

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 06-80058-Cr-Zloch/Snow

UNITED STATES OF AMERICA,

vs.

ADAM G. MCDANIEL,

Defendant.

_____ /

**UNITED STATES' MOTION TO AMEND
THE COURT'S ORDER OF JANUARY 16, 2007 [DE 60]**

The United States, by and through the undersigned Assistant United States Attorney, hereby files this Motion asking the Court to amend a portion of its Order dated January 16, 2007 [DE 60]. The Court's Order states that the Government intentionally withheld information from the Court. The United States respectfully submits that this was not the case.

Background

As explained in the attached Declaration of A. Marie Villafaña, this matter came to the attention of the U.S. Attorney's Office following defendant Adam McDaniel's arrest by the Boca Raton Police Department. Boca Raton P.D. arrested McDaniel when a fourteen-year-old minor, "C," did not return home, and her parents contacted the police out of concern that she had met a twenty-one-year-old man, McDaniel, at a hotel. McDaniel and "C" were found in a hotel room in Boca Raton and McDaniel was arrested. Following his arrest, McDaniel confessed to traveling to Florida from Texas to engage in sexual activity with "C." Because of the victim's age, the interstate travel aspect and the defendant's use of the internet to entice "C" to engage in sexual activity, the Palm Beach County State Attorney's Office referred the case to U.S. Immigration and Customs

Enforcement (“ICE”) and the Federal Bureau of Investigation (“FBI”) to begin a parallel investigation. (Villafaña Decl. at ¶ 4.) ICE and FBI presented the case to the U.S. Attorney’s Office, and it was accepted for prosecution. (*Id.*)

A criminal complaint and an indictment were prepared and arrest warrants were issued for defendant McDaniel. (*Id.* at ¶¶ 4, 5.) McDaniel was arrested in Texas and the U.S. Magistrate Judge released McDaniel on bond over the United States’ objection. (*Id.* at ¶ 7.) An emergency motion to revoke bond was prepared and filed with this Court. (*Id.* at ¶ 8.) The motion was granted by the Hon. James I. Cohn, who was serving as the “duty district judge” while the Court was out of the District. (*Id.*) The defendant sought review of the order of detention, and the United States prepared a response. (*Id.* at ¶ 9.) In each of its presentations to the courts in Texas and Florida, the United States noted the evidence it had found regarding possible additional victims. (*Id.* at ¶¶ 7-9.) The defendant withdrew his motion for review of the detention order, so a full presentation to the Court of the reasons for detention was never made. (*Id.* at ¶ 11.)

The United States filed with this Court a Response to the Standing Discovery Order that summarized the information it had gathered to date regarding a possible additional victim named “Melody.” (*Id.* at ¶ 10.) Attached to the copy of the response served on the defendant were the documents with the information about the relationship between Melody and McDaniel, as well as the document identifying another possible victim named “Amber.” (*Id.*)

With respect to Melody, the evidence showed that McDaniel had engaged in sexual activity with Melody when she was sixteen and he was nineteen. Based on these ages, that activity did not violate federal law or the laws of California, Texas, or Florida. (*Id.* at ¶ 12.) Further investigation led to the identification of Amber, and she was interviewed. Amber was a fifteen-year-old girl from

Lubbock, Texas, who had met McDaniel via the internet. The two had established a friendship and McDaniel had visited Amber on a number of different occasions but had never engaged in any sexual activity. Amber classified her relationship with McDaniel as a friendship. (*Id.* at ¶ 13.)

Despite the fact that the relationship between McDaniel and Melody did not on its face appear to violate state or federal laws, the agents investigated further and eventually located Melody and interviewed her via telephone. (*Id.* at ¶ 14.) Melody confirmed that she had engaged in sexual relationship with McDaniel when she was sixteen and he was nineteen years' old. (*Id.*) Melody reported that she had become pregnant and stated that she had terminated the pregnancy. (*Id.*) Melody stated that she had not told McDaniel about the outcome of the pregnancy. (*Id.*)

McDaniel decided to plead guilty near the time of the interview of Melody; accordingly a report of Melody's interview was never prepared and a *Jencks* disclosure of the report of Amber's interview was never produced because there was no trial. (*Id.* at ¶¶ 15-17.)

