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Case No. 17-2350

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

FILED
Jul 24, 2018
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,)	
)	
Plaintiff-Appellee,)	ON APPEAL FROM THE UNITED
)	STATES DISTRICT COURT FOR
v.)	THE WESTERN DISTRICT OF
)	MICHIGAN
JAMES GABRIEL SMITH,)	
)	
Defendant-Appellant.)	O P I N I O N

BEFORE: SUTTON, McKEAGUE, and KETHLEDGE, Circuit Judges.

McKEAGUE, Circuit Judge. James Smith pled guilty to sex trafficking a fourteen-year-old girl and received a sentence of 240 months. No doubt unhappy with the consequence of his actions, Smith contests the finding that he was competent, argues that his guilty plea was infirm, alleges his trial counsel was ineffective, and asserts the district court wrongly applied a sentencing enhancement for repeated and dangerous sex offenders. Finding no error, we affirm.

I

Smith's arguments span an extensive record, so we begin with a brief procedural overview and later will set forth additional facts relevant to each argument.

In July 2016, James Smith was indicted on three counts of conspiring to sex traffic fourteen-year-old S.A., sex trafficking of S.A., and being a felon in possession of a firearm. One

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month later, a superseding indictment added a count against Smith for sex trafficking S.A. by force, threats of force, fraud, and coercion.

Motivated by Smith's attorney's concerns raised a few months later, the United States moved to examine Smith's competency and sanity. The district court swiftly granted the motion, and Smith was transferred to a federal medical center for evaluation. Nearly five months later, in April 2016, the court received the reports, ordered them released, and referred the matter to a magistrate judge for a competency hearing. The magistrate judge credited a prison psychologist's findings that Smith had "exaggerated and malingered" psychotic symptoms throughout his examination and was indeed competent to assist in his defense and stand trial.

So Smith signed a plea agreement. He appeared for his change of plea hearing, and the magistrate judge advised him that he faced at least ten years in prison. For reasons unexplained, the magistrate judge then continued the hearing for three weeks. Once the hearing resumed, Smith pled guilty to one count of sex trafficking minor S.A. After a minor modification to the factual basis contained in the plea agreement, the magistrate judge concluded that Smith's plea was made knowingly, voluntarily, and with an understanding of his rights.

Fast forward to judgment day. The United States argued that Smith should receive a five-level pattern-of-activity enhancement for engaging in prohibited sexual conduct with S.A. on multiple occasions. After reviewing the evidence, the district court overruled Smith's objection to the enhancement for engaging in multiple instances of prohibited conduct. The enhancement packed a punch—Smith's Guidelines range increased to 262 to 327 months. Even so, the district court sentenced Smith to 240 months' incarceration—22 months below the Guidelines range.

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II

Smith argues that the district court erred each step of the way—from pre-trial to plea to sentencing—so we take each in turn.

A

Smith first argues that the district court erroneously found him competent. We review competency determinations for clear error. *See United States v. Dubrule*, 822 F.3d 866, 875 (6th Cir. 2016).

At his competency hearing, Smith highlighted his troubled background to support his argument that he lacked competency. He was exposed to drugs in utero. He failed third grade despite placement in special education classes. He dropped out at age 14. He qualified for social security disability benefits because of his intellectual disabilities. He has never driven. He cannot spell. On occasion, he has suffered from delusions. And his own mother testified to her belief that he had significant intellectual difficulties and noted that he struggled with basic tasks; for example, he still lived with her and she continued to pick out his own clothes for him daily.¹ Smith cites all of this evidence, along with his low IQ scores, to argue that he is incompetent.

For its part, the United States primarily relied upon the testimony of Dr. Shawn Channell, the physician that had evaluated Smith for over two months. Dr. Channell, a forensic psychologist, has performed over 500 competency evaluations over eighteen years with the Bureau of Prisons. Dr. Channell discussed the items he considered, which included three full-scale IQ scores—ranging from 40 to 50—from when Smith was younger. Dr. Channell also administered a fresh IQ test, and Smith obtained a full-scale score of 60. This score, while higher than past scores, still

¹ Yet he was able to do other tasks, including cashing his own checks.

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demonstrates significant impairment. But since an IQ score provides only one puzzle piece, Dr. Channell administered several additional tests.

During the Test of Memory and Malingering, Dr. Channell concluded Smith “was either completely guessing or knew the correct answer but deliberately chose the wrong one.” Other tests bolstered the latter theory: in the Rey-15 memory test, Smith “feigned memory impairment”; in the Minnesota Multiphasic Personality Inventory II, Smith “invalidated” his own test “because of the exaggeration of the psychotic symptoms”; in the Inventory of Legal Knowledge, Smith “knew the right answer and deliberately chose the wrong answers”; in the Competence Assessment for Standing Trial for Defendants with Mental Retardation, Smith “was deliberately trying to appear more impaired than he really is.”

In addition to objective measures, Dr. Channell’s personal observations led him to believe that Smith “would provide information which used pretty sophisticated legal terminology and indicated a fairly sophisticated understanding of the process.” Even so, Smith often claimed to not understand legal principles and words, only to use those principles and words appropriately. In other words, Smith was “clearly exaggerating” his memory impairment, “exaggerating or malingering completely psychotic symptoms,” and making a “concerted effort to suggest . . . that he was incompetent and lacked knowledge that he, in fact, possesses.”

To be sure, Smith produced ample evidence showing that he has faced significant intellectual challenges from birth. But intellectual disability does not equate to incompetency. “[T]he bar for incompetency is high[er]: a criminal defendant must lack either a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding or a rational as well as factual understanding of the proceedings against him.” *United States v. Miller*, 531 F.3d

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340, 350 (6th Cir. 2008). The court did not clearly err when he credited Dr. Channell's testimony that Smith was competent.

B

Smith next avers that he did not understand the interstate commerce nexus element of his crime or his sentencing exposure. He argues that "the piecemeal and incomplete advisement was incomplete under Rule 11 and thus constitutionally inadequate." We review de novo whether a defendant's plea is knowing, voluntary, and intelligent, though we review underlying factual bases for clear error. *United States v. Catchings*, 708 F.3d 710, 716 (6th Cir. 2013) (citing *United States v. Dixon*, 479 F.3d 431, 434 (6th Cir. 2007)). However, where a defendant fails to object "contemporaneously" to the district court's alleged failure to comply with Rule 11, we review for plain error. *United States v. Webb*, 403 F.3d 373, 378 (6th Cir. 2005).

Smith concedes that we should review his interstate-commerce argument for plain error. That makes a difficult argument nearly impossible. The information required to satisfy a "factual basis" requirement for a guilty plea is lower than that required to sustain a guilty verdict at trial. See *United States v. Mobley*, 618 F.3d 539, 547 (6th Cir. 2010); *United States v. Tunning*, 69 F.3d 107, 111 (6th Cir. 1995) (noting the requirement is not grounded in the Constitution, "but rather a requirement created by rules and statutes"). Smith acknowledged that he understood the interstate-commerce element multiple times. Among other interstate tools, he used a vehicle manufactured in Ontario and carried a gun manufactured in Connecticut to sex traffic a minor. Cf. *United States v. Willoughby*, 742 F.3d 229, 240 (6th Cir. 2014) (holding that condoms and clothes manufactured out-of-state and cell-phone use sufficed to establish interstate nexus for sex trafficking conviction). Any alleged error could not have been plain to the judge accepting Smith's plea.

