UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

-vs- Case No. 8:07-cr-170-T-24-TBM

PAUL F. LITTLE, aka MAX HARDCORE, aka MAX STEINER, and MAX WORLD ENTERTAINMENT, INC.,

Defendants.
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ORDER

This cause comes before the Court on Defendant Paul Little's Motion for a stay of sentence pending appeal (Doc. No. 210). The Government opposes this Motion.

INTRODUCTION

Defendant Little was convicted on June 5, 2008 of five counts of using an interactive computer service for the purpose of selling and distributing obscene matter, and five counts of delivering obscene matter by mail. On October 6, 2008, he was sentenced by this Court to forty-six months of imprisonment followed by thirty-six months of supervised release. On October 15, 2008, Defendant Little filed a Notice of Appeal. He now asks that he be allowed to remain free on bond pending the resolution of the appeal.

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DISCUSSION

The Court previously found that Defendant was not likely to flee or pose a danger when Defendant was allowed to self report to the Bureau of Prisons. Therefore for purposes of this

order, the Court will address 18 U.S.C. §3143(b)(1)(B). Under 18 U.S.C. § 3143(b)(1), a person convicted of a federal crime is eligible for release pending appeal if he can show by clear and convincing evidence that he is unlikely to flee or pose a danger to others, *and* that the appeal:

> . . . raises a substantial question of law likely to result in—
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> > (I) reversal,
> > (ii) an order for a new trial,
> > (iii) a sentence that does not include a term of imprisonment, or
> > (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

Defendant claims that the seven issues he intends to raise on appeal are ones that "the court of appeals may find sufficiently compelling to overturn Little's conviction." (Doc. No. 210, p. 4.) While this may be true, it is inapposite. A defendant cannot gain relief under § 3143 by merely showing that a court of appeals *may* choose to overturn a defendant's conviction. Rather, one must show that drastic relief is *likely* to be granted by the appeals court. Defendant's Motion does not state, nor does it demonstrate, that Mr. Little's claims meet such a compelling standard.

1. *Constitutionality of Federal Obscenity Statutes*

First Defendant claims that federal obscenity statutes violate substantive due process, and are therefore unconstitutional. Clear Supreme Court precedent, however, belies this argument. *See, e.g., Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 574 (2002) (stating "obscene speech, for example, has long been held to fall outside the purview of the First Amendment.") (citing *Roth v. United States*, 354 U.S. 476, 484-485 (1957)); *Miller v. California,* 413 U.S. 15,23 (1973). In light of this precedent, the Court finds it unlikely that

Defendant's appeal on this issue will result in a reversal, new trial, or the reduction of his sentence that either eschews imprisonment or reduces the period of imprisonment to less than the time that would be served pending appeal. The Defendant has previously raised this same argument in his motion to dismiss (Doc. No. 56) and motion for new trial (Doc. No. 168) which this Court denied.

2. *Publication of DVDs*

Second, Defendant claims that the Court's refusal to publish the entire contents of the charged DVD's, rather than excerpts, constituted error upon which the appellate court might afford Defendant § 3143 relief. The DVD's charged in Counts VI through X were nine to ten hours in length. The Court allowed publication of all of the video files charged in Counts I through V. The Court also allowed publication of all of the DVDs charged in Counts VI through X with the exception of the previews of other uncharged DVDs. The preview portion was a very small portion of the DVD. All of the DVDs were received into evidence and during the deliberations the Jurors were able to watch the preview section if they chose to do so.

Thus, the Court finds that it is not likely that the appellate court would grant any relief listed in § 3143 on this basis.

3. *The Court's Refusal to Recuse Itself*

Defendant raises as its third ground the Court's refusal to recuse itself for "comments indicating it had formed an opinion as to Defendant's guilt." (Doc. No. 210, p. 6.) Defendant bases this argument on the Court's questioning of whether it was actually in Defendant's best

interest for defense counsel to insist that the jury view the charged material in its entirety in the courtroom.

Except in the rarest of circumstances, the factual basis for recusal must stem from an extrajudicial source. The Supreme Court has made clear that "judicial remarks, during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Liteky v. United States*, 510 U.S. 540, 555 (1994).

The Court does not find it likely that the appellate court will overturn, remand, or reduce Defendant's sentence on this basis.

