

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT WALLACE SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX

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FILED

NOT FOR PUBLICATION

MAY 03 2018

UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT WALLACE SMITH,

Defendant-Appellant.

No. 16-10399

D.C. No. 1:13-cr-00194-DAD-BAM-1

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Dale A. Drozd, District Judge, Presiding

Argued and Submitted April 10, 2018
San Francisco, California

Before: WARDLAW and CLIFTON, Circuit Judges, and KATZMANN, ** Judge.

Defendant-Appellant Robert Wallace Smith appeals his jury trial conviction and his 240-month sentence. We affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Gary S. Katzmann, Judge for the United States Court of International Trade, sitting by designation.

1. The district court did not abuse its discretion by admitting Defendant's former girlfriend's testimony. The district court properly applied the four factors set forth in *United States v. Tsinnijinnie*, 91 F.3d 1285, 1288-89 (9th Cir. 1996), and subsequently weighed the probative value of the material against the danger of unfair prejudice. *See* Fed. R. Evid. 403, 404(b)(2). The evidence was properly admitted, with a limiting instruction, to prove intent, knowledge, and the absence of mistake or lack of accident.

2. Defendant appeals the non-disclosure of *in camera* materials that were submitted by the Government to the district court and asks this court to review the sealed materials. We have reviewed the documents and conclude that the district court did not abuse its discretion by deciding that the information need not be disclosed to the Defendant. *See United States v. Streit*, 962 F.2d 894, 900 (9th Cir. 1992).

3. Defendant challenges his 240-month sentence as substantively unreasonable. The district court adopted the presentence report which stated that the Defendant's advisory guideline sentence range would be between 324 and 405 months. The district court, however, recognized that the statutory maximum was 240 months and thus the appropriate advisory sentencing guideline in accordance with U.S.S.G.

§ 5G1.1(a). Additionally, as it stated, the district court “utilize[d] the advisory sentencing guidelines only as a starting point in the process.”

The district court heard arguments from the Defendant regarding sentencing enhancement objections, downward variance requests, and the offered plea terms prior to trial. The district court also considered, among other things, the Defendant’s submitted letter, the Defendant’s familial support, and the Defendant’s lack of criminal history. As the district court indicated, “for whatever reasons,” the Defendant was unable to accept responsibility.

In light of all these considerations, the district court imposed the 240-month sentence. Based on the record and the explanation given by the district court, we conclude that the 240-month sentence was not substantively unreasonable.

4. Defendant argues that the district court’s sentencing explanation was insufficient and constituted procedural error. We disagree. The district court heard Defendant’s arguments and objections and provided a sufficient explanation for the sentence imposed. Although succinct, the district court adequately stated the rationale for imposing the 240-month sentence and did not abuse its discretion.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUN 25 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ROBERT WALLACE SMITH,
Defendant-Appellant.

No. 16-10399

D.C. No. 1:13-cr-00194-DAD-BAM-1
Eastern District of California,
Fresno

ORDER

Before: WARDLAW and CLIFTON, Circuit Judges, and KATZMANN,* Judge.

The panel has unanimously voted to deny Defendant-Appellant's petition for rehearing. Judge Wardlaw has voted to deny the petition for rehearing en banc, and Judge Clifton and Judge Katzmann so recommend. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and rehearing en banc are DENIED.

* The Honorable Gary S. Katzmann, United States Judge for the Court of International Trade, sitting by designation.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)
Plaintiff,) No. 13-CR-194-DAD
vs.) SENTENCING
ROBERT WALLACE SMITH,)
Defendant.)

Fresno, California

Monday, September 12, 2016

REPORTER'S TRANSCRIPT OF PROCEEDINGS

KAREN HOOVEN, RMR-CRR
Official Court Reporter
CSR No. 5816

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1 Monday, September 12, 2016 Fresno, California
2 11:22 a.m.

3 THE CLERK: The Court calls item number 8. Case
4 1:13-CR-00194. United States versus Robert Wallace Smith.
5 Sentencing hearing.

6 MS. RICHARDS: Good morning, Your Honor, Megan
7 Richards for the United States.

8 MR. FOGDERUDE: Yes, good morning, Your Honor. Eric
9 Fogderude appearing in court. Mr. Smith is present in court
10 in custody.

