

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

UNITED STATES OF AMERICA

v.

DAVID HILTON,

Defendant

Criminal No. 97-78-P-C

Gene Carter, Senior District Judge

**MEMORANDUM AND ORDER ON THE COURT'S REQUEST FOR BRIEFING
ON WHETHER DEFENDANT MAY BE RETRIED IN LIGHT OF THE DOUBLE
JEOPARDY CLAUSE AND ORDER LIFTING STAY**

By Order dated January 14, 2005 (Docket Item No. 143), the Court requested the parties file briefs addressing the issue of whether the Double Jeopardy Clause precludes the government from retrying Defendant David Hilton. The parties have now filed with the Court thorough briefs outlining their respective positions. *See* Government's Response to the Double Jeopardy Issue as Framed by the Court's Order of January 14, 2005 (Docket Item No. 144) and David Hilton's Response to the Double Jeopardy Issue Framed by the Court's Order of January 14, 2005 (Docket Item No. 145). For the reasons set forth below, the Court concludes that double jeopardy protections afforded to criminal defendants are not triggered by the posture of this case and the government is not so prevented from retrying Defendant.

I. Facts and Procedural History

Defendant was originally indicted on December 17, 1997, and charged with one count of possessing three or more images of child pornography that had been transported in interstate or foreign commerce, in violation of 18 U.S.C. § 2252A(5)(B). This Court subsequently dismissed the Indictment, *see United States v. Hilton*, 999 F. Supp. 131 (D. Me. 1998), which was reinstated on appeal by the United States Court of Appeals for the First Circuit. *United States v. Hilton*, 167 F.3d 61 (1st Cir. 1999). On remand, Defendant was tried on a one count Superseding Indictment (Docket Item No. 47) and convicted following a three-day bench trial. *See United States v. Hilton*, No. 97-78-P-C, 2000 WL 894679, at *10 (D. Me. June 30, 2000). Defendant was sentenced to thirty-four months' imprisonment on an Amended Judgment entered on October 25, 2001 (Docket Item No. 84).¹

In this Court's Memorandum of Decision and Order, *see id.*, Defendant was found guilty of possession of child pornography under 18 U.S.C. § 2256. At the time this Court entered a guilty judgment against Defendant, an image constituted child pornography under 18 U.S.C. § 2256(8) if it depicted 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 sexually 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

¹ Defendant was originally sentenced to an incarceration term of forty months (Docket Item No. 70). On appeal, Defendant's conviction was affirmed, but his sentence was vacated. *See United States v. Hilton*, 257 F.3d 50, 58 (1st Cir. 2001). On remand, Defendant's sentence was reduced to thirty-four months.

- (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.

18 U.S.C. § 2256(8).

Defendant served approximately nineteen months of his sentence before his conviction and sentence were vacated in light of the United States Supreme Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002). See *United States v. Hilton*, No. 97-78-P-C, 2003 WL 21135703 (D. Me. May 15, 2003), *aff'd on reh'g*, 386 F.3d 13 (1st Cir. 2004). In *Free Speech Coalition*, the United States Supreme Court held that “[section] 2256(8)(B) covers materials beyond the categories recognized in *Ferber* and *Miller* [Therefore] the provision abridges the freedom to engage in a substantial amount of lawful speech. For this reason, it is overbroad and unconstitutional.” *Free Speech Coalition*, 535 U.S. at 256.²

II. Discussion

In light of the Supreme Court's holding in *Free Speech Coalition*, and the subsequent vacation of Defendant's conviction, the question this Court posed to counsel for the Government and Defendant is whether the Double Jeopardy clause prohibits retrial in this case. After thorough consideration of the issue, the Court is satisfied that it does not.

