

No. 24-11842-C

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT SMITH,

Defendant-Appellant.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA

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MOTION OF THE UNITED STATES TO DISMISS APPEAL  
BASED ON APPEAL WAIVER

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Northern District of Alabama

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Civil Rights Division  
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Ben Franklin Station  
P.O. Box 14403  
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**CERTIFICATE OF INTERESTED PERSONS  
AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Eleventh Circuit Rules 26.1-1 to 26.1-3 and 29, the United States certifies that the Certificate of Interested Persons filed by appellant and supplemented by the United States on June 27, 2024, is correct and complete, and that the United States is not aware of any other person who has or may have an interest in the outcome of this appeal.

The United States certifies that no publicly traded company or corporation has an interest in the outcome of this appeal.

s/ Ellen Noble  
ELLEN NOBLE  
Attorney

Date: July 26, 2024

## INTRODUCTION

As a correctional officer at the Federal Bureau of Prisons, defendant Robert Smith knowingly engaged in sexual acts with female inmates who were in official detention and under his custodial, supervisory, or disciplinary authority. Smith pleaded guilty to Sexual Abuse of a Ward, 18 U.S.C. 2243(b), and waived his right to appeal his conviction or sentence. Because Smith knowingly and voluntarily waived his right to appeal, this Court should dismiss his appeal without any briefing on the merits. *See United States v. Buchanan*, 131 F.3d 1005, 1008 (11th Cir. 1997).

## BACKGROUND

Acting in his capacity as a corrections officer at the Federal Correctional Institution, Aliceville, Robert Smith knowingly engaged in sexual acts with two female inmates. In 2018, Smith penetrated a female inmate's vulva with his penis in a mechanical room that he accessed by key, away from cameras and other inmates and officers. Attach. A, Plea Agreement, Doc. 28, at 3.\* In 2019, Smith penetrated another female inmate's vulva with his penis, this time in the confines

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\* "Doc. \_\_, at \_\_" refers to entries on the district court's docket, No. 7:23-cr-144 (N.D. Ala.). "CA Doc. \_\_, at \_\_" refers to entries on this Court's docket, No. 24-1182-C (11th Cir.). "Plea Tr. \_\_: \_\_" refers to the corresponding page and line of the Plea Hearing Transcript assigned by the court reporter. "Sentencing Tr. \_\_: \_\_" refers to the corresponding page and line of the Sentencing Hearing Transcript assigned by the court reporter.

of his office. *Id.* at 2-3. Both inmates were in official detention and under Smith's custodial, supervisory, or disciplinary authority. *Ibid.*

The United States charged Smith with two counts of Sexual Abuse of a Ward in violation of 18 U.S.C. 2243(b). Attach. A, Plea Agreement, Doc. 28, at 1-2. Smith pleaded guilty to Count 1, and in exchange, the government agreed to dismiss Count 2 of the Indictment. *Id.* at 1. The government made no other promises to the defendant, and the plea agreement explicitly stated “[t]hat the United States and defense counsel will be free to recommend any lawful sentence.” *Id.* at 1, 4.

As a part of the plea agreement, Smith also agreed to waive his right to appeal his “conviction and/or sentence.” Attach. A, Plea Agreement, Doc. 28, at 6. Under the terms of the waiver, Smith could contest on appeal only a “sentence imposed in excess of the applicable statutory maximum sentence[],” “[p]rosecutorial misconduct,” or “[i]neffective assistance of counsel.” *Id.* at 6-7.

During the plea colloquy, the district court reviewed with Smith the terms of the plea agreement, including the appeal waiver. *See* Attach. B, Plea Tr. The court asked Smith if he read the terms of the agreement, discussed them with his lawyer, and accepted them. *Id.* at 12-15. Smith confirmed that he had. *Ibid.* The court then specifically identified the appeal waiver within the plea agreement and asked Smith if he understood that, by signing the agreement, he was “giving up [his]

right to appeal or file a post conviction petition.” *Id.* at 13:24-14:8. Smith said “yes.” *Id.* at 14:9. The court also asked Smith if it was his signature that appeared below the appeal waiver, and Smith confirmed that it was. *Id.* at 14:10-14:12. The court ruled that Smith’s plea was “knowing and voluntary” and that Smith was “aware of . . . the consequences of the plea.” *Id.* at 15:14-15:20.