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Regarding his sentencing exposure, there is no question that the court satisfied Rule 11 and constitutional requirements. When Smith was asked whether he understood that he faced at least ten years and up to life in prison, he replied “yes.” Indeed, Smith admits that the court “gave all the most critical advisements on the constitutional trial rights that Smith was waiving and the penalties he was facing at the earlier hearing on June 15, 2017.” Yet he faults the court because it advised him over two dates, with a three-week continuance in between. This did not suffice, he now says, because the court “never revisited” all its prior advisements on the later date when it formally accepted Smith’s guilty plea.

We note that Smith’s trial counsel expressly agreed with the court’s plan to “pick up right where we left off” at the second session. But even assuming we review this issue *de novo*, nothing in the record leads us to conclude that Smith’s plea was anything but knowing, voluntary, and intelligent. It may be a better practice to give all advisements on the same day. However, Smith cites no authority holding that a continuance requires the court to revisit what a defendant has acknowledged before. Smith indicated he understood his sentencing exposure two times in writing and two more times on the record. We reject Smith’s shot at forgotten history.

C

Smith also argues that the district court failed to make any factual findings when it applied a five-level enhancement for Smith’s “pattern of activity involving prohibited sexual conduct.” U.S.S.G. § 4B1.5(b)(1).² In this context, we review the district court’s factual findings for clear error and its legal conclusions *de novo*. *United States v. Corp*, 668 F.3d 379, 391 (6th Cir. 2012).

² Like Smith, we focus exclusively on the third requirement of § 4B1.5(b)(1).

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Rather than contend with whether the record supports the enhancement—it clearly does—Smith says the court failed to make “express finding[s].” At first blush, Smith’s argument appears to gain traction. Smith cites a portion of the record where the district judge stated:

The next objection is the offense of convictions. The[] covered sex crime, neither 4B1 career offender nor subsection 4B1.5 applies and defendant engaged in a pattern of activity involving prohibited sexual conduct. Therefore, the defendant is a repeat and dangerous sex offender against minors. Offense level shall be five plus the offense level determined in chapters two and three.

In isolation, this is not very explicit. However, we first must ask whether any “evidence beyond a bare denial” called into question the factual allegations contained in the PSR and the testimony received at sentencing. *See United States v. Lang*, 333 F.3d 678, 681 (6th Cir. 2003) (internal citation and quotation marks omitted). The answer here is no. At sentencing, Smith’s counsel merely averred that Smith “has never admitted to participating more than that one time so he has a factual disagreement with that enhancement.”³

Contrast this threadbare assertion with the evidence contained in the PSR and offered at Smith’s sentencing hearing: S.A. testified before the grand jury that Smith forced her to go on “a bunch” of sex dates; a co-defendant proffered evidence about at least two sex dates; two text messages and three voicemails recovered from Smith’s cell phone showed other people inquiring about engaging in paid sex with S.A.; and, to make matters worse, a voice memo recorded Smith himself stating that S.A. was “sick” from “all that sex” Faced with this mountain of evidence and a “bare denial” to the contrary, the district court appropriately adopted the PSR’s findings and credited the government’s evidence and argument at sentencing.

But even if Smith had offered more than a “bare denial” sufficient to require the district court to make more express factual findings, the court did just that. At one point, the court found

³ In reality, Smith admitted to trafficking on “at least one trip,” an important distinction.

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Smith “threatened physical violence against S.A. if she did not go on sex dates,” “ke[pt] her involved with this prostitution,” and gave her “cocaine to do it.” The court lamented Smith’s pattern as “despicable by any standard”: “He would rent hotel rooms for these so-called sex dates and he also physically abused the young girl who he was using and forced the young girl, S.A., to have sex with him, which I do believe.” Smith’s assertion that he transgressed just “one time” is brazen, to say the least. Remanding for further explanation would produce a result as certain as death and taxes. *Cf. Molina-Martinez v. United States*, 136 S. Ct. 1338, 1348 (2016) (noting the discretion afforded to courts of appeals “in determining whether a remand for resentencing is necessary”); *accord Chavez-Meza v. United States*, 138 S. Ct. 1959, 1965 (2018).

Finally, due to its very nature, sex *trafficking* of a child or children usually (and tragically) involves more than just a “one-time” act. Being convicted of this offense often means “the defendant engaged in a pattern of activity involving prohibited sexual conduct” and thus often triggers the enhancement for repeated and dangerous sex offenders. *Compare* 18 U.S.C. § 1591(a)(1)–(2) *with* U.S.S.G. § 4B1.5(b)(1). The district court appropriately applied the pattern-of-activity enhancement in this case.

D

At last, Smith argues that his trial counsel was ineffective. His trial counsel, he says, failed to ensure he understood his sentencing exposure and failed to object to the interstate-commerce element during his plea hearing. “Except in rare circumstances” not present here, “this Court does not review ineffective assistance of counsel claims on direct appeal.” *United States v. Sypher*, 684 F.3d 622, 626 (6th Cir. 2012) (internal citation and quotation marks omitted). Smith instead may pursue a claim in a collateral proceeding under 28 U.S.C. § 2255. *See United States v. Walden*, 625 F.3d 961, 967 (6th Cir. 2010).

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III

For the foregoing reasons, we affirm.

1 || THE COURT: Okay.

2 MS. RAPA: -- in this case and it's witnesses from
3 the jail but they are not here. I supplied the document that
4 was given to me by the government that expressed those things
5 and I was not planning to call those witnesses.

6 THE COURT: Okay. Okay. Do you want to go forward
7 then on the motion to withdraw the plea?

8 MS. RAPA: Your Honor. I think that still is Mr.
9 Smith's preference.

10 THE COURT: All right.

11 Anything from the government?

12 MR. REUST: Your Honor, the only thing that I would
13 do is highlight what you've already got before you and the
14 government's response to that motion. And the main thing that I
15 would like to highlight is just the Sixth Circuit decision in
16 Buford which stated when a defendant admits his guilt in open
17 court and in his request to withdraw his plea this weighs
18 heavily against him. That's exactly what the Court has here.

19 Mr. Smith still admits the offense conduct that
20 constitutes a violation and constitutes sex traffic of a minor,
21 and the reasons that he gives are not fair and just reasons.

22 And I would also note that the Court has previously
23 already accepted his guilty plea so he has to provide fair and
24 just reasons for the withdrawal of it.

25 THE COURT: Well, I carefully read the briefs on

1 both sides and I think the government's argument really carries
2 the day because even as late as now -- and by "now" I mean when
3 I got the brief or the sentencing memorandum from the defendant,
4 he admits right in there that he committed the offense.

5 I think that the defendant's real issues go to the
6 sentencing factors. Whether, you know, whether this or that on
7 the sentencing factors and that's what we're going to have some
8 evidence on apparently.

