

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

CASE NO. 8:07-cr-00170-SCB-MSS-1

UNITED STATES OF AMERICA,

Plaintiff,

v.

PAUL F. LITTLE, a/k/a
“MAX HARDCORE,
“MAX STEINER” and
MAX WORLD ENTERTAINMENT, INC.,

Defendant.

RESPONSE TO GOVERNMENT’S MEMORANDUM IN AID OF SENTENCING

The Defendants, **PAUL F. LITTLE** and **MAXWORLD ENTERTAINMENT, INC.**, file this Response to the *Government’s Memorandum in Aid of Sentencing*, a 17-page document with almost 100 pages of Exhibits, filed at 9:06 p.m., the night of October 1, 2008 and as grounds would state as follows:

The Government, veterans of years of prosecuting child pornography cases fail to make a vital distinction which permeates their arguments contained in Sections I, II, and even III of their Memorandum. That is, that the definition of obscenity as opposed to child pornography, narcotics, and virtually any other contraband, only becomes illegal by the measure of the community standards of the individual community. The Supreme Court of the United States embraced this vital distinguishing part of the definition by noting that material enjoyed and legal in many parts of this country may be found not so in other parts of the country. The original definition also restricted the government from simply finding the most conservative jurisdiction in the country and utilize that

community as a site for the prosecution and once obtaining a successful jury verdict in that ultra conservative place using it to apply to that material distributed to every other part of the country.

The Defendant's have not objected to the fact that the material in question involved pecuniary gain, but the fact of the matter is that the material in question are 10 pieces of material that were subject to the prosecution in this case.

It is actually the government which mis-characterizes the definition of "distribution" by failing to acknowledge that the definition talks about "the transfer of obscene matter." The material in this case has only been found obscene by a Jury in the Middle District of Florida. Thus it enjoys constitutional protection as judged by the contemporary community standards everywhere else in the country. Therefore, distribution cannot apply to any of the other material as alleged to be distributed to anywhere else other than the Middle District of Florida.

There is no evidence that the government has brought forward to indicate that any of the \$40,000.00 worth of sales that they have alleged was from distribution to the Middle District of Florida other than those few specific pieces of material that were the subject matter of this case.

The government is further mistaken in their assertion that distribution of the DVD's outside the middle district of florida can be at all included in "relevant conduct." Again, the threshold question is the issue of the material's obscenity which must be measured only by the specific community of the Middle District of Florida. Again, the material enjoys constitutional protection in every other community. Again, this flawed analysis would stand the First Amendment and the definition of obscenity completely on its head. By this analysis, material found to be obscene in a small community such Hushpuckena, Mississippi could then be parlayed into a massive prison sentence based on the "relevant conduct" of the distribution of that material to the rest of the country.

The government references numerous sentencing guideline definitions and case law on Pages 3 through 5 of their Memorandum. All of these cited cases and sections do not expand the scope of this case to material that was allegedly distributed to anywhere else in this Country or abroad. There is no case which has found that the obscenity finding in one district would allow the Court to consider as relevant conduct material distributed anywhere else. All of the analogies to drugs or to child pornography are misplaced as those are *per se* contraband and their definitions are not subject to a material element of proof of the community standards in the place where the case is being prosecuted.

In the last sentence of the first full paragraph of Page 4 of the government's Memorandum, they have stated the basic flawed and unconstitutional premise for all of their arguments, "that all 93 Federal Districts have not convicted Defendants of the same obscenity crimes as in this case is immaterial to the issue of relevant conduct." The Defendants respectfully submit that the exact opposite is true. There can be no finding of relevant conduct for the distribution of material that only has been found to be obscene by a Jury of the Middle District of Florida to anywhere else in the Country.

The government's arguments are simply misplaced when they argue child pornography, narcotics, and fraud cases as being "helpful analogies" to this Court. Again, child pornography is *per se* contraband. Narcotics are *per se* contraband and fraud is the same fraudulent conduct from the great state of Alaska to the very tip of Florida and everywhere in between.

