

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

BRANDON GUTHRIE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In Miller v. California, 413 U.S. 15 (1973), the Court established the defining criteria for determining whether expression was obscene and, therefore, outside the protection of the First Amendment. In the 45 years since, the technology used for expression has changed, and American society has changed in terms of the variety and diffusion of sexually explicit expression. In response, this Court has refined the Miller test and has adopted more stringent criteria for state and federal efforts to regulate the lawful transmission of sexually explicit expression. Nevertheless, the dividing line between unprotected obscenity and sexually explicit expression protected by the First Amendment remains perilously unclear. The absence of a well-defined boundary leaves citizens in an untenable legal conundrum: the same sexually explicit acts whose transmission appears lawful as regulated by Congress continue to be declared “obscene” in specific cases, leading to imprisonment and life-long collateral consequences.

This petition arises from one of those cases falling in the ill-defined borderland between obscenity and sexually explicit expression. Brandon Guthrie was convicted of attempting to transmit obscene material to a minor, when that material was limited to brief videos of himself, an adult male, engaging in masturbation. The Fifth Circuit upheld Guthrie’s conviction on the grounds that the mere act of masturbation as recorded on the transmitted videos, without aggravating circumstances, itself could qualify as “patently offensive,” and, therefore, obscene under Miller.

In light of the foregoing, the question presented is:

Does Miller’s standard for obscenity require more than the mere depiction of an ultimate sexual act for sexually explicit material to be deemed “patently offensive” and, therefore, obscene and outside the bounds of First Amendment protection?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are named in the caption of the case before this Court.

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This Court declared that obscene materials are not protected by the First Amendment and, in Miller v. California, 413 U.S. 15 (1973), provided criteria for defining obscenity. The Court has also declared that sexually explicit expression that is not obscene is protected by the First Amendment, and Congress has stepped in to regulate sexually explicit conduct within the boundaries that this Court has permitted in accordance with those First Amendment protections. Yet there still exists extreme uncertainty in defining this boundary. The same sexual acts that this Court has accepted as First Amendment-protected sexually explicit expression when depicted in video,

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film or other material form, may still serve, as they did in this case, as the basis for criminal prosecution as obscene material, leading to imprisonment and life-long consequences of a sexual crime conviction. In light of recent technological development and changing social practices, that uncertainty now places in legal jeopardy private individuals engaged in contemporary forms of consensual sexual communication. This Court should grant certiorari in this case to decide the important First Amendment issues at stake in the application of the now decades-old <u>Miller</u> standards of obscenity in the context of contemporary societal norms and technology.....	9
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PRAYER

Petitioner Brandon Guthrie respectfully prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit issued on February 16, 2018.

OPINION BELOW

On February 16, 2018, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the judgment of conviction and sentence. The Westlaw version of the Fifth Circuit's opinion is reproduced in the appendix to this petition.

JURISDICTION

On February 16, 2018, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the judgment of conviction and sentence. This petition is filed within 90 days of that date and therefore is timely. See Sup. Ct. R. 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The questions presented involve the First Amendment to the United States Constitution, which states in relevant part “Congress shall make no law . . . abridging the freedom of speech. . . .” U.S. Constitution, Amend. I.

The questions presented also involve 18 U.S.C. § 1470, which states,

Whoever, using the mail or any facility or means of interstate or foreign commerce, knowingly transfers obscene matter to another individual who has not attained the age of 16 years, knowing that such other individual has not attained the age of 16 years, or attempts to do so, shall be fined under this title, imprisoned not more than 10 years, or both.

STATEMENT OF THE CASE

A. Course of proceedings.

On February 18, 2016, a grand jury in the Corpus Christi Division of the United States District Court for the Southern District of Texas indicted Brandon Guthrie for attempting to transfer obscene matter by means of interstate commerce to an individual who, as he knew, had not attained 16 years of age.

Guthrie filed a motion to dismiss the indictment on the grounds that the material alleged to be obscene was not obscene as a matter of law. Following an evidentiary hearing on May 24, 2016, the district court denied the motion, holding that the issue was a question of fact for the jury to decide. On July 21, 2016, Guthrie pleaded guilty to the indictment pursuant to a conditional plea agreement in which he preserved his right to challenge on appeal “all issues and matters raised and ruled upon in connection with” the district court’s order denying his motion to dismiss. During the guilty plea hearing, Guthrie challenged the sufficiency of the factual basis for his plea, arguing that the videos were not obscene. The district court, in accordance with its previous ruling on the motion to dismiss, determined that the material was obscene as a matter of fact, and accepted Guthrie’s guilty plea.

On December 6, 2016, the district court sentenced Guthrie to 15 months of imprisonment, followed by 3 years of supervised release. The conditions of supervision included sex offender registration as required by law and sex offender counseling, as well as restrictions on Guthrie’s ability to use any internet services, his residency within specific

locations associated with children, and his personal relationships with persons who have children under 18 years of age.

Guthrie filed a timely notice of appeal to the United States Court of Appeals for the Fifth Circuit on December 6, 2016. And, on February 16, 2018, the Fifth Circuit affirmed the judgment of conviction and sentence. See United States v. Brandon Guthrie, 2018 WL 935412 (5th Cir. Feb. 16, 2018) (unpublished) (Appendix A).

B. Statement of the relevant facts.

1. District Court.

This case began in December 2015, when the parents of a 14-year-old girl contacted Corpus Christi police about a man communicating with their daughter via the social media service Snapchat. The parents handed over the girl's cell phone to a police detective, who then began communicating with petitioner Guthrie via Snapchat.¹ During the following month, January 2016, the detective engaged in a number of online communications with Guthrie during which he sent various videos. Two of those videos included his recordings of himself exposing his erect penis and masturbating, in one video to ejaculation. Guthrie was arrested on January 15, 2016, on a complaint alleging attempted transfer of obscene

¹ "Snapchat" is a publicly available messaging platform and social networking application available for use only through smartphone technology. Snapchat is used primarily to "chat" with other participants and to send photos or videos. One of its primary features is the automatic deletion of such photos or videos within seconds of their viewing by intended recipients, or, using specific application variations, within 24 hours of posting. See Elise Moreau, "What is Snapchat? An Intro to the Popular Ephemeral App," Lifewire (Feb. 11, 2018), available at <https://www.lifewire.com/what-is-snapchat-3485908> (last visited on Apr. 9, 2018).

material to a minor, and the grand jury returned an indictment for the same charge without specification of the particular material alleged to be obscene.

