

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION**

UNITED STATES OF AMERICA

v.

CASE NO. 3:21cr59/MCR

NICHOLAS ALLEN WALKER
_____ /

**GOVERNMENT’S RESPONSE IN OPPOSITION TO
DEFENDANT’S OBJECTION TO THE ENHANCED STATUTORY
PENALTIES**

COMES NOW the United States of America, by and through the undersigned Assistant United States Attorney, and hereby respectfully responds in opposition to Mr. Walker’s motion because his prior Florida conviction for traveling to meet a minor qualifies for the enhanced penalties. (Doc. 47)

STATEMENT OF FACTS

On August 18, 2021, Mr. Walker was indicted by a Federal Grand Jury in the Northern District of Florida for Receipt, Distribution, and Possession of Child Pornography, in violation of 18 USC §§ 2252A(a)(2) and (a)(5). (Doc. 1). On January 27, 2022, Mr. Walker pled guilty to Receipt and Distribution of Child Pornography. (Doc. 25). Mr. Walker’s sentencing is scheduled for February 28, 2023, and his advisory guideline imprisonment range is 262 months to 327 months. (Doc. 39 ¶ 96). For each count, Mr. Walker faces a mandatory/minimum of five

years up to 20 years imprisonment or, if his prior 2014 conviction of traveling to meet a minor to commit unlawful sexual conduct in violation of Fla. Stat. § 847.0135(4)(B) qualifies as a sentencing enhancement pursuant to 18 USC § 2252A(b)(1), a mandatory/minimum of 15 years up to 40 years imprisonment. (Doc. 27).

Mr. Walker's prior sex offense was a June 5, 2014 conviction for traveling to meet a minor to engage in unlawful sexual conduct. (Doc. 39 ¶ 54). According to the arrest report, on November 15, 2013, the defendant responded to an online advertisement that had been posted to target suspects who engage in sexual activities with underage minors within the state of Florida. (*Id.*). On November 16, 2013, Mr. Walker traveled to Freeport, Florida, to a predetermined location for the purpose of engaging in sexual activity with a person he believed to be a 12-year-old female. (*Id.*) During conversations between Mr. Walker and the undercover officer posing as the 12-year-old female's mother, Mr. Walker solicited the "mother" to engage in sexual activities with the 12-year-old female. (*Id.*). Mr. Walker was sentenced to 38 months imprisonment and was designated as a sexual offender pursuant to Fla. Stat. § 943.0435(1)(a). (*Id.*).

MEMORANDUM OF LAW

Mr. Walker's prior conviction for traveling to meet a minor to engage in unlawful sexual conduct does apply under the "categorical approach" as a qualifying

offense for the sentencing enhancement pursuant to 18 USC § 2252A(b)(1). However, if the prior conviction does not apply, a sentence of at least 15 years is appropriate.

A. Mr. Walker’s prior conviction of Florida Statute § 847.0135(4)(b) qualifies for the enhanced penalties because under a “categorical approach” all offenses under the statute must involve sexual conduct.

Mr. Walker argues his prior conviction for traveling to meet a minor to engage in unlawful sexual conduct does not apply under a “categorical approach” as a qualifying offense under Florida law “relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward,” as required under 18 USC § 2252A(b)(1). The government disagrees.

Florida Statute § 847.0135(4)(b) defines the offense as:

Any person who travels any distance either within this state, to this state, or from this state by any means, who attempts to do so, or who causes another to do so or to attempt to do so for the purpose of engaging in any illegal act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in other unlawful sexual conduct with a child or with another person believed by the person to be a child after using a computer online service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to solicit, lure, or entice or attempt to solicit, lure, or entice a parent, legal guardian, or custodian of a child or a person believed to be a parent, legal guardian, or custodian of a child to consent to the participation of such child in any act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in any sexual conduct.

