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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	CASE NO. 08-CR-201-TCK
)	
ANDRE RALPH HAYMOND,)	
)	
Defendant.)	

TRANSCRIPT OF PROCEEDINGS
SEPTEMBER 27, 2016
BEFORE THE HONORABLE TERENCE C. KERN, SENIOR JUDGE PRESIDING
REVOCATION SENTENCING HEARING

A P P E A R A N C E S

FOR THE PLAINTIFF:	MR. R. TRENT SHORES
	MR. ANDREW J. HOFLAND
	Asst. United States Attorneys
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	Tulsa, OK 74119-1013
FOR THE DEFENDANT:	MR. WILLIAM DIXON LUNN
	Attorney at Law
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	Tulsa, OK 74103

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United States Court Reporter
Northern District of Oklahoma

1 PROCEEDINGS:

2 -----

3 **THE COURT:** The court calls the case of United States
4 of America vs. Andre Ralph Haymond, case number 08-CR-201.
5 This matter comes on for sentencing.

6 Appearances?

7 **MR. SHORES:** Good afternoon, Your Honor. Trent Shores
8 and Andrew Hofland on behalf of the United States.

9 **MR. LUNN:** William D. Lunn for Mr. Haymond, who's
10 here.

11 **THE COURT:** Mr. Lunn, have you and the defendant
12 reviewed the presentence report?

13 **MR. LUNN:** Judge, we have.

14 **THE COURT:** And did you receive it timely?

15 **MR. LUNN:** We have received it timely for purposes of
16 this sentencing hearing, yes.

17 **THE COURT:** The court will ask the presentence report
18 be placed in the record under seal, and direct that if any
19 appeal is taken, counsel on appeal be permitted access to the
20 sealed report with the exception that counsel on appeal is not
21 to be permitted access to the recommendations section.

22 Are there any issues in dispute?

23 **MR. SHORES:** None from the United States, Your Honor.

24 **MR. LUNN:** Judge, with regard to the sentencing
25 memorandum, we have obviously indicated that we think that the

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1 statute that he's being sentenced under, which is 18, U.S.C.,
2 3583(k), is unconstitutional, and we'd ask you to take the --
3 obviously a bold step to find it so and reduce his -- and
4 strike that from the sentencing statute so that he would be
5 only looking at a two-year maximum sentence.

6 **THE COURT:** The court finds, as its findings of fact,
7 a grade B violation; a criminal history category of I; custody
8 by statute not less than five years to life, under the
9 guidelines five years pursuant to Section 7B1.4(b)(2);
10 defendant is not eligible for probation; supervised release, by
11 statute and under the guidelines, five years to life; the fine
12 is satisfied; restitution is not applicable; the special
13 mandatory assessment has been satisfied.

14 Any objections to the court's findings of fact?

15 **MR. SHORES:** No, Your Honor.

16 **MR. LUNN:** No.

17 **THE COURT:** All right. Mr. Lunn, remarks on behalf of
18 the defendant? And I have reviewed your sentencing memorandum
19 and agree that there are some matters of significance that
20 should go to the Tenth Circuit.

21 You may proceed.

22 **MR. LUNN:** Judge, and I appreciate that.

23 When we were here last, which was actually in 2010
24 following Mr. Haymond's trial in the initial child pornography
25 case, and the court sentenced him to the 38-month prison term

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1 and then sentenced him to 10 years of supervised release
2 thereafter, I thought at the time that 10 years was going to be
3 a very long time for Mr. Haymond, and it didn't have anything
4 to do with the fact that Mr. Haymond was a criminal or was
5 inclined to do criminal things. There were two things, I
6 think, that were important with regard to my thinking that.

7 The first was is that Mr. Haymond had never acknowledged
8 that he had committed a crime in the first possession of child
9 pornography count, and it's an issue that we took up to the
10 Tenth Circuit. We did not get a result that we wanted. We
11 actually took it on to the United States Supreme Court and
12 asked -- filed a petition for cert, and it was a case that the
13 United States Supreme Court didn't want to hear. We got a
14 letter back probably by return mail.

15 So he was going to be in a position, when he got out of
16 prison, with an infrastructure that is geared towards dealing
17 with sex offenders where he would be saying, "I didn't ever do
18 this." And so that was always going to be a problem for him
19 within the structure of supervised release. So he was going to
20 be required to go to sex therapy classes, and he was always
21 going to say, "But I didn't do this." So that was always going
22 to be a problem for him.

23 Beyond that is that Mr. Haymond himself is a nonconformist.
24 He's the type of person -- you either like him or you don't
25 like him, and there are a lot of people who don't like

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1 Mr. Haymond because he's a gay American Indian and he rubs a
2 lot of people the wrong way. And in such a structure that you
3 get in a probation office, it was inevitable that he would rub
4 some people the wrong way.