Following the change of plea, the Probation Office contacted the United States to obtain material to prepare the Presentence Investigation Report. The Probation Officer was provided access to all of the discovery related to the case, including the 404(b) Notice contained in the Response to the Standing Discovery Order and all attachments thereto, which included Melody's online statements about her relationship with the defendant. (*Id.* at ¶ 17.) At the sentencing on October 6, 2006, the victim's mother addressed the Court and made a reference to another victim. (*Id.* at ¶ 19.) The Court asked the United States if there were other victims and the Assistant U.S. Attorney summarized the evidence regarding Melody and Amber. (*Id.* at ¶ 20.)

The Court then sentenced the defendant, varying upward from the term of imprisonment from a range of 57 to 71 months up to 120 months. After stating a series of reasons on the record for the

variance, the defendant stated his objection and asked the Court to clarify its basis for the variance. The Court then stated that it would enter a written order setting forth in further detail the reasons for the variance. That Order was entered on January 16, 2007. DE 60. This Motion follows.

The Order Should Be Amended To Strike the Allegation that the United States Intentionally Withheld Information from the Court.

In its Order, the Court states:

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.

(DE 60 at 7 (emphasis added).) The United States respectfully asks the Court to amend its Order to remove the underlined language above.

Following this introduction, the Court quotes the questions posed to the Assistant United States Attorney and her answers. Nothing in those answers suggests an attempt to “intentionally withhold” any information. Indeed, the information had previously been disclosed by the United States in several pleadings, including the transcript of the initial detention hearing, the emergency motion to revoke the bond, and the United States’ Response to the Standing Discovery Order. (Villafañá Decl. at ¶¶ 7, 8, 9, 10.) The Discovery Response, with its attachments, was made available to the Probation Officer, (*id.* at ¶ 17,) and the other documents remained part of the public

court file. The above referenced disclosures indicates there was no intent on the part of the United States to withhold the information regarding other possible victims.¹

The United States does not know which documents the Probation Office chose to copy and remove from the U.S. Attorney's Office, or whether in its discretion chose to leave the information contained in the discovery and other court filings out of the PSR. Indeed, since no criminal conduct had been discovered, the information would not have affected the calculation of the Sentencing Guidelines. (*Id.* at ¶ 18.) See, e.g., *United States v. Anderson*, 174 F.3d 515, 526 (5th Cir. 1999) ("for the acts to constitute relevant conduct, the conduct must be criminal"); *United States v. Dove*, 247 F.3d 152, 155 (4th Cir. 2001); *United States v. Peterson*, 101 F.3d 375, 385 (5th Cir. 1996); *United States v. Randall*, 157 F.3d 328, 331 (5th Cir. 1998) (citing *Peterson*); *United States v. Shafer*, 199 F.3d 826, 830-31 (6th Cir. 1999); *United States v. Schaefer*, 291 F.3d 932, 938-41 (7th Cir. 2002). Cf. *United States v. Norris*, 452 F.3d 1275, 1281 n.1 (11th Cir. 2006); *United States v. Amedeo*, 370 F.3d 1305, 1314 (11th Cir. 2004). In any event, the information was not withheld.

As set forth above, the United States did not "intentionally withhold" information regarding McDaniel's relationships with Amber and Melody from the Probation Office or the Court. To the contrary, the record shows that the Government disclosed the information on the record and took other actions inconsistent with an intent to withhold it. This Office contacted the attorney for defendant regarding his position on this motion but was not able to obtain a response by the time of filing.

¹The Standard Discovery Response sets forth the sexual relationship with Melody, but does not mention the termination of her pregnancy. Whether or not such information would have been admissible, the Government was not aware of it at the time it filed its Discovery Response.

CONCLUSION

For the reasons set forth above, the United States respectfully requests that the Court amend its Order of January 16, 2007.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 2, 2007, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. According to the Court's website, counsel for all parties are able to receive notice via the CM/ECF system.

S/ Andrew Lourie
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SERVICE LIST

**United States v. Adam G. McDaniel
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