

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA

v.

Criminal No. 97-78-P-C

DAVID HILTON,

Defendant

GENE CARTER, District Judge

MEMORANDUM OF DECISION AND ORDER

Defendant David Hilton is charged in a single-count Superseding Indictment with possession of computer disks, tapes, and other material that contained three or more images of child pornography that had been transported in interstate and foreign commerce by computer via the internet, in violation of 18 U.S.C. § 2252A(a)(5)(B).¹ After a three-day bench trial, the Court makes the following findings of fact and conclusions of law.

¹ Both the original Indictment (Docket No. 1) and the Superseding Indictment allege a violation of Title 18, United States Code § 2252A(5)(B), which is an improper citation. The section at issue is section 2252A(a)(5)(B) not section 2252A(5)(B). Defendant has not raised this error, and the Court finds the error caused Defendant no prejudice, because there is little doubt from the record that both Defendant and the Government were well aware that the section at issue

I. Findings of Fact

In November of 1995, Defendant telephoned the Federal Bureau of Investigations (AFBI@) to report that he had received unsolicited child pornography and that he wished to turn it over to the FBI for investigation. Revised Trial Transcript for First Day of Trial (ATT1") (Docket No. 59) at 16-17. Defendant spoke with FBI Special Agent Thomas Honan, and the two arranged to meet at Defendant's electronics repair business in Norway, Maine, a few days after the phone conversation. TT1 at 17-18. At that meeting, Defendant turned over to Special Agent Honan several computer floppy disks that, Defendant indicated, contained images of child pornography that had been sent to Defendant over the internet. TT1 at 18-19. Defendant explained to Special Agent Honan that he had received the unsolicited images while exploring the internet to assess its safety for use by children B a task he had undertaken at the request of a friend who had younger children. TT1 at 16-18. Defendant explained that the images were sent to him after he had posed as a twelve-year-old girl on the internet. TT1 at 20. Special Agent Honan had no doubt that Defendant understood that the possession of such images was illegal, and Defendant indicated to Special Agent Honan that he would delete from his computer any copies of the images he was turning over. TT1 at 19, 22. At the close of the meeting, Special Agent Honan told Defendant that he wanted any images that Defendant might receive in the future, but Special Agent Honan did not authorize Defendant to solicit child pornography. TT1 at 22-23. Special Agent Honan reviewed

in this case is section 2252A(a)(5)(B). *See, e.g.*, Government's Post-Trial Brief (Docket No. 56) (citing section 2252A(a)(5)(B)); Defendant's Post Trial Memorandum (Docket No. 60) (citing section 2252A(a)(5)(B)).

the images on the disks and determined that some of the images were child pornography and some of the images were what he considered adult pornography. TT1 at 23.

Within a week of this first meeting, Special Agent Honan received a second telephone call from Defendant, which resulted in a second meeting. TT1 at 24. This second meeting took place in Defendant's residence, which was located above his business. TT1 at 24-25. At the second meeting, Special Agent Honan reviewed several images on Defendant's computer. TT1 at 25. Special Agent Honan identified those images that he believed were child pornography, and Defendant copied those images to a disk, which Special Agent Honan took with him. TT1 at 26.

After one or two similar meetings, Special Agent Honan told Defendant that he no longer needed Defendant's assistance and that, if the FBI needed further assistance, Defendant would be contacted. TT1 at 26-27. The last meeting between Special Agent Honan and Defendant took place in either January or February 1996. TT1 at 28. At the last meeting, Special Agent Honan reminded Defendant that possession of child pornography was illegal. TT1 at 29.