5 And we do appreciate, mind you, the efforts that have made
6 by the probation office in this case. Certainly the first
7 phase of this case had to do with a state officer who wanted to
8 try to claim that Mr. Haymond hadn't filed a change of address
9 for purposes of sex offender status, and it was because of a
10 probation officer in the federal office that we were able to
11 deal with that case appropriately, and there was ultimately no
12 criminal sanction.

13 That being the case, we now have this situation where there
14 are -- his cell phone has been searched and you have a
15 situation that's really not a lot different from the situation
16 that we had when his computer was searched in 2008. You have a
17 batch of child pornography images, a very small batch, 59
18 images, that are situated in the same way they were in 2008.
19 They're sitting in the computer's cache without any metadata
20 around them, nothing that really puts Mr. Haymond's
21 fingerprints on them.

22 And so the courts obviously struggle with this situation.
23 And the most that I can say is that I appreciate the time that
24 the court spent struggling with this case. And as the court
25 correctly notes, it's a matter that we will take up to the

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1 Tenth Circuit. We appreciate all that the court did in this
2 regard, and we're obviously disappointed with the final
3 result.

4 So my perception of Mr. Haymond is that -- and you've got a
5 600-page booklet of really his entire activity over two years,
6 all of his texts, all of his -- you know, most of his e-mails,
7 and it doesn't paint a bad picture of him.

8 If I were a parent of Mr. Haymond, which I'm glad I'm not,
9 I would be exasperated in some ways. But if I were a parent of
10 Mr. Haymond, I would say, "Let's get you in college. Let's get
11 some of your talent channeled properly with the appropriate
12 discipline and maybe we can make something of you."

13 As we're now looking at Mr. Haymond's life, he was arrested
14 when he was only 18, he went to prison for 38 months, he's been
15 on supervised release for close to two years when this case
16 came up, he's been in jail for a year and he's very likely
17 looking at a 60-month sentence. His whole life is going before
18 him, and it's a wasted life, it's a waste of a life over these
19 issues that courts struggle with, frankly. So we would hope
20 that if there was any way for you to sentence him to less than
21 60 months, that you'd be able to do that.

22 We recognize that Andre Haymond didn't go to his sex
23 treatment classes like he should have, and that he committed
24 some minor violations, but we will always contend, and I firmly
25 believe this, that Mr. Haymond did not know that there were

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1 child pornography images on his smart phone, and I think the
2 fact that he was able to take lie detector tests that covered a
3 period of over two years should have been strong evidence that
4 there was something else going on here and that somehow we
5 should have dealt with it. And I hope, some way, that
6 Mr. Haymond doesn't face the rest of his life kind of like
7 briar rabbit with the tar baby, where he just can't ever seem
8 to get away from it. It would be unfortunate because
9 Mr. Haymond has talent. So, we'd ask for any kind of
10 consideration you can give to Mr. Haymond in the way of
11 leniency.

12 **THE COURT:** Thank you.

13 Mr. Haymond, any remarks you wish to make at this time on
14 your own behalf?

15 **THE DEPUTY COURT CLERK:** He'll need to use the
16 microphone.

17 **THE DEFENDANT:** Not at this moment, no.

18 **THE COURT:** Very well.

19 On behalf of the United States?

20 **MR. SHORES:** Nothing, Your Honor, other than to ask
21 for a guideline sentence.

22 Thank you.

23 **THE COURT:** The court notes for the record that the
24 defendant has filed a sentencing memorandum, docket 233, in
25 which he states he has no objection to the calculations in the

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1 probation officer's sentencing memorandum.

2 Defendant does object to the court's findings in the
3 opinion and order dated August 2nd, 2016, docket 227, wherein
4 the court found that the defendant committed violations 1
5 through 5 as alleged in the order on supervised release, docket
6 183, which included that the defendant committed a violation of
7 federal law by possessing child pornography in violation of 18,
8 U.S.C., Section 2252(a)(4)(B).

9 As the court has indicated, this has been a troubling case.
10 In fact, I don't recall ever writing an opinion of any
11 substance really on a revocation matter, certainly not a
12 26-page opinion, which the court has done in this case. I
13 believe that the defendant raises an argument that should be
14 decided by the Tenth Circuit and I hope that this case is in
15 the proper form in order to do that.

16 In Mr. Lunn's brief, he indicates that it's difficult to
17 imagine how this statute doesn't create Sixth Amendment
18 problems under *Apprendi* and *Blakely*, and the court in its order
19 acknowledged that and indicated that if the court were to
20 decide this case under the standard of beyond a reasonable
21 doubt, that the government would not have been able to bear
22 that burden of proof. The court has decided this case as it
23 must under revocation status based on preponderance of the
24 evidence.

25 The troubling aspect of this is that there is a mandatory

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1 sentence of 60 months' imprisonment based on a court and a
2 revocation using a preponderance-of-the-evidence standard, and
3 also based in a case that is difficult, it's difficult subject
4 matter for particularly a judge who practiced law using
5 Dictaphones and copy machines and whose children have to help
6 him with a cell phone and the IT department with my computer.