² This Court relied on the “appears to be” language of 18 U.S.C. 2256(8)(B) in finding one of the images presented at Defendant's trial constituted child pornography: “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. Apparently this image represents the combination – perhaps achieved with the assistance of a computer – 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.” *United States v. Hilton*, No. 97-78-P-C, 2000 WL 894679, at *7.

a. Double Jeopardy Protections

When an appellate court vacates a conviction based upon an error in the trial proceedings, the government is generally free to retry the defendant. *See Lockhart v. Nelson*, 488 U.S. 33, 38-39, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988). In contrast, when a defendant's conviction is reversed on the sole ground that the evidence was insufficient to sustain the verdict, the Double Jeopardy Clause bars retrial. *Burks v. United States*, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

[R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.

Id. at 15; *see also United States v. Porter*, 807 F.2d 21, 23 (1st Cir. 1986) (“Society ... has a strong interest in providing the government with a full and fair opportunity to prosecute a defendant whose conviction is reversed due to a trial error.”).

In his brief, Defendant suggests that his conviction was vacated on grounds of insufficiency of evidence rather than trial error.³ *See* David Hilton's Response to the Double Jeopardy Issue Framed by the Court's Order of January 14, 2005, at 6-8. Specifically, Defendant contends that “there was no evidence introduced [at trial] that would support any finding, let alone beyond a reasonable doubt, that the seven images on

³ When a conviction is reversed on direct appeal for insufficiency of evidence, *Burks* prohibits a retrial. *Porter*, 807 F.2d at 24.

the Sony backup tape were of real minors.” *Id.* at 6-7. Accordingly, defendant asserts, his conviction must have been vacated for lack of evidence.

This argument is flawed. As the law existed at the time of Defendant’s trial, the Government’s evidence was sufficient to support a conviction. The bar of double jeopardy attaches only where the acquittal involves “a resolution, correct or not, of some or all of the *factual elements of the offense charged.*” *United States v. Lachman*, 387 F.3d 42, 50 (1st Cir. 2004) (quoting *United States v. Martin Linen*, 430 U.S. 564, 571, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977) (emphasis in original). In the instant case, the facts presented by the Government at trial did not warrant the entry of a Rule 29 judgment of acquittal; instead, the legal landscape changed. The government may retry a defendant whose convictions, as here, are set aside due to trial error without running afoul of the Double Jeopardy Clause. *See United States v. Scott*, 437 U.S. 82, 90-01, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978) (“The successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict, poses no bar to further prosecution on the same charge.”) (citations omitted).

b. Double Jeopardy and section 2256(8)

Although the First Circuit Court of Appeals has not specifically addressed the issue of double jeopardy in light of *Free Speech Coalition*, the Court is guided by the decisions reached by the Fourth and Tenth Circuit Courts of Appeals. *See United States v. Ellyson*, 326 F.3d 522 (4th Cir. 2003) and *United States v. Pearl*, 324 F.3d 1210 (10th Cir. 2003). In permitting retrial of a defendant whose conviction was set aside following *Free Speech Coalition*, the Fourth Circuit Court of Appeals stated:

[T]he basis for setting aside Ellyson’s conviction is not an insufficiency of evidence; rather, we must set aside the verdict because of the erroneous

jury instruction. Under circuit law at the time of trial, the government presented more than sufficient evidence to support a guilty verdict against Ellyson. Prior to *Free Speech Coalition*, the government could satisfy its burden by showing that Ellyson's child pornography “appeared to be of a minor” under § 2256(8)(B), and it was unnecessary for the government to offer evidence that a minor depicted in a given image was an actual child and not a computer-generated image.

The record contains substantial evidence that the images possessed by Ellyson (apart from the ones involving “Mike”), at the very least, “appeared to be of . . . minors” involved in sexually explicit conduct, *see* 18 U.S.C.A. § 2256(8)(B), and that such images had moved in interstate commerce, *see* 18 U.S.C.A. § 2252A(a)(5)(B).

Ellyson, 326 F.3d at 532-533 (internal citation omitted).⁴

The Tenth Circuit Court of Appeals, in *Pearl*, also permitted retrial of a defendant whose conviction was vacated following *Free Speech Coalition*. In reaching this conclusion, the *Pearl* court stated:

Because the government “cannot be held responsible for ‘failing to muster’ evidence sufficient to satisfy a standard [actual minors] which did not exist at the time of trial,” and because this is “trial error” rather than “pure insufficiency of evidence,” Mr. Pearl may be retried without violating double jeopardy.