On August 29, 1997, Defendant telephoned the United States Customs Service (ACustoms@) and spoke with Special Agent Paul Coyman. TT1 at 48. Defendant indicated that he had come across child pornography on the internet and he wished to work with the Customs Service. TT1 at 48-49. Defendant told Special Agent Coyman that he had previously worked with the FBI for eight or nine months, but that that relationship had ended three months earlier. TT1 at 48-49. Defendant said that he had come across child pornography while conducting internet research on satanic rituals. TT1 at 49. Defendant indicated that he had identified five individuals who were engaged in trafficking in child pornography and that he wished to work with Customs to identify these and other traffickers. TT1 at 50-51. Special Agent Coyman asked if Defendant had images of child pornography in his possession, and Defendant stated that he did not because he had deleted any

child pornography images he had received. TT1 at 50. Because Special Agent Coyman was in the Boston, Massachusetts, office, he referred the matter to Customs Special Agent Stephen Marx in Maine. TT1 at 55.

Special Agent Marx, in turn, assigned the matter to Special Agent Karen Booke of the Customs Service. TT1 at 65. On or about October 24, 1997, Special Agent Booke telephoned Defendant and arranged to meet him. TT1 at 67-68. On October 29, 1997, Special Agent Booke and Special Agent Marx met with Defendant in his residence. TT1 at 68-69. Defendant stated that he had been chasing pedophiles for several years because he believed that it was wrong. TT1 at 69-70. Defendant explained that he participated in internet chat rooms, posing as minor females between the ages of eleven and fourteen years, and that during the course of such discussions, other people in the chat room would send unsolicited images of child pornography to him. TT1 at 70. Defendant demonstrated this practice in the presence of the agents by entering a chat room and posing as an eleven-year-old, although this demonstration did not result in child pornography being transmitted to Defendant. TT1 at 74-75. Defendant indicated that he did not solicit images of child pornography, he did not trade such images, and he did not transmit such images to others. TT1 at 71.

Defendant told Special Agents Marx and Booke that he began working with the FBI in November of 1995. TT1 at 71. Defendant indicated that he had worked with FBI Special Agent Honan for approximately one year, but that the relationship ended in October of 1996, in part because Defendant was unhappy that the FBI was failing to taken action as a result of the information he had provided to the FBI. TT1 at 71-72.

At the conclusion of the meeting, Defendant provided the agents with a log of chat-room conversations he had conducted while posing as a young girl. TT1 at 78. Additionally, Defendant

gave the agents a computer disk labeled AFTP for Customs@containing child pornography images that Defendant had apparently downloaded from an AFTP² site on the internet. TT1 at 78.

Defendant also provided a computer disk labeled AJay 27," which contained images of child pornography as well as a log of a chat-room conversation with a person identified as ASmog.@ TT1 at 79. Both agents were concerned that Defendant was in possession of child pornography given that he had no authority from the FBI or from Customs to possess child pornography. TT1 at 79, 159-60. As a result, Special Agent Marx twice asked Defendant if he was turning over all images of child pornography in his possession, because Defendant had no authority to possess it. TT1 at 160. Each time, Defendant responded that he was giving them everything that he had. TT1 at 160. Special Agent Marx reminded Defendant that Defendant had no authority to possess child pornography. TT1 at 160. At the close of this meeting, arrangements were made for a second meeting, on November 4, 1997. TT1 at 91. The purpose of the second meeting was to follow up on the information that Defendant had provided, as well as to make a final decision as to whether Customs would use Defendant as a source. TT1 at 91.

The second meeting never occurred. During and after the first meeting, Special Agents Booke and Marx became suspicious of Defendant and decided to treat him as a target of an investigation as opposed to a potential informant. TT1 at 103. The agents offered numerous reasons for their decision to treat Defendant as a target following the first meeting. TT1 at 104. Special Agent Booke was troubled by the inconsistent stories Defendant gave to Special Agent Honan, Special Agent Coyman, and to her and Special Agent Marx as to how Defendant started investigating child pornography on the internet. TT1 at 104. Additionally, Special Agent Booke

² The Court understands AFTP@to be an acronym for file transfer protocol.

was concerned that Defendant had apparently been collecting child pornography **B** ostensibly as part of his investigative efforts **B** both prior to his contact with the FBI and after his relationship with the FBI had ended. TT1 at 104. Special Agent Boone was most troubled by a story Defendant related about his personal experience with child pornography. TT1 at 98. Defendant indicated that a friend of his had asked him to photograph an eleven-year-old female in the nude for \$40. TT1 at 98. Defendant told Special Agent Boone that he went to the house where the girl was and pretended to photograph her using what he described as **A**junk film.[@] TT1 at 98.