In district court, Guthrie filed a motion to dismiss the indictment. He argued the indictment failed to allege an offense because the materials transmitted did not meet the definition of “obscene” as defined under Miller. In particular, he argued that the videos did not depict sexual conduct in a “patently offensive” manner, but he did not argue that the videos failed to appeal to prurient interest or that they held some artistic or other value. In hearings before the district court, the government agreed that several of the videos did not depict sexual conduct, but argued that the two videos in which Guthrie recorded himself masturbating did rise to that level of sexually explicit conduct that was “patently offensive.” In response, Guthrie argued that the two videos were only the “simple depiction of sexual conduct,” without any further aggravating characteristics, and that such depictions would not rise to the level of obscenity. Guthrie reached this conclusion based on Miller, where the Court imposed a requirement that a depiction of a sexual act such as masturbation be “patently offensive,” which would imply a requirement that the depiction present more than just the simple sexual act by itself. After reviewing the two videos in question, the district court denied the motion to dismiss, ruling that the question of whether the videos qualified as “obscene” under the statute was a question of fact for the jury.

Guthrie reached a conditional plea agreement with the government in which he preserved his right to appeal all matters raised and ruled upon by the district court in his motion to dismiss. At the plea hearing, the government included in its factual basis for the

plea the recitation that the videos included two in which Guthrie is recorded masturbating and that those videos were in fact obscene. Guthrie objected to the factual basis, reasserting his argument that the materials were not obscene. The district court overruled that objection by finding the factual basis as stated by the government sufficient to support his plea of guilty.

2. Appeal.

After sentencing, Guthrie filed notice of appeal. In his brief to the Fifth Circuit Court of Appeals, Guthrie pursued the same argument as in district court: that the two videos depicting him engaged in masturbation were not “patently offensive” as a matter of law because more recent case law and Congressional regulation establish that some additional element beyond the depiction of the mere sexual act (such as violence or abuse) would be necessary.

The Fifth Circuit affirmed the district court’s denial of the motion to dismiss and its acceptance of Guthrie’s guilty plea on the factual basis recited. The Fifth Circuit rejected Guthrie’s argument that the Miller standard, as developed in subsequent case law, required more than just a depiction of the act of masturbation, by itself, to be considered “patently offensive.” See Guthrie, 2018 WL 935412 at * 3 (“While the Supreme Court’s language indicates that *some* depiction of masturbation might not be patently offensive, it does not follow that *any* depiction of masturbation cannot be patently offensive absent some undefined ‘plus factor.’”) (italics in original). Although the Fifth Circuit acknowledged that some cases at least in part determined the depicted sexual conduct to be obscene

because of additional attributes such as sexual violence or bestiality, the court concluded that “[y]et these cases do not state that these characteristics are *required* to render something obscene” as a matter of law. Id. (italics in original). Consequently, the Fifth Circuit concluded, “we hold that a rational trier of fact could have found that the videos depicted sexual conduct in a patently offensive way.” Id.

BASIS OF FEDERAL JURISDICTION IN THE
UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

REASONS FOR GRANTING THE WRIT

This Court declared that obscene materials are not protected by the First Amendment and, in Miller v. California, 413 U.S. 15 (1973), provided criteria for defining obscenity. The Court has also declared that sexually explicit expression that is not obscene is protected by the First Amendment, and Congress has stepped in to regulate sexually explicit conduct within the boundaries that this Court has permitted in accordance with those First Amendment protections. Yet there still exists extreme uncertainty in defining this boundary. The same sexual acts that this Court has accepted as First Amendment-protected sexually explicit expression when depicted in video, film or other material form, may still serve, as they did in this case, as the basis for criminal prosecution as obscene material, leading to imprisonment and life-long consequences of a sexual crime conviction. In light of recent technological development and changing social practices, that uncertainty now places in legal jeopardy private individuals engaged in contemporary forms of consensual sexual communication. This Court should grant certiorari in this case to decide the important First Amendment issues at stake in the application of the now decades-old Miller standards of obscenity in the context of contemporary societal norms and technology.

I. Introduction

More than forty years ago, the Court in Miller v. California, 413 U.S. 15 (1973) fixed limits on government's power to abridge freedom of expression by setting out criteria to determine if expressive material was obscene. The Court issued its opinion in the context of the society and technology of the 1970's, when sexually explicit materials were primarily in the formats of paper and film being sold or presented at fixed locations or mailed to specific locations. Even then, the Court made clear that the depiction of sexual acts, by itself, was not obscene; instead, the Court imposed additional limiting criteria, including that the depiction present sexual acts in a "patently offensive" way when judged by contemporary community standards.

But both technology and society have changed. The technology used in expressive

activities of all kinds has moved from bookstores, theaters, and fixed mailing addresses to internet publication, where a publisher has world-wide distribution without effective control of the geographic dissemination of his production. And the advent of smartphone technology with cameras transmitting videos through mobile applications has transformed private sexual expression into a format of virtual communication.

This petition calls for the Court to confront that technological and social revolution. In this case, an adult man used smartphone and other internet-connected devices to record his private sexual activity and to transmit that recording by mobile applications. He was then convicted of the federal offense of transmitting the recordings to a minor under a statute that required as an element that the recorded material be obscene. Yet recordings of the same adults engaged in the same activity are extensively available on the internet, whether for commercial gain or simply for the pleasure of consenting adult viewers for free. And private individuals engage in transmission of the same material by the same type of mobile application used in this case. That same activity as Guthrie recorded appears to be sexually explicit expression protected by the First Amendment under some decisions of this Court and lower courts, and it is regulated as such by Congress under both civil and criminal legislation.

That contradictory treatment of recordings of the same activity produces exactly the unconstitutional vagueness that this Court intended to avoid in Miller. The liberty of citizens to engage in sexual expression without fear of criminal prosecution is at stake, and citizens engaged in the use of recent technology need definite guidance to avoid crossing the legal

boundaries of obscenity. The Court should grant certiorari to provide that guidance.