11 THE COURT: This is the date and time set for
12 imposition of judgment and sentence. The Court has reviewed
13 the presentence investigation report; the defendant's formal
14 objections to the report, which also included a sentencing
15 memorandum; the United States opposition to the defendant's
16 objections to the presentence report; and the United States
17 sentencing memorandum.

18 Is there anything else that I should have received in
19 connection with sentence?

20 MR. FOGDERUDE: Not on behalf of the defendant, Your
21 Honor.

22 MS. RICHARDS: Not on behalf of the government
23 either.

24 THE COURT: I think most of the objections of the
25 defense are straightforward and I'm prepared to rule on them.

1 The exception -- or the materials that the
2 government's requested that I take into consideration as
3 3553(a) factors. First, I'm generally aware of the nature of
4 those allegations and materials. I attempted to view the
5 disks by the alleged -- particularly the one by the alleged
6 victim over the weekend, had technical difficulties.

7 IT of the Court helped me this morning, though I
8 found the audio quality to be poor on my system and the disk
9 continued to freeze. So I didn't get much of a video
10 presentation. Haven't looked at the other one at all, the
11 second disk. I think it was -- I started to look at J, did
12 not complete it. Haven't looked at all at K.

13 The defense position is they object to my
14 consideration of it at all. And my understanding of the
15 defense position is if I am going to consider it, they want
16 additional time to investigate the allegations being made.
17 Particularly in light of the fact that they're dated, didn't
18 result in any criminal charges being filed at any time as well
19 as the other circumstances that the defense -- that causes the
20 defense to question them.

21 What's the government's position about all that?

22 MS. RICHARDS: Your Honor, the government's position
23 is that, as the government's already stated, that it believes
24 that it's relevant for several of the sub-factors under
25 3553(a). And that if the defense wants more time to look into

1 the allegations, to do any kind of their own investigation,
2 the government would not oppose that.

3 And especially in light of the Court not having been
4 able to review the CDs because of the quality, some extra time
5 may also allow the government to put together a transcript of
6 the audio.

7 I also wanted to point out that the allegations are
8 new, but the conduct is old. Just because charges haven't
9 been filed at this point doesn't mean, one, that charges won't
10 ever be filed. And two, it doesn't mean that this didn't
11 happen.

12 THE COURT: So the government continues to want me to
13 consider J and K?

14 MS. RICHARDS: Yes, Your Honor.

15 THE COURT: I mean, the guideline calculation but for
16 the statutory max would be a range of 324 to 405 months. I
17 know the defense is arguing for something less, but the
18 government -- that's the government's position, they want me
19 to consider the information?

20 MS. RICHARDS: Your Honor --

21 THE COURT: It's up to you. I'm just --

22 MS. RICHARDS: If Your Honor is aware of --

23 THE COURT: I'm just saying --

24 MS. RICHARDS: Your Honor, I can put on the record
25 that you have the disk. What it is is -- and this is also in

1 the PSR, that the child says that he abused her from when she
2 was five until fifth grade. If the Court -- if the Court
3 doesn't believe that it would be helpful in its determination,
4 then we can proceed.

5 THE COURT: Would it mean that I would strike the
6 references in the report and I would also -- to the
7 allegations?

8 MS. RICHARDS: Your Honor, may I have just one moment
9 to confer?

10 THE COURT: Yes.

11 (Off the record.)

12 MS. RICHARDS: Your Honor, the government would agree
13 to striking the facts from the PSR.

14 THE COURT: All right. So let's take up the
15 defendant's objections. Paragraph 16 will be stricken from
16 the PSR. And the objection sustained.

17 Paragraphs 30 and 31 will also be stricken in light
18 of that same objection, which has been sustained.

19 Paragraph 89 will be stricken in light of that same
20 objection.

21 With respect to the defense objections to paragraph
22 17 through 20, I think the last word I received on this was
23 that an agreement had been reached with respect to
24 restitution?

25 MR. FOGDERUDE: Your Honor, I believe the stipulation

1 may have been filed with the Court already agreeing to the
2 amount of \$5,000 to resolve that issue.