⁴ Defendant Hilton attempts to distinguish *Ellyson* on the grounds that there was testimony in the *Ellyson* case that certain pictures did in fact depict actual minors -- e.g., those involving “Mike” -- and that such evidence was not introduced in Hilton’s trial. However, *Ellyson* court clearly stated that the pictures of actual minors would be sufficient to uphold the verdict even after *Free Speech Coalition*; the *Ellyson* court did not state that such evidence was required in order to permit retrial after changes to section 2256(8). *Ellyson*, 326 F.3d at 534. With respect to the images introduced at the *Ellyson* trial that were not accompanied by testimony indicating that they depicted actual minors, the Fourth Circuit Court of Appeals stated:

Any insufficiency in proof was caused by the subsequent change in the law under *Free Speech Coalition*, not the government's failure to muster evidence. . . . The government presented its evidence under the wrong standard, i.e., it presented evidence correctly believing, based on the law at the time, that it was enough to prove the images “appeared” to depict minors. If the evidence in the record is insufficient to support a verdict under *Free Speech Coalition*, it is not because of the government's failure of proof but because of the changes brought by *Free Speech Coalition*.

Id. at 533-34.

Id. at 1214 (quoting *United States v. Wacker*, 72 F.3d 1453, 1465 (10th Cir. 1995)). The Court is satisfied that the same rationale applies in the instant case.

In an effort to distinguish *Pearl*, Defendant seizes upon the passage stating, “[w]here the government produces *no* evidence at trial, then double jeopardy bars retrial.” *Pearl*, 324 F.3d at 1214 (emphasis in original). The *Pearl* court, however, stated that there was sufficient evidence in the existing record to conclude beyond a reasonable doubt that the pornographic images depicted actual minors. *Id.* The same conclusion applies here. This is not a situation where no evidence was presented and a Rule 29 judgment of acquittal should have been entered. Instead, there was sufficient evidence to support a conviction under the law as it stood at the time of trial and an absence of evidence, if any, is entirely the result of a subsequent change in the law, not the Government’s failure to provide evidence warranting a conviction. That is, the Government had no reason to introduce evidence of “actual minors” because, at the time of Defendant’s trial, the Government was not required to prove this as an element of the crime. The Government is therefore not being given a second opportunity to prove an element it failed to prove at the first trial; rather the Government -- having originally prevailed at trial -- is afforded the opportunity to again present its case, this time against the more stringent requirements of 18 U.S.C. § 2256(8). Retrial under these circumstances “is not the sort of governmental oppression at which the double jeopardy clause is aimed.” *Lockhart*, 488 U.S. at 42.

III. Conclusion

For the reasons set forth above, it is **ORDERED** that this case be placed on the next available trial calendar. It is **FURTHER ORDERED** that the stay in this case be, and it is hereby, **LIFTED**.

/s/Gene Carter
GENE CARTER
United States Senior District Judge

Dated at Portland, Maine this 24th day of March, 2005.

Defendant

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Pending Counts

18:2252A.F ACTIVITIES RE
MATERIAL
CONSTITUTING/CONTAINING
CHILD PORNO
(1s)

Disposition

40 Months Imprisonment,
Defendant to self-report on 1/3/01
at institution designated by Bureau
of Prisons, 3 years supervised
release, .00 Special Assessment,
Fines Waived. AMENDED
JUDGMENT: Imprisonment: 34
months; Supervised Release: 3 ya
rs; Special Assessment: .00; Fines:
Waived

Highest Offense Level (Opening)

Felony

Terminated Counts

18:2252A(5)(B) - interstate
transportation of child
pornography via Internet
(1)

Disposition

**Highest Offense Level
(Terminated)**

Felony

Complaints

None

Disposition

Plaintiff

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