- II. The Court should grant certiorari to clarify that – given the evolution of technology and social practice, and both legislative and judicial responses to that evolution – the depiction of sexual activity, by itself, is not “patently offensive” and, therefore, not obscene unless the depiction also presents aggravating characteristics such as violence or abuse.

In Miller, this Court set out a three-part test that made clear that material depicted in print, films, and other means of expression was not obscene and, therefore, outside the protection of the First Amendment, simply by reason of depicting sexual activity. In order to characterize expression as obscene, the Court required (i) that the material, taken as a whole and judged by the “average person, applying contemporary community standards,” appeal to the “prurient interest,” (ii) that the material depict or describe sexual conduct specifically defined by the applicable statute in a manner that is patently offensive, again as judged by the average person applying contemporary community standards, and (iii) that the material lack serious literary, artistic, political, or scientific value.² The Court sought to ensure that statutes regulating expression would be narrowly drawn to avoid constitutional vagueness challenges by providing examples of the intended scope of the “sexual conduct” that could constitutionally be treated as obscene: “(a) *patently offensive* representations or descriptions of ultimate sexual acts . . .” and “(b) *patently offensive* representations or descriptions of masturbation, excretory functions and lewd exhibition of genitals.” Miller, 413 U.S. at 25 (italics added).

Although Miller’s examples made clear that just the depiction of the “ultimate

² Miller, 413 U.S. at 24; Smith v. United States, 431 U.S. 291, 300-01 (1977) (clarifying that community standards applied to “patently offensive” determination).

sexual act” would not justify classification as obscene without a finding of being “patently offensive,” early cases applying that standard reflected that era’s limited tolerance of sexual expression, indicating approval of determinations that material was “obscene” when the material portrayed explicit depictions of “ultimate sexual acts” without any further clarification of what made that material “patently offensive” beyond the judgment of the jury.³ As Miller itself demonstrates, the material the Court dealt with in those early cases was usually in printed or film format, and distributed or offered at a specific location, such as a theater or bookstore, or mailed to a specific address.⁴

But as society’s tolerance of sexually explicit communication changed, and, particularly, as the technology for communicating such material changed, this Court and Congress began to treat even pornographic material as indecent but not obscene communication, with limited First Amendment protection that permitted transmission

³ See, e.g., Paris Adult Theatre I v. Slaton, 413 U.S. 49, 52-53, 57-69 (1973) (although remanding for determination of adherence to Miller standards, discussing with approval Georgia court determination that two films showing “scenes of simulated fellatio, cunnilingus, and group sex intercourse” were “hard core pornography” not protected by First Amendment); Hamling v. United States, 418 U.S. 87, 92, 97 (1974) (affirming convictions for mailing obscene printed material under 18 U.S.C. § 1461 when the advertisement at issue contained photos of intercourse, masturbation, and oral sex but also including bestiality and stating that the “result of the Miller cases, therefore, as a matter of constitutional and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion ‘the average person, applying contemporary community standards’ would reach in in a given case”); Smith v. United States, 431 U.S. 291, 293 & 309 (1977) (affirming convictions under 18 U.S.C. § 1461 for mailing obscene materials including magazines with photographs of people engaged in masturbation, fellatio, cunnilingus, and sexual intercourse, and two films presenting scenes of the same types of conduct).

⁴ Miller, 413 U.S. at 16-18 (mass mailing of brochures with photos to specific addresses); Paris Adult Theatre I, 413 U.S. at 51-53 (sexually explicit films presented at theaters); Ward v. Illinois, 431 U.S. 767, 770 (1977) (state prosecution for sale of pornographic magazines at a store).

within a regulated framework. Recognizing changing social norms reflected in the term “lust” as used in a statute applied to stores and theaters that “purvey[ed] sexually oriented books and movies to the adult public,” the Court limited the reach of obscenity and expanded First Amendment protection by approving a definition of “prurient interest” that limited such term to appeals to “shameful or morbid interest in nudity, sex or excretion” and not to “material that provoked only normal, healthy sexual desires.” Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 494, 498 (1985). In Sable Communications of California, Inc. v. Federal Communications Commission, 492 U.S. 115, 126 (1989), the Court confronted early new technology for transmission of sexually explicit material, in this case by telephone, and affirmed that “[s]exual expression which is indecent but not obscene is protected by the First Amendment,” but subject to regulation for a compelling interest by use of the least restrictive means, striking down Congress’s attempt to ban all forms of sexually explicit communication by telephone.

The advent of cable television and internet pornography pushed this Court and Congress toward a paradigm of regulating sexually explicit pornography presenting ultimate sexual acts as protected indecent speech rather than wholly unprotected obscenity. The Court recognized that both technologies presented distinct issues for determining the extent of First Amendment protection.⁵ The Court found three of Congress’s attempts to

⁵ See Reno v. American Civil Liberties Union, 521 U.S. 844, 868-870, 877-78 (1997) (distinguishing features of internet from prior forms of broadcasting subject to regulation, noting non-profit and individual participants); Id., at 889-90 (O’Connor, J., concurring in part and dissenting in part) (acknowledging that “[t]he electronic world is fundamentally different” and arguing for an adult “zoning” on internet); United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 813 (2000) (recognizing that “[c]able television, like broadcast media, presents

regulate sexually explicit material on the internet and cable television to be unconstitutional as content-based restrictions on First Amendment-protected speech that were not tailored to be the least restrictive means of regulation.⁶ The Court invoked the importance of First Amendment protections: “Content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people.” Ashcroft v. American Civil Liberties Union, 542 U.S. at 660. And the Court did so despite the Court’s recognition that the sexually explicit material on the internet “extends from the modestly titillating to the hardest-core” and includes “commercial pornographic sites that charge their users for access.” See Reno v. American Civil Liberties Union, 521 U.S. at 853. The content at issue in these cases included some of the same “ultimate sexual acts” described in Miller.⁷

To effectuate the same concern with protection of minors at issue in Sable, Playboy,

unique problems, which inform our assessment of the interests at stake, and which may justify restrictions that would be unacceptable in other contexts,” but concluding that technology available for cable television, including home-specific blocking, rendered Congress’ restrictions on sexually explicit programming not narrowly tailored and more restrictive of First Amendment-protected expression than permitted).

