

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JASON LEE BENNETT,
Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Respectfully submitted,

Steve Hershberger, Attorney at Law
Texas State Bar # 09543950
600 No. Marienfeld St., Ste 1035
432-570-4014

Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether the District Court denied the Petitioner's constitutional right to a substantive due process under the Fifth Amendment by the lower court's construction of the term "sexually explicit conduct" as set forth in 18 U.S.C. sec. 2251(a).

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IN THE SUPREME COURT OF THE UNITED STATES

JASON LEE BENNETT,

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v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

The Petitioner, JASON LEE BENNETT, Appellant in the United States Court of Appeals for the Fifth Circuit and the Defendant in Case No. MO-17-CR-252, submits this Petition for Writ of Certiorari and respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on October 18, 2019.

OPINION BELOW

On October 18, 2019, the United States Court of Appeals for the Fifth Circuit entered its Opinion affirming the verdict guilty returned against Petitioner. A copy of the Opinion is attached as Appendix A.

The District Court's Criminal Judgment is attached as Appendix B.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code sec. 1254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states, in pertinent part to the Case *sub judice*:

No person...shall be deprived of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE

The Government obtained a single-count indictment against Jason Bennett alleged that on or about April 05, 2017 (ROA. 22) he used, persuaded, induce, entice, coerced or employed a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct. Jason Bennett, hereafter, referred to as Petitioner, waived arraignment and entered a plea of not guilty.

On November 21, 2013, Petitioner entered a plea of "not guilty".

The case was tried without a jury. After the bench trial, the Hon. David Counts, U.S. District Judge, Western District of Texas, found the Defendant guilty (ROA.152). Thereafter, on November 15, 2018, the District Judge sentenced Petitioner to 293 months incarceration and ordered an assessment of \$5,000.00 to the JVT found (ROA.102).

Petitioner appealed to the United States Court of Appeals, for the Fifth Circuit. On or about October 18, 2019, the United States Court of Appeals affirmed the conviction of the District Court, the United States District Court for the Western District of Texas.

REASON FOR GRANTING THE WRIT

The District Court erred, as a matter of law, by concluding the Petitioner engaged in sexually explicit conduct as that term is defined in the federal child pornography statute, 18 U.S.C. sec. 2256(2)(A). Although the conduct may rise to the level of a state law assault, the actions of

Petitioner did not come within the ambit of pornography.

In general, litigants are entitled to a fair and impartial verdict based solely on the evidence adduced at trial. Jordan v. Massachusetts, 225 U.S. 167, 176 (1912); Smith v. Phillips, 455 U.S. 209, 217 (1982). Further, the United States Supreme Court has recognized that due process implies a tribunal both impartial and mentally competent to afford a hearing with a factfinder capable and willing to decide the case solely on the evidence before it. Tanner v. United States, 483 U.S. 107, 117 (1987).

The Government failed to prove that Bennett engaged in sexually explicit conduct. The term "sexually explicit conduct" is defined in the Child Pornography Prevention Act of 1996. 18 U.S.C. sec. 2256(2)(A). Among other things, Congress has made it clear that this required aspect of a child pornography prosecution includes the actual or simulated lascivious exhibition of the genitals or pubic area of any person. Whether an item is lewd, lascivious or obscene is an intensely fact-bound question and that question is left for the factfinder to resolve, on the facts of each case. United States v. Steen, 634 F.3d 822, 825 (5th Cir. 2011).

To assist the fact finder to make that assessment, the courts have utilized a set of factors known as the "Dost" factors. Those factors derived from a decision from the United States District for the Southern District of California. United States v. Dost, 636 F.Supp. 828 (S.D. Cal. 1986). The factors require a consideration of

- [1] whether the focal point of the visual depiction is on the child 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.

Id. at 832; *United States v. Horn*, 187 F.3d 781, 789 (8th Cir. 1999); *United States v. Wolf*, 890 F.2d 241, 245 (10th Cir. 1989). The Courts of Appeals note that the list is not exhaustive, nor is a single factor dispositive. An image must be intended to elicit a sexual response to the viewer. *United States v. Kemmerling*, 285 F.3d 644, 645-646 (8th Cir. 2002). Nudity alone does not fit this description; there must be exhibition of female breast and buttocks that is lascivious. images or exhibition of female breast and buttocks are not within the purview of section 2251(a); *United States v. Gleich*, 397 F.3d 608, 614 (8th Cir. 2005).

The decision *sub judice* is in conflict with *Gleich*. The case involved a minor, J.W., who went to a school counselor after seeing herself on a cellphone showering (ROA. 113). The school counselor referred the matter to the Midland County Sheriff's Office, the Child Advocacy Center and Child Protective (ROA. 114). Thereafter, the Midland County Sheriff's Department investigated Bennett's computer.