3 THE COURT: I saw the reference to it. Did I get a
4 stipulation?

5 MS. RICHARDS: Your Honor, no. I referred to it in
6 the objections, but I thought we could enter the stipulation
7 today in court. Which was that the defendant would pay to the
8 victim, who's referred to as Sarah in the Marineland series,
9 \$5,000 based on his having three videos of the Marineland
10 series on his computer.

11 THE COURT: So stipulated?

12 MR. FOGDERUDE: So stipulated, yes.

13 THE COURT: The Court accepts that stipulation. And
14 so that moots out the defense objections to paragraph 17
15 through 20 of the presentence report. Correct, Mr. Fogderude?

16 MR. FOGDERUDE: Yes.

17 THE COURT: Paragraphs 21, 22 and 37, the defense
18 objects to the obstruction of justice upward adjustment.

19 Anything that you wish to add, Mr. Fogderude?

20 MR. FOGDERUDE: Your Honor, we've submitted, in our
21 objections, certain reasons for that. I would just add, also,
22 that there was conflicting evidence at trial as to other
23 adults in the residence at Salinas who had access to the
24 computer. And one in particular, a government's witness, Ms.
25 Crow, who testified and also gave conflicting statements to

1 law enforcement prior to trial that she had accessed the
2 computer and was knowledgeable there was CP, child porn,
3 images on that. And that, to that extent, would be somewhat
4 consistent with my client's part of his testimony.

5 But with that said, we will just submit it to the
6 Court based on our filing.

7 THE COURT: Anything the government wishes to add
8 with respect to that?

9 MS. RICHARDS: Your Honor, the government would
10 just -- would just refer to the sentencing memo. And if the
11 Court does apply obstruction, ask that the Court make a
12 finding on the record as to which false statements it's
13 referring to and whether they were on a material matter and
14 whether there was willful intent. And I'd refer to page seven
15 of the government's sentencing memorandum.

16 THE COURT: I do find that the adjustment for
17 obstruction of justice to be appropriate based upon the
18 defendant's false testimony at trial. My view, having
19 presided at the trial, was that his testimony went beyond
20 merely a blanket denial of the allegations. And the portions
21 of the trial testimony pointed out by the government in its
22 sentencing memorandum, those were blanket denials that in and
23 of itself would qualify for obstruction of justice adjustment
24 as set forth at pages 7 and 8 of the government's sentencing
25 memorandum.

1 That testimony was as to -- it did address a material
2 matter in the case because, as the government has argued, had
3 the jury accepted his testimony and found it to be believable,
4 he would not have knowingly received any images and would have
5 not known that such images were of children engaged in
6 sexually explicit conduct, so it clearly was material.

7 And my own view is that his testimony went beyond
8 just that and attempted to create a defense based upon
9 possible access by others and denied knowledge of not just the
10 presence on the computer, but even the presence of programs on
11 his computer that simply, from my point of view, were not
12 believable and, therefore, came as no surprise in my mind that
13 the jury rejected those denials. As I said, it was more than
14 just a blanket denial, it was the creation of a defense
15 essentially that was rejected.

16 And therefore, I find the obstruction adjustment to
17 be appropriate and overrule the defense objection.

18 The next objection, paragraphs 28 and 32 --

19 MS. RICHARDS: Your Honor.

20 THE COURT: Yes.

21 MS. RICHARDS: Are you also finding that his
22 testimony was willful?

23 THE COURT: I am.

24 MS. RICHARDS: Thank you, Your Honor.

25 THE COURT: The decision as to whether to testify

1 was, of course, up to Mr. Smith. And he did so knowingly and
2 willfully, chose to take the stand in his own defense. And as
3 I indicated, went beyond merely a blanket general denial of
4 the charges.

5 Turning to the objections to the specific offense
6 characteristics. The defense objects to the two level
7 increases under both sections 2G2.2(b)(3) and 2G2.2(b)(6) as
8 amounting to double counting, the use of the computer aspect.
9 It does appear that the case cited by the government, *United*
10 *States versus Kiefer*, 760 F 3d 926 at 930 through 32,
11 specifically ruled on this very issue and rejected the
12 argument made by the defendant here that imposition of both
13 adjustments constitutes impermissible double counting.

