

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

VIRGIL LEE BAILEY,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

APPENDIX

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APPENDIX A

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 18-11223
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED
May 31, 2019

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

VIRGIL LEE BAILEY, JR.,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas

Before DAVIS, HAYNES, and GRAVES, Circuit Judges.

PER CURIAM:

Virgil Lee Bailey, Jr., appeals his convictions of production of child pornography under 18 U.S.C. § 2251(a) and possession of child pornography under 18 U.S.C. § 2252(a)(4), as well as his 480-month prison sentence. He concedes that relief on the issues he asserts is foreclosed under our current precedent, and he raises the issues to preserve them for further review. In light of our current precedent, we dispense with further briefing and AFFIRM.

First, Bailey asserts that the factual basis supporting his guilty pleas to the charges is insufficient under Federal Rule of Criminal Procedure 11 because he did not admit that the offenses caused the materials to move in interstate commerce or, at least, that the materials did so in the recent past,

as § 2251(a) and § 2252(a)(4) should be construed to require. Relying on the Supreme Court’s decision in *Bond v. United States*, 572 U.S. 844 (2014), Bailey contends that a conviction in the absence of such proof impermissibly intrudes upon the police power of the States.

Plain error review applies to Bailey’s forfeited objection to the factual basis for his guilty pleas. *See United States v. Trejo*, 601 F.3d 308, 313 (5th Cir. 2010). We have held that the Commerce Clause authorizes Congress to prohibit local, intrastate production of child pornography where the materials used in the production were moved in interstate commerce. *See United States v. Dickson*, 632 F.3d 186, 189-90, 192 (5th Cir. 2011); *United States v. Kallestad*, 236 F.3d 225, 226-31 (5th Cir. 2000). The Supreme Court’s decision in *Bond* did not abrogate the holdings of these cases. *See United States v. McCall*, 833 F.3d 560, 564-65 (5th Cir. 2016). As Bailey concedes, he cannot show error in the district court’s decision that there was a sufficient factual basis for his guilty pleas in light of this caselaw. *See Puckett v. United States*, 556 U.S. 129, 135 (2009).

Alternatively, Bailey asserts that *Dickson* and *Kallestad* were wrongly decided in light of *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) (*National Federation*), and that the Commerce Clause does not authorize Congress to impose federal criminal liability where the defendant’s conduct is tenuously related to interstate commerce. Under the rule of orderliness, “we are not at liberty to overrule our settled precedent because the Supreme Court’s decision in *National Federation* did not overrule it.” *United States v. Alcantar*, 733 F.3d 143, 146 (5th Cir. 2013). Therefore, we are bound by *Kallestad* and *Dickson*. Bailey’s arguments are unavailing.

Next, Bailey argues that the district court plainly erred when it determined that his offense level exceeded 43 before subtracting three levels

for acceptance of responsibility. He contends that this constitutes an “arithmetic error” and falls within an exception to his appeal waiver. We disagree. The error Bailey complains of is not mathematical, as we have used that term; he challenges the district court’s application of the Guidelines, *see United States v. Reyes*, 881 F.2d 155, 156 (5th Cir. 1989), not the correctness of its arithmetic. *See United States v. Minano*, 872 F.3d 636, 636 (5th Cir. 2017). Thus, Bailey’s knowing and voluntary appeal waiver bars his challenge. *See United States v. Keele*, 755 F.3d 752, 754 (5th Cir. 2014); *United States v. Bond*, 414 F.3d 542, 544 (5th Cir. 2005).

Accordingly, the judgment of the district court is AFFIRMED. The Government’s motions for summary affirmance and, alternatively, for an extension of time to file an appellate brief, are DENIED.

APPENDIX B

~~United States District Court~~

Northern District of Texas

Lubbock Division

UNITED STATES OF AMERICA

v.

