

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

UNITED STATES OF AMERICA

vs.

**CASE NO. XXXX
(UNDER SEAL)**

JESSICA M. SCHWARTZ,

Defendant

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SENTENCING MEMORANDUM

Jessica Schwartz is the 31 year old mother of a 5 year old boy, Trevor Smith. She and her son's father are divorced. She remarried in November of last year. She recognizes that her theft of nearly \$185,000 from her employer, Tallahassee Management, Inc., has caused the company and the company's owner, Susan Lincoln, significant damage. She has, in a small way, attempted to ameliorate some of the damage in that she has, since the entry of her guilty plea, sat with the owner of the company, Susan Lincoln, accountants, and law enforcement investigators, answered all their questions, and explained how she embezzled the money. She did so because it was her understanding that information would help with the accounting of the loss and to "straighten out the books."

She apologizes for the theft and is remorseful for her crime. At the same time, she is greatly concerned about the well being of her son. She knows the Court will consider the magnitude of the offense, but she is hopeful that the Court will also consider the unique hardship that the mother of a young child suffers upon being incarcerated and, most importantly, the effect her incarceration will have upon her son.

There remains a dispute about the Guidelines range. The probation officer has determined that range to be 18 to 24 months. Defense counsel has, in a December 28, 2007, letter to the probation officer disputed the probation officer's conclusion that the incident involved "sophisticated means." Were the Court to accept defense counsel's arguments, the range would be 12 to 18 months. While Ms. Schwartz does not contend that a sentence within that advisory Guidelines range would be inappropriate in her case, she requests the Court to consider her circumstances in determining where, within the range, she should be sentenced.

Trevor

In June of 2005, a judge from the Superior Court of Decatur County in Georgia entered the final judgment in Ms. Schwartz's divorce from her husband, Brad Smith. (Def. Ex. 1). In that document, the judge awarded Ms. Schwartz and Mr. Smith "joint legal custody" of their son, Trevor. *Id.* at 1. The court, however, awarded "sole physical custody" of Trevor to Ms. Schwartz. *Id.* Ms. Schwartz maintained custody of her son until her arrest for the instant offense by state authorities in June of 2007. Several weeks after Ms. Schwartz was arrested and while she was still in jail, her ex-husband filed a pleading with the court asking that he be awarded custody of Trevor (Def. Ex. 2). On July 3, 2007, the court awarded "temporary custody" to the ex-husband. (Def. Ex. 3). Ms. Schwartz remained in jail until her first appearance before United States Magistrate Judge William Sherrill who released Ms. Schwartz from custody on August 10, 2007. (PSR, p. 1). Since then, Ms. Schwartz has had custody of Trevor only on the weekends. He lives with his father or his father's family the rest of the time.¹

¹Upon completion of her prison sentence, Ms. Schwartz will seek to have the original custody arrangement reinstated. She has been advised by the Georgia lawyer that her family has retained for her that the court is likely to do so.

Ms. Schwartz, as is surely true with most mothers, has keenly felt the loss of her child with the current custody arrangement. The loss she faces with her impending prison sentence will be greater. It is the sort of punishment that is unique to, especially, the parents of young children.

The loss is magnified by the knowledge that her son will be the one that suffers most. She's of the view that her son has had difficulty adjusting to, first her two months of imprisonment and, then, the change in the custody arrangements. Trevor did well last year in preschool, but his behavior in school this year has been uncharacteristically unruly since he began living with his father and started kindergarten. Ms. Schwartz's parents, Danny and Kathy Berg, have written the court a letter and in that letter they have described Trevor's circumstances:

Jessica has been the one constant in Trevor's life, she's raised him since he was born and had custody of him since her divorce from Brad. . . . When Jessica was arrested and put in jail we kept Trevor for a couple of weeks, everyday he would cry and want his mother. Then Brad's family saw an opportunity to get Trevor and filed for emergency custody of Trevor while Jessica was in jail. . . . We were able to talk to Trevor on the phone and keep him every other weekend for the two months that Jessica was in jail. . . . All he kept asking was when he would see his Mommy and when he would go home. He still considers being with Jessica as home even though his father has custody now. Jessica has had him with her most weekends; he won't let her out of his sight when she's with him and clings to her. Trevor never wants to go back to his dad's and counts the days until he gets to go back home with Jessica. Trevor started kindergarten this fall and has been having problems at school with minding his teacher. Trevor tells us that he doesn't like school there and we feel the cause behind this is because he was taken away from the one person who had been there with him everyday of his life, and shows how much he is loved. . . . A child can have the love of everyone in the world but noone can replace a mother's love.

(Def. Ex. 4).