⁶ See Reno v. American Civil Liberties Union, 521 U.S. at 874 (“We find the CDA [Communications Decency Act] lacks the precision that the First Amendment requires when a statute regulates the content of speech.”); Playboy Entertainment Group, Inc., 529 U.S. at 826-27 (Finding unconstitutional Section 505 of the Telecommunications Act of 1996 because not narrowly tailored to the least restrictive means to address access of minors to sexually explicit programming, stating that “[b]asic speech principles are at stake in this case.”); Ashcroft v. American Civil Liberties Union, 542 U.S. 656 (2004) (upholding preliminary injunction against enforcement of Child Online Protection Act given that software filters were less restrictive than the criminal penalties for posting on the internet material harmful to minors when done for commercial purposes).

⁷ See Playboy Entertainment Group, Inc., 529 U.S. at 833 (Scalia, J., dissenting) (describing programming on Spice Network to include masturbation, oral sex, and cunnilingus.).

and the foregoing internet cases, Congress established a regulatory regime for producers of pornography to avoid child pornography criminal penalties. This legislation requires recordkeeping concerning the identity and age of performers, and the Attorney General has prescribed regulations concerning the form, content, publication and maintenance of those records for inspection. 18 U.S.C. § 2257; 28 C.F.R. §§ 75.1-75.9. These regulations apply to producers of material portraying acts within the Miller examples, including intercourse and masturbation. See 18 U.S.C. § 2257(h)(1) (referencing definition of “sexually explicit conduct” at 18 U.S.C. § 2256(2)(A)). More recent statutes governing telecommunications also continue to set up a safe harbor provision even for communication that is obscene if the purveyor of that material “has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to the communication” or has restricted access by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number. 47 U.S.C. § 223(d), (e)(5).

This Court has never declared that the sexually explicit conduct at issue in cases such as Playboy and the internet cases was not obscene.⁸ But that conclusion follows from the combination of at least three factors: (i) the Court’s application of First Amendment principles to cable programming and internet content that contained the same types of “ultimate sexual acts” described in Miller; (ii) Brockett’s limitation of “prurient interest” to sexual interest beyond normal, healthy sexuality; and (iii) Congress’s detailed regulation of

⁸ See Reno v. American Civil Liberties Union, 521 U.S. at 883 (severing unconstitutional provisions relating to indecent material but preserving prohibitions on broadcast of obscene material); Playboy Entertainment Group, Inc., 529 U.S. at 811 (“ . . . all parties bring the case to us on the premise that Playboy’s programming has First Amendment protection.”)

adult pornography producers to ensure that minors were not used in the production of pornography or given access to pornography. All of this leads to the conclusion that the portrayal of intercourse, masturbation, and other “ultimate sexual acts” in the broad category of adult pornography is not “patently offensive” obscenity, but rather indecent or sexually explicit expression that enjoys First Amendment protection.

Understood this way, the category of obscenity must require something more than just the depiction of ultimate sex acts. Some lower courts have moved forward with this understanding, pointing toward a criterion of “patently offensive” that would require additional aggravating factors, such as violent or abusive sexual acts, including abuse of children.⁹ The Fifth Circuit’s decision in United States v. Ragsdale, 426 F.3d 765, 781 (5th Cir. 2005), exemplifies exactly that manner of construing the obscenity test. In that case, the Fifth Circuit noted that the videos at issue clearly depicted sexual conduct (“actual sexual intercourse”) but found that the portrayals were “patently offensive” due to the added

⁹ See United States v. Guy, 708 Fed. Appx. 249 (6th Cir. 2017) (unpublished) (affirming conviction for obscene visual representation of sexual abuse of children for manipulated images); United States v. McCoy, 602 Fed. Appx. 501 (11th Cir. 2015) (unpublished) (affirming conviction for transportation of obscene material, 18 U.S.C. § 1462, for website posting of stories involving “graphic and explicit detail [of] the sexual abuse, rape and torture of young children”); United States v. Dean, 635 F.3d 1200, 1207-08 (11th Cir. 2011) (discussing range of sexual acts that would not be “patently offensive” to include intercourse between consenting, older teenagers, but including as likely obscene material intercourse between younger minors or acts of “graphic bestiality and sadistic or masochistic abuse”); United States v. Adams, 337 Fed. Appx. 336, 338 (4th Cir. 2009) (unpublished) (affirming convictions for mailing and distributing obscene matter when videos included bestiality and penetration with large objects); see also Kinsley, “The Myth of Obsolete Obscenity,” 33 Cardozo Arts & Ent. L. J. 607, 617-27, 640 (2015) (summarizing federal prosecutions for obscenity involving primarily depictions of extremely violent sexual acts, abuse of children, excretory activities, sexual acts with animals and similar “fetish” activities, but noting a trend that “prosecutions also notably began with more extreme or fringe material, but then migrated to more mainstream content and content producers”).

element of abuse:

The sexual conduct portrayed in the videos is not only exceedingly protracted but also intentionally designed to make the viewer believe that the female participant is in a significant amount of pain, distress and danger. . . . We conclude that the videotapes do depict “patently offensive” sexual conduct. In coming to that conclusion we take into account not only the inordinate length of the acts in the video and the portrayal of excessive torture and pain during the commission of the acts that is intended to seem non-consensual, but also the calculated camera angles and zoom shots employed to display the acts.

Id. at 781.

But, as the Fifth Circuit pointed out in the instant case,¹⁰ there is no clear rule that “patently offensive” requires acts beyond the mere depiction of the “ultimate sexual act,” such as masturbation. And the Fifth Circuit decided petitioner Guthrie’s case on exactly that basis – that the mere act of an adult male masturbating to climax could be “patently offensive” without any aggravating factors.¹¹ The Fifth Circuit cited in support one of its own prior decisions and the decisions of two sister circuits treating video transmissions of an adult male masturbating via person-to-person electronic messaging applications as patently offensive obscene matter for purposes of federal criminal punishment.¹²

¹⁰ “Guthrie points to several cases where depictions of sexual conduct are deemed patently offensive at least in part because of ‘additional characteristics’ like sexual violence and bestiality. Yet these cases do not state that these characteristics are *required* to render something obscene. Guthrie points to no case law holding a video of an adult man masturbating to ejaculation cannot be obscene as a matter of law.” Guthrie, 2018 WL 935412 at * 3 (footnote and internal citation omitted).

