Clear Error or De Novo—*State v. Whited*: Did the Court Inadvertently Introduce a New Appellate Standard of Review in Tennessee in Its Opinion in a Child Pornography Case?

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Child pornography first received national attention in the late 1970s, and Congress and state legislatures reacted by criminalizing the production of pornography involving children.[1] In *New York v. Ferber*, the Supreme Court of the United States upheld one of those new state statutes and found that "the States are entitled to greater leeway in the regulation of pornographic depictions of children" because of the important objective of preventing "sexual exploitation and abuse of children."[2] Modeled after the statute upheld in *Ferber*, the Tennessee child pornography statute criminalizes the use of a minor in a production that includes the minor engaging in sexual activity;[3] however, Tennessee's statute is broader than both the statute

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1. *See* New York v. Ferber, 458 U.S. 747, 749 (1982) (noting the "serious national problem" of the "exploitative use of children in the production of pornography" and the legislation in Congress and forty-seven states).

2. *Id.* at 757.

3. TENN. CODE ANN. § 39-17-1005 (2014). Tennessee also has similar statutes for sexual exploitation and aggravated sexual exploitation. *See* TENN. CODE ANN. §§ 39-17-1003 to -1004 (2014).

upheld in *Ferber* and the federal child pornography statute.[4] In the aftermath of *Ferber*, courts looked for objective factors by which to judge whether the subject child pornography constitutes a minor engaging in sexual activity, and one federal district court, in its decision in *United States v. Dost*,[5] set out six factors that numerous courts around the country subsequently used.[6] In 2016, the Tennessee Supreme Court reviewed the convictions of Thomas Whited ("Defendant"), who was prosecuted and convicted under Tennessee Code Annotated section 39-17-1005 for videotaping his twelve-year-old daughter and her teenage friend on numerous occasions with a hidden camera while they were undressing in a bathroom or bedroom.[7] The court reversed the convictions and *held*: (1) that the lower courts should not use the *Dost* factors; (2) that the subjective intent of a defendant is not relevant in evaluating whether the material depicts a lascivious exhibition; (3) that the courts should review a jury's finding of a lascivious exhibition de novo; and finally, (4) using that standard of review, that the videos do not depict a lascivious exhibition. *State v. Whited*, 506 S.W.3d 416, 418–19, 427 (Tenn. 2016). In deciding what standard of review to apply, the court looked to federal precedent and debated between applying a clear error standard and de novo standard.[8] Ultimately, the court decided to apply a de novo standard to this case.[9] In even considering a clear error standard, however, the court introduced a new standard of review into Tennessee jurisprudence, as the Tennessee appellate courts have never before applied a clear error standard. This introduction is particularly

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4. *Compare* TENN. CODE ANN. § 39-17-1002(8)(G) (2014) ("Sexual activity," is defined as the "[l]ascivious exhibition of the female breast or the genitals, buttocks, anus or pubic or rectal area of any person."), *with* 18 U.S.C. § 2256 (2012) ("'[S]exually explicit conduct' means actual or simulated . . . lascivious exhibition of the genitals or pubic area of any person . . . ."), *and* Ferber, 458 U.S. at 751 (quoting the statute, which defined "sexual conduct" as "the lewd exhibition of the genitals").

5. 636 F. Supp. 828, 832 (S.D. Cal. 1986).

6. *See* State v. Whited, 506 S.W.3d 416, 433 (Tenn. 2016) (citing numerous federal and state courts, including Tennessee appellate courts, which have relied on the *Dost* factors).

7. *Id.* at 418.

8. *Id.* at 425–27.

9. *Id.* at 427.

noteworthy for the court did not even acknowledge its departure from Tennessee's current jurisprudence.[10]

The federal courts are currently split over whether to apply a clear error standard of review or a de novo standard of review in child pornography cases; before discussing the split, however, it is important to understand the history of child pornography statutes in the United States, their exception from First Amendment protection, and the Tennessee child pornography statutes. Building on the obscenity exception to the First Amendment,[11] the U.S. Supreme Court created a broader exception for the criminalization of child pornography when it examined New York's child pornography statute in *New York v. Ferber*.[12] Recognizing the need to protect "the welfare of children," the Supreme Court held that, for child pornography, "[a] trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole."[13] Although broader than the obscenity exception, the Court held that "[t]he category of 'sexual conduct' proscribed must also be suitably limited and described."[14] The New York statute criminalized the use of a child in a performance that

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10. See, *id.* at 425–27, where the court discusses what standard of review to apply but fails to acknowledge that Tennessee courts have never applied a clear error standard of review.