At trial, the Government introduced Exhibit No. 1, which showed Petitioner videoing with J.W., the minor. J.W.'s shorts are pulled down and her buttocks are visual. Petitioner appears to be examining J.W.'s buttocks with his hand, but there is depiction of the vaginal area (ROA. 115-120).

The video was not done for financial gain, nor any type of distribution (ROA.124-125). There was not an exchange of something for value between Petitioner and J.W. The agent

Midland, TX 79701
432-570-4014

By: Steve Hershberger
Steve Hershberger
Texas State Bar # 09543950

Attorney for Petitioner

APPENDIX A
(Opinion of the United States Court of Appeals, for the Fifth Circuit)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-50991
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

October 18, 2019

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JASON LEE BENNETT,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 7:17-CR-252-1

Before BENAVIDES, GRAVES, and HO, Circuit Judges.

PER CURIAM:*

Jason Bennett appeals his conviction for production of child pornography in violation of 18 U.S.C. § 2251(a). He argues that the evidence was insufficient to establish that he “used” the minor to engage in “sexually explicit” conduct. See § 2251(a).

Bennett argues for the first time on appeal that the evidence did not support a finding by the district court that he “used” the minor to engage in

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

sexually explicit conduct. Because this issue was not raised below, we will reverse only if the record is so “devoid of evidence pointing to guilt” that the conviction creates “a manifest miscarriage of justice.” *United States v. Ruiz*, 860 F.2d 615, 617 (5th Cir. 1988) (internal quotation marks and citation omitted). The conduct proscribed in § 2251(a) is assessed by asking two questions: “Did the production involve the use of a minor engaging in sexually explicit conduct, and was the visual depiction a depiction of such conduct?” *United States v. Steen*, 634 F.3d 822, 826 (5th Cir. 2011). With respect to the first question, “[a] person who videotapes or photographs a minor clearly ‘uses’ the minor for the purposes of the statute.” *United States v. Barry*, 634 F. App’x 407, 411 (5th Cir. 2015); *Steen*, 634 F.3d at 826 (videotaping a minor is “using” a minor). The uncontradicted testimony established that Bennett admitted to filming the minor in the video in question. Therefore, the “use” element was sufficiently established by the evidence. *See Barry*, 634 F. App’x at 411; *Ruiz*, 860 F.2d at 617.

Bennett additionally argues that the district court erred in finding that the conduct at issue was “sexually explicit,” contending that the facts of his case are closer to those in *United States v. Gleich*, 397 F.3d 608, 614 (8th Cir. 2005). At issue is only whether there was a lascivious exhibition of the minor’s genitalia or pubic area, which is a factual finding reviewed for clear error. *See Steen*, 634 F.3d at 825-26. A factual finding is not clearly erroneous if it is “plausible in light of the record as a whole.” *United States v. Torres-Hernandez*, 843 F.3d 203, 207 (5th Cir. 2016). (internal quotation marks and citation omitted). After application of the nonexhaustive factors set forth in *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), we hold that the district court did not clearly err in determining that the conduct at issue was sexually explicit. *See Steen*, 634 F.3d 825-26. *Gleich* is inapposite insofar as the conduct

No. 18-50991

at issue therein involved taking pictures only of a minor's non-pubic area. *See* 397 F.3d at 614.

AFFIRMED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

October 18, 2019

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 18-50991 USA v. Jason Bennett
USDC No. 7:17-CR-252-1

Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5TH Cir. R.s 35, 39, and 41 govern costs, rehearings, and mandates. **5TH Cir. R.s 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5th CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5th CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

Deborah M. Graham

By:

Debbie T. Graham, Deputy Clerk

Enclosure(s)

Mr. Joseph H. Gay Jr.

Mr. James Steven Hershberger

Ms. Angela Sandoval Raba

APPENDIX B
(Criminal Judgment, United States District Court for the Western District
of Texas, Midland Division)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

UNITED STATES OF AMERICA

v.

Case Number: 7:17-CR-00252-DC(1)
USM Number: 97625-380

JASON LEE BENNETT

Defendant.

**JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)**

The defendant, JASON LEE BENNETT, was represented by Steve Hershberger, Esq.