¹¹ Id.

¹² Id., n. 22, citing United States v. Kirkpatrick, 662 Fed. Appx. 237, 240 (5th Cir. 2016) (unpublished); United States v. Rogers, 474 Fed. Appx. 463, 470 (7th Cir. 2012) (unpublished); United States v. Jenkins, 322 Fed. Appx. 716, 716-17 (11th Cir. 2009) (unpublished).

This contradictory treatment of the same acts creates a legal whipsaw for private citizens. Congress’s recordkeeping and inspection regulations for creators of adult pornography, which specifically apply to creators of images with exactly the same act at issue in this case, and this Court’s treatment of adult pornography as worthy of First Amendment protection in cases such as Brockett, Playboy, Reno v. American Civil Liberties Union, and Ashcroft v. American Civil Liberties Union, all appear to give notice that plain adult pornography depicting just a sexual act between consenting adults will not be “patently offensive” or obscene under the law. Those precedents give notice that something more is required for a depiction of sexual conduct to be considered “patently offensive,” such as the abuse of minors or violence against other persons or animals. But that is not how the law is applied consistently, trapping private individuals like Guthrie who engage via internet connections in person-to-person communications that are no different from the “hardest core” pornography available online that this Court indicated would be treated as First Amendment-protected speech in Reno v. American Civil Liberties Union.¹³ This legal uncertainty has very serious consequences, including, for petitioner Guthrie and others similarly situated, imprisonment and years of sexual offender

¹³ Reno v. American Civil Liberties Union, 521 U.S. at 853 (recognizing that sexually explicit material available on the internet included “hardest-core” pornography); id. at 849 (“Notwithstanding the legitimacy and importance of the congressional goal of protecting children from harmful materials, we agree . . . that the statute abridges the ‘freedom of speech’ protected by the First Amendment.”); id. at 874 (“In order to deny minors access to potentially harmful speech, the CDA [Communications Decency Act] effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.”)

registration.¹⁴

Of course, this Court has not declared that adult pornography is protected First Amendment speech. As Justice Thomas made clear in his concurring opinion in Playboy, “the Government has ample constitutional and statutory authority to prohibit [the] broadcast entirely” of much of the programming at issue because such programming would be “patently offensive” “under the standards applicable in many communities,” and it was only the assumption of the parties in that litigation that the programming was indecent but not obscene that led to his concurrence in the opinion.¹⁵ But given the contradictory treatment of sexually explicit expression under Congressional regulation, in this Court’s cases, and in the lower courts’ application of the Miller standard, now is the time for this Court to intervene and clarify the application of the “patently offensive” criterion in light of contemporary social norms and new technologies and to establish that boundary between obscenity and indecent speech. It is important for the Court to take that step now for the following reasons.

Adult sexually explicit forms of expression, including the depiction of “ultimate sexual acts,” whether in videos or in other forms of communication, are now a far more

¹⁴ See United States v. Schofield, 802 F.3d 722, 730 (5th Cir. 2015) (holding offense under 18 U.S.C. § 1470 subject to federal sex offender registration requirements).

¹⁵ Playboy Entertainment Group, Inc., 529 U.S. at 829-30 (Thomas, J., concurring); see also Ashcroft v. American Civil Liberties Union, 542 U.S. at 676 (Scalia, J., dissenting) (asserting that statute covering commercial pornography targeted at specified sexual acts should be upheld because “this business could, consistent with the First Amendment, be banned entirely.”); id. at 681 (Breyer, J. dissenting) (stating that the commercial pornography to which the statute’s application was limited is “unprotected obscene material.”)

accepted and common form of expression, with great prevalence on the internet and mobile applications.¹⁶ In Reno v. American Civil Liberties Union, this Court already recognized that sexually explicit material was “widely available” on the web, including materials posted from anywhere in the world and immediately available to viewers everywhere. Reno, 521 U.S. at 854.

In contrast to this Court’s previous cases, where commercial pornography is at issue, a great deal of current sexually explicit expression is in the form of “do-it-yourself” explicit materials distributed, as in petitioner Guthrie’s case, by mobile and internet applications between private individuals.¹⁷ These new technologies that increase private sexual communication make it important to heed Justice Kennedy’s warning in Ashcroft v.

¹⁶ See Cynthia J. Najdowski, “Legal Responses to Nonconsensual Pornography: Current Policy in the United States and Future Directions for Research,” 23 Psychol. Pub. Pol’y & L. 154 (2017) (“Pornography has never before been as widely available or variously specialized as it is now, due to individual users’ ability to generate and contribute their own material to the online market.”); Katie Van Syckle, “What it’s like to report about the porn industry,” N.Y. TIMES (Mar. 26, 2018), available at <https://www.nytimes.com/2018/03/26/insider/reporting-the-porn-industry/html> (reporting that adult film is “one of the most consumed forms of media in the world,” with one website, Pornhub, drawing 80 million visitors a day.)

¹⁷ Snapchat, the mobile application Guthrie used, claims to have 180 million users. See “What is Snapchat?” available at <https://whatis.snapchat.com> (last visited April 9, 2018). A recent study found that 27% of adults in the United States using social media use Snapchat, rising to 78% of social media-active adults between the ages of 18 and 24 years old. See Aaron Smith and Monica Anderson, “Social Media Use in 2018,” Pew Research Center (Mar. 1, 2018), available at <http://www.pewinternet.org/2018/03/01/social-media-use-2018/> (last visited April 9, 2018). The use of Snapchat for amateur, self-produced pornography has been the subject of much comment and controversy. See Cooper Fleishman, “Inside Snapchat’s Secret Amateur-Porn Ring,” The Daily Dot (Oct. 2, 2014); Nicole A. Poltash, “Snapchat and Sexting: A Snapshot of Baring Your Bare Essentials,” 19 Rich. J.L. & Tech. 14 (2013). And self-produced pornography has also appeared in virtual reality applications available for use with a variety of hardware, including smartphones. See David Ng, “Naked Ambition: Porn is getting a virtual reality boost, but manufacturers aren’t happy,” L.A. TIMES (Jan. 7, 2018), at C1.