11. The Supreme Court has long recognized an obscenity exception to the First Amendment, but the Court laid out the modern standard for that exception in *Miller v. California*. 413 U.S. 15 (1973). The Court announced the standard for defining and evaluating obscene materials:

> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citations omitted).

12. 458 U.S. 747, 750–52 (1982). At the time the Court decided *New York v. Ferber*, twenty states, including New York, had statutes criminalizing "the distribution of material depicting children engaged in sexual conduct without requiring that the material be legally obscene." *Id.* at 749.

13. *Id.* at 764.

14. *Id.*

includes "the lewd exhibition of the genitals" by the child.[15] The Court upheld this phrasing under the newly announced standard for child pornography.[16]

After the decision in *Ferber*, the Tennessee legislature enacted Tennessee Code Annotated section 39-17-1005 and modeled it after the statute the Court upheld in *Ferber*. It states that "[i]t is unlawful for a person to knowingly . . . use . . . a minor . . . in the production of, acts or material that includes the minor engaging in: (1) Sexual activity,"[17] defined as the "[l]ascivious exhibition of the female breast or the genitals, buttocks, anus or pubic or rectal area of any person."[18] Although the Tennessee statute uses "lascivious" instead of "lewd," the change is minor because courts have almost universally defined "lascivious" synonymously with "lewd," which means tending to excite lust or indecent.[19] The Tennessee courts define it that way as well: "'[l]ascivious' means tending to excite lust; lewd; indecent."[20]

Since the creation of child pornography statutes and the decision in *Ferber*, the federal circuit courts have split on what standard of review to apply to the lower courts' determination of whether a particular image or video is a lascivious exhibition.[21] Some

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15. *Id.* at 765.

16. *Id.*

17. TENN. CODE ANN. § 39-17-1005 (2014); *see supra* note 3.

18. TENN. CODE ANN. § 39-17-1002(8)(G) (2014). While this definition is similar to the definition in the statute upheld in *Ferber* and similar to the definition in the federal statute, Tennessee's statute is broader because it also includes the "lascivious exhibition of the female breast . . . , buttocks, anus . . . or rectal area." *Compare id.*, *with* 18 U.S.C. § 2256 (2012) ("'[S]exually explicit conduct' means actual or simulated . . . lascivious exhibition of the genitals or pubic area of any person . . . ."), *and* Ferber, 458 U.S. at 751 (quoting the statute, which defined "sexual conduct" as "the lewd exhibition of the genitals").

19. *See Lascivious*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also* United States v. Price, 775 F.3d 828, 833 (7th Cir. 2014) (approving the judge's instruction); United States v. Helton, 302 F. App'x 842, 847 (10th Cir. 2008); United States v. Rivera, 546 F.3d 245, 254 (2d Cir. 2008) (quoting the jury instructions approvingly); United States v. Grimes, 244 F.3d 375, 381 (5th Cir. 2001); United States v. Knox, 32 F.3d 733, 745 (3d Cir. 1994); United States v. Wiegand, 812 F.2d 1239, 1244 (9th Cir. 1987).

20. State v. Whited, 506 S.W.3d 416, 423 (Tenn. 2016) (citing the trial court's jury instructions and the Tennessee Pattern Instructions).

21. The federal circuit courts also diverge over the use and proper application of the so-called *Dost* factors, which the district court established, United States v.

review the issue de novo while others review for clear error. The Tenth Circuit uses a de novo standard of review.[22] In *United States v. Helton*, the defendant secretly recorded videos of several minors in the bathroom, including minors using the toilet and undressing for a shower, and the trial court[23] found him guilty on child pornography charges.[24] The Tenth Circuit stated, "On the mixed question of whether the facts satisfy the proper legal standard, we conduct a de novo review where, as here, the question primarily involves the

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Dost, 636 F. Supp. 828 (S.D. Cal. 1986), and which the various circuits have widely used. *See, e.g.*, United States v. Brown, 579 F.3d 672, 680 (6th Cir. 2009); United States v. Helton, 302 F. App'x 842, 847 (10th Cir. 2008); Grimes, 244 F.3d at 380; United States v. Horn, 187 F.3d 781, 789 (8th Cir. 1999); United States v. Villard, 885 F.2d 117, 122 (3d Cir. 1989). *See also* Whited, 506 S.W.3d at 433 ("Since *Dost* was decided, most federal courts have utilized the *Dost* factors to some extent in deciding whether a visual depiction of a minor constitutes lascivious exhibition under the sexual exploitation statutes."). In *United States v. Dost*, the district court laid out six factors to determine whether a visual depiction "constitutes a 'lascivious exhibition of the genitals or pubic area.'" *Dost*, 636 F. Supp. at 832. The six 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.