9 But the motion to withdraw does come late. He's
10 doing it against the advice of his counsel.

11 The specific offense is pretty clear that he did it.
12 I mean, he even says that he did it. So that's the primary
13 reason that we have to do that.

14 He continues to admit his guilt as the government
15 points out. He had full notice of his rights when he pled. I
16 read the transcript of that and he was informed of his rights
17 and he pled guilty to the charge against him which was
18 trafficking S.A.

19 One of the things that gives me pause is I read also
20 his psychological testing when he was a young boy even and I
21 understand that he has substantial intellectual deficits but he
22 was found competent to proceed and understanding the charge
23 against him and ability to help his attorney.

24 He's somewhat familiar with the criminal justice
25 system. To his credit he doesn't have a long record like a lot

1 of people that we see here.

2 Regarding the prejudice to the government I don't
3 see a lot of prejudice there. There might be more prejudice to
4 the alleged victims but the government has all the same
5 resources and I don't know of anybody that's absconded or has
6 disappeared so I don't see that as an issue.

7 And as far as the penalties go he was informed of
8 the penalties. I reread the plea, Magistrate Judge Kent, I
9 think, took the plea, and he was informed that he could have a
10 sentence up to life, and Judge Kent also found him competent
11 and, of course, the government, at least, psychologist found him
12 competent.

13 Therefore, I'm going to deny his motion to withdraw
14 his plea.

15 The sentencing is a matter that gives me more pause
16 in this particular case. Part of the pause comes which would be
17 a United States sentencing guideline 5K2.0 or 2.1, I'm not sure,
18 but and that is that people that are at least as culpable and
19 probably more culpable than the defendant, Mr. Smith, received
20 heavy sentences but substantially less than the guidelines
21 provide for Mr. Smith. And for me that is a very troubling
22 thing.

23 Now, I know the law pretty well saying that you look
24 at a nationwide basis for the sentencing disparities but
25 considering the facts of this case it's going to be very

United States District Court

Western District of Michigan

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

-vs-

Case Number: 1:16:CR:132-03

JAMES GABRIEL SMITH

USM Number: 21214-040

Anna Rapa
Defendant's Attorney

THE DEFENDANT:

- pleaded guilty to Count 4 of the Superseding Indictment.
- pleaded nolo contendere to Count(s) ___, which was accepted by the court.
- was found guilty on Count(s) ___ after a plea of not guilty.

The defendant is adjudicated guilty of these offense(s):

Title & Section	Offense Ended	Count No.
18 U.S.C. § 1591(a)(1), (b)(2), and (c)	June 25, 2016	Four

Nature of Offense

Sex Trafficking of a Minor

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- All remaining counts and charges are dismissed on the motion of the United States.

IT IS ORDERED that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence: October 26, 2017

DATED: October 26, 2017

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

AO 245B (MIWD Rev. 12/16) Judgment in a Criminal Case

Judgment - Page 2

Defendant: JAMES GABRIEL SMITH

Case Number: 1:16:CR:132-03

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **two hundred forty (240) months**.

The Court makes the following recommendations to the Bureau of Prisons:

Defendant be afforded educational and vocational training.
Defendant be placed in a facility close to Michigan.

The defendant is remanded to the custody of the United States Marshal.

The Defendant shall surrender to the United States Marshal for this district:

at _____ on _____.
 as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2:00 P.M. on _____.
 as notified by the United States Marshal.
 as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

United States Marshal

By: _____
Deputy United States Marshal

AO 245B (MIWD Rev. 12/16)- Judgment in a Criminal Case

Judgment - Page 3

Defendant: JAMES GABRIEL SMITH

Case Number: 1:16:CR:132-03

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **ten (10) years**.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the Court.
 The above drug testing condition is suspended, based on the Court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6. You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

AO 245B (MIWD Rev. 12/16)- Judgment in a Criminal Case

Judgment - Page 4

Defendant: JAMES GABRIEL SMITH

Case Number: 1:16:CR:132-03

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the Court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the Court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the Court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with the law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

AO 245B (MIWD Rev. 12/16)- Judgment in a Criminal Case

Judgment - Page 5

Defendant: JAMES GABRIEL SMITH

Case Number: 1:16:CR:132-03

SPECIAL CONDITIONS OF SUPERVISION

1. You must participate in a program of testing and treatment for substance abuse, as directed by the probation officer, and follow the rules and regulations of that program until such time as you are released from the program by the probation officer, and must pay at least a portion of the cost according to your ability, as determined by the probation officer.
2. You must not use or possess any controlled substances without a valid prescription. If you have a valid prescription, you must follow the instructions on the prescription. You must not possess, use, or sell marijuana or any marijuana derivative (including THC) in any form (including edibles) or for any purpose (including medical purposes). You are also prohibited from entering any marijuana dispensary or grow facility.
3. You must not use/possess any alcoholic beverages and must not frequent any establishments whose primary purpose is the sale/serving of alcohol.
4. You must provide the probation officer with access to any requested financial information and authorize the release of any financial information. The probation office will share financial information with the U.S. Attorney's Office.
5. You must not have contact with the victim in this case. This includes any physical, visual, written, electronic or telephonic contact with such persons. Additionally, you must not directly cause or encourage anyone else to have such contact with the victim(s).
6. You must have no contact with minors (under the age of 18) without the written approval of the probation officer and must refrain from entering into any area where children frequently congregate including, but not limited to parks, schools, day care centers, playgrounds, theme parks, theaters, and playgrounds.
7. You must participate in a cognitive behavioral treatment program, as directed by the probation officer, and follow the rules and regulations of that program until such time as you are released from the program by the probation officer and must pay at least a portion of the cost according to your ability, as determined by the probation officer.
8. If you are unemployed after the first 60 days of supervision, or for 60 days after termination or lay-off from employment, you must perform at least 20 hours of community service work per week, as directed by the probation officer until gainfully employed full-time.

AO 245B (MIWD Rev. 12/16) Judgment in a Criminal Case

Judgment - Page 6

Defendant: JAMES GABRIEL SMITH

Case Number: 1:16:CR:132-03

CRIMINAL MONETARY PENALTIES¹

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on the following pages.

<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
remitted	waived	-0-

- The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.
- The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	-------------------	----------------------------	-------------------------------

- Restitution amount ordered pursuant to plea agreement: \$
- The defendant must pay interest on restitution and/or a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options in the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The Court determined that the defendant does not have the ability to pay interest and it is ordered that:
 - the interest requirement is waived for the fine.
 - the interest requirement is waived for the restitution.
 - the interest requirement for the fine is modified as follows:
 - the interest requirement for the restitution is modified as follows:

¹ Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (MIWD Rev. 12/16) Judgment in a Criminal Case

Judgment - Page 7

Defendant: JAMES GABRIEL SMITH

Case Number: 1:16:CR:132-03

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A Lump sum payment of \$____ due immediately, balance due
 - not later than _____, or
 - in accordance with C, D, E, or F, below; or
- B Payment to begin immediately (may be combined with C, D, or F, below); or
- C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment, or
- D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F Special instructions regarding the payment of criminal monetary penalties:

The restitution and/or fine is to be paid in minimum quarterly installments of \$25.00 based on IFRP participation, or minimum monthly installments of \$20.00 based on UNICOR earnings, during the period of incarceration, to commence 60 days after the date of this judgment. Any balance due upon commencement of supervision shall be paid, during the term of supervision, in minimum monthly installments of \$ to commence 60 days after release from imprisonment. The defendant shall apply all monies received from income tax refunds, lottery winnings, judgments, and/or any other anticipated or unexpected financial gains to any outstanding court-ordered financial obligations.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court, 399 Federal Building, 110 Michigan N.W., Grand Rapids, MI 49503, unless otherwise directed by the court, the probation officer, or the United States Attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Joint and Several Amount, and corresponding payee, if appropriate:

- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the property set forth in the Preliminary Order of Forfeiture filed October 26, 2017 (ECF No. 224) to the United States.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

File No. 1:16-CR-132

JAMES GABRIEL SMITH,

Defendant.