14 Was there anything that the defense wanted to add?

15 MR. FOGDERUDE: Your Honor, the other basis for the
16 objection was that the evidence was inconclusive, it was
17 conflicting evidence as to the installation and/or use. There
18 was testimony by my client indicating he attempted to install
19 the file sharing type program, but was, in essence,
20 unsuccessful.

21 We also had testimony that, as the Court has alluded
22 to and I did earlier, that others in the Salinas household had
23 access to that computer, to use it they would have had the
24 password. And I believe there was even testimony that perhaps
25 there was that type of program on the computer at that time.

1 So therefore we raised more of a foundational
2 question as to whether it has been sufficiently established
3 by, I believe, a preponderance of the evidence that my client
4 was the person who knowingly installed that for the purpose of
5 downloading child porn.

6 And we also reiterated that the government could have
7 asked for a special verdict on that specific issue, did not
8 opt to do so. And for those reasons, we would ask the Court
9 not to include that finding.

10 THE COURT: Anything the government wishes to add on
11 this issue?

12 MS. RICHARDS: The government doesn't have anything
13 else to add, other than what it put in its objections, which
14 are that the government's not required to have a special
15 verdict form to find the distribution enhancement. And also
16 that the evidence at trial is sufficient for the Court to make
17 a finding that the defendant is the one who used peer-to-peer
18 file sharing to distribute files on his computer.

19 THE COURT: I find that there was overwhelming
20 evidence submitted at trial that the defendant knowingly used
21 the peer-to-peer file sharing software to receive and
22 distribute child pornography using his computer. And that his
23 testimony to the contrary and the suggestions that it was
24 actually someone else has not only -- I think was rejected
25 inferentially certainly by the jury, it's rejected by me and

1 serves, at least in part, as the basis for my obstruction of
2 justice conclusion as well.

3 So that defense objection is overruled and both
4 upward adjustments, I find, are applicable.

5 Is that all the formal objections to the presentence
6 report?

7 MR. FOGDERUDE: Yes. We did have some objections as
8 to the conditions of release. And then the primary remainder
9 of our brief deals with 3553 issues and an appropriate
10 sentence in this case.

11 THE COURT: And I'm sorry, I was not -- I recall
12 reading the objections to the special conditions. Did
13 probation respond to those in the informal response?

14 PROBATION OFFICER: Yes, Your Honor. It's on page
15 four of -- page four, five -- pages four and five of Officer
16 Micheli's response.

17 THE CLERK: Please state your name for the record.

18 PROBATION OFFICER: I'm sorry. Nicole Wright with US
19 Probation.

20 THE COURT: Mr. Fogderude, I recall now having
21 reviewed those responses. Before they all seemed to me to be
22 appropriate and reasonable. Is there anything in particular
23 that you wanted to point out that you think is not appropriate
24 or somehow otherwise problematic?

25 MR. FOGDERUDE: Yes, Your Honor. It's the generic

1 nature that as to special conditions one, two and four, they
2 deal with monetary issues about whether the defendant, once he
3 completes his sentence, has assets and attempts to dissipate
4 them in light of a restitution order. Issues concerning
5 income, inheritance, possible judgments that he might collect,
6 et cetera. And number four deals with lines of credit.

7 And all we ask to do is to include language, which I
8 think would be as to those three conditions, that the approval
9 the condition asks for be conditioned that upon providing the
10 defendant reasonable and necessary medical care, educational
11 costs and living expenses.

12 In other words, there's no limitation on the
13 probation office as to those conditions. In essence, it could
14 be interpreted by a probation officer in the future that every
15 dime available to my client, when he may have health issues,
16 other living expense issues, as we've noted, ostensibly would
17 not be an argument he could raise should this come back before
18 a Court. We just think that there should be some restrictions
19 or reasonable limitations. And those are the ones that we're
20 asking as to those three conditions, special condition one,
21 two and four.

22 And I should add, eight also we add the same
23 language, although it's dealing with a different topic, if you
24 will. That he's not to possess any online computer service
25 unless approved by probation. And we just add there that he

1 may need those, once he completes his sentence, for purposes
2 of employment, health issues. And we just think it should not
3 be a carte blanche restriction, but there should be some
4 consideration to his ability to care for his basic needs once
5 he's completed the sentence, such as education, medical and
6 living expenses.

