

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA,)
)
v.) Crim. No. 97-78-P-C
) Civil No. 02-235-P-C
DAVID HILTON,)
)
Defendant)

**RECOMMENDED DECISION ON 28 U.S.C. § 2255 MOTION AND
MOTION FOR BOND**

David Hilton is serving a thirty-four-month sentence for his conviction under 18 U.S.C. § 2252A(a)(5)(B). He now seeks to have his conviction vacated and asks to be released on bond in the interim on the grounds that the United States Supreme Court in Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S. Ct. 1389 (2002) agreed with one of the positions that Hilton (and this Court) took at the indictment phase of Hilton’s prosecution: the 18 U.S.C. § 2256(8)(B) definition of child pornography pertaining to § 2254(a)(5)(B) prosecutions,¹ by encompassing images that “appear to be [] of minors engaging in sexually explicit conduct,” is unconstitutional under the First Amendment because it works an overbroad restriction on protected speech. The United States opposes both motions arguing, in main, that Hilton has not produced evidence that the images were not real children and that some of the testimony at trial supported the

¹ Hilton’s motion to dismiss the indictment focused on subsection (B) and not subsection (D), proscribing images “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)(D), a definition the Supreme Court also concluded was unconstitutionally overbroad. Free Speech Coalition, 122 S.Ct. at 1406.

conclusion that the images in question depicted non-morphed, actual children. For the reasons that follow I recommend that the Court **GRANT** Hilton's motions.

Housekeeping

Before addressing the merits of the parties' positions, I must deal with one housekeeping detail. The United States filed its opposition to Hilton's motion for bond late, accompanied by a motion to file a late response. I now **GRANT** the motion to file a late response.

Discussion

A. Getting Here from There

Hilton was charged in 1997 with possessing child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B), a provision enacted by Congress in 1997 as part of the Child Pornography Prevention Act of 1996 (CPPA). Hilton moved to dismiss his indictment on the ground that his prosecution violated his First Amendment rights. He challenges the definition of child pornography in 18 U.S.C. § 2256(8)(B) which brings within § 2252A's embrace a visual depiction that "is, or appears to be, of a minor engaging in sexually explicit conduct," 18 U.S.C. § 2256(8)(B) (emphasis added). Citing New York v. Ferber, 458 U.S. 747 (1982), and Osborne v. Ohio, 495 U.S. 103 (1990), Hilton contended that the new enactment was vague and overbroad and impermissibly prohibited protected expression. (Docket No. 11.) In a decision familiar to both parties and the Court, this Court granted the motion to dismiss the indictment, concluding that § 2256(8)(B) was both impermissibly vague and overbroad. United States v. Hilton, 999 F. Supp. 131, 135-37 (D. Me. 1998) (Carter, J.).

The United States appealed. The Court of Appeals for the First Circuit reversed this Court. United States v. Hilton, 167 F.3d 61 (1999) (Hilton I). It analyzed, among other precedents, Ferber and Osborne, and Miller v. California, 413 U.S. 15 (1973), and reasoned:

[S]exually explicit material may be seen to fall along a constitutional continuum entitling it to varying degrees of protection. At one end of the spectrum, pictures of actual children in sexually compromising positions, deemed to have little or no social value, are entitled to no constitutional protection. At the opposite end of the spectrum, non-obscene images involving actual adults are entitled to full protection. Sexually explicit material created without the benefit of a live child model but which appears to depict an actual minor, or produced by having an adult pose as a minor and later presented or sold as if it depicted an actual minor, arguably falls somewhere in between.

Hilton, 167 F.3d at 70. It rejected Hilton’s argument that the First Amendment allows regulation of sexually explicit materials only where actual children are abused in its creation, stating that it amounted “to an effort to draw a bright line in an area of law in which courts have resisted creating clear-cut categories.” Id. at 72. The panel explained: “We think that it is a logical and permissible extension of the rationales in Ferber and Osborne to allow the regulation of sexual materials that appear to be of children but did not, in fact, involve the use of live children in their production.” Id. at 73. “Like sexually explicit material produced with actual children,” the Court added, “there is little, if any, social value in this type of expression.” Id.; see also id. at 74 (reasoning that an affirmative First Amendment defense to the prosecution would be available to prevent convictions for serious contributions to the arts and sciences). The Court concluded that the statutory definition was not overbroad. Id.² The United States Supreme Court

² The First Circuit also rejected Hilton’s vagueness challenge. It held that “appears to be a minor” was an objective rather than a subjective standard, id. at 75, and observed that the scienter requirement of knowing possession in § 2252A(a)(5)(B) served as “an additional safeguard assuring that individuals had

denied Hilton's petition for certiorari review. United States v. Hilton, 528 U.S. 844 (1999).