American Civil Liberties Union (2002):

Indeed, when Congress purports to abridge the freedom of a new medium, we must be particularly attentive to its distinct attributes, for differences in the characteristics of new media justify difference in the First Amendment standards applied to them. . . . The economics and the technology of each medium affect both the burden of a speech restriction and the Government's interest in maintaining it.

Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 594 (2002) (Kennedy, J., concurring).

Given the increasing diffusion of sexually explicit materials portraying actual sexual acts through the internet and person-to-person communication on internet mobile applications, the inability of private citizens to draw the line for what is “patently offensive” is more important than ever in light of the severe criminal penalties that can be brought down on those individuals. From the beginning of Miller's application, various members of the Court recognized the possible vagueness inherent in a “patently offensive” under “contemporary community standards” approach.¹⁸ At the time, the Court found the

¹⁸ Miller, 413 U.S. at 40-41, 45-46 (Douglas, J., dissenting) (asserting that the determination of offensiveness was inherently vague because of the absence of constitutional standards: “The Court is at large because we deal with tastes and standards of literature. What shocks me may be sustenance for my neighbor. What causes one person to boil up in rage over one pamphlet or movie may reflect only his neurosis, not shared by others.”); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 83-84 (1973) (Brennan, J., dissenting) (“Of course, the vagueness problem would be largely of our own creation if it stemmed primarily from our failure to reach consensus on any one standard. But after 16 years of experimentation and debate I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level while at the same time striking an acceptable balance between the protections of the First and Fourteenth Amendments, on the one hand, and on the other the asserted state interests in regulating the dissemination of certain sexually oriented materials.”); Smith v. United States, 431 U.S. at 314-16 (Stevens, J., dissenting) (“In the final analysis, the guilt or innocence of a criminal defendant in an obscenity trial is determined primarily by individual jurors' subjective reactions to the materials in question rather than by the predictable application of rules of law. . . . In my judgment, the line between communications which ‘offend’ and those

Miller test to withstand vagueness challenges because of the other limits forming part of the test.¹⁹ However, members of the Court have also recognized the increasingly perilous vagueness of contemporary community standards to determine what is “patently offensive” without more definition in the era of internet communications.²⁰

The potential vagueness problem is particularly acute for person-to-person communication applications. Many of these cases no longer deal with commercial pornography, the focus of this Court’s concern previously.²¹ Instead, they are purely

which do not is too blurred to identify criminal conduct. It is also too blurred to delimit the protections of the First Amendment.”).

¹⁹ Hamling, 418 U.S. at 113-14 (rejecting vagueness challenge to federal obscenity prosecution under 18 U.S.C. § 1461 because of Miller specification of the specific sexual conduct that could be found to be patently offensive); Reno v. American Civil Liberties Union, 521 U.S. at 873 (distinguishing Miller obscenity standards from vagueness of statute at issue: “Each of Miller’s additional two prongs – (1) that, taken as a whole, the material appeal to the ‘prurient’ interest, and (2) that it ‘lac[k] serious literary, artistic, political, or scientific value’ – critically limits the uncertain sweep of the obscenity definition.”)

²⁰ See Ashcroft v. American Civil Liberties Union (2002), 535 U.S. at 594-97, 601-02 (Kennedy, J., concurring) (noting difficulty of determining community standards to apply in the context of world-wide communication on the internet, stating “[t]he national variation in community standards constitutes a particular burden on Internet speech,” and that the international interconnection of the web raises concerns “whether the variation in community standards renders the Act substantially overbroad.”); *id.*, at 605 (Stevens, J., dissenting) (stating that “the Internet presents a unique form of communication” by its world-wide, immediate diffusion of postings, so that “[i]n light of this fundamental difference in technologies, the rules applicable to the mass-mailing of an obscene montage or to obscene dial-a-porn should not be used to judge the legality of messages on the World Wide Web” given variations in community standards).

²¹ See, e.g., Hamling, 418 U.S. at 94-95 (addressing brochures sent out as mass-mailing advertisement); Paris Adult Theatre I, 413 U.S. at 57 (“In particular, we hold that there are legitimate states interests at stake in stemming the tide of commercialized obscenity. . . .”); Ashcroft v. American Civil Liberties Union (2004), 542 U.S. at 680 (Breyer, J., dissenting) (noting limitation of challenged statute to commercial purveyors and that such limit was “consistent with Congress’ avowed objective in enacting this law; namely, putting material produced by professional pornographers behind screens that will verify the age of the viewer.”).

private communications, as illustrated in petitioner Guthrie's case, where his communication, although with a minor, was a person-to-person communication via Snapchat, not intended for dissemination outside the group of private individuals to whom he sent that communication. The previously expressed concern with vagueness is all the more important in this context because it implicates the privacy concerns that led the Court to uphold an individual's right to possess even obscene material in the home but to also uphold as constitutional a ban on the same obscene material when made available in a public place.²² The Court long ago held that the right to possess obscene material in the home did not imply a right to give such material to someone else,²³ but how is a private individual, interacting only with other private individuals and not a film distributor, supposed to know that particular community standard? In Guthrie's case, despite the private nature of his communication, the federal government punished him with imprisonment and required him to register as a sex offender based on a classification of his private communication as "obscene," derived from a "contemporary community standard" that is not reflected in the broad availability of pornography on the internet or among other users of mobile applications. Yet the law as currently applied expected Guthrie to divine that standard and adhere to it in his private communications.

²² Compare, Stanley v. Georgia, 394 U.S. 557, 568 (1969) (holding unconstitutional a criminal punishment for possession of obscene materials within the privacy of the home as a violation of First Amendment) with Paris Adult Theatre I, 413 U.S. at 65 (upholding a ban on exhibition of films determined to be obscene, rejecting arguments on the right of privacy of consenting adult customers to view such material, because of publicly accessible nature of exhibition).

²³ United States v. 12 200-ft. Reels of Super 8mm Film, 413 U.S. 123, 128-29 (1973).