Defendant then took the girl out of the house. TT1 at 98. Special Agent Boone was particularly concerned that **B** given his expressed hatred of child pornography **B** Defendant volunteered that he did not report this incident to the police. TT1 at 103. Special Agent Marx shared many of Special Agent Boone's concerns and had additional concerns. TT1 at 164-65. Special Agent Marx was troubled by Defendant's indication that he was involved in some sort of disagreement with local police arising out of his anti-child-pornography efforts. TT1 at 165. Additionally, Special Agent Marx concluded that if Defendant had been valuable as an investigative resource, his relationship with the FBI would not have ended. TT1 at 165. Accordingly, the agents obtained a warrant to search Defendant's home. TT1 at 108.

The search warrant was executed on November 7, 1997, by Special Agents Boone and Marx, along with other law enforcement officers. TT1 at 109, 167. While the search was ongoing, Defendant agreed to be interviewed by Special Agent Boone. TT1 at 109. During the interview, Defendant reiterated that he had deleted all images of child pornography that he had received and that he did not keep any of them. TT1 at 116. During the course of the search, the agents seized Defendant's computer, computer-related documents, and various computer storage media such as computer disks and computer backup tapes. TT1 at 169-171. The Government

contends that some of the images found on Defendant's computer and on a backup tape, as well as a hard copy of images apparently downloaded from the internet, are child pornography as defined under federal law. Those images form the basis for this prosecution.

II. Affirmative Defense B Public Authority

The Court begins its legal analysis with an examination of the affirmative defense raised by Defendant. Pursuant to Fed. R. Crim. P. 12.3, Defendant filed a timely Notice of Intention to Claim Defense of Exercise of Public Authority (Docket No. 6). Prior to trial, the Government filed a Motion *in Limine* (Docket No. 35) seeking to preclude Defendant from introducing any evidence at trial relative to the public authority defense. By an Order of this Court (Docket No. 42), the Government's Motion *in Limine* was denied, with the understanding that the Government could renew a similar objection at the close of evidence and the Court would determine whether Defendant had generated evidence sufficient to warrant a public authority jury instruction. Subsequently, the Court accepted Defendant's waiver of his right to a jury trial (Docket No. 43), and a bench trial was conducted. Accordingly, the Court will now consider Defendant's public authority defense in light of the evidence adduced at trial.

By Defendant's Post Trial Memorandum (Docket No. 60), Defendant clarifies that he raises the affirmative defense of entrapment by estoppel as well as the affirmative defense of public authority. Given the close similarity between these doctrines, the Court overlooks the fact that Defendant's Notice pursuant to Fed. R. Crim. P. 12.3 refers to only the public authority defense. Entrapment by estoppel has been recognized as a defense available in *certain*, relatively narrow, circumstances.[@] *United States v. Smith*, 940 F.2d 710, 714 (1st Cir. 1991). The defense of entrapment by estoppel is predicated on principles of fairness embodied in the Due Process Clause. The four-part test for the defense is straightforward. First, the defendant must be advised

by a government official that the conduct in question is legal. Second, the defendant must rely on that advice. Third, such reliance must be reasonable. And fourth, the prosecution must be *unfair* as a result. *Id.* at 715.