In due course Hilton did two things relevant to this § 2255 motion. He elected to waive his right to a jury trial (Docket No. 43) and he filed a motion to stay prosecution because the Ninth Circuit, in Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1999), had come to the opposite conclusion than had the First Circuit on the challenges raised by Hilton (Docket No. 44). Hilton's motion anticipated that a petition for certiorari review would be filed in Free Speech Coalition, that the Supreme Court would exercise its supervisory powers in light of the split, and requested that the Court stay his prosecution until the Ninth Circuit case had "run its course."³ Hilton and the United States entered into a stipulation that, among other things, the Court would withhold publication of its verdict "until the case of Free Speech Coalition v. Reno is finalized." (Docket No. 46.) The bench trial was held on January 11 through 13, 2000.

There was post-trial briefing. On February 7, 2000, the United States queried, in response to Hilton's post-trial Free Speech Coalition speedy trial waiver, whether it was correct to understand that the Court would withhold publication of its verdict only until the Ninth Circuit had ruled on the motion for rehearing en banc. (Dockets Nos. 53 & 54.) The Court responded that it "understood that it was agreeing to withhold its opinion and the verdict until the Ninth Circuit decided the Reno [referred to herein as the Free Speech Coalition] case. The Court requires a new signed waiver so indicating. SO ORDERED."

fair warning that their conduct is criminal." Id. at 74-75; see also id. at 76 ("We believe, in short, that the statute's provisions 'suitably limit' the reach of the Act so that a person of ordinary intelligence can easily discern likely unlawful conduct and conform his or her conduct appropriately.").

³ Foreshadowing his current predicament, Hilton lamented, "should this case proceed to trial presently, and result in conviction, there is a substantial likelihood that the Defendant will serve jail time as the result of the federal statute that is unconstitutional. If that happens, his only remedy will be a section 2255 petition. He will not be able to recover the time that he wrongfully spends in jail."

(Docket No. 54.) The new waiver was duly filed in conformity with this order. (Docket No. 62.)

The Court entered its Memorandum of Decision and Order on June 30, 2000, a decision in which it found Hilton guilty of the § 2252A(a)(5)(B) offense, applying the § 2256(8) definitions of child pornography upheld as constitutional by the First Circuit. (Mem. Dec. & Order at 15-17.) Back on the other coast, on July 24, 2000, the Ninth Circuit denied the petition for rehearing en banc and rejected the suggestion for rehearing en banc in Free Speech Coalition, 220 F.3d 1113 (2000).⁴

Hilton appealed again to the First Circuit, and among other things asked the First Circuit to revisit its constitutionality determination in light of the Ninth Circuit's decision in Free Speech Coalition and the Supreme Court's grant of cert with respect thereto. See Ashcroft v. Free Speech Coalition, 531 U.S. 1124 (2001). The First Circuit declined the invitation "noting that the Ninth Circuit struck down only those portions of the Act making illegal possession of computer generated images of fictitious children." United States v. Hilton, 257 F.3d 50, 53 (1st Cir. 2001) (Hilton II) (citing Free Speech Coalition, 198 F.3d at 1097); but see Free Speech Coalition, 198 F.3d at 1097 ("We hold that the language of 'appears to be a minor' set forth in 18 U.S.C. § 2256(8)(B) and the language 'convey[s] the impression' set forth in 18 U.S.C. § 2256(8)(D) are unconstitutionally vague and overbroad."). The Court also rejected Hilton's other challenges to his conviction, including a sufficiency of the evidence challenge, but remanded on a sentencing concern. Hilton, 257 F.3d at 53-58. The amended judgment entered on October 25, 2001.

⁴ It is not clear from the file why, in view of the stipulation, the entry of the verdict preceded the filing of the Ninth Circuit's en banc denial.

The next chapter in Hilton’s 18 U.S.C. § 2252A/ § 2256(8)(B) saga was the issuance of the United States Supreme Court decision, Free Speech Coalition v. Reno, 535 U.S. 234, 122 S.Ct. 1389 (2002), on April 16, 2002. In Free Speech Coalition the Supreme Court affirmed the Ninth Circuit’s conclusion that § 2256(8)(B) is constitutionally infirm, and the First Circuit’s Hilton I, 167 F.3d 61, appears in print as a dishonorable mention, along with United States v. Fox, 248 F.3d 394 (5th Cir. 2001); United States v. Mento, 231 F.3d 912 (4th Cir. 2000); United States v. Acheson, 195 F.3d 645 (11th Cir. 1999). 122 S.Ct. at 1398.

