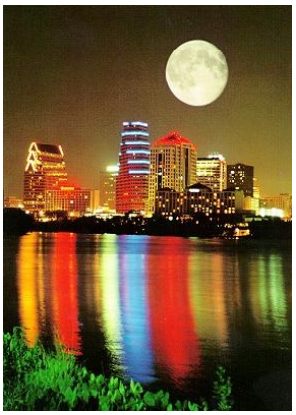

One Fabulous Skyline


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Vol. 25, No. 40 - October 23, 2017


**Case Name**: ***The State of Texas v. Mark Bolles***

- **OFFENSE**: Possession of Child Pornography
- **COUNTY**: Nueces
- **COURT OF APPEALS**: Corpus Christi 2016
- **C/A CITATION**: 512 S.W.3d 456
- **C/A RESULT**: Conviction Reversed
- **CCA. CASE No**. PD-0791-16 **DATE OF OPINION**: October 18, 2017
- **DISPOSITION**: Court of Appeals Reversed
- **OPINION**: Judge Richardson **VOTE**: 9-0
- **TRIAL COURT**: 94th D/C
- **LAWYERS**: Adam Roddrigue (Defense); Douglas Norman (State)

(**Background Facts**): On February 14, 2014, Appellant entered the Corpus Christi Library and used one of the computers available to library patrons to browse the internet. Alex Hatley, the library's technology manager, noticed Appellant viewing images of "what looked like partially clothed individuals." Hatley testified that he told a secretary to contact law enforcement because the images appeared to him to depict children. Agent Brian Johnson of the FBI arrived at the library in response to the call. At trial, Agent Johnson testified that he observed Appellant from a distance and confirmed that he appeared to be viewing "what looked like nude children to me, and he was also holding a cell phone up to the screen and taking photographs of the screen." Agent Johnson briefly detained Appellant and spoke to him. After Appellant executed a written release consenting to a search of his phone, Agent Johnson released Appellant and turned the phone over to the Corpus Christi Police Department's computer forensic division. The forensics division later recovered from the phone several photos of nude or partially nude females and one image of Appellant's face and penis.

**539.01 Sufficiency of the Evidence (Possession of Child Pornography)**: Among the images discovered on Appellant's cell phone and admitted into evidence was one that he photographed from the computer screen of a famous portrait by photographer, Robert Mapplethorpe. It is a

portrait of a young girl of about three years old, sitting on a stone bench. "Rosie" depicts a young female child seated on a stone bench. She sits with her left leg drawn inwards towards her body while her right leg is vertical and bent at the knee. She touches the side of the bench with her right arm while her left arm reaches down in the direction of her left foot. She wears a dress but no underwear. As a result, her vagina is visible in a small part of the extreme lower portion of the image. The parties stipulated in writing that Mapplethorpe created the photograph in 1976 and that the original photograph is in the collection of the Guggenheim Museum in New York City. The second image ("the cropped image") is a close-up of the full image which depicts only the vagina and a small portion of the edge of Rosie's dress. Appellant apparently created the cropped image by using the zoom function on his camera phone to take a picture of that portion of the full image. The trial court convicted Appellant of Count 1, and acquitted him of Count 2. On appeal, Appellant asserted that the evidence is insufficient to support his conviction. He reasoned that the cropped image cannot be lewd because it is only a portion of the full image, which is a work of art and not lewd. The Court of Appeals reversed Appellant's conviction (see ℘, Vol. 24, No. 26; 06/27/2016). It held that "the evidence was insufficient to support the conviction on Count 1 because (1) the full image does not depict a lewd exhibition of the genitals, and (2) the cropped image does not depict a person who was under the age of eighteen at the time the image was made."

**Holding**: Whether an image falls within the statutorily defined category of child pornography under Texas state law is a question that must be answered on a case by case basis. Thus, borrowing from what Justice Stewart famously observed about pornography in his concurring opinion in ***Jacobellis v. Ohio***, 378 U.S. 184 (1964), we shall not attempt further to define the kinds of material we understand to be child pornography; and perhaps we could never succeed in intelligibly doing so. But we know it when we see it. *** As the court stated in ***United States v. McCall***, 833 F.3d 560 (5th Cir. 2016), "it is the depiction — not the minor—that must bring forth the genitals or pubic area to excite or stimulate." Thus, the context of the making of the cropped image and the composition of the image, as cropped, can factor into this evaluation. The magnified cropped image is not a work of art hanging in a museum or depicted in books containing Robert Mapplethorpe's work. The magnified and cropped image is a picture of a child's genitals, legs spread open. We find that this image constitutes a "lewd exhibition" of her genitals. It would be difficult to conclude otherwise since all six [factors set out in ***United States v. Dost***, 636 F. Supp. 828 (S.D. Cal. 1986)] have been satisfied. *** In sum, we hold that child pornography can result from image editing and manipulation. In this case, the act of zooming in, magnifying, and retaking the image as cropped is a form of image editing. The act of image manipulation combined with the particular composition of the edited image — i.e., a close-up of the child's genital area — resulted in the creation of a different image that constitutes the "lewd exhibition" of a child's genitals. We therefore hold that the evidence is sufficient to support the Appellant's conviction on Count 1 because the zoomed-in cropped image depicting a child's genitals constitutes child pornography as that term is defined in Penal Code sections 43.26 and 43.25(a)(2).

(**David A. Schulman**) Personally, I don't see this as even a close call. While Mapplethorpe's work was art is not pornography, a photographic image showing nothing but a little girl's genitals is nothing but pornography . . . and I don't need to see it to know it.

(**John G. Jasuta**) It's the composition which gets him. Obviously if you're in the Guggenheim and stand a bit too close when you take your picture and don't quite get it all in you are still trying to take a photo of the artwork. The funny thing about the law and this case is that he could blow it up by zooming in anytime he viewed the original but he just couldn't save it. Dumbass.