

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 06-80058-CR-ZLOCH

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ORDER

ADAM G. McDANIEL, a/k/a
"GoDemon@hotmail.com," a/k/a
"Demonic Go,"

Defendant.

THIS MATTER is before the Court upon Plaintiff United States of America's Motion To Amend The Court's Order Of January 16, 2007 (DE 61). The Court has carefully reviewed said Motion and the entire court file and is otherwise fully advised in the premises.

The facts giving rise to the above-styled cause, as well as its procedural history, are set forth in the Court's prior Order (DE 60). In said Order, the Court stated its reasons for imposing a sentence upon Defendant of 120 months followed by a term of supervision of 120 months. The Order contains the following language, which forms the basis for the instant Motion:

By the conclusion of allocution, the Court had become concerned with the passing references to sexual contact between Defendant and other minors made not only at sentencing, but elsewhere in the record. See, e.g., DE Nos. 26, p. 1, 30, p. 3, and 31, p. 9. The Court therefore inquired about the same, and includes the Government's response here in full, first, because it contributed significantly to the Court's reasoning in imposing sentence. Second, the following facts provided by the Government were provided only in response to the Court's inquiry at sentencing. They are not included in full in any other pleading, were not provided to the United States Probation Officer who prepared the Presentence Investigation Report dated September 1, 2006,

and were otherwise absent from the argument of both the Government and Defendant at sentencing. The Court is at a total loss as to why the Office of the United States Attorney for the Southern District of Florida, as well as the Assistant United States Attorney assigned to the above-styled cause, found it appropriate to intentionally withhold the following information from the Court.

THE COURT: . . . There has been some reference to another incident with a minor girl. What do you know about that, if anything?

MS. VILLAFANA: Your Honor, there are two other minor girls that have been -

THE COURT: You mean in addition to the victim in this case?

MS. VILLAFANA: Yes, your honor.

THE COURT: Go ahead.

MS. VILLAFANA: One was a girl who was 16 years old who met the Defendant via the internet when he was 19. She traveled at his request from California to Texas, and they did engage in a sexual relationship that resulted in her getting pregnant.

There also was a 15 year old girl that the Defendant was developing a relationship with at the time of his arrest. We don't know of any sexual behavior between the two of them.

THE COURT: And the minor who became pregnant, what was the outcome of the baby?

MS. VILLAFANA: She had an abortion.

DE 60, pp. 7-8 (emphasis added). In the instant Motion, the Government requests that the Court strike the underlined language from its prior Order. Defendant has not filed any response to the instant Motion, and a hearing was held on the same on March 13, 2007, at which Ann Marie C. Villafana, Esquire, AUSA (hereinafter "Villafana"), Andrew C. Lourie, Esquire, AUSA (hereinafter "Lourie"), and Patrick M. Hunt, Esquire, AFD (hereinafter "Hunt")

were present.

As an initial matter, it is important for the Court to note the role Defendant's conduct with other minors played in imposing its sentence. At the sentencing hearing, defense counsel Hunt characterized Defendant as a shy young man, whose shyness was probably compounded by certain psychological difficulties. Hunt further characterized Defendant as a young man who simply fell in love with the victim in this case. See DE 57, pp. 18-19. During the sentencing Hunt argued that a downward departure from the sentencing guidelines was appropriate given the facts of the case. Counsel for the Government, in turn, focused on the fact that actual sexual conduct had occurred between Defendant and the victim, as opposed to a sting operation using a law enforcement agent posing as a minor, where no actual sexual conduct takes place. Additionally, the Government argued that the sentence should act as both a deterrent to Defendant and the public from such conduct, and that it should further provide Defendant with the opportunity to receive treatment for his psychological difficulties. See id. pp. 29-32. The Government concluded that a sentence at the low end of the guideline range was appropriate.

During the sentencing, the Court heard an impact statement from the victim's mother. She detailed the emotional and psychological damage done to her daughter by her involvement with Defendant. In the course of her statement, she referenced her belief that Defendant was a sexual predator based on his conduct with her daughter and another underage girl with whom he was

previously involved. It was only when the Court inquired into Defendant's contact with the other minor referenced by the victim's mother that the full nature of Defendant's conduct became clear. The Court learned that Defendant's first relationship with a minor occurred when he was 19, and the minor was 16. They met over the internet, and she traveled from California to meet the Defendant and engage in a sexual relationship. She consequently became pregnant and thereafter had an abortion. This initial sexual relationship with the minor from California coincided with the commencement of the relationship with the victim in this action. Subsequent investigation further revealed that at the time Defendant met and had sex with the victim in this case, claiming to be in love, he had already commenced a relationship with a third minor, who he also met on the internet. The serial nature of Defendant's seduction of minor girls was revealed for the first time to the Court upon the Government's response to the Court's inquiry. In its prior Order, the Court recited how this information and its necessary implications informed its thinking in departing upward from the sentencing guidelines. See DE 60.