The government agrees with Mr. Walker that the statute can be violated “if the purpose of the online communication and subsequent travel was the have the child

engage or participate in an illegal act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in other unlawful sexual conduct with a child.” (Doc. 47. Pg. 3). Mr. Walker argues that the statute can be violated by any illegal act under Chapter 827, including sections 827.03 (abuse, aggravated abuse, and neglect of a child) and 827.04 (contributing to the delinquency or dependency of a child). However, the only illegal act under Chapter 827 that violates the statute is section 827.071 (sexual performance by a child; child pornography) based on the language of statute.

The statute states “consent to the participation of such child in any act described in chapter 794, chapter 800, or chapter 827, or to *otherwise engage in any sexual conduct.*” The term “otherwise” means “in a different way or manner” and suggests a similarity between the enumerated and unenumerated offenses. *Begay v. United States*, 553 U.S. 137, 144, 150–51 (2008), abrogated by *Johnson v. United States*, 576 U.S. 591 (2015). Therefore, in the context of Fla. Stat. § 847.0135(4)(b), the enumerated offenses covered in chapters 794, 800, and 827 must involve sexual conduct. Section 827.071 (sexual performance by a child; child pornography) is the only chapter 827 crime that involves sexual conduct. In addition, to violate the statute one must “solicit, lure, or entice a parent, legal guardian, or custodian of a child...to consent to *the participation of such child in any act* described in chapter 794, chapter 800, or chapter 827...” A child cannot participate in “abuse, aggravated

abuse, and neglect of a child” or “contributing to the delinquency or dependency of a child” as Mr. Walker argues. However, the participation of a child is required for the crimes of sexual performance by a child and child pornography, which again suggests § 827.071 is the only chapter 827 crime that violates the statute. Furthermore, a conviction for violating Fla. Stat. § 847.0135(4)(b) requires sex offender registration, which also indicates the offenses covered in chapters 794, 800, and 827 must involve sexual conduct. Fla. Stat. § 943.0435(1)(a). Violations of § 827.03 (abuse, aggravated abuse, and neglect of a child) and § 827.04 (contributing to the delinquency or dependency of a child) do not involve sexual conduct and do not require sex offender registration. The only chapter 827 offense that requires sex offender registration is § 827.071 (sexual performance by a child; child pornography) and, therefore, is the only chapter 827 offense that violates Fla. Stat. § 847.0135(4)(b). Therefore, Mr. Walker's prior conviction for traveling to meet a minor to engage in unlawful sexual conduct does apply under the “categorical approach” as a qualifying offense for the sentencing enhancement pursuant to 18 USC § 2252A(b)(1).

B. A sentence of at least 15 years of imprisonment is appropriate pursuant to factors set forth in 18 USC § 3553a.

Even if the prior conviction does not apply, a sentence of at least 15 years is appropriate. Mr. Walker was convicted in 2014 for attempting to engage in sexual

conduct with a 12-year-old girl. Now he has pled to receiving and distribution child pornography. He possessed thousands of images and/or videos of child pornography, including files depicting children as young as infants engaging in oral, vaginal, and anal sexual conduct with adults and other children. (Doc. 28). Mr. Walker also traded child pornography with others on a social media application and had disturbing conversations with other users relating to the sexual abuse of children. (Doc. 39, ¶¶ 24-25). Therefore, a sentence including at least 15 years of imprisonment is appropriate.

WHEREFORE, for the foregoing reasons, the government respectfully requests the Court deny Mr. Walker's motion and sentence him pursuant to the enhanced penalties.

Respectfully submitted,

JASON R. COODY
United States Attorney

//s// Jeffrey M. Tharp
JEFFREY M. THARP
Assistant United States Attorney
Northern District of Florida
Florida Bar No. 45066
21 East Garden Street, Suite 300
Pensacola, Florida 32502-5675
Phone: (850) 444-4000
Email: jeffrey.tharp@usdoj.gov

LOCAL RULE 7.1(F) CERTIFICATE

I HEREBY CERTIFY that the above memorandum complies with the word limit in N.D. Fla. Loc. R. 7.1(F) because this memorandum contains 1,305 words, excluding those parts that are exempted by the rule.

//s// Jeffrey M. Tharp
JEFFREY M. THARP
Assistant United States Attorney