Distinct from entrapment by estoppel is the affirmative defense of public authority. Under a public authority defense, the defendant seeks exoneration based on the fact that he reasonably relied on the authority of a government official to engage him in [illegal] covert activity. *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1368 n.18 (11th Cir. 1994). The Court of Appeals for the First Circuit has expressly adopted the Court of Appeals for the Eleventh Circuit's characterization of the defense in *Baptista-Rodriguez*. See *United States v. Holmquist*, 36 F.3d 154, 161 n.7. However, the Court of Appeals for the First Circuit has also made clear that a public authority defense must rest on actual authority, not apparent authority. *Id.* at 161 n.6. In other words, if the Government official in question did not have actual authority to engage the defendant in this illegal conduct, then the defendant's mistaken reliance, even if reasonable, is a mistake of law and, therefore, not a valid defense. The standard for the public authority doctrine is as follows. First, the defendant must have been asked to engage in covert activity by a governmental official. Second, the official must have actual authority to authorize such covert activity. Third, the defendant must have relied on the request. Fourth, the reliance must have been reasonable. See *Baptista-Rodriguez*, 17 F.3d at 1368 n.18.

As stated above, there is a strong similarity between the defenses of entrapment by estoppel and public authority, but they are not identical. The entrapment by estoppel defense does not necessarily require cooperation in a government investigation. For example, a federal judge and a U.S. Attorney could erroneously and expressly inform a convicted defendant at sentencing that his sentence would not preclude him from possessing a firearm. Subsequent prosecution of

that defendant for possession of firearms charges would implicate the entrapment by estoppel doctrine, but it would not implicate the public authority defense as there has been no cooperation in a covert investigation. Alternatively, the cooperation of a felon in an investigation of illegal arms dealing, during which the felon is told by a law enforcement agent that he will have immunity for his possession of firearms during the course of the covert operation, would implicate the public authority defense, but not the entrapment by estoppel defense, because the felon has not been told that possession of a firearm is legal (merely that he has immunity for such possession). Finally, if a law enforcement agent told the felon that his possession of a firearm during the course of the covert investigation would be legal, both defenses would be implicated.

Applying the defense of entrapment by estoppel to this case, the Court is satisfied beyond a reasonable doubt that the defense of entrapment by estoppel does not apply to Defendant. The first element of entrapment by estoppel is that a Government agent told Defendant that the conduct in question was legal. There is no evidence to suggest that a Government agent told Defendant that his possession of child pornography was legal. First and foremost, the context in which Defendant contacted both the FBI and Customs was that Defendant understood that possession of child pornography was illegal and that he wished to assist these law enforcement agencies in apprehending and prosecuting child pornography traffickers. Given the context of their contact with Defendant, Special Agents Honan, Marx, and Booke had no doubt that Defendant understood that possession of child pornography was illegal. TT1 at 19, 72-73, 76, 159. Despite this understanding, Special Agent Honan testified that he expressly told Defendant that possession of child pornography was illegal. TT1 at 43. Similarly, Special Agent Marx repeatedly told Defendant that possession of child pornography was illegal. TT1 at 160. Because the Court is satisfied that the Government established beyond a reasonable doubt that Government agents never

told Defendant that his possession of child pornography was legal, Defendant's invocation of the affirmative defense of entrapment by estoppel fails.

Turning to the public authority defense, again the Court is satisfied beyond a reasonable doubt that Defendant is not entitled to the public authority defense. As with the defense of entrapment by estoppel, the Court need go no further than the first element of the public authority defense **B** that Defendant must have been asked to engage in covert activity by a governmental official **B** to determine that Defendant cannot avoid a conviction on the grounds of the public authority defense. None of the Government agents who had contact with Defendant asked Defendant to engage in a covert operation to collect child pornography or to identify child pornography traffickers. Beginning with Special Agents Boone and Marx, although the purpose of their first meeting was to explore the possibility that Defendant could participate in a covert operation in the future, they expressly told Defendant that he currently did not have authority to conduct such operations himself. It is true that Special Agents Boone and Marx watched Defendant enter a chat room, posing as a young girl, during their first meeting. However, no images were downloaded during that first meeting, and without downloading child pornography, Defendant did not require public authority to pose as a young girl in a chat room because such conduct, on its own, is not illegal.