7 It's repugnant to me that there is a mandatory five-year
8 sentence in such a case where a defendant does not have the
9 opportunity to ask for a jury or to be tried under what should
10 be the legal standard, and that is beyond a reasonable doubt.

11 It's further troubling that the United States failed to
12 call its own expert, which made this case much more difficult
13 for the court, and demonstrates to the court either some amount
14 of laziness or lack of concern for educating the court on
15 matters far outside the court's normal base of knowledge.

16 The court doesn't, this court at least, doesn't know much
17 about a cache or pathways or thumbnails, and we did the best
18 that we could. But there should have been an expert on the
19 other side of this case. It would have made all the difference
20 in the world. And I think had the United States gone in front
21 of a jury and presented this case, there damn sure would have
22 been an expert called on behalf of the United States. They
23 wouldn't have tried to rely just on cross-examination of the
24 defendant's expert.

25 So, the court's considered the sentencing guidelines along

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1 with the factors set forth in 18, U.S.C., Section 3553(a) to
2 reach a sentence -- I don't know that it's an appropriate or
3 reasonable sentence in the case, but I'm supposed to say that
4 it's appropriate and reasonable. And the court has considered
5 the defendant's five violations and the history and
6 characteristics of the defendant.

7 During the course of the defendant's term of supervised
8 release, the court found that defendant possessed child
9 pornography and other sexually explicit images, failed to
10 disclose to the probation office all Internet devices he
11 possessed, failed to install monitoring software equipment and
12 pay required monitoring fees as directed, and failed to attend
13 required sex offender treatment counseling sessions.

14 Violation 1, possession of child pornography, in violation
15 of 18, U.S.C., Section 2252(a)(4)(B), statutorily requires a
16 term of imprisonment of at least five years pursuant to 18,
17 U.S.C., Section 3583(k).

18 The court finds no factor present that warrants a sentence
19 above the mandatory minimum. In fact, were there not this
20 statutory minimum, the court would have looked at this as a
21 grade B violation and probably would have sentenced in the
22 range of two years or less. In fact, I think the probation
23 office indicates at one point a normal grade B violation is
24 like four to 10 months. I don't know if that would have been
25 appropriate in this case, but it certainly would not have been

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1 five years.

2 The court finds no factor -- let's see. The sentence
3 imposed will reflect the seriousness of the violations, promote
4 respect for the law -- I'm not sure that's even true -- and
5 afford adequate deterrence to the defendant and others.

6 Given the nature and seriousness of the defendant's
7 violations and underlying original offense, reimposition of a
8 term of supervised release is necessary to ensure compliance
9 with registration requirements to aid in protection of the
10 community as well as to assist the defendant with reintegration
11 back into the community. Now, as I have found out, that's also
12 mandatory. I wouldn't give as much time in supervised release
13 were I not forced to.

14 In accordance with applicable law -- Mr. Haymond, if you'll
15 stand at this time -- the court hereby imposes the following
16 sentence: It's the order and judgment of the court that the
17 defendant, Andre Ralph Haymond, is hereby committed to the
18 custody of the United States Bureau of Prisons to be imprisoned
19 for a term of five years.

20 Upon release from imprisonment, defendant shall be placed
21 on a term of supervised release for a period of five years as
22 required. Immediately upon release from imprisonment, but in
23 no event later than 72 hours, the defendant shall report in
24 person to the probation office in the district to which the
25 defendant is released. While on supervised release, defendant

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1 shall not commit another federal, state, or local crime.
2 Defendant is prohibited during the period of supervised release
3 or afterward from possessing a firearm, destructive device,
4 ammunition, or other dangerous weapon.

5 Further, while on supervised release, defendant shall not
6 illegally possess a controlled substance, shall comply with the
7 standard conditions adopted by the court, and the following
8 additional special conditions of supervised release: Defendant
9 shall abide by paragraphs 1 through 6, number 8 and number 9 of
10 the special sex offender conditions.

11 I have a duty to advise you that you have a right to appeal
12 the sentence that has been imposed. Any such appeal must be
13 filed within 14 days of the date the judgment is entered. If
14 you wish to appeal and cannot afford an appeal, there are forms
15 in the clerk's office to request an appeal in forma pauperis,
16 which means without any expense whatsoever.

17 And as I understand it, Mr. Lunn, you do intend to appeal?

18 **MR. LUNN:** Yes.

19 **THE COURT:** Very well.

20 Anything else on behalf of the defendant?

21 **MR. LUNN:** No, Your Honor. Thank you.

22 **THE COURT:** On behalf of the United States?

23 **MR. SHORES:** No, Your Honor. Thank you.

24 **THE COURT:** The defendant is remanded to the custody
25 of United States Marshal.

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1 And this court is adjourned.

2 (PROCEEDINGS CLOSED)

3 **REPORTER'S CERTIFICATION**

4 I CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT
5 TRANSCRIPT OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

6
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