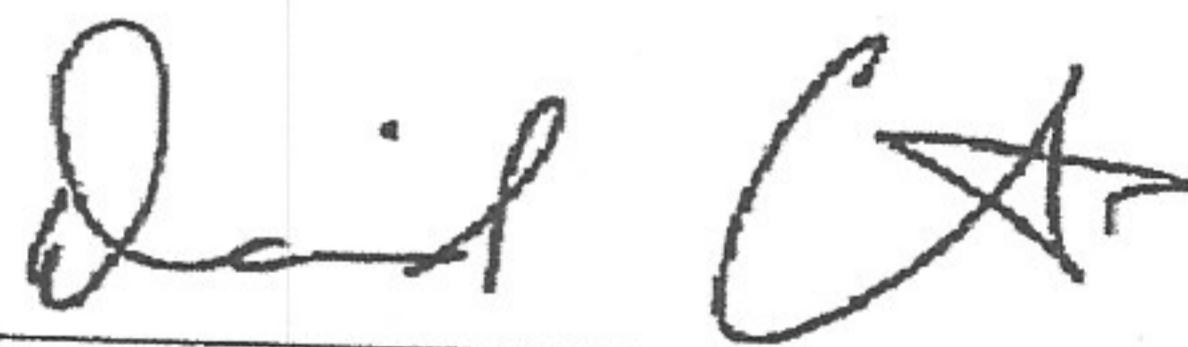
The defendant was found guilty by bench trial to Count(s) One of the Indictment on July 27, 2018. Accordingly, the defendant is adjudged guilty of such Count(s), involving the following offense(s):

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 2251(a)	Production of Child Pornography	04/05/2017	One

As pronounced on November 15, 2018, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall 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 changes in economic circumstances.

Signed this 19th day of November, 2018.



David Counts
United States District Judge

DEFENDANT: JASON LEE BENNETT
ASE NUMBER: 7:17-CR-00252-DC(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **Two Hundred Ninety-Three (293) months as to Count One (1)** with credit for time served while in custody for this federal offense pursuant to 18 U.S.C. § 3585(b).

The Court makes the following recommendations to the Bureau of Prisons:

That the defendant shall serve this sentence at F.C.I. Marianna.

The defendant shall remain in custody pending service of sentence.

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: JASON LEE BENNETT
ASE NUMBER: 7:17-CR-00252-DC(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **LIFE**.

While on supervised release, the defendant shall comply with the mandatory, standard and if applicable, the special conditions that have been adopted by this Court, and shall comply with the following additional conditions:

The defendant shall participate in a sex offense-specific treatment program and submit to periodic polygraph testing as a means to ensure compliance with the requirements of supervision or the treatment program. The defendant shall follow the rules and regulations of the program. The probation officer will supervise the defendant's participation in the program (provider, location, modality, duration, intensity, etc). The defendant shall pay the costs of the program if financially able.

The defendant shall not have direct contact with any child the defendant knows or reasonably should know to be under the age of 18, including his own children, without the permission of the probation officer. If the defendant has any direct contact with any child the defendant knows or reasonably should know to be under the age of 18, including his own children, without the permission of the probation officer, the defendant must report this contact to the probation officer within 24 hours. Direct contact includes written communication, in-person communication, or physical contact. Direct contact does not include incidental contact during ordinary daily activities in public places.

The defendant shall not communicate, or otherwise interact, with J.W., either directly or through someone else, without first obtaining the permission of the probation officer.

The defendant shall submit his or her person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. The probation officer may conduct a search under this condition only when reasonable suspicion exists that the defendant has violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search shall be conducted at a reasonable time and in a reasonable manner.

DEFENDANT: JASON LEE BENNETT
ASE NUMBER: 7:17-CR-00252-DC(1)

CONDITIONS OF PROBATION AND SUPERVISED RELEASE
(As Amended November 28, 2016)

It is ORDERED that the Conditions of Probation and Supervised Release applicable to each defendant committed to probation or supervised release in any division of the Western District of Texas, are adopted as follows:

Mandatory Conditions:

- [1] The defendant shall not commit another federal, state, or local crime during the term of supervision.
- [2] The defendant shall not unlawfully possess a controlled substance.
- [3] 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 on probation or supervised release and at least two periodic drug tests thereafter (as determined by the court), but the condition stated in this paragraph may be ameliorated or suspended by the court if the defendant's presentence report or other reliable sentencing information indicates low risk of future substance abuse by the defendant.
- [4] The defendant shall cooperate in the collection of DNA as instructed by the probation officer, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).
- [5] If applicable, the defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et. seq.*) as instructed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which the defendant resides, works, is a student, or was convicted of a qualifying offense.
- [6] If convicted of a domestic violence crime as defined in 18 U.S.C. § 3561(b), the defendant shall participate in an approved program for domestic violence.
- [7] If the judgment imposes a fine or restitution, it is a condition of supervision that the defendant pay in accordance with the Schedule of Payments sheet of the judgment.
- [8] The defendant shall pay the assessment imposed in accordance with 18 U.S.C. § 3013.
- [9] The defendant shall notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines or special assessments.

Standard Conditions:

- [1] The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.
- [2] After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.
- [3] The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.
- [4] The defendant shall answer truthfully the questions asked by the probation officer.
- [5] The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.