7 THE COURT: Well, as the probation office has
8 indicated in their response to the informal objections, these
9 special conditions have previously been imposed or approved by
10 the Court, they're imposed in not just a case such as this
11 one, but in all -- practically all cases where there's a
12 supervised release term to follow a period of incarceration.

13 It's not been brought to my attention over the years
14 that probation denies anyone the financial means to take care
15 of them, their costs or living expenses or necessary medical
16 care. And if a supervising probation officer would do so, the
17 matter could be brought to the Court's attention on a motion
18 to clarify or address the conditions of supervised release.

19 So I think it's -- I don't -- I don't think the
20 objection is well taken. I don't want to hamstring the
21 supervising probation officer at the outset in terms of their
22 judgment. If it turns out there's an issue, the Court can
23 certainly get involved at the appropriate time. But these are
24 standard conditions that have been determined to be
25 appropriate. And I think they're appropriate in this case as

1 well.

2 So I'm overruling the defense objections to the
3 conditions of supervised release following any custodial
4 sentence.

5 MR. FOGDERUDE: Your Honor, there were two others I
6 didn't address, which were a different topic. One, we
7 objected to -- or raised issue with special condition nine,
8 which says he shall have no contact with known children under
9 the age of 18 excluding his own children without probation.

10 And we just point out to the Court that this
11 conviction does not relate to personal contact with children
12 and, therefore, the defendant's position would be that that
13 blanket restriction is unwarranted and prejudicial in this
14 case.

15 THE COURT: And I'm rejecting that argument as well.

16 MR. FOGDERUDE: And just to finish up, Your Honor.
17 We had two other conditions. And just if I may briefly. On
18 number ten, the condition deals with inspection of any
19 computers that my client may have. And the last sentence of
20 the second paragraph, we're just asking that it be modified to
21 read as follows. "The defendant consents to not installing
22 any new hardware without the prior approval of probation
23 office" -- and the addition would be "which approval will not
24 be denied if the purpose is for the installation" -- "of the
25 installation is for any purpose that is not illegal or

1 inconsistent with any other special condition of probation."
2 We're thinking about future employment issues.

3 THE COURT: That's always been issue in these cases,
4 but that's something of the defendant's own making.

5 MR. FOGDERUDE: I understand.

6 THE COURT: And because of the use of computers in
7 connection with this very serious offense, I reject that
8 argument as well. I think that the condition as recommended
9 is completely appropriate and absolutely necessary.

10 MR. FOGDERUDE: And Your Honor, the last one, with
11 the Court's permission, was condition 14, which requires,
12 among other things, that he submit to polygraph exams. And as
13 we've noted in our objection, polygraph exams are not
14 admissible in a court of law, neither state nor federal court,
15 unless there's a stipulation between all parties. They're
16 basically just unreliable. And for that reason, we're asking
17 that that condition be modified to delete the requirements for
18 polygraph exams.

19 THE COURT: And I overrule that objection as well for
20 the reason set forth in the probation officer's response to
21 the informal objections at page five of that response. And
22 will adopt the condition as recommended.

23 MR. FOGDERUDE: Thank you.

24 THE COURT: Can we bring Mr. Smith up?

25 And Mr. Fogderude, I know we've been talking about

1 the reports and the defense objections to the presentence
2 report. But just to make the record absolutely clear. Have
3 you received and read a copy of the presentence report and
4 have you had an opportunity to discuss it with your client,
5 Mr. Smith, in detail?

6 MR. FOGDERUDE: Yes, Your Honor.

7 THE COURT: And Mr. Smith, have you read a copy of
8 the presentence report?

9 THE DEFENDANT: Yes, I have, Your Honor.

10 THE COURT: And have you had an opportunity to
11 discuss it with your attorney in detail?

12 THE DEFENDANT: Yes, I have, Your Honor.

13 THE COURT: The Court has ruled on all of the defense
14 written objections to the presentence report. Mr. Fogderude,
15 are there any other objections to any statements of material
16 facts, sentencing classifications, sentencing guideline ranges
17 and/or policy statements filed that the Court is not aware of?

18 MR. FOGDERUDE: Just we've addressed it in our formal
19 objections on pages 3 and 4. And we've listed, on page 3 of 6
20 of our report, different factual findings that have been set
21 forth in the probation report concerning the history and
22 characteristics of my client, which we feel are factors that
23 should weigh in favor of the Court granting 3553 reduction in
24 this case.