With respect to Special Agent Honan, it is undisputed that he provided Defendant with authority to possess pornography for the purpose of turning it over to him if Defendant received it unsolicited. Beyond that, however, Special Agent Honan testified that he never authorized Defendant to seek out child pornography on the internet. TT1 at 27-28. Even if the Court were to conclude that the authority Defendant received from Special Agent Honan to possess child pornography for the purpose of turning it over to the FBI was akin to being asked to participate in a

covert operation, the Court finds beyond a reasonable doubt that Defendant could not have reasonably been relying on any such authority when his home was searched on November 7, 1997, given that Defendant's last meeting with Special Agent Honan was in either January or February of 1996 **B** nearly two years prior. The Court finds that the Government has proven beyond a reasonable doubt that Defendant is not entitled to the protection of the public authority defense.³

³ Throughout the trial, Defendant's attorney suggested that Defendant was entitled to either the entrapment by estoppel defense or the public authority defense as a result of information he gained from the Customs web site. Without any direct evidence to suggest that Defendant did in fact rely on the information on the web site, the Court is satisfied that the Government has established beyond a reasonable doubt that Defendant is not entitled to the entrapment by estoppel

defense or the public authority defense based on the Customs=web site.

However, the Court is concerned that the Customs=web site, as it currently exists, could erroneously induce people to collect child pornography for law enforcement purposes. The Court is particularly concerned about the following language on the Customs=web site under the heading **Reporting Child Pornography.** **Please include as much information as possible about the persons involved if known, their E-mail addresses, FTP site, etc. *You will remain anonymous and could be eligible for a cash award!*** *U.S. Customs Enforcement*, (visited June 12, 2000) <<http://www.customs.ustreas.gov/enforcem/enforcem.htm>> (emphasis in original). By directing concerned citizens to collect **as much information as possible,** and offering the possibility of a cash reward, the Court fears that Customs is inadvertently encouraging people to collect child pornography. People will undoubtedly conclude that their chances of receiving a cash reward increase if they provide Customs with copies of the alleged perpetrator's child pornography. In their rush to **get the goods** on those who traffic in child pornography, concerned citizens run the very real risk of violating federal law themselves simply by being in possession of child pornography. Although 18 U.S.C. ' 2252A(d) provides an affirmative defense that could protect a person who collects child pornography for the purpose of assisting law enforcement agencies, the protection is narrow in that it applies only if the person has two or fewer images of child pornography.

The Court suggests that Customs modify its web site to include clear and specific language warning those who wish to help Customs fight child pornography that they must not possess child pornography as part of those efforts. All of the agents who testified at this trial were apparently careful to warn Defendant that possession of child pornography was illegal **B** even if such possession was for a good cause. The Court cannot understand why the U.S. Customs Service web site does not offer a similar admonition.

III. The Charged Conduct

Having disposed of Defendant's affirmative defenses, the Court now turns to the charged conduct, possession of computer disks, tapes, and other material that contained three or more images of child pornography that had been transported in interstate commerce. In its post-trial brief, the Government identified three sets of images, each of which, the Government contends, constitutes a violation of 18 U.S.C. § 2252A(a)(5)(B). The first group is seven images (the Sony backup tape images) (Gov. Ex. 24a-g) found on a Sony backup tape (Gov. Ex. 65). The second group is four images (Gov. Ex. 25a) printed on paper and found in a gray box (Gov. Ex. 62) near Defendant's computer. The images on Exhibit 25a are identical to four of the seven images on the Sony backup tape. The third group is three images (Gov. Ex. 48(b), 48(g), and 48(i)) found on the hard drive of Defendant's computer (Gov. Ex. 60).

Section 2252A(a)(5)(B) provides:

Any person who knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, shall be punished as provided in subsection (b).