The government's argument urging the Court to apply the 16-level enhancement based on all of the value of the subscriptions to the website is likewise erroneous. Their analogy to Section 2G3.1 in relation to the definition of "distribution" is totally misplaced as it specifically refers to

material involving the *sexual exploitation of a minor* when it speaks concerning a website. For that matter, all of the arguments concerning the distribution of matters involving children or the exploitation of children are not applicable to adult obscenity crimes that are the subject matter of this case.

The government's "gas station analogy" beginning on Page 8 and continuing on Pages 9 & 10 of their Memorandum based on the 10th Circuit Shaffer case is useful to illustrate to this Court to show why the government is simply wrong in their analysis. If the gas in that example represents material alleged to be obscene, it would only be the gas that is put in the tanks of cars with license plates from the Middle District of Florida that could be counted in the relevant conduct. Gasoline available to any other car from anywhere else in the country is not contraband nor relevant to the conduct the Court should attribute to the Defendants' in this case.

The Defendants' would object to the government's argument contained in Section II, subparagraph B. Just as the White House does not realize that their website is hosted in Phoenix, Arizona is it relevant that the server was located in Tampa, Florida. Further, the fact that a server was located in Tampa, Florida is irrelevant. The particular images that ultimately find their way to the end recipient are not images in a server in Tampa, Florida. The mere digital codes, or bytes, consist of 1's and 0's and nothing else. The argument that those images somehow "pass through" Tampa, Florida because the server is here is preposterous. The old case law that talks about material that can be prosecuted anywhere along the transportation route is not applicable to computer digital cases.

The Government has offered no evidence to assess a value for the specific trailers that were found to be obscene for the "pecuniary gain" enhancement. In fact, each and every one of those trailers was available free to anyone going to the public portion of the website. Even though the

analyst who joined the membership portion of the website and then downloading the specific five trailers in this case, he did not have to do so to obtain the trailers. The trailers are available for viewing on the public portions of the website without one nickle being spent. They are free.

All of the analogies contained in Section III of the Government's Memorandum citing child pornography cases as to the issue of sadistic or violent are absolutely inapplicable to adult obscenity cases. The insertion of objects as the subject matter of an adult obscenity prosecution must be judged by the contemporary community standards as to the two prongs of the test of obscenity. In a child exploitation or a child pornography case, the Courts have found that mere penetration itself is adequate for sadistic or violent in child cases. If the same were applied to adult obscenity, the definition of obscenity would cause all material to be enhancable. While it is admitted that there are many in the community that would find the material that is the subject matter of this case unpleasant, it is respectfully submitted that the material does not rise to the level of sadistic masochistic or violent for the purposes of the four level enhancement.

The Defendants' would respectfully submit to the Court that adding 2 criminal history points based on the Defendant being on probation for driving while intoxicated and the fact that those points bring him to the next criminal history category overstates the seriousness of the criminal history and it is submitted the Court should horizontally depart based upon this overstatement.

The Defendant would respectfully reserve the right to further argue at the Sentencing Hearing.

I HEREBY CERTIFY, that a true and correct copy of the foregoing has been delivered by electronic mail to: **Jeffrey J. Douglas, Esq.**, 1717 Fourth Street, Third Floor, Santa Monica, CA 90401, **H. Louis Sirkin, Esq.**, Sirkin, Pinales & Schwartz, LLP, 105 W. Fourth Street, Suite 920,

Cincinnati, OH 45202, **Edward J. McAndrew, Esq.**, U.S. Department of Justice - Criminal Division, 1400 New York Avenue, NW Suite 600, Washington, DC 20005 and to **LisaMarie Freitas, Esq.** Department of Justice, 1400 New York Avenue, NW Suite 600, Washington, DC 20005 this 2nd day of October, 2008.

Respectfully Submitted,

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