More than four months later, at sentencing, the district court determined that Smith qualified for a guideline imprisonment range of 6 to 12 months, and then varied upwards, sentencing Smith to 24 months’ imprisonment. Attach. C, Sentencing Tr. 19:11-19:16, 41:13-41:19, 42:16-42:19. The court advised the defendant of his right to appeal and stated that appeal waivers are “generally” not enforceable under the terms of the plea agreement when the court issues a sentence “above the guideline calculation,” as done here. *Id.* at 44:22-45:2.

Smith appealed and intends to argue that the sentence was “both substantively and procedurally unreasonable.” Statement of Issues, CA Doc. 14, at 1.

## **ARGUMENT**

**This Court should dismiss this case because Smith knowingly and voluntarily waived his right to appeal.**

“When a defendant attempts to appeal a sentence in the face of an appeal waiver, the government may file a motion to dismiss the appeal based upon the

waiver.” *United States v. Buchanan*, 131 F.3d 1005, 1008 (11th Cir. 1997).

“[W]here it is clear from the plea agreement and the Rule 11 colloquy . . . that the defendant knowingly and voluntarily entered into a sentence appeal waiver, that waiver should be enforced without requiring the government to brief the merits of the appeal.” *Ibid.*

A waiver is knowing and voluntary where “the district court specifically questioned the defendant concerning the sentence appeal waiver during the [plea] colloquy,” or where “it is manifestly clear from the record that the defendant otherwise understood the full significance of the waiver.” *United States v. Bushert*, 997 F.2d 1343, 1351 (11th Cir. 1993). The Court reviews de novo whether an appeal waiver is knowing and voluntary. *Id.* at 1352.

Here, Smith knowingly and voluntarily agreed to waive his right to appeal his sentence. During the Rule 11 plea colloquy, the district court specifically questioned Smith about the appeal waiver in the plea agreement and confirmed that Smith understood that he was giving up his right to appeal. *See* Attach. B, Plea Tr. 13:24-14:12. The court also confirmed that Smith had signed directly under the text of the appeal waiver, signifying his knowing and voluntary consent. *See id.* at 14:10-12; *see also* Attach. A, Plea Agreement, Doc. 28, at 7. Smith agreed that he had discussed his rights with his lawyer, read the plea agreement in its entirety, understood its binding effect, and signed it voluntarily. Attach. A, Plea Agreement,

Doc. 28, at 12-13; *see also* Attach. B, Plea Tr. 12:4-12:23.

This Court has found appeal waivers enforceable in similar circumstances. *See United States v. Boyd*, 975 F.3d 1185, 1192 (11th Cir. 2020) (finding that “appeal waiver was knowing and voluntary because the district court specifically questioned [defendant] about the waiver during the plea colloquy”); *see also United States v. Speigner*, 843 F. App’x 228, 230 (11th Cir. 2021) (finding appeal waiver was knowing and voluntary where the district court, in the plea colloquy, “referenced the appeal waiver, [the defendant] confirmed that he had read and understood the agreement and waiver, and [the defendant] acknowledged in the agreement that he was making the waiver freely and voluntarily”).