The Free Speech Coalition Court concluded that “the prohibitions of §§2256(8)(B) and 2256(8)(D) are overbroad and unconstitutional,” and did not reach the vagueness challenge. Id. at 1406. As with the First Circuit’s Hilton I, playing a prominent role in the Court’s reasoning were Miller, Ferber, and Osborne. Id. at 1401-05. However, the Supreme Court came to the opposite conclusion than the First Circuit about the constitutionality of the definitional sections. I need not belabor the reasoning of the Supreme Court.⁵

⁵ There are many points of departure from that offered in Hilton I. For instance, the First Circuit panel had reflected that, “[l]ike sexually explicit material produced with actual children, there is little, if any, social value in this type of expression.” Hilton I, 167 F.3d at 73. The Supreme Court came to a markedly different conclusion on this issue:

Our society, like other cultures, has empathy and enduring fascination with the lives and destinies of the young. Art and literature express the vital interest we all have in the formative years we ourselves once knew, when wounds can be so grievous, disappointment so profound, and mistaken choices so tragic, but when moral acts and self-fulfillment are still in reach. Whether or not the films we mention violate the CPPA, they explore themes within the wide sweep of the statute’s prohibitions. If these films, or hundreds of others of lesser note that explore those subjects, contain a single graphic depiction of sexual activity within the statutory definition, the possessor of the film would be subject to severe punishment without inquiry into the work’s redeeming value. This is inconsistent with an essential First Amendment rule: The artistic merit of a work does not depend on the presence of a single explicit scene.

Free Speech Coalition, 122 S. Ct. at 1400 – 01.

It is not surprising, in view of the Supreme Court's holding, that Hilton believes he is entitled to § 2255 relief. Hilton filed the present 28 U.S.C. § 2255 motion on November 13, 2002,⁶ under a year after his time for seeking a writ of certiorari of the October 17, 2001, amended judgment in the United States Supreme Court. See Clay v. United States, 538 U.S. ___, ___, 2003 WL 716643, 2 -7 (Mar. 4, 2003). The United States filed its response on December 13, 2002. Hilton filed his reply and a motion to extend time to reply on February 3, 2003, that was granted. On this date he also filed a motion for release on bond. The United States filed its motion to file a late response and a response on March 14, 2003, and the two matters were finally teed-up for decision.

B. The United States' Arguments in Response to Hilton's Motions

While it may appear to Hilton that he is entitled to relief under Free Speech Coalition, in its reply to Hilton's motions the United States makes the argument that to resolve the § 2255 motion the Court should simply view the pictures to make the determination of whether they are of actual children. There is a certain commonsense appeal to this as Hilton's was a bench trial and this Court, and not the jury, heard, saw, and weighed the evidence at that juncture.

However, several things concern me about this suggestion. First, Hilton waived his right to a jury only after his lack of success with the First Circuit in Hilton I, having received the clear message that all the United States needed to prove was that the pictures "appeared to be" children. As addressed below, if Hilton had ultimately succeeded with his challenge to the indictment he could have forced the United States to generate

⁶ Apparently Hilton waited until this juncture because he hoped the First Circuit would take action directly in view of Free Speech Coalition. In his pleadings Hilton indicates that he petitioned the First Circuit for a recall of the mandate in early May 2002. He states that the First Circuit denied this motion on November 7, 2002.

evidence that actual children were involved in the production of the images, an effort that might well require placing expert testimony in front of a factfinder for proof beyond a reasonable doubt. Second, while the United States cites the Fifth Circuit's Fox, 248 F.3d 394, for the proposition that the images themselves are the best evidence for, in this case, the judge to make this determination, (Gov'ts Resp. § 2255 Mot. at 30 & n.6; Gov't's Resp. Mot. Bond at 5.)⁷ I think this recommendation on how to proceed is a bit too flippant in the aftermath of Free Speech Coalition. One of the United States' contentions before the Supreme Court in Free Speech Coalition was that the possibility that defendants can generate pictures by using computer images makes it difficult to prosecute individuals who produce pornographic images using actual children. 122 S. Ct. at 1404. The United States argued in Free Speech Coalition that both types of images must be criminalized because even experts have a difficult time saying whether the pictures are made using real children or by using computer imaging and that both must be subscribed. Id. (describing this vein of argument as turning the First Amendment "upside down").