Given the changes in social norms and in technology used by private citizens, the continued application of Miller without adequate clarification of the type of aggravating factors needed to classify the portrayal of a sexual act as “patently offensive” raises serious questions as to whether § 1470 and other statutes like it premised on a determination of obscenity still comply with the Court’s test for unconstitutional vagueness: whether a penal statute “define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” Kolender v. Lawson, 461 U.S. 352, 357 (1983) (citations omitted). Accordingly, the time has come for this Court to address the question of whether Miller’s standard for obscenity requires more than the mere depiction of an ultimate sexual act for sexually explicit material to be determined to be “patently offensive,” and, therefore, wholly outside First Amendment protection. The Court should grant the petition.

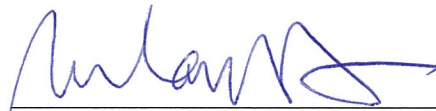
CONCLUSION

For the foregoing reasons, petitioner Brandon Guthrie prays that this Court grant certiorari to review the judgment of the Fifth Circuit in this case.

Date: April 23, 2018

Respectfully submitted,

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UNITED STATES of America, Plaintiff-Appellee
v.
Brandon GUTHRIE, Defendant-Appellant

No. 16-41630

|
Filed February 16, 2018

Appeal from the United States District Court for the Southern District of Texas, USDC No. 2:16-CR-120-1

Attorneys and Law Firms

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Before HIGGINBOTHAM, PRADO, and HIGGINSON, Circuit Judges.

Opinion

PER CURIAM: *

*1 Brandon Guthrie was indicted on one count of knowingly attempting to transfer obscene material to a minor and convicted pursuant to a conditional guilty plea. Guthrie argues that the videos underlying his conviction were not obscene and that the district court thus erred in denying his motion to dismiss the indictment and accepting his guilty plea, which he contends lacks a sufficient factual basis. We affirm.

I.

Between January 6 and January 12, 2016, Guthrie sent photos and videos via Snapchat¹ to a number of recipients, including a detective posing as fourteen-year-old Jane Doe.² Guthrie sent, *inter alia*, videos of himself masturbating nude, including one where he masturbates to ejaculation.³ On February 18, 2016, Guthrie was indicted on one count of knowingly attempting to transmit obscene matter to another individual who had not attained the age of sixteen years, in violation of 18 U.S.C. § 1470.⁴

Guthrie filed a motion to dismiss the indictment, arguing that the government failed to allege an offense because the transmitted materials were not obscene as a matter of law.⁵ The district court denied the motion, finding that whether the videos were obscene is a question of fact for the jury.

Guthrie then pleaded guilty pursuant to a conditional plea agreement that reserved his right to appeal the denial of the motion to dismiss. The court sentenced Guthrie to fifteen months of confinement followed by three years of supervised release.

On appeal, Guthrie contends that videos of masturbation, without any additional characteristics such as violence or bestiality, are not "patently offensive" as a matter of law and therefore cannot be obscene. He contends that the district court thus erred both in denying his motion to dismiss and in accepting his plea.

II.

The denial of a motion to dismiss based on the interpretation of a federal statute is reviewed de novo.⁶ "[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense."⁷

APPENDIX

*2 “The propriety of granting a motion to dismiss an indictment ... is by-and-large contingent upon whether the infirmity in the prosecution is essentially one of law or involves determinations of fact.... If a question of law is involved, then consideration of the motion is generally proper.”⁸ By Guthrie's own description “[t]he sole question presented by the motion to dismiss was whether, as a matter of law, the images transmitted by Mr. Guthrie were obscene.” If the videos are not obscene as a matter of *law*, then the indictment may be insufficient. If, however, the obscenity of the videos is a question of *fact* for the jury, then the district court properly denied Guthrie's motion to dismiss the indictment.

Guthrie further argues that the district court erred in accepting his guilty plea because it was not supported by a legally sufficient factual basis. Notwithstanding Guthrie's plea, this court “will reverse on direct appeal where the factual basis for the plea as shown of record fails to establish an element of the offense of conviction.”⁹ The Federal Rules of Criminal Procedure “require[] the district court to determine that the *factual* conduct to which the defendant admits is sufficient *as a matter of law* to constitute a violation of the statute.”¹⁰ To comply with this rule, the district court must compare “the conduct to which the defendant admits” with “the elements of the offense charged.”¹¹ A challenge to the legal sufficiency of an undisputed factual basis is reviewed *de novo*.¹² The district court's acceptance of a guilty plea is a factual finding that is reviewed for clear error.¹³

As with the motion to dismiss, Guthrie does not dispute the facts underlying the guilty plea. He states that “[t]he sole dispute in this case is whether, as a matter of law, the materials he transmitted were obscene.” Because both of Guthrie's arguments turn on the same legal question, we address the merits of his arguments together.

Section 1470 prohibits the transfer of obscene material to a minor. In order to establish that material is obscene, the government must show that: (1) “‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest”; (2) “the work depicts or describes, in a patently offensive way, sexual conduct”; and (3) “the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”¹⁴ Guthrie concedes that the videos in

question appealed to the prurient interest and lacked serious literary, artistic, political, or scientific value; thus, he challenges only whether the videos could be patently offensive.

“*Miller* states that the question[] of ... what is ‘patently offensive’ under the obscenity test which it formulates [is] ‘essentially [a] question [] of fact.’ ”¹⁵ A fact-finder evaluates whether material is patently offensive in light of contemporary community standards.¹⁶ Of course, this does not mean that jurors have “unbridled discretion in determining what is ‘patently offensive.’ ”¹⁷ The Supreme Court made clear that an appellate court could refuse to uphold a fact-finder's determination of obscenity where it would be “wholly at odds” with *Miller*—e.g., where a jury based an obscenity conviction “upon a defendant's depiction of a woman with a bare midriff.”¹⁸

*3 Guthrie argues that videos depicting masturbation “without more” cannot be patently offensive. To make his point, Guthrie points to an illustrative list of potentially obscene materials from *Miller*, which includes “[p]atently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.”¹⁹ Guthrie urges us to read this language to indicate that depictions of masturbation alone cannot be patently offensive because otherwise the qualifiers “patently offensive” and “lewd” would be mere surplusage. We disagree. While the Supreme Court's language indicates that *some* depiction of masturbation might not be patently offensive, it does not follow that *any* depiction of masturbation cannot be patently offensive absent some undefined “plus factor.”²⁰

Guthrie points to several cases where depictions of sexual conduct are deemed patently offensive at least in part because of “additional characteristics” like sexual violence and bestiality.²¹ Yet these cases do not state that these characteristics are *required* to render something obscene. Guthrie points to no case law holding a video of an adult man masturbating to ejaculation cannot be obscene as a matter of law.