The sentence Ms. Schwartz is facing will separate her nearly completely from her son, and he will suffer the attendant consequences. It is, of course, impossible to predict exactly how Trevor will be affected, but, given the difficulty he has already had, it seems likely the consequences will be

considerable. In a paper presented in 2001 to the U.S. Department of Health and Human Services Conference “From Prison to Home,” the authors recognized that the effects vary depending on a variety of variables. Nonetheless, in the article, the authors summarized some of the research:

In light of the results of this research on separation and attachment, it is not surprising that when their parents are incarcerated, young children (ages 2 - 6 years) have been observed to suffer a variety of adverse outcomes that are consistent with the research on the effects of insecure attachments (Johnson, 1995). In fact, according to one estimate (Baunach, 1985) 70% of young children with incarcerated mothers had emotional or psychological problems. Children exhibit internalizing problems, such as anxiety, withdrawal, hypervigilance, depression, shame and guilt (Bloom & Steinhart, 1993; Dressler et al., 1992). They exhibit somatic problems such as eating disorders. And, perhaps most clearly, young children exhibit externalizing behaviors such as anger, aggression, and hostility toward caregivers and siblings (Fishman, 1983; Gaudin, 1984; Johnston, 1995; Jose-Hampfner, 1995; Sack et al., 1976).

School-age children of incarcerated parents exhibit school-related problems and problems with peer relationships. Sack et al. (1976) reported that over 50% of the children of incarcerated parents had school problems, such as poor grades or instances of aggression, albeit many of these problems were temporary. Among the younger children (6-8 years old) in the Sack et al. (1987) study, 16% exhibited transient school phobias and were unwilling to go to school for a 4-6 week period after their parent’s incarceration. In another report, Stanton (1980) found even higher rates of school problems : 70% of 166 children of incarcerated mothers showed poor academic performance and 5% exhibited classroom behavior problems.

Ross D. Parke and Kay Alison Clarke-Stewart, *Effects of Parental Incarceration on Young Children*, from U.S. Department of Health and Human Services Conference “From Prison to Home” (2001). Available at: <http://aspe.hhs.gov/hsp/prison2home02>. See also John Hagan and Romit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 Crime and Justice 121, 145-146 (1999).

The “over-arching provision” of 18 U.S.C. § 3553(a) is, of course, to impose a sentence sufficient, but not greater than necessary” to meet the goals of sentencing established by Congress. Kimbrough v. United States, 128 S.Ct. 558, 570 (2007). The statute, in addition to requiring the sentencing court to consider the “nature and circumstances of the offense,” requires the court to consider the “history and characteristics of the defendant.” The unique penalty suffered by the parent of a young child that goes to prison and the hardship that will be suffered by the child are surely circumstances that fall within this latter category and are deserving of considerable weight. Ms. Schwartz is hopeful the Court will weigh especially the hardship that Trevor will suffer in arriving at her sentence.

One of the factors listed in §3553(a) is the need “to protect the public from further crimes of the defendant.” It is a circumstance that supports some leniency in Ms. Schwartz’s case. Apart from the hardship a mother of a young child suffers from incarceration and the adverse effect that imprisonment has on the child, a mother’s concern for her child seems to have an effect on recidivism:

Even though the [Sentencing] Commission found that the recidivism risk of women in lower criminal history categories does not vary dramatically from that of men, it remains lower. Existing data indicate that women’s lower recidivism rate may be connected to their family and childcare responsibilities. . . Since many of the offenders with young children also constitute lower recidivism risks in light of their offense of conviction and their prior criminal records, sentencing judges should at least be allowed to consider the impact of a prison sentence on families and minor children.

Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Non-Prison Sentences and Collateral Sanctions*, 58 Stan. L. Rev. 338, 352 (2005). Then, too, Ms. Schwartz’s age and the absence of any criminal history suggest a reduced possibility of recidivism. Studies performed by the United States Sentencing Commission show that those, like Ms. Schwartz, who are

in criminal history category I and are between the ages of 31 to 35 have a reduced risk of recidivism. Those in criminal history category I who are under 21 years of age, for example, have a recidivism rate of 29.5%. United States Sentencing Commission, *Measuring Recidivism: Criminal History Computation of the Federal Sentencing Guidelines*, Exhibit 9 at p. 28 (2004).² Those in Ms. Schwartz's age bracket, though, have a recidivism rate of less than half that amount at 14.6%. *Id.* There is a suggestion in the research, as well, that those like Ms. Schwartz who have no prior arrests have an even lower rate of recidivism than some of the others in criminal history category I with prior arrests or one criminal history point. *Id.* at 15.

