

Monday, June 4, 2007

Feds prosecute Max Hardcore for obscenity.

The Bill of Rights. (From the public domain.) Until George Bush I was voted out of office, the federal government spiritedly prosecuted obscenity, often leading to long prison terms. The Clinton administration did an about face and barely initiated any new obscenity cases, preferring to focus on child pornography and adults seeking sex with minors. George Bush II's administration continued on a similar path, but ultimately started pursuing adult obscenity prosecutions, ultimately creating an anti-obscenity unit in mid-2005. The Bush II administration's renewal of obscenity prosecutions appears to have been driven, at least in part, by a desire to satisfy its supporters in the moral conservative camp, and perhaps also as a backlash against the Supreme Court's 2002 ban on prosecution of virtual child pornography, where the actors appear to be minors but are not. By now, sexually explicit videos are so widespread (on the Internet, in ordinary video stores, and on mainstream hotels' pay-per-view) and have been so widely viewed that prosecutors will have a tougher time obtaining obscenity convictions under the Supreme Court's following Miller obscenity test. Under Miller, a jury must affirmatively answer the following three questions before finding guilt for obscenity: (1) whether the material depicts patently offensive representations or descriptions of "ultimate sexual acts, normal or perverted, actual or simulated" or "masturbation, excretory functions, and lewd exhibition of the genitals;" (2) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. 15 (1973). Concerning the first prong, fewer people today than ever will be offended by explicit depictions of mainstream consensual sexual activity. Similarly, with the second prong, fewer people today will find that such explicit depictions of mainstream consensual sexual activity appeals to the "prurient interest," where the Supreme Court has defined prurience as "that which appeals to a shameful or morbid interest in sex." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 505 (1985). As to Miller's third prong, plenty of jurors will believe that explicit depictions of mainstream consensual sexual activity have serious value in that such material can enhance marital relationships. Perhaps to try to get around the problem of obtaining obscenity convictions for material depicting mainstream consensual sexual activity, federal prosecutors have included a focus on material on the shocking edges, including those from Extreme Associates, while also taking risks (and particularly unconstitutional measures) with trying to prosecute mere words, as horrifying as those words may be, under the obscenity laws. The feds' latest effort to go after the more shocking variety of adult material is its May 17, 2007, indictment of Paul F. Little, who goes by the screen name Max Hardcore. I met Max Hardcore ever so briefly at the 2001 Free Speech Coalition annual awards event, too briefly to get any added understanding of him. However, I surmise that he produces the type of material that he produces to satisfy a market demand; otherwise, one would expect he would have shifted gears after all these years. As is common, the indictment not only seeks to convict Max Hardcore, but also seeks to forfeit his assets. Producers of more mainstream explicit adult material should recognize that the same First Amendment being damaged by the prosecution of Max Hardcore is the same one that is supposed to be protecting their own activities. Click here to see the brief comments about this prosecution from Max Hardcore's lawyer Jeff Douglas, with whom I have enjoyed interacting through the Free Speech Coalition and our activity with the First Amendment Lawyers Association. Jon Katz. ADDENDUM. Now that Max Hardcore's indictment was unsealed on May 31, his case docket became available online through PACER on June 4. His case is U.S. v. Paul F. Little and Max World Entertainment, Inc., U.S. Dist. Ct. (M.D. Fl.) Crim. No. 8:07-cr-00170-SCB. Here is the current case docket as of June 4, 2007. Thanks to a lawyers listerv member for posting a newslink on this prosecution.

Posted by Jon Katz in Criminal Defense at 06:20