25 I can either list them or, if the Court sees that, I

1 refer back to where in the probation report there is a
2 reference to those. I think there are twelve items that we've
3 listed starting with no criminal history, some mental health
4 issues, been enlisted in military service twice, although did
5 not -- had uncharacteristic discharges, in part due to mental
6 health issues.

7 And we list verifiable employment. Has family
8 support. And his parents were here during the trial and
9 testified. They're here today, as the Court may see. And we
10 also noted that he will have to live with the stigma,
11 obviously, of a felony conviction and the requirements on
12 release.

13 And also a unique factor, Your Honor, is that he
14 spent over two years, 26 months to be exact, on what they now
15 call roofline in-home incarceration as part of his conditions
16 of release. And even though that doesn't count as time
17 credits, it is kind of extraordinary, if you will, that he's
18 had and his family have dealt with that. And I think the
19 report also alluded that his compliance under pretrial service
20 has been mostly positive as noted in paragraph 97.

21 And last, as noted in paragraph 92, that the
22 defendant was found not to be involved in the original
23 production.

24 For those reasons and also the reasons we raise in
25 our objection about unwarranted disparity of sentences, the

1 probation officer has noted in his remarks that, in fact, on
2 cases of this nature -- although he says that generally those
3 were where pleas were entered -- there has been a substantial
4 variance, downward departure, if you will, in the sentencing
5 guidelines, from the sentencing guidelines that have been
6 imposed.

7 We would even note one case that the Court has
8 referred to that's cited in the government's brief, *US versus*
9 *Kiefer*, the sentencing range, as noted in that appellate
10 ruling, was a range with the mid term of 131 months and the
11 sentence imposed in *Kiefer* was a 63 month, about a 50 percent,
12 a little over a 50 percent reduction.

13 We're asking the Court to look at the plea offer,
14 which we've attached, that was made to my client before he
15 went to trial. He rejected. And we went to trial. And add
16 in -- which is what I've attempted to do in my brief -- three
17 points for the loss of acceptance of responsibility. And in
18 doing those things, you would come to, I believe, a level 33
19 and a low sentencing range of 135 months. And the plea
20 agreement provided for a 97 month sentence. So I suggest to
21 the Court take the mid range of those numbers.

22 And the other way to look at it would be if the Court
23 just made a 25 percent reduction in the offense level, that
24 would be 11 levels. That would get us down to a sentencing
25 range of 97 to 137 and take the middle.

1 So I'm suggesting lots of ways to get there, but I
2 just think with the background of no criminal history, the
3 other factors I've alluded to and the fact that, as I
4 understand courts not only in this district but elsewhere are
5 making, as noted in the *Kiefer* case, substantial reductions in
6 these cases for someone who's had no prior criminal history.
7 I think that's appropriate.

8 And we'd ask the Court to consider a reasonable
9 sentence in this case to be the mid range, which I think is
10 116 months.

11 THE COURT: All right. With respect to -- other than
12 the objections I've ruled on, are there any other objections?

13 MR. FOGDERUDE: None. Other -- we do have an
14 institutional recommendation at the end.

15 THE COURT: Other than what I've already ruled upon,
16 the Court adopts the findings of the report and determines
17 them to be true and correct.

18 Pursuant to those findings, the applicable offense
19 level is 41. The criminal history category is Roman numeral
20 I. That would result in a guideline -- advisory sentencing
21 guideline range of 324 to 405 months. However, the statutory
22 maximum for the offense of conviction is 240 months. So 240
23 months becomes the advisory sentencing guideline range.

24 I note that the probation office, in its presentence
25 report, has recommended that a sentence of 240 months be

1 imposed with a 20-year term of supervised release, waiver of a
2 fine based upon a finding that the defendant's not financially
3 able to pay a fine, \$100 special assessment and restitution in
4 the stipulated amount now agreed to.

5 Of course, in determining the appropriate sentence to
6 be imposed, the Court utilizes the advisory sentencing
7 guidelines only as a starting point in the process. The Court
8 is to impose a sentence that is reasonable as described by the
9 Supreme Court in its decisions in *Booker* and *Fanfan*.

