.

pornography count in this case charged that petitioner "did *and attempted to* knowingly employ, use, persuade, induce, entice, and coerce Jane Doe, a minor, to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct" in violation of 18 U.S.C. 2251(a) and (e). C.A. App. A14 (emphasis added). Even if petitioner were correct that the video did not depict a lascivious exhibition of Jane Doe's genitals or pubic area because the camera was obscured or did not specifically focus on those areas, see Pet. 16-17, he cannot show that he was actually innocent of *attempting* to create a lascivious exhibition. He directed Jane Doe to position the camera—and even positioned it himself—in a way designed to capture her genitals. See Pet. App. 3a, 13a, 26a. Because petitioner cannot show that he is actually innocent of the more serious charge of attempted production of child pornography, he cannot seek to take advantage of the actual-innocence exception to excuse his procedural default.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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