Id. While numerous courts have used the *Dost* factors, several federal circuit courts have also criticized and debated their proper use. *Compare* United States v. Wallenfang, 568 F.3d 649, 658 (8th Cir. 2009) (applying the sixth *Dost* factor objectively), *with* United States v. Overton, 573 F.3d 679, 688–89 (9th Cir. 2009) (applying the sixth *Dost* factor subjectively). *See also* United States v. Frabizio, 459 F.3d 80, 87 (1st Cir. 2006) (explaining that the lower court had relied too heavily on the *Dost* factors in a way "that accorded to them the same status as the statutory definition itself").

22. United States v. Helton, 302 F. App'x 842, 844–45 (10th Cir. 2008).

23. "The parties jointly requested a non-jury trial pursuant to Rule 23(a) of the Federal Rules of Criminal Procedure and the court granted the request." *Id.* at 846.

24. *Id.* at 844–45.

consideration of legal principles."[25] Conducting a de novo review, the court found no error and upheld the conviction.[26]

The Third Circuit also used a de novo standard of review in *United States v. Knox*.[27] In *Knox*, the court reviewed whether tapes that depicted children posing and dancing could constitute lascivious exhibitions when their genitals were covered with bikinis, leotards, or underwear.[28] The court stated that, "[b]ecause the meaning of the statutory phrase 'lascivious exhibition' . . . poses a pure question of law, our review is" de novo.[29] Performing a de novo review, the *Knox* court upheld the conviction despite the fact that the children were partially clothed.[30]

On the other hand, multiple federal circuit courts apply a clear error standard instead of a de novo standard. For instance, the Ninth Circuit, in *United States v. Overton*, applied a clear error standard.[31] In *Overton*, the district court determined that three pictures taken by the defendant depicted sexually explicit conduct.[32] In deciding what appellate standard of review would apply, the court noted that "'lascivious' is a 'commonsensical term,' and that whether an image is lascivious is a determination that a lay person can and should make 'based on the overall content of the visual depiction.'"[33] The court reasoned that the defendant's argument "amounts to nothing more than his personal disagreement with the trier of fact's findings with respect to the images," and the court applied "the significantly deferential, clearly erroneous standard to Overton's challenge to the district court's findings of fact."[34] Under the standard, the court stated that it "must

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25. *Id.* at 846.
26. *Id.* at 848–49.
27. 32 F.3d 733, 744 (3d Cir. 1994).
28. *Id.* at 737–38.
29. *Id.* at 744.
30. *Id.* at 747.
31. 573 F.3d 679, 688 (9th Cir. 2009).
32. *Id.* at 687.
33. *Id.* at 688 (first quoting United States v. Wiegand, 812 F.2d 1239, 1243 (9th Cir. 1987); and then quoting United States v. Hill, 459 F.3d 966, 972 (9th Cir. 2006)).
34. *Id.* at 687–688. Although this case involved a bench trial, the court noted that the standard would not change in a jury trial. *Id.* at 685 (citing United States v. Doe, 136 F.3d 631, 636 (9th Cir. 1998)).

accept the district court's findings unless upon review we are left with the 'definite and firm conviction that a mistake has been committed.'"[35] The court found no clear error and upheld the conviction.[36]

Relying on similar reasoning, the Seventh Circuit applied a clear error standard in *United States v. Schuster*.[37] *Schuster* involved a picture of "a two-year-old boy [who] is squatting in the tub, and the image shows him from the chest-down to his knees. The photo is taken from a perspective that is above the boy, on a downward angle, and shows the boy's genitalia."[38] Acknowledging the "intensely fact-bound" nature of determining whether an image is a lascivious exhibition, the court rejected the defendant's argument that it should apply a de novo standard and, instead, applied a clear error standard.[39] The court reasoned that a jury can apply "common sense" to "the facts of each case" in determining whether an image is a lascivious exhibition.[40] Under a clear error standard, the court upheld the defendant's conviction in *Schuster*.[41]

The Fifth Circuit has also applied a clear error standard. In *United States v. Steen*, the court reviewed the conviction of a defendant who had filmed a girl in a tanning salon, focusing on "her back and hair, though her pubic region was visible on the right edge of the frame for approximately 1.5 seconds before she closed the tanning bed."[42] The court applied 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."[43] The court ultimately found that clear error existed and overturned the conviction.[44]

