

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

UNITED STATES OF AMERICA

-vs-

Case No. 8:07-CR-516-T-24

ROBERT LESLIE METZ

DEFENDANT'S SENTENCING MEMORANDUM

Now comes ROBERT LESLIE METZ, Defendant herein, by and through the undersigned attorneys, and submits this Sentencing Memorandum.

I. Charges

The Defendant pleaded guilty to Counts 1 and 2 of the Indictment, charging receipt and transportation by computer of visual depictions of a minor engaging in sexually explicit conduct. The maximum penalty on each charge is 20 years imprisonment; each charge carries a five-year minimum mandatory sentence. The sentencing guidelines calculation as set forth in the PSR provides for a sentence of imprisonment of up to life. (See paragraphs 97 and 136 of the PSR) Unresolved objections by the defendant to those guideline calculations result in a sentence of 210 -262 months. Because the defendant can be sentenced to a maximum of 20 years per count , the maximum sentence that can be imposed by the court is 40 years.

II. Prior Criminal Record

The defendant has no prior criminal record whatsoever.

III. Sentencing Enhancements

Several sentencing enhancements have been applied to bring the defendant's maximum sentence exposure up to the 40-year level. These include: use of a computer to commit the offense; distribution for the receipt, or expectation of the receipt, of a thing of value, but not for pecuniary gain; possession of more than 600 images; material that portrays sadistic or masochistic conduct; and engaging in a pattern of activity involving the sexual abuse or exploitation of a minor. This last enhancement - "sexual abuse or exploitation of a minor" - is contentious, because unlike the other enhancements, this particular category involves conduct which is neither directly related to the commission of the charged offenses, nor of which the defendant has ever been charged, prosecuted or convicted. Furthermore, the alleged conduct which is being utilized to apply this particular enhancement occurred decades ago.

IV. Defendant's Pre-Arrest Conduct

It is critical to note that at the time of the first contact by law enforcement with the Defendant, Mr. Metz voluntarily drove directly from his place of employment to his residence where agents were executing a search warrant. Metz cooperated with the agents and over an ensuing period of several days, he provided numerous oral, written and recorded statements to the agents, without asking for or receiving legal counsel. These statements provided detailed admissions of his involvement in the charged offenses, as well as the molestation of his daughters occurring several years before. In addition, he remained in the community at all times, and made no effort whatsoever to conceal his whereabouts in any manner. Metz was arrested more than two weeks after the execution of the search warrant. He has been in custody since his arrest.

V. Expert Psychological Evaluation

Dr. Peter Bursten, a forensic psychologist, examined and tested the Defendant as part of his psychological evaluation of him. He will testify, based upon these findings, that the defendant is sexually disturbed as a result of his own sexual abuse as a child. However, because of other positive personality traits such as the defendant's lack of prior record (criminality), his lack of any antisocial tendencies other than the offense conduct described in the PSR (sexual deviancy), the de-escalation of that conduct from actual abuse of his daughters down to the Internet receipt and transportation of child pornography, his employment record and other factors, the defendant is likely to respond well to treatment and is unlikely to reoffend. Dr. Bursten's opinion is based, in part, on the following factors.

A. Client's background

Mr. Metz was born in York, Pennsylvania. As noted in the PSR, Mr. Metz was repeatedly sexually abused as a child, beginning at age 8. The abuse was perpetrated by an adult male neighbor and included oral and anal sex.

Mr. Metz's father had multiple sclerosis, which occurred in Metz's childhood. As a result, his mother worked outside the home and was for the most part the sole source of income for the family. As a child, Metz spent a lot of time at home with his father. His father was involved with pornography, and Metz was exposed to it by his father at about age 12. In fact, he and his father viewed pornographic movies together.

His first heterosexual experience occurred at age 12, with a 13 year old female during which they engaged in consensual sex. Thereafter, he regularly patronized strip clubs and message parlors in his adolescence and early adulthood. He is bisexual.

His first marriage was to a 16-year old; this marriage foundered when he had an affair with the family babysitter, who was 14 at the time. He and the babysitter subsequently married.