Omnibus Hearing

Before

THE HONORABLE RAY KENT
United States Magistrate Judge
June 15, 2017

APPEARANCES

DAVIN REUST
Assistant U.S. Attorney
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ANNA R. RAPA
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Mears, MI 49436
Attorney for Defendant

Digital audio recording transcribed by:

Kevin W. Gaugier, CSR-3065
U.S. District Court Reporter

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6 || PROCEEDINGS

15 DEFENDANT SMITH: Yes.

16 THE COURT: Mr. Smith, remind me how far you got in
17 school.

18 DEFENDANT SMITH: I think tenth or eleventh.

19 THE COURT: Okay. Can you read and write English?

20 DEFENDANT SMITH: A little bit.

25 DEFENDANT SMITH: A little bit.

1 THE COURT: All right. Do you feel like you
2 understand the few things I've said so far?

3 DEFENDANT SMITH: Yes.

4 THE COURT: All right. If at any time you don't
5 understand something, raise your hand so I know there's a
6 problem. All right?

7 DEFENDANT SMITH: Okay.

8 THE COURT: In the last 24 hours have you had any
9 drugs, alcohol, or medicine?

10 DEFENDANT SMITH: No.

11 THE COURT: Mr. Smith, you have the right to have
12 this hearing conducted by Judge Gordon Quist. Judge Quist is
13 the trial judge assigned to your case and the judge who will
14 sentence you if your plea of guilty is accepted. Judge Quist
15 is a United States district judge. He was appointed under the
16 Constitution and serves for life.

17 I'm not a United States district judge. I'm a
18 magistrate judge. I was appointed under a statute and I serve
19 an eight-year term. Unlike Judge Quist, I can't accept your
20 plea of guilty here this morning or find you guilty. What I
21 can do is ask you the questions Judge Quist would ask if he
22 was here, advise you of your rights as he would, and then
23 prepare a written report to him recommending that he either
24 accept or reject your plea of guilty. Do you understand the
25 differences between Judge Quist and me?

1 DEFENDANT SMITH: Kinda.

2 THE COURT: Hmm. Okay. Well, when you fully
3 understand what we're doing here this morning, we'll come back
4 and take another stab at this if you want to, but that's about
5 as far as we're going to go. Ms. Rapa, meet with your client.
6 (Proceedings recessed at 11:08 a.m.; reconvened at 11:34 a.m.)

7 THE COURT: All right. We're back on the record in
8 16-CR-132, United States v. James Gabriel Smith. We took a
9 little break.

10 Mr. Smith, my concern is for you in this
11 proceeding. I can't let you plead guilty unless you
12 understand each step of the process. You know, we've had a
13 competency evaluation done on you and the psychiatrist
14 concluded that you're competent. I have no reason to disagree
15 with them. I found you competent in an order after the
16 psychiatric evaluation was completed and we had a hearing on
17 your competence.

18 But even so, if you don't understand everything
19 you're doing, I can't let you go forward with your plea. Your
20 plea has to be knowing. You have to know each and every --
21 every single thing we do here today, you have to know what
22 we're doing and understand it or we just can't go forward.

23 So I'm going to ask you some of the -- a few of the
24 questions over again. If at any time you don't understand
25 something, just tell me I don't understand that and I'll do my

1 best to explain it to you. And if you then understand, okay,
2 we'll go forward. If after my best efforts to explain it to
3 you you don't understand, we'll have to decide what to do, but
4 we probably won't be able to do your plea hearing today. I
5 mean, not probably. If you don't understand, we won't be
6 able -- and I can't make you understand, we won't be able to
7 go forward with your plea hearing.

8 So let's backtrack to the question about whether you
9 have any physical or mental condition that would make it
10 difficult for you to understand the charges against you in the
11 indictment, the plea agreement that you've entered into, or
12 what's happening in court; and if you do, please tell me what
13 they are.

14 DEFENDANT SMITH: It's hard for me to comprehend
15 sometimes, but sometimes I understand.

16 THE COURT: Okay. So do you know whether you -- I
17 don't remember what you were diagnosed with. Ms. Rapa?

18 MS. RAPA: Your Honor, he has a low IQ score, I
19 think of about 60.

20 THE COURT: That's right.

21 MS. RAPA: So it does take him some more time to
22 understand things.

23 THE COURT: You're absolutely right. I'd forgotten
24 that. All right. As I said, if there's anything you don't
25 understand, please raise your hand, tell Ms. Rapa, tell me,

1 and I'll do my best to explain it to you till you do.

2 We went through the question of whether you
3 understand that your trial judge is Judge Quist. Do you
4 understand that?

5 DEFENDANT SMITH: Yes.

6 THE COURT: And that Judge Quist is the judge who
7 will sentence you if he accepts your guilty plea. Do you
8 understand that part?

9 DEFENDANT SMITH: Yes.

10 THE COURT: All right. You also have the right to
11 allow me to handle this hearing in his place. Do you
12 understand that?

13 DEFENDANT SMITH: Yes.

14 THE COURT: Do you want me to handle the hearing in
15 place of Judge Quist?

16 DEFENDANT SMITH: Yes.

17 THE COURT: All right. Do you understand that I
18 can't either accept your plea or find you guilty today? Do
19 you understand that?

20 DEFENDANT SMITH: Yes.

21 THE COURT: But I'll make a recommendation to Judge
22 Quist that he either accept or reject it. Do you understand
23 that?

24 DEFENDANT SMITH: Yes.

25 THE COURT: Okay. Do we have a consent form,

1 Stephanie? All right. I've projected up on the screen a
2 consent form which appears to contain your decision to let me
3 handle the hearing in place of Judge Quist. Is that your
4 signature near the bottom of the form?

5 DEFENDANT SMITH: Yes.

6 THE COURT: Did you read the form or did Ms. Rapa
7 read the form to you before you signed it?

8 DEFENDANT SMITH: Yes, she read it to me.

9 THE COURT: Okay. Did you understand it?

10 DEFENDANT SMITH: Yes.

11 THE COURT: Okay. Now, Mr. Smith, when you were
12 here the first time, I told you you had the right to remain
13 silent. Do you remember that?

