

**IN THE COMMON PLEAS COURT OF FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION**

State of Ohio,

Plaintiff,

vs.

Case #19CR4589

Michael Davis,

Judge Karen Phipps

Defendant.

**MOTION TO SCREEN THE DEFENDANT
FOR ADMISSION TO CBCF RIVER CITY**

Now comes the defendant, Michael Davis, by and through the undersigned counsel, Terry K. Sherman, and hereby requests that he be immediately screened for acceptance to the CBCF River City Intense Therapy Program. This request is in the interest of justice and is supported by the attached Memorandum .

Respectfully submitted,

/s/Terry K. Sherman, #0002417
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MEMORANDUM IN SUPPORT

INTRODUCTION:

The defendant, Michael Davis, who is 60 years of age, having never had criminal contact with any local, state or federal law enforcement, is now before this Court pursuant to a four count Indictment charging him with three counts of Pandering Sexually Oriented Matter Involving a Minor, felonies of the 2nd degree, and one count of Possession of Sexually Oriented Matter Involving a Minor, a felony of the 4th degree.

It is Mr. Davis' intent to enter guilty pleas to all four counts on the scheduled trial date, January 30, 2020. Mr. Davis' offense behavior consists of acts of downloading images from the Internet and emailing some of those images to himself alone. Mr. Davis' offense

conduct consisted only of viewing these images. It is undisputed that Mr. Davis did not create, distribute, or share these images. Furthermore, there is no indication Mr. Davis has ever had any inappropriate contact with any minor children on any level.

The production allegation contained in the Indictment is solely linked to the technology associated with images being downloaded from the Internet to a device belonging to Mr. Davis, resulting in a copy being placed on Mr. Davis' device's memory.

As will be explained in greater detail in a Sentencing Memorandum with reports from Dr. Jolie Brams and Olena Sowers, Licensed Professional Counselor, Mr. Davis suffered for many years with numerous mental health issues, including severe depression and anxiety, resulting in his attempted use of pornography to self-medicate. Since his arrest, Mr. Davis has engaged fully and genuinely in intensive behavioral therapy for approximately four months.

PURPOSES OF FELONY SENTENCING:

Pursuant to O.R.C. §2929.11(A):

"A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others, to punish the offender, and to promote the effective rehabilitation of the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both."

After considering the purposes of felony sentencing pursuant to O.R.C. §2929.11(A), the Court then must turn to O.R.C. §2929.11(B). Subsection (B) states:

"A sentence imposed for a felony shall be reasonably calculated to achieve the three overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and **consistent with sentences imposed for similar crimes committed by similar offenders.**" (Emphasis added.)

Defense counsel will address the purposes of sentencing in a Sentencing Memorandum and at the time of sentencing. The purpose of the present Motion is only to take the initial

step in screening Mr. Davis for acceptance to the CBCF River City Intense Therapy Program, should the Court be so inclined to consider such a program at the time of sentencing. Defense counsel has completed a review of Franklin County cases, discussed below, to demonstrate that sentencing Mr. Davis to a program similar to CBCF River City would not be inconsistent with sentences in similar cases.

SIMILAR CRIMES COMMITTED BY SIMILAR OFFENDERS:

A review of cases in Franklin County from October, 2012 to present reveals 253 cases with similar charges to the instant case of F2 and F4 counts of pandering. Forty-four (44) defendants (approximately 17%) received incarceration at ODRC and/or FCCC. Twenty-nine of the above forty-four defendants incarcerated included the following aggravating factors: prior criminal offenses; a case involving additional felony charges; and/or the defendant was specifically identified by the Court as either "not amenable" to community control, nor a suitable candidate for intensive behavioral therapy. Only fifteen (15) of the 253 defendants were sentenced to a period of incarceration at ODRC or FCCC without any of the above-mentioned aggravating factors (approximately 6%).

209 of the 253 defendants (approximately 83%) in similar cases did not receive a sentence that included incarceration at ODRC or FCCC. The majority of cases with one or more F2 counts, including several cases with as many as twelve F2 counts, were given plea deals reducing the counts to one or two F2 guilty pleas. Sometimes the defendant was allowed to plead to lower F3 or F4 charges. Defense counsel's review indicates that the overwhelming majority of the defendants who were sentenced as first time offenders in Franklin County were placed on community control with intensive supervision for sexual offenders for terms ranging between two to five years. All researched defendants were placed on the tier II sex offender registry for 25 years.

Three specific cases are worthy of special mention:

1. Dean Worthington (18 CR 3565) was a police officer who was charged and pled to two F2's and one F4, was sentenced to 180 days at FCCC, 90 days suspended in lieu of a \$5,000 fine, and five years of community control. Dean Worthington was caught

actively trying to distribute child pornography. He used tumbler to share images with others, along with nude pictures of himself.

2. Kevin Delancey (14 CR 4527) was charged with twelve F2's and twelve F4's. He pled guilty to two F2's and received five years community control and intensive sex offender therapy.
3. Nathan R. Eal (10 CR 1268) entered a no contest plea to ten counts of Pandering, F2, and ten counts of Possession of Child Pornography, F4, and received community control with intensive supervision for sexual offenders.

A number of Franklin County judges have sentenced defendants in a way that suggests they recognized that first time offenders convicted of Pandering Sexually Oriented Matters Involving a Minor, whose behavior consisted solely of downloading and viewing images, were amenable to rehabilitation, and by allowing them to participate in intensive behavioral therapy, minimized the chances of their re-offending.