Generating a related concern, the United States in its response suggests that Hilton has not shouldered his burden of producing evidence that the images underlying

⁷ There are two odd aspects of this citation to Fox. First there is no page citation and I could not locate exactly what portion of the decision the United States relies on in the case. Second, the citation indicates that the Fox decision was vacated on other grounds. Free Speech Coalition lists Fox as one of the four Circuit cases it was rejecting and the United States Supreme Court promptly vacated the judgment and remanded the case to Fifth Circuit for reconsideration in light of Free Speech Coalition. United States v. Fox, 535 U.S. 1014 (2002). I do not read this disposition as being "on other grounds" in that it, by implication, rejects as unconstitutional the Fox conception of how the fact that the pictures are "child pornography" is to be found. For the same reason, the pre-Free Speech Coalition reflections of the First Circuit on how these facts are proved are of little guidance in the post-Free Speech Coalition context. See Hilton, 167 F.3d at 76 ("We disagree with the district court's assumption that the use of a legal standard requiring an evaluation of the appearance of an image renders the test arbitrary or overly susceptible to manipulation. Reasonable objective assessments of the impression conveyed by a person's actions or how an image "appears" are routinely made by judges and juries."). There is further irony in this reliance on Fox in opposing Hilton's release on bond because the docket for Fox's case in United States District Court for the Eastern District of Texas indicates Fox lodged a motion for release under 18 U.S.C. § 3143(b) on April 25, 2002, nine days after Free Speech Coalition, and the motion was granted on July 29, 2002.

his prosecution were not of actual children. (Gov't's Resp. § 2255 Mot. at 31; Gov't's Resp. Mot. Bond at 5-6.) I can only describe this assertion as a baffling effort to resurrect the notion that a defendant has the burden to generate an affirmative defense. I read Free Speech Coalition to require that the government prove the involvement of actual children in the production of the images as an element of the § 2252A offense. And while Hilton I embraced the notion of the constitutionality-saving affirmative defense, 167 F.3d at 27-74, the Supreme Court addressed this contention with this rebuff:

The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.

To avoid the force of this objection, the Government would have us read the CPPA not as a measure suppressing speech but as a law shifting the burden to the accused to prove the speech is lawful. In this connection, the Government relies on an affirmative defense under the statute, which allows a defendant to avoid conviction for nonpossession offenses by showing that the materials were produced using only adults and were not otherwise distributed in a manner conveying the impression that they depicted real children. See 18 U.S.C. § 2252A(c).

The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful. An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense. In cases under the CPPA, the evidentiary burden is not trivial. Where the defendant is not the producer of the work, he may have no way of establishing the identity, or even the existence, of the actors. If the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor.

Free Speech Coalition, 122 S. Ct. at 1404 (emphasis added). In the post-Free Speech Coalition world the United States has “the burden of proving beyond a reasonable doubt that the visual depictions at issue involved real children.” United States v. Sims, 220 F.Supp.2d 1222, 1226-27 (D.N.M. 2002) (concluding it had erred at the pre-Free Speech Coalition trial in not requiring the government to carry that burden in view of Free

Speech Coalition, rejecting the government’s burden shifting argument for upholding the conviction on this count, and granting acquittal on the count of receiving material involving the sexual exploitation of children); see also United States v. Sims, ___ F.Supp. 2d ___, 2003 WL 1227571, *1 n.1 (D.N.M. Mar. 11, 2003) (denying motion for reconsideration of a denial of motion for acquittal on a different count that alleged knowing transport in interstate commerce of “visual depictions of minors engaging in sexually explicit conduct which were produced using minors engaged in such conduct,” emphasizing that the relief was procedurally barred due to defendant’s failure to file a motion for a new trial on that count rather than seeking acquittal).

