

NOT FOR PUBLICATION

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. CROIX**

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CRIM. NO. 2003-0029
	)	
MALCOLM L. HUGHES,	)	
	)	
Defendant	)	
_____	)	

ATTORNEYS:

St. Clair Theodore, Asst. U.S. Attorney  
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*Attorney for Defendant Malcolm Hughes*

**MEMORANDUM OPINION**

**Finch, Chief Judge**

This matter comes before the Court on the pretrial motion of Defendant Malcolm L. Hughes to dismiss the one-count Indictment.

## **I. Background**

On September 16, 2003, Defendant Malcolm L. Hughes was charged by Indictment with one count of knowingly possessing one or more pictures containing child pornography, in violation of 18 U.S.C. §§ 2252 (a) (4) (B) and (b) (2). The Indictment specified that by “child pornography,” it was referring to the term as it is defined in 18 U.S.C. § 2256, and that the child pornography in the Defendant’s possession had been produced with materials that were mailed, shipped, and transported in interstate commerce. The charge stems from a police officer’s discovery of 30 or more explicit photographs of a seventeen-year-old girl. The photographs were found in the girl’s own dresser drawer and when she was asked who took the photographs, the girl claimed that Malcolm Hughes had taken the photographs in his home in Lyndon B. Johnson Gardens in St. Croix.

Defendant’s motion argues that although 18 U.S.C. § 2252 (a) (4) (B) confers federal jurisdiction on the basis of the Commerce Clause, the photographs in this case did not have a substantial affect on interstate commerce and that the Court therefore lacks the requisite jurisdiction.

## **II. Analysis**

The District Court of the Virgin Islands has subject matter jurisdiction over the prosecution of violations of federal criminal statutes occurring in the Virgin Islands. See the Revised Organic Act of 1954, § 22(a), as amended, 48 U.S.C. § 1612. Hughes is charged with acts occurring in the Virgin Islands constituting possession of child pornography under 18 U.S.C. §§ 2252 (a) (4) (B) and (b) (2), which state, in relevant part:

Any person who...knowingly possesses 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if--  
(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and  
(ii) such visual depiction is of such conduct;  
shall be punished as provided in subsection (b) of this section.

Defendant questions the constitutionality of this statute and the constitutionality of its application. The Third Circuit has already addressed this issue directly. In U.S. v. Rodia, 194 F.3d 465 (3d Cir. 1999), the Court reviewed the legislative history of 18 U.S.C. §§ 2252 and held that:

“...Congress rationally could have believed that child pornography that did not itself travel in interstate commerce has a substantial effect in interstate commerce, and is thus a valid subject of regulation under the Commerce Clause...child pornography cannot be effectively regulated without federal control over both the interstate and local versions of the activity.”

Id. at 479. The U.S. Supreme Court denied certiorari in this case on May 22, 2000.

The Third Circuit had another opportunity to examine this same issue in U.S. v. Galo, 239 F.3d 572 (3d Cir. 2001). While acknowledging that possession of child pornography is not directly linked to interstate commerce, the Court unequivocally held that “Congress was empowered to enact the statute [18 U.S.C. § 2252 (a) (4) (B)] under the Commerce Clause.” Id. at 575 - 576. The Third Circuit in Galo further declared that Rodia had affirmed the constitutionality of the statute and then struck down Galo’s challenge to the constitutionality of the statute as applied. Id. at 576. Therefore, deferring to the holdings in Rodia and Galo, this Court finds no merit in Defendant Hughes’ attack on the constitutionality of 18 U.S.C. § 2252 (a) (4) (B) either on its face, or as applied to the facts of this case.

**III. Conclusion**

In accordance with the foregoing analysis, Defendant Hughes' Motion to Dismiss is denied. An appropriate order is attached.

**ENTER:**

**DATED:** November 18, 2003

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**RAYMOND L. FINCH**  
**CHIEF U.S. DISTRICT JUDGE**

**ATTEST:**  
Wilfredo F. Morales  
CLERK OF THE COURT

By: \_\_\_\_\_  
Deputy Clerk

cc: Honorable Jeffrey L. Resnick, U.S. Magistrate Judge  
St. Clair Theodore, AUSA  
Kirsten Getty Downs, Asst. Federal Public Defender