It is clear to Dr. Bursten that Mr. Metz experienced sexual trauma at an early age, due to the repeated and ongoing abuse by the neighbor and the abnormal relationship with his father exposing him to pornography. Because of this sexual trauma, he developed atypical, chronic deviant sexual patterns. According to Dr. Bursten, Mr. Metz is sexually disturbed, and fits the definition of a pedophile.

Once confronted with his sexual deviancy, Mr. Metz was open and honest regarding his history of abuse and his abnormal sexual tendencies. Not only was Mr. Metz open and candid with Dr. Bursten, he was very cooperative and forthcoming with law enforcement officers. He disclosed to them, on several occasions in great detail (by written statements and recorded audio statements), his sexual deviant behavior. His willingness to openly discuss these very personal issues suggests a strong amenability to treatment. He clearly appreciates that his behavior is not normal, is not acceptable, and his openness and willingness to confront it is very important in a treatment setting.

B. "Criminality"

Dr. Bursten's examination and evaluation of Mr. Metz, led Dr. Bursten to conclude that he is not criminally predisposed. According to Dr. Bursten, Metz is certainly sexually deviant, and although "criminality" is often combined in people's behavior with sexual deviance, such is **not** the case with Metz. There are a number of factors that suggest that a sexual deviant is inclined toward criminality, none of which are

present in his background. Those factors include: a prior criminal history or a history of violent behavior in a non-sexual context; substance abuse; an inability to enter into and maintain relationships, and a sporadic employment history. None of these factors is present with Metz. On the contrary - he has had two marriages of some duration, a current long-term platonic relationship with his roommate Ms. Heagy, a good relationship with his mother and sister and had worked steadily for two different employers for over seven years at the time of his arrest.

In addition, he has no history of juvenile delinquency, he is not antisocial (see “D” below) and there is no indicia of a so-called ‘criminal lifestyle’. Mr. Metz does not have a history of substance abuse of any kind. Other than the reprehensible abuse to his daughters and his involvement in child pornography, which clearly are the result of his own abuse as a child and adolescent, Metz has been a productive member of society.

C. Likelihood of reoffending

From a clinical standpoint, the aforementioned circumstances suggest a quite low likelihood of reoffending. Mr. Metz has now admitted to others that he has a sexual disorder, and perhaps more importantly, he feels guilt and remorse about it. And while Dr. Bursten is well aware of the molestation of his children as reflected in the police reports and the PSR, research suggests that sex offenders whose behavior is intrafamilial have the lowest likelihood of reoffending. Mr. Metz’s background of openness and honesty, his guilt and remorse, and his lack of “criminality” factors all suggest that he is predisposed to managing his deviant behavior. According to Dr. Bursten, research in this area has shown that the best predictors of recidivism are a history of crime and violence. Again, given his complete lack of those histories, Dr. Bursten feels that he is not prone

to reoffend.

Sex offenders such as Metz tend to continue in their behaviors until caught. Mr. Metz had not been apprehended and subject to court sanctions until now. Because of the absence of criminal tendencies discussed earlier, and his good prospects in therapy, Dr. Bursten feels he will be unlikely to reoffend.

D. Presence of Mental Disorders

Mr. Metz has suffered from depression, anxiety, and panic disorder for an extended period of time. These disorders are the result of the sexual abuse he experienced in his youth; his 'hiding' his secret behaviors and his disturbed personal relationships. These disorders can be treated.

Much the same as alcoholics and drug addicts very often abuse their substance of choice as a means of self-medicating to obtain relief from such disorders, Metz has utilized child pornography as a means of relieving the emotional pain he experienced. His reference to the film "Happy Gilmore" and the concept of going to a "happy place" in his interviews with law enforcement strongly suggest that child pornography was his "drug of choice" to relieve his depression and anxiety. Importantly, the treatment and control of these mental disorders will also reduce the risk of his (feeling a) need for viewing pornography.

Testing administered by Dr. Bursten revealed post-traumatic stress disorder, and a high level of insecurity, as well as the aforementioned anxiety and depression. Significantly, antisocial, narcissistic, and sadistic tendencies were not detected. The absence of these traits increases the likelihood of successfully participating in treatment and decreases the likelihood of reoffending.