As noted above, in the instant Motion, the Government requests that the Court strike the underlined language from its prior Order. In support of its position, the Government makes two arguments. First, the Government states that Villafana had no intention to withhold the information regarding Defendant's conduct with other minors, and that this is evidenced by said information's presence in the Government's pleadings and other papers, as well as her

honest response upon being questioned by the Court. Second, the Government states that because Defendant's conduct with minors other than the victim in this case was not criminal, it was not relevant in the sense that it would not have affected his guideline range. The Court notes that Lourie raised both arguments at the hearing on this Motion and vigorously advocated the position that Defendant's sexual conduct with another minor was not relevant under Defendant's guideline computation and the factors enumerated under 18 U.S.C. § 3661 (2006).

After review of the instant Motion (DE 61) and the Declaration attached thereto, as well as argument at the hearing on the same, the Court finds that the information in question was provided to the United States Probation Office. However, it was not provided in a form that highlighted the existence of this relevant evidence. The Court's Order (DE 60) should not be read to state that the facts regarding the same were entirely absent from the record prior to sentencing.

The Court next considers whether the record supports its statement that Villafana intentionally withheld the above-referenced information. The Government argues that Villafana's forthright response to the Court's inquiry, as well as its earlier disclosures of the information in question, indicate that it did not have the intention to so withhold the information. The Court notes, however, that as stated in its prior Order (DE 60), Defendant's conduct was not set forth "in full" in any other place

in the record before the Court's inquiry at sentencing. For example, Defendant's age at the various times of his conduct is not found elsewhere in the record. Defendant's age is important because it is the measuring stick by which the quick succession of "relationships" can be seen. Further, the precise age of the other minor from California, with whom Defendant had sexual contact, is not set forth in the record to determine whether such conduct was both illicit and criminal.

This omission by the Government becomes particularly puzzling when the Court considers that the Government raised Defendant's other conduct as evidence that he was a danger to the community in opposing the reinstatement of Defendant's bond. See Government's Response To The Defendant's Motion For Reinstatement Of Bond (DE 26, p. 1) ("[T]he United States can present evidence related to the charged offenses as well as extrinsic evidence related to the defendant's danger to the community . . . including . . . his sexual activity with a sixteen-year-old-girl, 'M,' whom he met over the internet; and his on-line activity with a fifteen-year-old girl, 'A.'"); see also Government's Notice Of Appeal From Magistrate's Order Denying Pre-Trial Detention And Request To Revoke Bond And/Or Set Emergency Rehearing (DE 9, p. 6) ("In addition, there is evidence that [Defendant] is having 'romantic' chats with other minors, including one located in Texas."); Government's Response To The Standing Discovery Order (DE 30, p. 3) (stating the Government's intent to introduce at trial evidence of

Defendant's conduct with the first minor pursuant to Federal Rule of Evidence 404(b)). The existence of such references to Defendant's other sexual conduct with minors in the record, demonstrates that the conduct was relevant to a court's decision-making when it kept Defendant from posting bond or helped the Government secure a tactical advantage at trial, but it was irrelevant to the Court's understanding of Defendant, his crime, his background, his conduct, and his character at the time of sentencing. The Court notes that although the aforementioned references to Defendant's sexual conduct with another minor are present in the record, the Motions (DE Nos. 9 & 26) in which they are raised were brought before and ruled upon by judges other than the undersigned. There was not a single occasion upon which the undersigned had occasion to review and rule upon a motion that contained such allegations.

In the instant Motion (DE 61), the Government's argument that Villafana did not intentionally withhold the information concerning Defendant's other sexual relationship with a minor, centers on the fact that she did not affirmatively set it forth at sentencing because the conduct was not unlawful. Villafana also argued that she has appeared before judges in the Southern District of Florida who have forbid her to raise non-criminal conduct at sentencing. Therefore, she did not bring this conduct to the Court's attention at sentencing. For the reasons expressed below, the Court finds that the Government's argument, in an effort to excuse Villafana's

withholding of Defendant's other conduct with the other minor, is fallacious. With the exception of the provision referenced above, the Court stands by the original wording of its Order (DE 60), and, for the reasons expressed below, finds that Defendant's other sexual conduct with a minor was intentionally withheld from the Court.