Proposed Disposition

In contrast to the two other Free Speech Coalition premised § 2255 motions that have been addressed in this District, United States v. Dean, 231 F.Supp.2d 382 (D. Me. 2002) (Singal, J.); United States v. Oakes, 224 F.Supp.2d 296 (D. Me. 2002) (Carter, J.), Hilton’s § 2255 motion is a rare posture. He has persistently raised his constitutional argument commencing at the indictment phase, including twice in direct appeals to the First Circuit, and his argument has now been embraced by the United States Supreme Court relatively shortly after his conviction. This Court is now confronted with a timely first motion to vacate based on an argument that has not been procedurally defaulted.⁸ The United States does not argue that in this posture Hilton is not entitled to have Free Speech Coalition applied to his case. See Bousley v. United States, 523 U.S. 614, 619-21 (1998); Teague v. Lane, 489 U.S. 288 (1989); see also Caspari v. Bohlen, 510 U.S. 383, 389 (1994) (nonretroactivity principle not jurisdictional, the habeas court is not required

⁸ As a consequence, Hilton need not demonstrate cause and prejudice or that he is actually innocent. See Bousley v. United States, 523 U.S. 614, 621-24 (1998).

to sua sponte raise and decide the issue). Without the assistance of briefing it appears to me that Free Speech Coalition was a decision of the “Court holding that a substantive federal criminal statute does not reach certain conduct, like decisions placing conduct beyond the power of the criminal law-making authority to proscribe, [that] necessarily carries a significant risk that [Hilton] stands convicted of an act that the law does not make criminal. Bousley, 523 U.S. at 620 (internal quotation and citation omitted). Bailey v. United States, 516 U.S. 137 (1995) – the case the § 2255 application of which is addressed by Bousley – held that the “use” prong of the 18 U.S.C. § 924(c)(1) firearm violation required the Government to show active employment of the firearm. Though the cases are not entirely parallel with respect to the substantive interpretation of the criminal statutes I conclude that the cited Bousley reasoning controls. Accordingly, the Teague retroactivity bar vis-à-vis new rules of criminal procedure is not applicable to Hilton’s claim and thus the Court need not undertake the analysis of Teague’s two exceptions to non-retroactivity. Bousley, 523 U.S. at 620.

That said, what should be the disposition of the motion to vacate and the motion for bond? The fate of the defendants in the Fifth Circuit’s Fox, the Eleventh Circuit’s Acheson, and the Fourth Circuit’s Mento, is, as best as I can tell, as follows.

In the immediate aftermath of Free Speech Coalition, on April 25, 2002, Fox filed a successful motion for release pursuant to 18 U.S.C. § 3143(b). On May 31, 2002, the Fifth Circuit, having received the order vacating and remanding from the Supreme Court, entered an order remanding the case to the District Court for further proceedings and disposition consistent with Free Speech Coalition. United States v. Fox, 293 F.3d 237 (2002). Fox’s motion for release was granted July 29, 2002. Trial was set, but Fox

eventually plead guilty to time served. (It appears that in October and November 2002 Fox was indicted at least twice more concerning his conditions of release.)

Acheson, of the Eleventh Circuit, was sentenced to twenty-seven months and three years of supervised release on two counts, to run concurrently. He began serving his sentence at the beginning of December 1999. He filed a § 2255 motion in June of 2000 that was denied in January 2001. There is no post-Free Speech Coalition docket activity and there was nothing pending before the Supreme Court at the time of its Free Speech Coalition decision to warrant a remand. Though it would seem Acheson was still on supervised release in April 2002, it appears that Acheson has made no effort to revive his claim in a second § 2255, a step that would not be wisely undertaken until the Supreme Court has expressly “made” Free Speech Coalition retroactive to habeas motions. See Tyler v. Cain, 533 U.S. 656 (2001); see also id. at 677 (Breyer, J., dissenting) (lamenting that only cases postured as Hilton’s can, after the lower courts make the retroactivity determination, be the basis for the Supreme Court to “make” its prior holding retroactive to cases on collateral review within the meaning of the provision for filing second or successive petitions).⁹

Finally, with regards to Mento, a defendant whose petition for certiorari review was pending at the issuance of Free Speech Coalition, the Supreme Court vacated and remanded his case to the Fourth Circuit immediately. Mento v. United States, 535 U.S. 1014 (2002). Mento was on supervised release at the time the Supreme Court vacated

⁹ The only two grounds for bringing a second and successive petition are the production of newly discovered evidence or the existence of “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” 28 U.S.C. § 2255 ¶ 7; see also id. § 2244(b)(2)(A) (same language for state habeas second or successive petitions). Compare § 2255’s “a new rule of constitutional law,” to Teague’s “a new rule of criminal procedure” as it would seem that the retroactivity analysis envisioned by § 2255 ¶ 7 (and 28 U.S.C. § 2244(b)(2)(A)) would be required vis -à-vis decisions such as Free Speech Coalition that Bousley counsels work a substantive rather than a procedural change in the law and that are not governed by Teague.

his judgment and the docket shows that on May 13, 2002, he was discharged from his supervised release. The order from the Fourth Circuit vacating and remanding the judgment for dismissal of the indictment or for such other further proceeding was entered on the docket on August 2, 2002.