VIRGIL LEE BAILEY, JR.
Defendant.Case Number: 5:18-CR-00016-C(01)
USM No. 57010-177**JUDGMENT IN A CRIMINAL CASE**
(For Offenses Committed On or After November 1, 1987)

The defendant, VIRGIL LEE BAILEY, JR., was represented by David E. Sloan.

The defendant pleaded guilty to count 1 and 2 of the superseding information filed April 19, 2018. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Date of Offense</u>	<u>Count Number</u>
18 U.S.C. § 2251(a)	Production Of Child Pornography	01/18/2018	1
18 U.S.C. § 2252(a)(4)	Possession Of Child Pornography	01/18/2018	2

As pronounced on August 31, 2018, the defendant is sentenced as provided in pages 1 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of \$200.00, for count 1 and 2 of the superseding information, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material change in the defendant's economic circumstances.

Signed this the 31st day of August, 2018.



SENIOR DISTRICT JUDGE SAM R. CUMMINGS
UNITED STATES DISTRICT COURT

DEFENDANT: VIRGIL LEE BAILEY, JR.
CASE NUMBER: 5:18-CR-00016-C(01)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 360 months as to count 1, and 120 months as to count 2 to be served consecutive to one another for a total of 480 months.

The defendant shall remain in the custody of the U.S. Marshal Service.

The Court recommends incarceration at FCI Seagoville, Texas.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: VIRGIL LEE BAILEY, JR.
CASE NUMBER: 5:18-CR-00016-C(01)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 20 years as to count 1 and 20 years as to count 2 to be served concurrent with one another for a total of 20 years.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer.
- ☒ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense.
- ☐ The defendant shall participate in an approved program for domestic violence.
- ☐ The defendant must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Fine and Restitution sheet of the judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
- 2) The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 4) The defendant shall support his or her dependents and meet other family responsibilities.
- 5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment.
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician.
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: VIRGIL LEE BAILEY, JR.
CASE NUMBER: 5:18-CR-00016-C(01)

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall abstain from the use of alcohol and all other intoxicants during the term of supervision.
2. The defendant shall have no contact with the victim(s) or the victim's family, directly or indirectly without prior approval by the probation officer.
3. The defendant shall have no unsupervised contact with persons under the age of 18, nor shall the defendant loiter near places where children may frequently congregate. The defendant shall neither seek nor maintain employment or volunteer work at any location and/or activity where persons under the age of 18 congregate and the defendant shall not date or befriend anyone who has children under the age of 18, without prior permission of the probation officer.
4. The defendant shall not utilize or possess a camera, recording device, camcorder, or other similar device during the term of supervised release, without prior approval by the probation officer.
5. The defendant shall not possess, have access to, or utilize a computer or internet connection device without permission of the Court.
6. The defendant shall participate in mental health treatment services as directed by the probation officer until successfully discharged. These services may include medications prescribed by a licensed physician. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least \$20.00 per month.
7. The defendant shall participate in sex offender treatment services as directed by the probation officer until successfully discharged. These services may include psycho-physiological testing (i.e., clinical polygraph, plethysmograph, and the ABEL screen) to monitor the defendant's compliance, treatment progress, and risk to the community. The defendant shall contribute to the costs of services rendered at a rate of at least \$20.00 per month.
8. The defendant shall neither possess nor have under his control any sexually oriented, or sexually stimulating materials of adults or children. The defendant shall not patronize any place where such material is available.
9. The defendant shall participate in a program (inpatient and/or outpatient) approved by the U.S. Probation Office for treatment of narcotic, drug, or alcohol dependency, which will include testing for the detection of substance use or abuse. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least \$20.00 per month.

CRIMINAL FORFEITURE

Pursuant to 18 U.S.C. § 2253, it is hereby ordered that defendant's interest in the following property is condemned and forfeited to the United States: HP Stream Notebook PC11, Serial Number 5CD510665L, containing a SanDisk SDHC card, a SanDisk 32GB thumb drive, and a GorillaDrive thumb drive.