The Court turns first to the Government's argument that the conduct with the other minors was not criminal and therefore was not relevant. In this assertion by Lourie and Villafana, they both misstate the law and are confused as to the relevancy of non-criminal prior conduct at sentencing. First, Defendant's other conduct with the minor from California was criminal, and second the Court is not constrained to consider only criminal conduct at the time of sentencing. The first minor discussed above, traveled from California to Texas where she and Defendant engaged in sexual intercourse. Under Texas law, Defendant could have been charged with Sexual Assault and Indecency With A Child, both separate offenses. Tex. Penal Code §§ 22.011(a)(2)(A), 22.11(a)(1) (Vernon 2007). Both statutes contain an affirmative defense if the actor is not more than three years older than the victim. Id. §§ 22.011(e)(1), 22.11(b)(1). While the record in this case is unclear as to whether Defendant could have availed himself of that defense, the fact remains that he could have been charged under the aforementioned provisions. This, in turn, means that Defendant could have been convicted of a federal offense under the Mann Act,

18 U.S.C. §§ 2421, et seq. (2006). The Mann Act makes it a criminal offense for anyone who "knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce . . . to engage in . . . any sexual activity for which any person can be charged with a criminal offense." Id. § 2422(a) (emphasis added). Accordingly, Lourie and Villafana are incorrect in their assertion that Defendant's conduct with the minor from California was not criminal. Whether Defendant and the minor from California's ages provided Defendant with the affirmative defense under Texas law has no bearing on whether the action could be charged under Texas law and is, therefore, a violation of the Mann Act. Further, the Government's ability to exercise prosecutorial discretion because of the potential affirmative defense does not in any way make the conduct less criminal under the Mann Act. Therefore, even under the Government's reading of § 1B1.3 of the Sentencing Guidelines, the conduct should have been brought to the Court's attention as other criminal conduct.

Even if the Government is correct with regard to the lawfulness of Defendant's conduct with the other minor, the Court is troubled by the conclusion the Government derives therefrom, namely that said conduct, if it is not criminal, is irrelevant to the sentencing judge. Based upon the argument made by Lourie and Villafana, the Government appears to be relying on the principle that only criminal conduct may be considered for the purpose of

calculating a defendant's guideline range.¹ However, no such criminality requirement attaches to the statutory factors the Court is compelled to consider under 18 U.S.C. § 3661 (2006). Rather, § 3661 specifically provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a Court of the United States may receive and consider for the purpose of imposing an appropriate sentence." Id. When considering the responsibility imposed by this provision, the United States Court of Appeals for the First Circuit stated, "[i]n a nutshell, the government has an unswerving duty to bring all facts relevant to sentencing to the judge's attention." United States v. Saxena, 229 F.3d 1, 6 (1st Cir. 2000). The Government's "solemn" duty, arises from the fact that "[t]he sentencing judge faces an awesome responsibility." United States v. Hogan, 862 F.2d 386, 389 (1st Cir. 1988). The charge given to a judge, the power to pass judgment on and sentence a person convicted of committing a crime against society, is one of

¹ § 1B1.3 of the Sentencing Guidelines is entitled "Relevant Conduct (Factors that Determine the Guideline Range)." In considering what qualifies as relevant conduct under this provision, the United States Court of Appeals for the Eleventh Circuit recently noted that it has expressed no opinion as to whether such conduct need be criminal, but it did cite a number of other Circuit Courts that have held that relevant conduct under § 1B1.3 must be criminal. United States v. Norris, 452 F.3d 1275, 1281 n. 1 (11th Cir. 2006) (citing United States v. Schaefer, 291 F.3d 932, 939-40 (7th Cir. 2002); United States v. Dove, 247 F.3d 152, 155 (4th Cir. 2001); United States v. Peterson, 101 F.3d 375, 385-86 (5th Cir. 1996); United States v. Dickler, 64 F.3d 818, 830-31 (3d Cir. 1995)).

the greatest responsibilities a society can impose upon its citizens. United States v. Falk, 201 F.3d 208, 213 (3d Cir. 2000). In order to exercise such an "awesome responsibility," the Court must be provided with an accurate picture of a defendant, his crime, his background, his conduct, and his character, to fashion a sentence that comports with the factors prescribed by this country's elected representatives. 18 U.S.C. §§ 3553, 3661. In order to properly exercise this responsibility, the sentencing judge has an absolute and unqualified "right to expect that the prosecutor and the probation department, at the least, give him all relevant facts within their ken; half truths and evasions" are unacceptable and an affront to their charge as officers of the Court. Hogan, 862 F.2d at 389. Therefore, it is impossible for the Government to argue that as the law stands only criminal behavior is relevant at the time the Court imposes sentencing.