Also of guidance is the very recent Fourth Circuit decision, United States v. Ellyson, __ F.3d __, 2003 WL 1194332 (4th Cir. Mar. 17, 2003) deciding an appeal of a 1998 conviction that was lodged pre-Free Speech Coalition and that the Fourth Circuit held "in abeyance" pending the Supreme Court's decision. 2003 WL 1194332, at * __. While there was evidence before Ellyson's jury that some of the depictions in question involved actual children many of the images that were introduced were not accompanied by testimony concerning the use of actual minors and the jury instructions were given based on the pre-Free Speech Coalition definition of child pornography. Id. at __.¹⁰ The Court concluded:

Had the jury found Ellyson guilty based on these images because they "appeared to be" a depiction of child pornography, the verdict could not stand under Free Speech Coalition. In sum, the evidence in the record, coupled with the court's instructions, permitted the jury to convict Ellyson on both a constitutional and unconstitutional basis. Because there is no way for us to determine the jury's basis for its verdict, we must set the verdict aside.

¹⁰ On this score the Fourth Circuit remarked:
This evidence included multiple images of an actual, identifiable minor engaged in explicit sexual conduct; how-ever, there were many other images introduced for which there was no testimony that the minors depicted were actual children. The district court instructed the jury that the government was required to prove that Ellyson "knowingly possessed at least one visual depiction of an image ... he knew to be child pornography." J.A. In accordance with the Child Pornography Prevention Act of 1996 ("CPPA"), see 18 U.S.C.A. § 2256(8) (West 2000), the district court instructed the jury that "child pornography" was defined as "any visual depiction, including any photograph, film, video, picture, or ... computer-generated image ... of sexually explicit conduct, where the production of such visual depiction involves the use of a minor ... engaging in sexually explicit conduct; or such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct."
Id. at __ (transcript citations omitted, emphasis by Fourth Circuit).

Id. at ___. The Court concluded that, rather than outright reversal of the conviction, the appropriate disposition was a remand allowing for possible retrial. Id. at ___.

It is my view that Hilton is entitled to have his current conviction vacated, rather than reversed, with the United States retaining the right to re-try him if it so chooses. In the mean time, and in the event the United States appeals any decision by this Court, I conclude that Hilton is entitled to a bond hearing to determine if he is eligible for release pursuant to 18 U.S.C. § 3143. See Aronson v. May, 85 S.Ct. 3, 5 (1964) (“[I]n addition to there being substantial questions presented by the appeal, [the defendant standing convicted of a (federal) crime must demonstrate] some circumstance making this application exceptional and deserving of special treatment in the interests of justice.”); United States v. DiSalvo, 663 F. Supp. 142 (E.D. Pa. 1985) (applying 18 U.S.C. § 3143(b) standards in the context of an appeal of a federal conviction). Because of the nature of this recommendation I have not addressed the ineffective assistance of counsel claims contained in this § 2255 motion.

Conclusion

I **GRANT** the United States’ motion to file a late response to Hilton’s motion for release on bond. However, for these reasons set out above, I recommend that the Court **GRANT** Hilton’s motion to vacate his conviction and, further, that Hilton be granted a hearing to determine if he is eligible for release on bond.

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive

memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Dated March 20, 2003.

Margaret J. Kravchuk

CJACOUNSEL, CLOSED

U.S. Magistrate Judge

**U.S. District Court
District of Maine (Portland)
CRIMINAL DOCKET FOR CASE #: 2:97-cr-00078-GC-ALL
Internal Use Only**

Case title: USA v. HILTON

Other court case number(s): None

Date Filed: 12/17/97

Magistrate judge case number(s): None

Assigned to: JUDGE GENE
CARTER

Referred to:

Defendant(s)

DAVID HILTON (1)
TERMINATED: 10/25/2001

represented by **DAVID HILTON**
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TERMINATED: 10/25/2001
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: CJA Appointment

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, \$100.00 Special
Assessment, Fines Waived.
AMENDED JUDGMENT:
Imprisonment: 34 months;
Supervised Release: 3 years;
Special Assessment: \$100.00;
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)**

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Felony

Complaints

None

Plaintiff

USA

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