E. Context of Metz's Behavior

There are essentially three categories of offenders involved in child pornography. First are the "Viewers", whose behavior is essentially limited to the viewing of images. These individuals are the least dangerous, and Metz falls into this category. Second are the "Travelers"; people like those depicted on the "To Catch a Predator" TV series, who physically "travel" to meet with the subjects they have communicated with, and seek actual physical contact. Third, and most malignant, are the "Commercial Producers" of child pornography, who pursue financial profit from procuring and posing children for production of pornographic images. Metz's behavior for the last several years has been limited to viewing, and again, he has shown no inclination whatever to pursue physical contact since abusing his daughters many years ago.

VI. Case Law on Sentencings in Other Child Pornography and Related Cases

The following cases are cited for the purpose of illustrating sentences in cases involving similar conduct to Mr. Metz's. (The specific legal issues in these cases are not addressed.)

1. United States v. McBride, 511 F. 3d 1293 (CA 11, 2007). Defendant pleaded guilty in the Middle District of Florida to one count of distributing child pornography. The guidelines range was 151-188 months imprisonment. Several sentencing enhancements set forth in U.S.S.G. 2G2.2 were applied in his case. These enhancements included: (1) a two level increase because the material involved a prepubescent minor; (2) a two level enhancement because the offense involved distribution; (3) a four level enhancement because the material portrayed sadistic or masochistic conduct; (4) a two level increase for use of a computer; (5) a five level enhancement for more than 600

images. The district court imposed a sentence of 84 months. His background reflected severe physical and sexual abuse by family members, and he spent a great deal of time in foster homes. He had a prior criminal record of convictions for lewd acts on two young children. He had also admitted to several other sexual encounters with children for which he was not prosecuted including performing oral sex on a 9 year old boy and molesting five girls at his church. He also had an extensive history of other uncharged conduct including voyeurism and exposure. He was diagnosed as a pedophile. The district court's sentence of 84 months was upheld over a government appeal.

2. United States v. Gray, 453 F. 3d 1323 (11th Cir. 2006). Defendant pleaded guilty in the Middle District of Florida to one count of distribution of child pornography. The guidelines were 151 to 188 months imprisonment. The defendant received a sentence of 72 months. The defendant cited his cooperation with authorities, and had no history of child molestation. He was in poor physical health, and had a "minimal" prior criminal record. The sentence was upheld over a government appeal.

3. United States v. Kevin McMahon (U.S. District Court, Middle District of Florida, 2008- Case is not reported. Information taken from newspaper article) Defendant pled guilty to one count of distributing child pornography. He sent 200 images of minors engaging in sexually explicit conduct. He also possessed 1,700 images and ten videos of child pornography. He had not record of child molestation. The sentencing guidelines called for a sentence of 97 to 121 months. The defendant was sentenced to 67 months.

4. United States v. Bohannon, 476 F.3d 1246 (11th Circuit 2007). Defendant appealed his 120-month sentence for use of the internet to entice a minor into sexual activity. The sentence was below the 135 to 168 advisory guideline range. (The

sentence was affirmed.) Defendant ‘traveled’ to meet with who he thought was a 15-year old female with whom he’d communicated via the internet. He had a propensity to take pictures of his sexual encounters with females. He had no prior criminal record.

VII. Conclusion

Recent Supreme Court and Eleventh Circuit cases have made it clear that a sentence must achieve all the purposes set forth in 18 U.S.C. 3553(a) rather than be tied to a mandatory and rigid guideline system. United States v. Rita, 127 S. Ct. 2456 (2007). The instant case is not unlike United States v. McBride, cited above. Indeed there were aggravating factors in McBride not present here. Like in McBride, there is compelling justification for the rejection of a mandatory sentencing scheme derived from arithmetic calculation. The nature and circumstances of the instant offense, particularly the defendant’s own abuse as a child and the other factors set forth herein, justifies a sentence less than 40 years in prison.

Respectfully submitted,

s/ Brent D. Armstrong and Morris Bornstein

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CERTIFICATE OF SERVICE

We hereby certify that I electronically filed the foregoing with the clerk of court by using the CM/ECF system, which will send notice of the electronic filing to the following: United States Attorney's Office.

S/ Brent D. Armstrong and Morris Bornstein