Meanwhile, the Eighth Circuit has held that whether an image or movie is "lascivious" is a mixed question of fact and law and that trial courts in the circuit should analyze it in two steps. In *United States*

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35. *Id.* at 688 (quoting Easley v. Cromartie, 532 U.S. 234, 242 (2001)).
36. *Id.* at 689.
37. 706 F.3d 800, 806 (7th Cir. 2013).
38. *Id.* at 807.
39. *Id.* at 806.
40. *Id.* (citing United States v. Russell, 662 F.3d 831, 843 (7th Cir. 2011)).
41. *Id.* at 808.
42. 634 F.3d 822, 824 (5th Cir. 2011).
43. *Id.* at 826.
44. *Id.* at 828.

v. Rayl, the court, citing First Amendment concerns and the prejudice issues of submitting pictures of children to a jury, held that "the district court should conduct a preliminary review of whether materials offered by the government . . . depict sexually explicit conduct as a matter of law."[45] The court also noted, however, that "whether materials depict 'lascivious exhibition of the genitals,' an element of the crime, is for the finder of fact."[46] Although the *Rayl* court did not clearly state what standard it was applying to the lower court's finding, it upheld the defendant's conviction for "pictures of a young girl in sexually provocative poses."[47]

With this federal split over clear error or de novo review in mind, the Tennessee Supreme Court examined the convictions of Defendant in *State v. Whited*. In *State v. Whited*, the jury convicted Defendant on nine counts of especially aggravated sexual exploitation of a minor.[48] Defendant used a camera to secretly videotape his twelve-year-old daughter and her friend on nine different occasions.[49] The videos begin with Defendant setting up the hidden camera and repositioning it so that it would catch as much of the girls' bodies as possible.[50] The six videos taken in the bathroom show the daughter undressing and getting in and out of the shower; the daughter is "fully nude, from the back, from the front, and in profile. Her bare breasts, buttocks, and pubic area are intermittently visible . . . ."[51] In the bedroom videos, the daughter and her friend are changing clothes, and "the girls are shown with their back or side facing the hidden camera; breasts, bare buttocks, and pubic regions are intermittently visible."[52] The intermediate appellate court upheld the convictions.[53] The Supreme Court of Tennessee overturned both the appellate court and trial court decisions, reversed the convictions, and held that Tennessee courts should not use the *Dost* factors as an analytical framework in

45. 270 F.3d 709, 714 (8th Cir. 2001).

46. *Id.*

47. *Id.* at 715. The court does not describe the pictures beyond that.

48. 506 S.W.3d 416, 418 (Tenn. 2016).

49. *Id.*

50. *Id.* at 442.

51. *Id.*

52. *Id.*

53. State v. Whited, No. E2013-02523-CCA-R3-CD, 2015 WL 2097843, at *7–8 (Tenn. Ct. Crim. App. May 4, 2015).

Tennessee.[54] Importantly, the court analyzed what standard of review should apply[55] and ultimately decided to apply a de novo standard of review.[56] Under that standard, the court found that the videos do not include a minor engaging in a lascivious exhibition.[57]

The Tennessee Supreme Court spent three pages of its opinion discussing what standard of review should apply and noted the split of authorities on the issue.[58] The court wrote that the federal courts "lack uniformity on whether appellate review of a lasciviousness determination is the review of a factual finding, a legal conclusion, or a mixed question of fact and law."[59] The court, quoting *Steen v. United States*, further noted:

> The standard of review for lasciviousness determinations requires additional explanation, as our sister courts of appeal are split on the issue. The Third, Eighth, and Tenth Circuits have held that the decision of whether an image is lascivious requires *de novo* review because it involves a legal standard. The Ninth Circuit calls for clear error review, noting that a district court's findings of lasciviousness should be upheld unless the appellate court has a "definite and firm conviction that a mistake has been committed."[60]

In deciding what standard to apply, the Tennessee Supreme Court settled on what it described as a middle-ground approach.[61] The court claimed to adopt the Eighth Circuit approach and quoted approvingly of that court's decision in *United States v. Rayl*, which stated that the question is a mixed question of fact and law;[62] it also

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54. *Whited*, 506 S.W.3d at 446. See *supra* note 21 and accompanying text for a discussion of the *Dost* factors.

55. *Id.* at 425–27.

56. *Id.* at 427.

57. *Id.* at 449.

58. *Id.* at 425–27.

59. *Id.* at 426.

60. *Id.* at 426 (quoting United States v. Steen, 634 F.3d 822, 825 (5th Cir. 2011)).