Ms. Schwartz is aware that the damage and hardship she has caused to Ms. Lincoln and her company, Tallahassee Management, will be central to the Court's sentencing decision. As the "nature and circumstances of the offense" it will weigh heavily in the Court's effort to arrive at a sentence that, as required by § 3553(a), reflects the seriousness of the offense, promotes respect for the law, provides just punishment, and affords adequate deterrence.

The probation officer recently provided the defense with a series of letters written by Ms. Lincoln and others in her company that detail some of those circumstances. The comments in the letters are understandably strong. At one point, Ms. Lincoln refers to Ms. Schwartz as "truly evil," others have written of their feelings of "shock and betrayal," and some have gone on to address their view of Ms. Schwartz's character by accusing Ms. Schwartz of ancillary transgressions such as lying about her son being sick and falsely claiming that the fellow that beat her was her boyfriend when, in fact, he was her husband.

²The report is available at www.USSC.gov/research.htm.

To the extent the writers address the feeling of betrayal, the loss and hardship caused by Ms. Schwartz's crime, and even the characterization of her crime as being motivated by "greed," they amount to fair comment and have been earned by Ms. Schwartz. Ms. Schwartz, however, cannot agree with all that has been said. She denies the claim by Ms. Lincoln that "she has no remorse and no shame." Ms. Lincoln has had no contact with Ms. Schwartz since her arrest other than the session where Ms. Schwartz attempted to help Ms. Lincoln "straighten out the books." Ms. Schwartz is sorry for her crime and she deeply regrets it.

In her letter, too, Ms. Lincoln accuses Ms. Schwartz of "deliberate mishandling of the 401K payments." Ms. Schwartz did not mishandle those payments and has, up until the receipt of the letters, never been accused of doing so. As for the claim that Ms. Schwartz is currently living off what was stolen, she is not. Currently, Ms. Schwartz and her husband are having to rely to a considerable extent upon the generosity of her parents.

It is, of course, more than fair that those who worked with Ms. Schwartz have concluded that Ms. Schwartz's character is sadly lacking. They are not, though, entirely on target. Trevor, for example, was, like many young children, sick on occasion. Sadly, too, Rex Schwartz badly beat her back in 1995, but that was sometime before they were married in November of 2006. (PSR ¶35). More importantly, there are those that have seen another side of Ms. Schwartz. Fred Reynolds, an engineer with whom Ms. Schwartz has worked in the past and who knows Ms. Schwartz's parents writes:

As you can imagine, I was shocked and dismayed when I heard the news of Jessica's arrest and apparent offense. In the time that I have known Jessica I've always felt that she was an honest forthright and trustworthy person. I don't know what her life circumstances have been, but it's almost unimaginable that she would commit such an offense. Her son, Trevor, has been the center of her

universe since his birth, and it is almost unfathomable that she would do anything to jeopardize his well being or their relationship. I would consider Jessica's offense to be completely out of character for her and a monumental lapse of judgment on her part. I believe she must fully understand the gravity of her situation now and the seriousness of her offense, and in light of this, I cannot imagine that she would ever commit another offense.

(Def. Ex. 5). Craig Berg, who is Mr. Schwartz's brother, explains that his sister has "disappointed [him] deeply," but describes his sister as "a very loving and devoted mother to her son." (Def. Ex. 6). Elizabeth Steichen, who is Craig Berg's fiancé, finds Ms. Schwartz to be "a caring and thoughtful person." She says "Trevor is the light in her life and she is the light in his." (Def. Ex. 7).

Ms. Schwartz recognizes that this Court will, as it should, give considerable weight to the views of Ms. Lincoln and the others that have provided victim-impact statements. It is her hope, though, that the Court will consider circumstances beyond what is in those letters, specifically the unique punishment suffered by parents who are separated from their children, the hardship that Trevor will suffer, the reduced risk of recidivism she presents, and her willingness to cooperate. Taking all of the circumstances of her case into account, it is her view that a sentence within the advisory Guidelines range of 12 to 18 months would be "sufficient, but not greater than necessary" to fulfill the goals of sentencing established by Congress. Ultimately, her only request is for the Court to make a reasoned decision in accord with the requirements of 18 U.S.C. §3553(a), and while considering the harm suffered, temper the passion of those harmed with the rule of law.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished to the office of Assistant United States Attorney, Stephen Kunz, by hand delivery, on this 17th day of January, 2008.

Respectfully submitted,

RANDOLPH P. MURRELL
Federal Public Defender
Fla. Bar No. 220256
227 N. Bronough Street, Suite 4200
Tallahassee, FL 32301
(850) 942-8818
Attorney for Defendant

For reasons of privacy, the names of all the individuals mentioned in the memo, as well as the name of the company that suffered the loss, are fictional.