14 DEFENDANT SMITH: Yes.

15 THE COURT: You still have that right, but if we go
16 forward with your guilty plea, I'm going to be asking you more
17 questions. In answering them you'll be giving up both the
18 right to remain silent and the presumption of innocence. Do
19 you understand that?

20 DEFENDANT SMITH: Yes.

21 THE COURT: Moreover, before I ask you any more
22 questions, I'm going to have you placed under oath to tell the
23 truth. If you were then to answer, if you were to lie to me
24 about anything, you could be charged with new crimes,
25 including perjury or making a false statement. Do you

1 understand that?

2 DEFENDANT SMITH: Yes.

3 THE COURT: And those crimes would carry their own
4 separate penalties. Do you understand that?

5 DEFENDANT SMITH: Yes.

6 THE COURT: Do you still want to go forward?

7 DEFENDANT SMITH: Yes.

8 THE COURT: All right. If you would, please, sir,
9 stand and raise your right hand. I'm going to have you placed
10 under oath to tell the truth.

11 (Defendant Smith was sworn by the Clerk.)

12 THE COURT: Mr. Smith, when you were here for your
13 first hearing, your initial appearance, I told you you had the
14 right to a lawyer. You asked me to appoint you a lawyer and I
15 appointed Ms. Rapa. Have you been satisfied with her
16 representation of you so far?

17 DEFENDANT SMITH: Yes.

18 THE COURT: Mr. Smith, do you understand you still
19 have the right to maintain your plea of not guilty if you want
20 to?

21 DEFENDANT SMITH: Yes.

22 THE COURT: Do you understand that as you sit here
23 right now you're still presumed innocent of all of the
24 charges?

25 DEFENDANT SMITH: Yes.

1 THE COURT: Do you understand that the government
2 would still have the burden of proving you guilty if you went
3 to trial?

4 DEFENDANT SMITH: Yes.

5 THE COURT: Do you understand that at trial you
6 would have the right through Ms. Rapa to confront and question
7 the witnesses against you?

8 DEFENDANT SMITH: Yes.

9 THE COURT: That you would have the right to call
10 your own witnesses?

11 DEFENDANT SMITH: Yes.

12 THE COURT: That you would have the right to present
13 other evidence which you believe makes you not guilty?

14 DEFENDANT SMITH: Yes.

15 THE COURT: Do you understand that you would have
16 the right to either testify in your own defense or remain
17 silent and not have your silence used against you?

18 DEFENDANT SMITH: Yes.

19 THE COURT: But if you go forward with your guilty
20 plea, there's not going to be a trial. Do you understand
21 that?

22 DEFENDANT SMITH: Yes.

23 THE COURT: And you'll give up all the rights I've
24 just talked to you about except the right to continue being
25 represented by Ms. Rapa. Do you understand that?

1 DEFENDANT SMITH: Yes.

2 THE COURT: Mr. Smith, under the terms of the plea
3 agreement, you'll be pleading guilty to Count 4. Do you know
4 that?

5 DEFENDANT SMITH: Yes.

6 THE COURT: Have you read the indictment or has Ms.
7 Rapa read it to you?

8 DEFENDANT SMITH: She read it to me.

9 THE COURT: Okay. I'm going to read Count 4 to
10 you. It charges you with sex trafficking of a minor.

11 In or about June 2016, in Calhoun County, in the
12 Southern Division of the Western District of Michigan and
13 elsewhere, James Gabriel Smith and Michael Ray Noble, II,
14 knowingly recruited, enticed, harbored, transported, provided,
15 obtained, and maintained, by any means in or affecting
16 interstate commerce, a minor whose initials are S.A., age 14,
17 knowing and in reckless disregard of the fact, and having had
18 a reasonable opportunity to observe S.A., that S.A. had not
19 attained the age of 18 years and would be caused to engage in
20 one or more commercial sex acts.

21 Now, there's a lot of legal words in there, a lot of
22 legal speak which we really should think about in the future,
23 Mr. Reust, about whether we really need to talk that way in an
24 indictment. But what it comes down to is the United States
25 claims that back in June of last year you and Mr. Noble found

1 this 14-year-old girl and caused her to prostitute herself and
2 that you made money off it. Do you understand what you're
3 charged with?

4 DEFENDANT SMITH: Yes.

5 THE COURT: All right. If Judge Quist accepts your
6 plea of guilty to Count 4, there are certain maximum penalties
7 that apply. Those include not less than ten years in prison
8 and up to life in prison. Do you understand that?

9 DEFENDANT SMITH: Yes.

10 THE COURT: So do you understand that if you're
11 found guilty, you are going to be sentenced to at least ten
12 years in prison?

13 DEFENDANT SMITH: Yes.

14 THE COURT: There's also a fine of up to \$250,000, a
15 period of supervised release of not less than five years and
16 up to lifetime supervised release. Supervised release is a
17 time following your release from prison. So let's say just
18 for the sake of argument as an example that Judge Quist gives
19 you the minimum sentence, ten years. You go in and serve your
20 prison term. When you come out, you'll start supervised
21 release.

22 What that means is Judge Quist will still be
23 supervising you. You'll be living out in the community
24 somewhere, at a halfway house to start, but then later
25 hopefully in your own home somewhere. But Judge Quist will

1 put conditions on you, conditions like you not commit any new
2 crimes, maybe you look for and keep a job, maybe you get
3 mental health counseling, whatever Judge Quist thinks you
4 need, basically. But if you violate any of those conditions,
5 Judge Quist can send you back to prison. Do you understand
6 that?

7 DEFENDANT SMITH: Yes.

8 THE COURT: There are also some financial penalties,
9 including a \$100 special assessment which I don't see on the
10 court sheet, Mr. Reust, and an additional \$5,000 special
11 assessment under a law called the Justice for Victims of Sex
12 Trafficking Act. So Congress, our government, has decided
13 that when somebody is convicted of a crime like this, sex
14 trafficking of a 14-year-old girl, that they will pay an
15 additional penalty in the amount of \$5,000. Do you understand
16 that?

17 DEFENDANT SMITH: Yes.

18 THE COURT: And finally, you'll be subject to
19 restitution. What that means is if the 14-year-old girl,
20 S.A., needed medical treatment or she needed to see a
21 counselor because remembering what you and Mr. Noble caused
22 her to do is painful for her or makes her life difficult, all
23 of that costs money, and Judge Quist could order you to pay
24 her, reimburse her for any money that she spends on those sort
25 of things. Do you understand that?

1 DEFENDANT SMITH: Yes.

2 THE COURT: Now, Mr. Smith, I'm going to talk to you
3 about what the government would have to prove to the jury if
4 you said -- if you changed your mind and said, You know what,
5 I'm going to go to trial, I've decided I'm not going to plead
6 guilty, because you have to understand what the government
7 would have to prove before you decide to give that up and not
8 make them prove it. So here's what they would have to prove.
9 Number one, that you recruited this 14-year-old girl to be a
10 prostitute. Do you understand that part?

11 DEFENDANT SMITH: Yes.

12 THE COURT: Number two, that you either knew she was
13 under 18 or you should have known that she was under 18. Do
14 you understand that part?