In fact, this court and at least two others have upheld convictions under § 1470 for transmission of videos depicting masturbation.²² Guthrie tries to argue that these cases are inapposite because they did not address

the patent offensiveness of the videos themselves. That argument is unavailing. In each case, the appellate court held that a rational trier of fact could have found the videos patently offensive.²³ Implicit in each of these holdings is the idea that a video of male masturbation is not non-obscene as a matter of law.

We reaffirm that view today and hold that a reasonable fact-finder applying contemporary community standards could determine that the videos transmitted by Guthrie were “patently offensive representation[s]” of masturbation or “lewd exhibition of the genitals.” Guthrie concedes that the videos could appeal to the prurient interest and lack serious literary, artistic, political, or scientific merit. Thus, whether these specific videos are

obscene is a question of fact, and we hold that a rational trier of fact could have found that the videos depicted sexual conduct in a patently offensive way.

III.

*4 For the foregoing reasons, the district court's decisions to deny the motion to dismiss and to accept Guthrie's guilty plea are affirmed.

All Citations

--- Fed.Appx. ----, 2018 WL 935412

Footnotes

- * 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.
- 1 Snapchat is a video message application that allows users to send photos, videos, and texts to a controlled list of recipients.
- 2 Before the relevant time period, Guthrie exchanged messages with Doe. When Doe's parents learned of their daughter's correspondence with Guthrie, they turned the phone over to the police and granted a detective permission to take over Jane Doe's cell phone and social media accounts. The detective began communicating with Guthrie.
- 3 Guthrie sent additional photographs and videos of himself partially undressed, but the government conceded that material is not obscene and not the basis for its case.
- 4 “Whoever, using the mail or any facility or means of interstate or foreign commerce, knowingly transfers obscene matter to another individual who has not attained the age of 16 years, knowing that such other individual has not attained the age of 16 years, or attempts to do so, shall be fined under this title, imprisoned not more than 10 years, or both.” 18 U.S.C. § 1470.
- 5 Guthrie argued that “it is difficult to see how the simple depiction of masturbation, an ordinary sexual act, could fall outside the scope of [First Amendment] protection.”
- 6 *United States v. Olvera*, 687 F.3d 645, 647 (5th Cir. 2012).
- 7 *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974).
- 8 *United States v. Fontenot*, 665 F.3d 640, 644 (5th Cir. 2011) (quoting *United States v. Flores*, 404 F.3d 320, 324 (5th Cir. 2005)).
- 9 *United States v. White*, 258 F.3d 374, 380 (5th Cir. 2001).
- 10 *United States v. Marek*, 238 F.3d 310, 314 (5th Cir. 2001) (en banc).
- 11 *Id.* at 315.
- 12 *United States v. Butler*, 637 F.3d 519, 521 (5th Cir. 2011).
- 13 *United States v. Reasor*, 418 F.3d 466, 470 (5th Cir. 2005).
- 14 *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230, 92 S.Ct. 2245, 33 L.Ed.2d 312 (1972)). See *United States v. Rudzavice*, 586 F.3d 310, 315 (5th Cir. 2009) (stating that courts “read [the *Miller*] test into federal obscenity statutes” including § 1470).
- 15 *Jenkins v. Georgia*, 418 U.S. 153, 159, 94 S.Ct. 2750, 41 L.Ed.2d 642 (1974) (quoting *Miller*, 413 U.S. at 30, 93 S.Ct. 2607). See also *United States v. Ragsdale*, 426 F.3d 765, 782 (5th Cir. 2005) (“While the definition of obscenity is a legal conclusion, whether a work qualifies as obscenity *vel non* as applied to the facts of a particular case is a question of fact.”).
- 16 *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 576 n.7, 122 S.Ct. 1700, 152 L.Ed.2d 771 (2002).
- 17 *Jenkins*, 418 U.S. at 160, 94 S.Ct. 2750.
- 18 *Id.* at 161.

- 19 *Miller*, 413 U.S. at 25, 93 S.Ct. 2607.
- 20 Furthermore, *Guthrie*'s textual argument loses much of its force in the face of *Jenkins*, issued only one year after *Miller*. In *Jenkins*, the Supreme Court stated that it "took pains in *Miller* to 'give a few plain examples' " of what could be considered patently offensive, "includ[ing] ... 'representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.' " *Jenkins*, 418 U.S. at 160, 94 S.Ct. 2750 (quoting *Miller*, 413 U.S. at 25, 93 S.Ct. 2607). This framing makes clear that the Supreme Court contemplated some category of "representations of masturbation" could be patently offensive, and it gives no indication that patent offensiveness relies on any additional characteristic.
- 21 See, e.g., *Ragsdale*, 426 F.3d at 781; *United States v. Adams*, 337 Fed.Appx. 336, 338 (4th Cir. 2009) (unpublished).
- 22 *United States v. Kirkpatrick*, 662 Fed.Appx. 237, 240 (5th Cir. 2016) (unpublished); *United States v. Rogers*, 474 Fed.Appx. 463, 470 (7th Cir. 2012) (unpublished); *United States v. Jenkins*, 322 Fed.Appx. 716, 716–17 (11th Cir. 2009) (unpublished).
- 23 See *Kirkpatrick*, 662 Fed.Appx. at 240 ("[A] rational trier of fact could have found that the videos depicted 'sexual conduct' in a 'patently offensive way' within the meaning of the *Miller* obscenity test."); *Rogers*, 474 Fed.Appx. at 470 ("In this case, the image of the erect penis falls within the constitutional bounds of 'patently offensive' material. A jury could reasonably find that the picture represented or described a lewd exhibition of [the defendant's] genitals."); *Jenkins*, 322 Fed.Appx. at 717 ("The jury saw each of the six video recordings of Jenkins, which was evidence sufficient for the jury to make an obscenity determination.").

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