10 Therefore, in addition to the advisory guidelines,
11 the Court also gives due weight to the factors set out in
12 section -- 18 USC Section 3553(a) in determining the
13 appropriate sentence to be imposed in any criminal case. And
14 I will do so in this case as well.

15 Is there any reason why judgment and sentence should
16 not now be pronounced?

17 MR. FOGDERUDE: No.

18 MS. RICHARDS: No, Your Honor.

19 THE COURT: And anything that you wish to add, Mr.
20 Fogderude, with respect to sentencing?

21 MR. FOGDERUDE: No, Your Honor. Other than my client
22 did submit a letter, which I believe was attached.

23 THE COURT: Yes. Does the government wish to make
24 any argument or statement before I impose sentence in the
25 case?

1 MS. RICHARDS: Your Honor, the government will submit
2 on its sentencing memorandum.

3 THE COURT: Mr. Fogderude's asked for a -- pursuant
4 to 3553(a) considerations, some further downward adjustment
5 from the advisory guideline range, pointing to the defendant's
6 lack of any prior criminal record, no alcohol or substance
7 abuse history, verifiable employment, that the defendant was
8 on pretrial services supervision for a lengthy period of time,
9 for the most part -- or at least to some degree without issue,
10 that there may be mental health issues at play in terms of the
11 defendant's conduct, the consequences that will already befall
12 him as a result of the conviction and the fact that he has the
13 support of his family and was not involved in any original
14 production of child pornography.

15 Mr. Fogderude concludes that perhaps a -- and he
16 points to the pre-trial plea negotiations of the parties,
17 including the offer that was apparently made and rejected.
18 And argues to the Court that I should vary downward from the
19 advisory guidelines. And I think he ultimately recommends
20 that the Court impose 116 months based upon his interpretation
21 of, all right, let's add obstruction of justice on to the
22 offer that was rejected prior to trial.

23 What's the government's reaction to all that?

24 MS. RICHARDS: Your Honor, that would be two-thirds
25 less than his guideline range right now and it would be

1 inappropriate. The first -- first of all, the plea
2 negotiations from, I think, two years before trial are, I
3 would say, irrelevant to a sentencing at this point. We're in
4 a very different situation than we were a few years before
5 trial. The defendant has now -- we're now at sentencing. The
6 defendant went to trial, which he had a right to do.

7 And he could have gone to trial, he could have even
8 testified at trial and he could have later admitted that he
9 had done what he's convicted of. But he hasn't done that.
10 Instead, he went to trial, he gave perjured testimony. And
11 we're here today, after his obstruction at trial, and he still
12 hasn't admitted to any of the conduct. And so this is a very
13 different circumstance than we had when we gave -- when our
14 office gave that offer, which was rejected.

15 Also -- and this is along the same lines, comparing
16 him to other defendants, most of which have not gone to trial
17 and obstructed, is not -- does not -- sorry. Let me back up.

18 He is differently situated than defendants who admit
19 their guilt, whether before trial or after trial. A defendant
20 who obstructs is -- deserves more of a punishment and deserves
21 a guideline sentence at least. And so in this case, that
22 would be the 240 months.

23 THE COURT: All right. Mr. Smith, is there anything
24 that you wish to say to me before I impose sentence in your
25 case? I have considered your letter, which was attached to

1 your lawyer's submission as well as to the presentence report,
2 I believe.

3 THE DEFENDANT: The other thing that is part
4 of -- that should have been part of that letter as well, that
5 I was hesitant to put in at that time, was on July 2nd of this
6 year, I did attempt to take my life because this case has
7 destroyed any chance of having a normal life whatsoever. I
8 almost feel like you'd be doing me a favor if you put me to
9 death now.

10 They accuse me of this crime and I've asked them for
11 a polygraph to show that I'm innocent and they've denied.
12 I -- I used to have, as I said in my letter, focus, purpose
13 and now I have nothing. I -- that's why I say in my letter
14 what is my plan to be after the sentencing or after serving
15 the sentence, I don't know because I don't know if I'll live
16 that long. Either through my hand or somebody else's. I
17 can't say anything more, sir.