15 DEFENDANT SMITH: Yes.

16 THE COURT: And then third, and this is difficult,
17 but this is what gives the federal government jurisdiction
18 over you. This is why your case is in federal court, not in
19 state court. You used a -- and correct me if I'm wrong, Mr.
20 Reust, but I can't think of why else these statements of fact
21 would be contained in the plea agreement. The car you used, a
22 2001 Chevy Impala, was manufactured in Canada.

23 DEFENDANT SMITH: Can I --

24 THE COURT: In Ontario, Canada. You probably
25 wouldn't even know that when you were driving the car. It

1 doesn't say probably anywhere that you're going to look that
2 it was made in Canada, but the car was made in Canada. And
3 what that means is that that car crossed the border from
4 Canada into the United States and ended up in Michigan. You
5 then used that car during your prostitution of the 14-year-old
6 girl. Do you understand that part?

7 DEFENDANT SMITH: Yeah, but I don't own a car.

8 THE COURT: No, I understand you don't own it, but
9 it was used by you and Mr. Noble in transporting this girl
10 from place to place.

11 (Ms. Rapa conferred with Defendant Smith.)

12 THE COURT: So do you remember -- do you understand
13 at least that this car was manufactured outside the United
14 States?

15 DEFENDANT SMITH: Yes.

16 THE COURT: And that that gives the federal
17 government jurisdiction over you?

18 DEFENDANT SMITH: Yes.

19 THE COURT: Okay. All right. Mr. Reust is now
20 going to describe what evidence he would present to the jury
21 if you did go to trial. So I want you to listen very
22 carefully to what he says because I'm going to have a couple
23 questions for you when we're done.

24 DEFENDANT SMITH: Uh-huh.

25 MR. REUST: Thank you, Your Honor.

1 If this case were to proceed to trial, the
2 government would present evidence that Mr. Smith met the minor
3 in this case who is referred to by her initials, S.A.; that
4 she was 14 years old at the time that he interacted with her;
5 that he had an opportunity to observe and interact with her to
6 understand that she was under 18 years old; that he drove, at
7 least rode in the vehicle that as he has explained was owned
8 by Mr. Noble or Mr. Noble's mother; that that vehicle was a
9 2001 Chevy Impala that was manufactured in Ontario, Canada;
10 and that Mr. Smith carried a gun, a Ruger .22 caliber pistol;
11 that that pistol was manufactured in the State of Connecticut;
12 and that he then accompanied this minor girl, S.A., to
13 multiple dates where she had sex for money, and he transported
14 her with Mr. Noble and then provided what he at least
15 understood to be protection for her during these dates.

16 THE COURT: Thank you.

17 Mr. Smith, did you understand -- did you hear what
18 Mr. Reust said the evidence would be from the government?

19 DEFENDANT SMITH: Yes.

20 THE COURT: Did you understand what he was saying?

21 DEFENDANT SMITH: Yes.

22 THE COURT: Do you agree that the government would
23 be able to produce that evidence if you had a trial?

24 DEFENDANT SMITH: Yes.

25 THE COURT: Do you believe that that evidence would

1 be enough to convict you if you went to trial?

2 DEFENDANT SMITH: Yes.

3 THE COURT: We are going to take another short
4 recess. I'd like to see counsel in chambers, and you can
5 leave Mr. Smith in place. We won't be long.

6 (Proceedings recessed at 11:51 a.m.)

7 * * *

8 CERTIFICATE OF REPORTER

9

10 I, Kevin W. Gaugier, Official Court Reporter for the
11 United States District Court for the Western District of
12 Michigan, appointed pursuant to the provisions of Title 28,
13 United States Code, Section 753, do hereby certify that the
14 foregoing is a true and correct transcript of the proceedings
15 had in the within-entitled and numbered cause on the date
16 hereinbefore set forth.

17 I do further certify that the foregoing transcript
18 was prepared by me.

19

20

21

22 /s/ Kevin W. Gaugier

23 Kevin W. Gaugier, CSR-3065
24 U.S. District Court Reporter
110 Michigan N.W.
622 Federal Building
25 Grand Rapids, MI 49503

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

File No. 1:16-CR-132

JAMES GABRIEL SMITH,

Defendant.

Change of Plea Hearing

Before

THE HONORABLE RAY KENT
United States Magistrate Judge
July 5, 2017

APPEARANCES

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Digital audio recording transcribed by:

Kevin W. Gaugier, CSR-3065
U.S. District Court Reporter

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6 || PROCEEDINGS

8 THE COURT: This is 16-CR-132, United States v.
9 James Gabriel Smith. We are back on the record in this case.
10 Back on June 15th, we were here at that time to take
11 a change of plea from Mr. Smith from not guilty to guilty
12 pursuant to the terms of a written plea agreement. We got
13 partway through the proceedings. I had some concerns. My
14 concerns have been laid to rest in a meeting with the lawyers
15 earlier today and I'm prepared to go forward and take Mr.
16 Smith's plea.

20 DEFENDANT SMITH: Yes.

1 MR. REUST: It does to me, Your Honor.

2 THE COURT: Ms. Rapa?

3 MS. RAPA: Yes, Your Honor.

4 THE COURT: All right. Any reason to recover any of
5 that ground from the government?

6 MR. REUST: No, Your Honor.

7 THE COURT: Ms. Rapa?

8 MS. RAPA: No, Your Honor.

9 THE COURT: Okay. Then I'm going to pick up right
10 where we left off, and that is, Mr. Smith, I'm going to advise
11 you that under the Sentencing Reform Act of 1984 the United
12 States Sentencing Commission formulated sentencing guidelines
13 for judges like Judge Quist to use when they're formulating a
14 sentence in a criminal case. Have you talked to Ms. Rapa
15 about these federal sentencing guidelines and how they might
16 apply to you?

17 DEFENDANT SMITH: Yes.

18 THE COURT: Do you understand that Judge Quist won't
19 be able to determine what guidelines apply to you until after
20 there's been a presentence report prepared?

21 DEFENDANT SMITH: Yes.

22 THE COURT: Do you understand that even after the
23 presentence report has been prepared and Judge Quist has
24 determined what guideline range applies to you, he can still
25 sentence you within that range, above that range, or below

1 that range?

2 DEFENDANT SMITH: Yes.

3 THE COURT: Do you understand that if the sentence
4 Judge Quist gives you is more severe, longer than what you're
5 expecting, you'll still be bound by your guilty plea and will
6 not be able to withdraw it?

7 DEFENDANT SMITH: Yes.

8 THE COURT: Is there a cooperation clause in the
9 plea agreement?

10 MR. REUST: There's not, Your Honor.

11 THE COURT: Mr. Smith, do you understand that parole
12 has been abolished in the federal prison system and if you're
13 sentenced to prison, you will not be released on parole?

14 DEFENDANT SMITH: Yes.

15 THE COURT: Ms. Rapa, is Mr. Smith presently on
16 parole, probation, bond, or other supervision to any other
17 court?

18 MS. RAPA: Your Honor, he does have a bond provision
19 in the Calhoun County Court for charges that were associated
20 with this case. He was not on bond, I believe, while this
21 happened, but because of this case he got charged in Calhoun
22 County as well.