STATUTORY FRAMEWORK AND THE LOSS DISTINCTION BETWEEN PANDERING F2 AND F4:

The felony 2's for which Mr. Davis is charged are consequence of his reproduction of images from the Internet to his own electronic device. The single felony 4 charge is the result of possessing unlawful images. Penalties for felonies of the 2nd degree carry with them a presumption of incarceration, whereas felonies of the 4th degree favor community control as the appropriate sanction. The distinction between "reproduction" of images and "possession of images" at the time the statutes were enacted were decidedly dissimilar.

When the pandering statute was enacted there was a significant divide between those who merely possessed unlawful depictions of unlawful images versus those who knowingly created or otherwise took part in the manufacture, reproduction and distribution of such materials. These statutes were written at a time when such materials were made with a camera and film and creating copies involved the making of physical copies of such pictures from the photo negative. Distribution involved physically transferring the images from one person to another. Thus, persons having mere possession of such images came into possession of them as physical objects. Online downloading of images available on the web is totally unlike the conduct which led to felony 2 enactments. Those involved in the latter

production have a much greater criminal culpability since such defendants were directly and physically involved with children and their victimization. Taking actual photographs while being physically present and operating a camera requires an especially depraved state of mind. The Ohio General Assembly's decision to classify physical production and reproduction as 2nd degree felonies with a more severe punishment speaks directly to the perceived harm inflicted on children. Far less, though still serious, are those who merely possess such images for their own personal use. Those persons had nothing to do with either the creation or wider distribution of such materials. Because of this, the State of Ohio has chosen to make the mere possession of such images a fourth degree felony. A felony of the 4th degree carries with it a less severe punishment and a presumption in favor of community control, rather than incarceration.

The era of film is over. Transfer of these images is no longer made of physical objects in a hand-to-hand fashion in the presence of another person. Rather, electronic transfers are made by downloading the digital images stored on one computer to another over the Internet. Reproduction of the images by way of downloading, although it comes within the statutory definition of "production," occurs in a way that was not originally contemplated by the drafters of the pertinent statutes. Thus, the distinction in cases of downloading between O.R.C. §2907.322(A)(1) and (A)(3) in the digital electronic age no longer exists. Anyone seeking merely to possess such images via a computer download has automatically and in many cases unknowingly "produced" child pornography. As such, these days nearly every person seeking only possession finds himself charged with and convicted of the more serious crime of "production."

While Mr. Davis intends to admit his legal and moral guilt to "producing" child pornography, in violation of O.R.C. §2907.322, the fact remains he never sought to make his own child pornography. He did not recruit underage persons nor photograph any of them. His downloading child pornography came from the "open" web, not the "dark" web. All Mr. Davis' actions were consistent only with someone seeking to possess images that have

already been made. Had he purposely made copies of these images for the purpose of distributing them to others, that would be a different case; but that is not the case in this matter. The fact that such materials were "produced" on his own hard drive was an inevitable aspect of the way digital electronic items are downloaded. He collected child pornography, nothing more.

THE STATUTORY PURPOSE OF FELONY SENTENCING INCLUDES REHABILITATING THE OFFENDER, O.R.C. §2929.11(A):

According to several mental health specialists, Mr. Davis suffers from serious long-term mental health issues, including but not limited to severe depression, anxiety, compulsive hoarding behaviors, memory loss, and emotional isolation. Dr. Jolie Brams' report, which will be submitted separately, outlines in detail the long-term mental health issues with which Mr. Davis has been struggling. As a result of his conditions, he has been self-medicating by compulsively collecting images without specific memory of what he was collecting, resulting in many repeats of what he already had. As a consequence of Mr. Davis' compulsive addiction, he was unable to monitor himself. As Dr. Brams' report concludes, Mr. Davis is amenable to rehabilitation in the form of intensive behavioral therapy. Dr. Brams' conclusion is based in part on the fact that Mr. Davis, immediately after his arrest, immersed himself in intense counseling and rehabilitative therapy, including the following:

1. Columbus Springs/Dublin Springs:

Mr. Davis was originally admitted as an inpatient for six days; thereafter he was placed in a partial hospitalization program. This program met daily from 8:00 AM to 4:00 PM for fifteen days straight, not including weekends. It was intense group therapy, which attempted to stabilize and deal with anxieties, and consisted of very aggressive group participation, focusing on suicide prevention.

2. Olena Sowers, Licensed Professional Counselor/Blue Boat Counsel in Worthington:

The Sowers' report will be provided separately. Mr. Davis has been attending individual psychotherapy sessions two to three times per week. Mr. Davis is also attending

group therapy for individuals with similar difficulties.

3. Mahmoud El-Said Shehata, MD, Psychiatric Services:

Mr. Davis is presently receiving outpatient psychiatric services from Dr. Shehata, at Upper Arlington Behavioral Health.

CONCLUSION:

Mr. Davis has experienced long-term mental health conditions which contributed directly to his illegal, antisocial, and unlawful collection of child pornography. Since his arrest he has genuinely and meaningfully engaged in intensive behavioral therapy with local counselors in Franklin County. His progress is positive and he has conducted himself at all times lawfully, sincerely, and remorsefully.

WHEREFORE, counsel respectfully requests this Honorable Court permit the defendant to screen for acceptance to CBCF River City for the following reasons:

1. Mr. Davis is meaningfully engaged in an ongoing intensive behavioral therapy with Olena Sowers; and
2. It is in the interest of justice to continue intensive behavioral treatment inasmuch as Mr. Davis has never engaged in any predatory behavior and certainly is no threat to the community.

/s/Terry K. Sherman, #0002417
Attorney for Defendant

CERTIFICATE OF SERVICE

The undersigned certifies that on this 23rd day of January, 2020, a copy of the foregoing was filed electronically. Notice of this filing will be sent to the Franklin County Prosecutor's Office by operation of the Court's electronic filing system.

/s/Terry K. Sherman, #0002417
Attorney for Defendant