18 THE COURT: All right. Mr. Fogderude, in light of
19 the amount of child pornography that was present on the
20 defendant's computers, as well as the nature of that child
21 pornography, which has resulted under the advisory guidelines
22 and increases in the offense level due to the nature of the
23 material, as well as, for whatever reasons, the defendant's
24 continued inability to accept responsibility, I feel that I've
25 got really little choice but to follow the advisory sentencing

1 guidelines in the case. Which, because of the statutory
2 maximum, result in a range lower than what would otherwise be
3 calculated with an offense level of 41 in any event.

4 It's -- these are always very difficult situations
5 and -- pursuant to the Sentencing Reform Act of 1984, it is
6 the judgment of the Court that the defendant Robert Wallace
7 Smith is hereby committed to the custody of the Bureau of
8 Prisons to be imprisoned for a term of 240 months.

9 The defendant shall pay a special assessment of \$100,
10 payment to begin immediately. The Court finds the defendant
11 does not have the ability to pay a fine, imposition of fine is
12 therefore waived.

13 It is further ordered that the defendant shall pay
14 restitution in the amount of \$5,000 to the victim of the
15 Marineland series. That payment to be directed to the clerk
16 of the Court for distribution to the victim.

17 Upon release from imprisonment, the defendant shall
18 be placed on supervised release for a term of 240 months.
19 Within 72 hours of release from the custody of the Bureau of
20 Prisons, he shall report in person to the probation office in
21 the district in which the defendant is released.

22 While on supervised release, he shall not commit
23 another federal, state or local crime. Shall not possess a
24 firearm, ammunition, destructive device or any other dangerous
25 weapon. And shall not illegally possess controlled

1 substances.

2 The defendant shall cooperate in the collection of a
3 DNA sample as directed by his probation officer. And comply
4 with the standard conditions which have been recommended by
5 the US sentencing commission and adopted by this Court.

6 The defendant shall comply with the requirements of
7 the Sex Offender Registration and Notification Act as directed
8 by his probation officer, the Bureau of Prisons or any state
9 sex offender registration agency in which he or she resides,
10 works, is a student or was convicted of a qualifying offense.

11 The mandatory drug testing condition is suspended
12 based on the Court's determination that the defendant poses a
13 low risk of substance abuse.

14 The Court adopts the special conditions of
15 supervision recommended by the probation office on page 20
16 through 22 of the presentence report and imposes all of those
17 listed as special conditions.

18 The -- what is the institutional recommendation that
19 the defense seeks?

20 MR. FOGDERUDE: His first request would be the
21 institution at Butner, North Carolina. And second choice
22 would be, if that was for some reason unavailable, that the
23 Court designate Terminal Island.

24 THE COURT: The Court will recommend, in the first
25 instance, that the defendant be incarcerated at the Federal

1 Bureau of Prisons Institution located in Butner, North
2 Carolina?

3 MR. FOGDERUDE: Yes.

4 THE COURT: Butner, North Carolina. And if that, for
5 any reason, either classification or space availability, is
6 not available, the alternative recommendation is for
7 incarceration at the institution located at Terminal Island,
8 California. Both of those alternate recommendations are made
9 only insofar as they accord with classification determinations
10 and space availability by the Bureau of Prisons.

11 I will advise you, Mr. Smith, that you have the right
12 to appeal from the judgment and sentence in this case. If you
13 desire to appeal, you must file a notice of appeal in writing
14 with the Court within 14 days of today's date. If you cannot
15 afford an attorney in connection with that appeal, the Court
16 will appoint one for you.

17 And in that regard, at this time the Court will
18 relieve Mr. Fogderude and appoint attorney John Balazs for
19 purposes of pursuing appeal on behalf of the defendant.

20 MR. FOGDERUDE: Thank you.

21 THE COURT: Is there anything else?

22 MR. FOGDERUDE: Nothing further.

23 THE COURT: Anything else from the government?

24 MS. RICHARDS: No, Your Honor. Thank you.

25 THE COURT: Thank you.

1 (The proceedings were concluded at 12:12 p.m.)

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3 I, KAREN HOOVEN, Official Reporter, do hereby certify
4 that the foregoing transcript as true and correct.

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6 DATED: 3rd of November, 2016 /s/ Karen Hooven
KAREN HOOVEN, RMR-CRR

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