23 THE COURT: All right. And it's my recollection
24 that under the terms of the plea agreement the government
25 expects those charges to be dismissed. Is that right, Mr.

1 Reust?

2 MR. REUST: Correct, Your Honor. I've spoken with
3 the assistant prosecuting attorney from Calhoun County and
4 that's every expectation.

5 THE COURT: Okay. Mr. Smith, do you understand that
6 after Judge Quist sentences you, the government might appeal
7 your sentence?

8 DEFENDANT SMITH: Yes.

9 THE COURT: Mr. Smith, do you believe you understand
10 the nature of the charge that you're pleading guilty to; that
11 is, the charge in Count 4, sex trafficking a minor? Do you
12 believe you understand that charge?

13 DEFENDANT SMITH: Yes.

14 THE COURT: Do you understand the maximum penalties
15 provided by law for that charge?

16 DEFENDANT SMITH: Yes.

17 THE COURT: Do you understand your rights as I
18 explained them to you when we were here last time?

19 DEFENDANT SMITH: Yes.

20 THE COURT: Understanding all of these things, how
21 do you plead to Count 4 of the indictment, guilty or not
22 guilty?

23 DEFENDANT SMITH: Guilty.

24 THE COURT: Did anybody threaten you or coerce you
25 to get you to plead guilty?

1 DEFENDANT SMITH: No.

2 THE COURT: Did anybody promise you anything that is
3 not contained in the written plea agreement to get you to
4 plead guilty?

5 DEFENDANT SMITH: No.

6 THE COURT: Is your decision to plead guilty a
7 free-will and voluntary act by you?

8 DEFENDANT SMITH: Yes.

9 THE COURT: Are you pleading guilty because you are
10 in fact guilty of Count 4?

11 DEFENDANT SMITH: Yes.

12 THE COURT: Are you pleading guilty at least partly
13 because the government has agreed that if you plead guilty to
14 Count 4, it will dismiss Counts 2, 5, and 6?

15 DEFENDANT SMITH: Yes.

16 THE COURT: Are you also pleading guilty because if
17 you plead guilty in this court, the charges against you in
18 state court are going to be dismissed?

19 DEFENDANT SMITH: Yes.

20 THE COURT: Mr. Smith, have you either read the
21 entire plea agreement or has Ms. Rapa read the entire plea
22 agreement to you?

23 DEFENDANT SMITH: She read it to me.

24 THE COURT: Okay. Do you understand the entire plea
25 agreement?

1 DEFENDANT SMITH: Yeah.

2 THE COURT: Do you agree with the entire plea
3 agreement?

4 DEFENDANT SMITH: Yeah.

5 THE COURT: Do you agree to be bound by the entire
6 plea agreement?

7 DEFENDANT SMITH: What that mean?

8 THE COURT: That means that you agree that you will
9 abide by all of the conditions contained in the plea
10 agreement.

11 DEFENDANT SMITH: Yes.

12 THE COURT: Mr. Reust, are there any portions of the
13 plea agreement you wish to place on the record?

14 MR. REUST: The only additional portion of the plea
15 agreement that I wish to cover for the record is that
16 contained in Paragraph 12 which refers to a waiver of appeal
17 and collateral attack rights. In subparagraph A it states
18 that in exchange for the promises made by the government, the
19 defendant waives all right to appeal or collaterally attack
20 his conviction, sentence, or any other matter relating to this
21 prosecution except the exceptions listed in Paragraph B, and
22 then Paragraph B lists four exceptions.

23 He could appeal if his sentence were based on an
24 unconstitutional factor. The second subparagraph states that
25 he could appeal if the district court incorrectly determined

1 his sentencing guidelines range. The third subparagraph
2 states that he could appeal if his sentence was above the
3 guidelines range as determined by the Court at sentencing and
4 was unreasonable. And subparagraph four states that Mr. Smith
5 could appeal if an attorney who represented him during the
6 course of the case provided ineffective assistance of
7 counsel.

8 THE COURT: All right. Thank you, Mr. Reust.

9 MR. REUST: Thank you, Your Honor.

10 THE COURT: Ms. Rapa, any portions of the plea
11 agreement you wish to place on the record?

12 MS. RAPA: No, Your Honor, thank you.

13 THE COURT: You're welcome.

14 All right. Mr. Smith, I've already asked you if you
15 agree with the entire plea agreement. You've said yes. I
16 want to turn your attention now specifically to Paragraph 8,
17 factual basis of guilt. Do you agree that every statement
18 contained in Paragraph 8 is true?

19 (Ms. Rapa conferred with Defendant Smith.)

20 DEFENDANT SMITH: Yeah, I'd like to plead to one
21 time on the multiple one.

22 THE COURT: Okay. But what I'm asking you, is there
23 statements made in Paragraph 8, this is not -- I mean, you're
24 pleading to Count 4, but I'm asking you if every statement
25 contained in Paragraph 8 is true.

1 (Ms. Rapa conferred with Defendant Smith.)

2 DEFENDANT SMITH: I only went one time.

3 THE COURT: So I guess you're saying that every
4 statement contained in Paragraph 8 is not true because
5 Paragraph 8 says that you knowingly accompanied S.A. to
6 multiple commercial sex dates. So is that not true?

7 DEFENDANT SMITH: Right.

8 THE COURT: All right. Then, counsel, I think what
9 I'm going to do is we'll adjourn and perhaps we can come up
10 with an alternate factual basis of guilt that Mr. Smith agrees
11 with, that the government agrees with, and we'll pick up again
12 where we left off. I think I'm -- I have some things this
13 afternoon, but I'm generally available. So we'll be
14 adjourned.

15 (Proceedings recessed at 11:33 a.m.; reconvened at 11:34 a.m.)

16 THE COURT: So, counsel, here's what I'm going to
17 suggest. So the sentence beginning: "In or about June 2016,
18 the Defendant met S.A. and, knowing that she was 14 years old,
19 facilitated commercial sex acts with her with paying
20 customers" on at least one occasion "by, including but not
21 limited to, knowingly accompanying her during transport in a
22 2001 Chevy Impala manufactured in Canada," maybe we'll follow
23 up with at least one commercial sex date, "standing guard,"
24 I'm going to take out at various locations, "including a
25 hotel."

1 So it would now read, and Mr. Smith, please listen
2 carefully to this and see if this is true: "Defendant
3 stipulates and agrees that the facts in this paragraph at a
4 minimum are true and form a factual basis of guilt. In or
5 about June 2016, Defendant met S.A., and knowing that she was
6 14 years old, facilitated commercial sex acts for her with
7 paying customers on at least one occasion by, including but
8 not limited to, knowingly accompanying her during transport in
9 a 2001 Chevy Impala manufactured in Ontario, Canada, to at
10 least one commercial sex date; standing guard, including at
11 various" -- well, "standing guard at a hotel while S.A.
12 engaged in commercial sex acts." And then the rest of the
13 paragraph would be the same: "Carrying a Ruger .22 caliber
14 semiautomatic pistol -- manufactured in the state of
15 Connecticut -- during the transportation of S.A. and while she
16 was engaged in commercial sex."