The Court of Appeals for the First Circuit has held that the scienter element **B** resulting from the term **Knowingly@B** applies both to possession of the media and to the contents of the media. *See United States v. Hilton*, 167 F.3d 61, 75 (1st Cir.), *cert. denied*, 120 S. Ct. 115, 145 L. Ed. 2d 98 (1999)⁴. In other words, to obtain a conviction under this section, the Government must prove beyond a reasonable doubt both that Defendant knowingly possessed, for example, the Sony

⁴ The *Hilton* decision represents an earlier chapter in this case, wherein Defendant unsuccessfully challenged the constitutionality of portions of the statute at issue.

backup tape and that he knew it contained child pornography. The Court of Appeals for the First Circuit has held, however, that the scienter element of section 2252A does not apply to the interstate commerce provision. *See id.* at 76 n.9. The Government need not prove that Defendant knew the child pornography had been transported in interstate or foreign commerce.

Accordingly, section 2252A can be distilled to four elements, all of which the Government must establish beyond a reasonable doubt. Using the Sony backup tape as an example, first, the Government must prove that Defendant knowingly possessed the Sony backup tape. Second, the Government must prove that the Sony backup tape contains at least three images that meet the statutory definition of child pornography.⁵ Third, the Government must prove that Defendant knew the Sony backup tape contained the images of child pornography. Fourth, the Government must prove that the images traveled in interstate or foreign commerce. If, and only if, the Government meets all four of these requirements will a violation of section 2252A be proven.

The Court begins by analyzing the seven images on the Sony backup tape. Beginning with the first element of section 2252A, knowing possession by Defendant, the Sony backup tape was

⁵ The requirement that the Government prove possession of three or more images of child pornography is derived from section 2252A(d)(1), which provides that

[i]t shall be an affirmative defense to a charge of violating subsection (a)(5) that the defendant **B** (1) possessed less than three images of child pornography; and (2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof **B** (A) took reasonable steps to destroy each such image; or (B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

If, however, a defendant is found to possess three or more images of child pornography, the affirmative defense is lost, regardless of efforts to destroy the images or to turn them over to a law enforcement agency.

found in Defendant's computer room and, according to expert testimony of Special Agent Marx⁶, had been used to back up data from Defendant's computer. TT1 at 170, 212. Based on these facts, the Court is satisfied that the Government has proven beyond a reasonable doubt that Defendant knowingly possessed the Sony backup tape.

The Court next turns to the definition of child pornography. An image constitutes child pornography under federal law if it depicts sexually explicit conduct where:

- (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
- (B) such visual depiction is, or appears to be, of a minor engaging in sexual explicit conduct;
- (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
- (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.

⁶ At trial, the parties stipulated to the designation of Special Agent Marx as an expert in the field of computer forensics, permitted to offer expert testimony. TT1 at 147-48.

18 U.S.C. ' 2256(8). A minor is a child under the age of eighteen years. 18 U.S.C. ' 2256(1).

ASexually explicit conduct@includes actual or simulated sexual intercourse,⁷ bestiality, masturbation, sadistic or masochistic abuse, or lascivious exhibition of the genitals or pubic area of any person. 18 U.S.C. ' 2256(2).

The Government has identified seven images on the Sony backup tape that it contends meet the statutory definition of child pornography. Government's Exhibit 24(a) depicts a minor girl who appears to be engaging in sexual intercourse with an adult male. During trial, the Government offered the testimony of Dr. Lawrence Ricci, a licensed pediatrician accredited as an expert in pediatrics. Revised Trial Transcript for Third Day of Trial (TT3") (Docket No. 58) at 8. Dr. Ricci provided his expert opinion as to the ages of children depicted in various images seized during the search of Defendant's residence and recorded his opinion on the back of the images. TT3 at 8-9, 12. According to Dr. Ricci, Government's Exhibit 24(a) depicts the head and upper torso of a girl under the age of twelve years and the genitals of an adult female. TT3 at 12, Gov. Ex. 24(a). Apparently this image represents the combination B perhaps achieved with the assistance of a computer B of two separate images. The result is an image that appears to be of a minor engaging in sexual intercourse. 18 U.S.C. ' 2256(8)(B). Accordingly, the Court finds beyond a reasonable doubt that Government's Exhibit 24(a) is an image of child pornography as defined by federal law.