4. *Evidence of Defendant's Knowledge that the DVDs were Shipped Via U.S. Mail*

Defendant next claims insufficient evidence was presented to demonstrate that Defendant knew the obscene material would be shipped by mail. Title 18 U.S.C. § 1461 requires that Defendant "knowingly cause" the materials "to be delivered by mail." Causing the delivery of something by mail, according to the Eleventh Circuit Pattern Jury Instructions, means "to do an act with knowledge that the use of the mails will follow in the ordinary course of business or where such use can reasonably be foreseen. ELEVENTH CIRCUIT CRIMINAL PATTERN JURY INSTRUCTIONS § 53, at 307 (2003); *see also Pereira v. United States*, 347 U.S. 1, 8-9 (1954) ("Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used.")

Defendant claims that he was unaware that the DVDs were sent through the mail rather

than via UPS, Federal Express, or DHL and that this absolves Defendant of the requisite mens rea. However, the evidence indicates that Defendant ran a large–scale media–distribution business that marketed and sold materials on-line to people located throughout the world. The evidence is equally clear that Defendant employed a commercial distributor to process orders and ship the DVDs to the end user. The distributor would send an invoice for the ordered videos to Defendant's home/principal place of business. Defendant would then send the distributor the DVDs, and the distributor would send the material to the buyer and a check to Defendant. The evidence was sufficient to allow a jury to infer that Defendant performed acts in which the use of the mails would reasonably be foreseen to follow. Thus, the Court believes Defendant is not likely to gain relief on this ground. This same argument was raised in Defendant's Motion for Judgment of Acquittal and Motion for New Trial which the Court denied. (Doc. No. 165 and Doc. No. 183.)

5. *Jury Irregularities*

Defendant claims that he may be afforded relief because (1) the alternate juror passed a note requesting that the jury be allowed to see only excerpts of the DVDs, (2) an Assistant United States Attorney, not associated with the case, made a comment to a juror about "watching that porn," and (3) a juror informed the Court that she had been terminated from her job as a result of serving on the jury. The Court has previously considered each of these arguments and found them to be without merit. (Doc. No. 183).

6. *Obscenity Vel Non of the Video Clips and the DVDs*

Defendant argues next that he will likely be granted appellate relief because the Government presented no evidence of community standards in proving that the pornography was obscene. However, the Government was required to present no such evidence. It needed only present the material itself. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973). The jury itself represents the community of the Middle District of Florida. The jury's standard represents the community standard. That this jury found the material to be obscene was sufficient to adjudicate that, according the to the community standards of the Middle District of Florida, the material was obscene. The Court does not find it likely that the appellate court would grant the relief listed in § 3143 on this ground. Again this argument has been previously raised by Defendant and denied by the Court. (Doc. No. 183)

7. *Federal Obscenity Statutes and the World Wide Web*

Defendant claims that federal obscenity statutes, which allow obscenity to be classified using community standards, are inapplicable to the World Wide Web—and therefore unconstitutional when applied in that context—because the internet reaches a world–wide community that transcends the necessarily–local notions of a jury.

However, precedent binds this Court. It is "constitutionally permissible to subject defendants in obscenity prosecutions to varying community standards of the various judicial districts into which they transmit obscene material." *United States v. Bagnell*, 679 F.2d 826, 832 (11th Cir. 1982) citing *Hamling* v. *United States,* 418 U.S. 87 (1974). "At a minimum, prosecutors may elect to bring obscenity charges against a defendant in either the district of

dispatch or the district of receipt without running afoul of the due process clause." *Id.* The obscene materials at issue in Counts I through V were downloaded from the Max Hardcore website through an internet provider in the Tampa area in the Middle District of Florida, and the images were also transmitted to this community.

The Court does not find it likely that this Circuit will afford Defendant relief based on the Court's ruling here, as it is this Circuit's precedent that necessitated it. In addition, even if the appeals Court were to grant relief on this ground, it would only affect Counts I–V, the sentence for which runs concurrent to the sentence imposed for Counts VI–X. Therefore, Defendant will be unable to obtain the relief listed in § 3143 required for a stay of his sentence on this matter.

CONCLUSION

Accordingly, it is ORDERED AND ADJUDGED that Defendant Paul Little's Amended Motion for stay of sentence pending appeal is DENIED. The issues raised by the Defendant do not raise a substantial question of law likely to result in reversal, an order for new trial, a sentence that does not include imprisonment, or a reduced sentence .

DONE AND ORDERED this 28th day of October, 2008.

Susan C. Bucklew

SUSAN C. BUCKLEW
United States District Judge

Copies to:

Counsel of Record