The relevancy of other behavior is particularly obvious in this action. At the sentencing hearing, defense counsel Hunt took great pains to paint Defendant as shy and immature for his age, as a psychologically troubled young man who could not communicate with girls his own age. Hunt further argued that Defendant took great pains to cultivate a relationship with the victim, and that they were very much in love. Hunt believed that these factors warranted a downward departure from the sentencing guidelines. While the Government took the position that a sentence at the low end of the guideline range was appropriate, there was nothing in Villafana's argument to the Court that factually contradicted the picture

painted by Hunt or gave the Court an indication that Hunt's characterization of a socially awkward young man who was in love was anything but accurate. The only point of disagreement between the parties was the extent to which the Court should punish a single instance of conduct: one side arguing for a sentence at the low end of the sentencing guidelines, the other seeking a downward variance.

In this action, an accurate picture of Defendant, his crime, his background, his conduct, and his character would necessarily include his serial engagement in sexual conduct with minors. Instead of having the Government bring this information to the Court's ken during its argument at sentencing, it took a fortuitous statement by the victim's mother to inform the Court that the picture of an awkward, love-struck teen was, in fact, anything but accurate. That being the case, the Government failed in its solemn duty to bring all relevant facts to the Court's attention; instead, it stayed silent as defense counsel advocated for his client; it did not object to the certain "half-truths" that were at the heart of defense counsel's argument for a sentence beneath the guidelines.

As noted above, in defense of her silence as to the truth of Defendant's character and its statutory import under § 3661, Villafana argued that she has appeared before judges in the Southern District of Florida who have forbid her to raise non-criminal conduct at sentencing. As an initial matter, the Court is unsure as to the weight this assertion should be given, because as

noted above, the Government appeared confused as to the relevancy of non-criminal prior conduct at the time of sentencing: either Villafana did not know the conduct was relevant, or she knew it was relevant and decided the Court would not want to be fully informed in its decision-making. That aside, even if it is true that despite § 3661 and the above-cited case law, there are judges who do not wish to be apprised at sentencing of non-criminal conduct undertaken by a defendant, the undersigned has never imposed such a limitation on the information he is to receive. Furthermore, because such a prohibition is remarkable in light of the sentencing Judge's responsibility and above-cited case law, it is irresponsible for the Office of the United States Attorney to impute such a sentencing practice to any Judge who has not expressly established it.

Based on the foregoing analysis, there is no question that Defendant's sexual conduct with the other minor was relevant under § 1.B3 of the Sentencing Guidelines and that his conduct with both minors was relevant under § 3661. The Court will not venture a guess as to Villafana's reason for withholding the same. However, the Court finds that the relevancy of Defendant's conduct with the other minors was too apparent for it to escape Villafana that the information was necessary for the Court to form an accurate picture of the Defendant at the time of sentencing. Therefore, the Court finds that Defendant's other conduct with minors was intentionally withheld at the time of sentencing. However, because Villafana and Hunt both represented to the Court, at the hearing on this Motion,

under oath, that said withholding was not the product of an agreement between them, the Court does not find that the intentional withholding was done as part of a quid pro quo between the parties. Rather, Villafana's failure to accurately apprise the Court of the facts surrounding Defendant's conduct with other minors was intentional and/or a serious lapse in judgment on her part.

Therefore, the Court stands by the original wording of its Order (DE 60); Defendant's conduct with other minors was intentionally withheld from the Court.

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED that Plaintiff United States of America's Motion To Amend The Court's Order Of January 16, 2007 (DE 61) be and the same is hereby **GRANTED** in part and **DENIED** in part as follows:

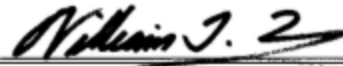
1. To the extent the Court's prior Order (DE 60) states that Plaintiff United States of America withheld information from the United States Probation Office, or is read to state that facts regarding Defendant Adam McDaniel's romantic and/or sexual conduct with minors, other than the victim in this case, were entirely absent from the record in the above-styled cause prior to sentencing, the instant Motion be and the same is hereby **GRANTED**;

2. Any language in the Court's prior Order (DE 60) stating that Plaintiff United States of America withheld information from the United States Probation Office be and the same is hereby

STRICKEN. Furthermore, the Court hereby states that its prior Order (DE 60) shall not be read to state that facts regarding Defendant Adam McDaniel's romantic and/or sexual conduct with minors other than the victim in this case were entirely absent from the record in the above-styled cause prior to sentencing; and

3. In all other respects, the instant Motion (DE 61) be and the same is hereby **DENIED**.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida this 9th day of October, 2007.



WILLIAM J. ZLOCH
United States District Judge

Copies furnished:

All Counsel of Record