Government's Exhibit 24(b) depicts a girl engaging in sexual intercourse. In Dr. Ricci's opinion, the girl in the image is approximately twelve years old. TT3 at 12; Gov. Ex. 24(b).

⁷ Sexual intercourse includes Agenital-genital, oral-genital, anal-genital, or oral-anal [contact], whether between persons of the same or opposite sex.@ 18 U.S.C. ' 2256(2)(A).

Accordingly, the Court finds beyond a reasonable doubt that Government's Exhibit 24(b) is an image of child pornography as defined by federal law.

Government's Exhibit 24(c) depicts a girl engaging in sexual intercourse. Again, it is Dr. Ricci's opinion that the girl in Government's Exhibit 24(c) is approximately thirteen to fourteen years old. TT3 at 12; Gov. Ex. 24(c). The Court finds beyond a reasonable doubt that Government's Exhibit 24(c) is an image of child pornography as defined by federal law.

Government's Exhibit 24(d) is an image of a nude girl displaying her genitals while an adult male ejaculates on her genitals. Dr. Ricci is of the opinion that the girl depicted in Government's Exhibit 24(d) is between five and seven years old. TT3 at 12; Gov. Ex. 24(d). The Court finds beyond a reasonable doubt that Government's Exhibit 24(d) is an image of child pornography as defined by federal law.

Government's Exhibit 24(e) depicts a girl engaging in sexual intercourse. Dr. Ricci is of the opinion that the girl in Government's Exhibit 24(e) is between eight and twelve years old. TT3 at 12; Gov. Ex. 24(e). The Court finds beyond a reasonable doubt that Government's Exhibit 24(e) is an image of child pornography as defined by federal law.

Government's Exhibit 24(f) is an image of a nude girl displaying her genitals while performing oral sex on an adult male. It is Dr. Ricci's opinion that the girl depicted in Government's Exhibit 24(f) is between the age of five and seven years. The Court finds beyond a reasonable doubt that Government's Exhibit 24(f) is an image of child pornography as defined by federal law.

Government's Exhibit 24(g) depicts sexual intercourse between a girl and an adult male. Dr. Ricci is of the opinion that the girl in Government's Exhibit 24(g) is of preschool age. The

Court finds beyond a reasonable doubt that Government's Exhibit 24(g) is an image of child pornography.

Because the Court has found beyond a reasonable doubt that the seven images on the Sony backup tape, Government's Exhibits 24(a)-(g), are images of child pornography as defined by federal law, Defendant is not entitled to the affirmative defense that he possessed fewer than three images of child pornography. 18 U.S.C. § 2252A(d). Additionally, these seven images satisfy the child pornography element of section 2252A(a)(5)(B).

The third element under section 2252A(a)(5)(B) requires the Government to prove that Defendant knew the Sony backup tape contained the images of child pornography. Special Agent Marx testified that the images were transferred from Defendant's computer to the Sony backup tape on September 11, 1997, approximately two months before the tape was seized from Defendant's residence. TT1 at 212. Furthermore, Special Agent Marx testified that the images were transferred onto Defendant's computer hard drive via a modem, indicating that Defendant intentionally placed the images on his computer. TT1 at 211-12. Therefore, the Court finds that the Government has proven beyond a reasonable doubt that Defendant intentionally placed the Sony backup tape images on his computer hard drive and later intentionally transferred the Sony backup tape images onto the Sony backup tape. Given Defendant's computer expertise **B** as witnessed by Special Agents Boone and Marx and as inferred by his profession as an electronics repairman **B** the Court is satisfied that Defendant knew the Sony backup tape images were on the Sony backup tape. Finally, having reviewed the Sony backup tape images, the Court is satisfied beyond a reasonable doubt that Defendant knew these images were images of child pornography. Accordingly, the third element under section 2252A(a)(5)(B) is met.