17 DEFENDANT SMITH: Yes.

18 THE COURT: As amended, is the paragraph now true?

19 DEFENDANT SMITH: Yes.

20 THE COURT: Okay. Mr. Reust, does the government
21 agree to that factual basis of guilt?

22 MR. REUST: Yes, Your Honor. The only thing I'd add
23 is that this was in Calhoun County, Michigan.

24 THE COURT: All right. Do you also agree with that,
25 Mr. Smith, that these acts took place in Battle Creek or

1 elsewhere in Calhoun County?

2 DEFENDANT SMITH: Yeah.

3 THE COURT: All right. I don't know what we do
4 about the plea agreement. I mean, I might suggest some kind
5 of an amendment cleaning this up before Judge Quist reviews
6 it, and I note as I think I did last time that my copy has
7 some handwritten edits to it. It might be wise for the
8 parties to prepare and file a corrected, maybe, plea
9 agreement.

10 MR. REUST: Yes, Your Honor. I'd be happy to draft
11 that and send it to Ms. Rapa for her review.

12 THE COURT: Okay. All right. So I'm going to
13 circle back. I know I asked you this, Mr. Smith. The factual
14 basis of guilt in Paragraph 8 as I just read it to you which
15 is a change, you understand that's a change from the written
16 plea agreement?

17 DEFENDANT SMITH: Yes.

18 THE COURT: Do you agree to that change?

19 DEFENDANT SMITH: Yes.

20 THE COURT: Do you agree as I read it to you that
21 all of the statements are true?

22 DEFENDANT SMITH: Yes.

23 THE COURT: Do you agree that those statements are
24 sufficient to find you guilty?

25 DEFENDANT SMITH: Yes.

1 THE COURT: All right. Mr. Reust, do you agree that
2 the amended factual basis of guilt is sufficient to support
3 the plea?

4 MR. REUST: Yes, Your Honor.

5 THE COURT: Ms. Rapa, do you agree?

6 MS. RAPA: Yes, Your Honor.

7 THE COURT: All right. Mr. Smith, I find that your
8 plea of guilty to Count 4 is made knowingly and with full
9 understanding of each of the rights that I explained to you;
10 that it's made voluntarily and free from any force, threats,
11 or promises apart from the promises contained in the written
12 plea agreement itself. I find that you understand the nature
13 of the charge in Count 4, the penalties provided by law for
14 that charge, and that your plea has a sufficient basis in
15 fact, specifically the facts as I read them in the amended
16 Paragraph 8, factual basis of guilt.

17 I'm going to defer acceptance of the plea
18 agreement. That's Judge Quist's decision to make, not mine.
19 Mr. Reust is going to draft an amendment in which he includes
20 the changes that I made here in court today to Paragraph 8.
21 I'm going to recommend that Judge Quist accept your plea of
22 guilty and find you guilty, and I will prepare a written
23 report to that effect today. I'm going to order that a
24 presentence investigation begin and a presentence report be
25 prepared.

1 It's likely that the next thing that will happen in
2 the case from your perspective, Mr. Smith, is that you'll be
3 interviewed by a probation officer. The probation officer
4 will ask you all kinds of questions about your childhood, your
5 family, your upbringing, your education, your health, your
6 work history, your criminal history, health history, substance
7 abuse, all kinds of questions. And using that information and
8 other information that the probation officer will collect, he
9 or she will write a report to Judge Quist about you giving
10 Judge Quist more background about who you are. Part of that
11 report will be a scoring of the guidelines.

12 You'll get that report -- and Ms. Rapa will be there
13 with you for this interview, by the way. But you and Ms. Rapa
14 will get a copy of this report at least a month before you're
15 sentenced. You'll go through it. I'm sure she'll come up,
16 sit down, go through it with you. If there are things in the
17 report that you disagree with, let's say the scoring of the
18 guidelines, which is important for you, of course, Ms. Rapa
19 will meet with the probation officer and try to work out any
20 disagreements. If she's unable to work out -- if there are
21 disagreements and she's unable to work them out, Judge Quist
22 will settle those before he sentences you.

23 You probably won't be sentenced now until
24 October-ish. It's running about four months from plea to
25 sentencing. In the meantime you'll continue in the custody of

1 the marshals.

2 Do we need that, do you think, Steph?

3 THE CLERK: We didn't have it entered last time.

4 THE COURT: We didn't, okay. All right. Okay.

5 Okay. Mr. Smith, before we adjourn here because
6 we've come just about to the end of our business, Ms.

7 Carpenter advises me that we never -- when you were here last
8 time in June we never got to entering in the record your
9 consent to having me handle this hearing. We went through the
10 rights, though, did we not, that Mr. Smith has the right to
11 have the plea before Judge Quist?

12 MS. RAPA: Yes.

13 MR. REUST: Yes, Your Honor.

14 THE COURT: So, Mr. Smith, we've projected up on the
15 screen a consent form. I talked to you when we were here last
16 about your right to have the hearing before Judge Quist, but
17 we never got to the form. So I'm asking you now is that your
18 signature near the bottom of the form?

19 DEFENDANT SMITH: Yes.

20 THE COURT: And this form contains your agreement to
21 let me handle this hearing in place of Judge Quist. Is that
22 right?

23 DEFENDANT SMITH: Yes.

24 THE COURT: Did anybody -- did you read the form or
25 did Ms. Rapa read you the form before you signed it?

1 DEFENDANT SMITH: She read it to me before I signed
2 it.

3 THE COURT: And did you understand the form before
4 you signed it?

5 DEFENDANT SMITH: Yes.

6 THE COURT: Okay. Did anybody threaten you, coerce
7 you, or promise you anything to get you to agree to let me
8 handle the hearing?

9 DEFENDANT SMITH: No.

10 THE COURT: Was that a free-will and voluntary
11 decision on your part?

12 DEFENDANT SMITH: Yes.

13 THE COURT: Well, I believe that it was. I accept
14 your consent and make the form part of the record.

15 Mr. Reust, anything further from the United States
16 on this case?

17 MR. REUST: No, Your Honor, thank you.

18 THE COURT: All right. Ms. Rapa, anything from you?

19 MS. RAPA: No, thank you, Your Honor.

20 THE COURT: Mr. Smith, did you understand everything
21 that happened in court here this morning?

22 DEFENDANT SMITH: Yes.

23 THE COURT: Do you have any questions for me before
24 I adjourn your case?

25 DEFENDANT SMITH: No, sir.

1 THE COURT: All right. Well, good luck to you.

2 (Proceedings concluded at 11:43 a.m.)

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6 CERTIFICATE OF REPORTER

7

8 I, Kevin W. Gaugier, Official Court Reporter for the
9 United States District Court for the Western District of
10 Michigan, appointed pursuant to the provisions of Title 28,
11 United States Code, Section 753, do hereby certify that the
12 foregoing is a true and correct transcript of the proceedings
13 had in the within-entitled and numbered cause on the date
14 hereinbefore set forth.

15 I do further certify that the foregoing transcript
16 was prepared by me.

17

18

19

20 /s/ Kevin W. Gaugier

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25 Grand Rapids, MI 49503