61. *Id.* at 426–27.

62. The court's decision of which standard to apply hinged on whether the question was one of fact or law. *See id.* at 426 ("[T]he standard for appellate review

noted, however, that the question of whether the materials depict a lascivious exhibition is for the finder of fact.[63] The court also cited to the Ninth Circuit's view that this question is a mixed question of fact and law; however, the Ninth Circuit made it clear that the "[t]he question of whether the pictures fall within the statutory definition is a question of fact as to which we must uphold the district court's findings unless clearly erroneous."[64] The court ultimately concluded that the question of whether the videos depict a lascivious exhibition within the meaning of the statute is "primarily an issue of law, subject to de novo review."[65]

While this discussion of the proper standard of review appears benign at first glance, the Tennessee Supreme Court actually introduced a new concept into Tennessee jurisprudence: clear error review. The Tennessee appellate courts have never applied a clear error standard of review,[66] and no analogue in Tennessee jurisprudence currently exists.[67] In *State v. Whited*, Defendant challenged the

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is informed by whether the court is reviewing a finding of fact or a conclusion of law.").

63. *Id.* at 427 (citing United States v. Rayl, 270 F.3d 709, 714 (8th Cir. 2001)). The question of law is the meaning of "lascivious exhibition." *Id.*

64. *Id.* (quoting United States v. Wiegand, 812 F.2d 1239, 1244 (9th Cir. 1987)); *see also* United States v. Overton, 573 F.3d 679, 688 (9th Cir. 2009).

65. *Whited*, 506 S.W.3d at 427.

66. *See generally* 2 LAWRENCE A. PIVNICK, TENNESSEE CIRCUIT COURT PRACTICE § 30.7 (2017) (discussing the various standards of appellate review in Tennessee). I've also conducted an exhaustive search of cases in Tennessee and have not found any mention of clear error outside of the context of administrative decisions. *See, e.g.*, City of Memphis v. Civil Serv. Comm'n of City of Memphis, 216 S.W.3d 311, 316 (2007) ("[O]nly those agency decisions not supported by substantial and material evidence qualified as arbitrary and capricious but determined that even those decisions with adequate evidentiary support might still be arbitrary and capricious if caused by a clear error in judgment.").

67. In *Overton v. United States*, the Ninth Circuit explained that, under a clear error standard of review, the court "must accept the district court's findings unless upon review we are left with the 'definite and firm conviction that a mistake has been committed.'" 573 F.3d 679, 688 (9th Cir. 2009) (quoting Easley v. Cromartie, 532 U.S. 234, 242 (2001)). Tennessee courts have nothing akin to this deferential standard but do allow for plain error review; that standard of review is entirely different, however, and only applies to "an error that has affected the substantial rights of a party at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal." TENN. R. APP. P. 36(b). In those cases, Tennessee

sufficiency of evidence to support his convictions for child pornography, and the court acknowledged that "the general standard for appellate review [in Tennessee] of the sufficiency of the evidence 'is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[68] The court went beyond the general standard of review, however, and introduced the possibility of clear error review by then stating that "[b]eyond that, however, the standard for appellate review is informed by whether the court is reviewing a finding of fact or a conclusion of law" and discussing whether to review Defendant's convictions de novo or for clear error.[69] Although the court ultimately decided to review Defendant's conviction de novo, the court introduced a new concept into Tennessee jurisprudence with its thorough discussion of whether to review Defendant's convictions for clear error.[70] The court does not acknowledge this introduction of a new standard of review, nor does the court dismiss the standard as one that is not present in Tennessee.[71] As such, the Tennessee Supreme Court needs to clarify whether clear error review is available to appellate courts and practitioners in Tennessee.[72]

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appellate courts have discretion on whether to review the issue. *See* State v. Knowles, 470 S.W.3d 416, 423 (2015) ("We refer to this discretionary consideration of waived issues as 'plain error' review."). I only mention the plain error standard because the two standards sound similar, not because they are similar in practice.

68. *Whited*, 506 S.W.3d at 425–26 (quoting State v. Bell, 480 S.W.3d 486, 516 (Tenn. 2015) (internal quotations omitted)).

69. *Id.* at 426.

70. *Id.* at 427.

71. *See id.* at 425–27.

72. I leave it to the Tennessee Supreme Court and other authors to examine whether clear error review should or should not be available to the Tennessee appellate courts. I have simply written this comment to point out that the Supreme Court, with its thorough discussion of the clear error standard, has opened the door to that type of review in Tennessee.