The fourth and final requirement of section 2252A(a)(5)(B) is that the images traveled in interstate or foreign commerce. It is well established that images transported over the internet have traveled in interstate commerce. *See United States v. Carroll*, 105 F.3d 740, 742 (1st Cir.), *cert. denied*, 520 U.S. 1258, 117 S. Ct. 2424 (1997), (ATransmission of photographs by means of the Internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce.®). Furthermore, transporting photographs via a computer modem over telephone lines B but without use of the internet B would also constitute interstate commerce.⁸ This is true because any telephone connection is an instrumentality of interstate commerce B even if used only for intrastate telephone calls. *See United States v. Gilbert*, 181 F.3d 152, 158-59 (1st Cir. 1999).

There are several pieces of evidence that demonstrate that the Sony backup tape images were received by Defendant via a computer modem B most likely over the internet. First, the Sony backup tape images were located in the AMIRC@subdirectory of the Sony backup tape. TT1 at 210-11. Special Agent Marx testified that aside from the Sony backup tape images, the AMIRC@subdirectory contained software and files related to AIRC@chat. TT1 at 211. Special Agent Marx explained that IRC was software that allows people to engage in real-time conversations, or

⁸ A modem may be used for purposes other than connecting with the internet. For example, a modem may be used to directly connect two computers over telephone lines without use of the internet. Additionally, many modems have the capability to send and receive faxes either to or from traditional fax machines or to or from other computers with similarly capable modems. So long as a modem is used to transmit information via telephone lines, it is an instrumentality of interstate commerce.

Achat, over the internet and that Defendant used IRC software when he demonstrated to Special Agents Booke and Marx his ability to pose as a young girl in internet chat rooms. TT1 at 152-54. Special Agent Marx testified that, in his expert opinion, because the Sony backup tape images were located on the MIRC subdirectory B which contained internet-chat-related files B the images were likely associated with the internet. TT1 at 211. Special Agent Marx also testified that the time and date on which each of the Sony backup tape images was created on Defendant's computer is indicative of a transmission via modem. TT1 at 211. Special Agent Marx based this conclusion on the fact that the Sony backup tape images were created on Defendant's computer at intervals of time consistent with downloading the images via a modem. TT1 at 211. Finally, the trial record amply demonstrates B based on Defendant's actions and words B that Defendant was an active user of the internet, that he was well aware that it was a source of child pornography, and that child pornography had been downloaded onto his computer from the internet. Taking all of this evidence into consideration B in particular, Special Agent Marx's expert testimony B the Court is satisfied beyond a reasonable doubt that all seven of the Sony backup tape images were transmitted to Defendant's computer via a modem, over the internet, such that the interstate commerce requirement of section 2252A(a)(5)(B) is met.

Because the Court has found that the Government has proven beyond a reasonable doubt all elements of section 2252A(a)(5)(B) with respect to the Sony backup tape images, the Court need not analyze the other groups of images identified by the Government.

IV. Conclusion

Having found that the Government has proven beyond a reasonable doubt all elements of 18 U.S.C. ' 2252A(a)(5)(B), the Court finds Defendant **GUILTY** on the sole count of the

Superseding Indictment. It is hereby **ORDERED** that judgment be entered finding Defendant Hilton guilty on the sole count of the Superseding Indictment. The Court further **ORDERS** preparation of the customary presentence report.

GENE CARTER
District Judge

Dated at Portland, Maine this 30th day of June, 2000.

DAVID HILTON (1)
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