The terms of the appeal waiver preclude Smith’s appeal. The waiver prohibits Smith from appealing his conviction and sentence unless he is arguing that (1) his sentence exceeds the statutory maximum, (2) there was prosecutorial misconduct, or (3) he received ineffective assistance of counsel. *See* Attach. A, Plea Agreement, Doc. 28, at 7. Smith’s appeal does not fall under any of the three exceptions. He is appealing his sentence on the grounds that it is substantively and procedurally unreasonable. CA Doc. 14, at 1. Smith does not allege prosecutorial misconduct or ineffective assistance of counsel, and Smith’s sentence of 24 months’ imprisonment is far below the statutory maximum of 15 years, *see* 18 U.S.C. 2243(b). Because the appeal waiver was knowing and voluntary, and

because the waiver's text precludes Smith's appeal, this Court should dismiss the case.

Finally, the district court's statement at sentencing regarding Smith's right to appeal does not invalidate the appeal waiver. At sentencing, the district court stated that appeal waivers are "generally not enforceable" under the terms of the plea agreement when the court issues a sentence "above the guideline calculation." Attach. C, Sentencing Tr. 44:24-45:2. That is generally correct. Appeal waivers in the Northern District of Alabama often have a provision reserving the defendant's right to appeal an above-guidelines sentence. But the appeal waiver in *this* case contains no such provision. Because the United States intended to seek an above-guidelines sentence, and communicated that to the defense, the parties agreed to terms that prohibit Smith from appealing such a sentence. *See* Attach. A, Plea Agreement, Doc. 28, at 7.

This Court "consistently enforce[s] knowing and voluntary appeal waivers according to their terms." *United States v. Bascomb*, 451 F.3d 1292, 1294 (11th Cir. 2006) (citing cases). This is true even when the district court at sentencing invites or encourages the defendant to pursue an appeal despite a waiver. *See id.* at 1295 (citing *United States v. Howle*, 166 F.3d 1166, 1168 (11th Cir. 1999)). "Having approved the plea agreement, the district court ha[s] no more right to change its terms than it would have to change the terms of any other contract."



*Howle*, 166 F.3d at 1169. “[A]s long as an appeal waiver is voluntarily and knowingly entered into as part of a valid plea agreement, and that agreement is accepted by the court, the waiver is enforceable. It cannot be vitiated or altered by comments the court makes during sentencing.” *Bascomb*, 451 F.3d at 1297.

The same is true here. Although the district court advised Smith of his standard right to appeal and noted what the terms of appeal waivers *generally* permit, *see* Attach. C, Sentencing Tr. 44:24-45:2, those comments do not vitiate Smith’s knowing and voluntary appeal waiver. Indeed, a district court is required to advise a defendant of his right to appeal after sentencing, *see* Fed. R. Crim. P. 32(j)(1)(B), and doing so has “no effect on [an] appeal waiver,” *United States v. Cook*, No. 21-13739, 2022 WL 1515949, at \*4 (11th Cir. May 13, 2022). This Court routinely enforces appeal waivers even when, as here, the district court instructs the defendant that he has a right to appeal. *See ibid.*; *United States v. Espinal*, 743 F. App’x 922, 925 (11th Cir. 2018); *United States v. Aponte*, 461 F. App’x 828, 831 (11th Cir. 2012); *United States v. Makler*, 249 F. App’x 816, 818 (11th Cir. 2007); *Bascomb*, 451 F.3d at 1294-1297; *Howle*, 166 F.3d at 1167-1169.

Because Smith knowingly and voluntarily agreed to waive his right to appeal absent exceptions that are inapplicable here, and the terms of the appeal waiver clearly preclude Smith from challenging the reasonableness of his sentence on appeal, this Court should dismiss the case.

## CONCLUSION

This Court should dismiss the appeal.

Respectfully submitted,

PRIM F. ESCALONA  
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Northern District of Alabama

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Assistant Attorney General

MICHAEL B. BILLINGSLEY  
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s/ Ellen Noble  

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## **CERTIFICATE OF COMPLIANCE**

This motion complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 1700 words. This motion also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in Times New Roman 14-point font using Microsoft Word for Microsoft 365.

s/ Ellen Noble  
ELLEN NOBLE  
Attorney

Date: July 26, 2024

## **ADDENDUM**

**ADDENDUM: TABLE OF CONTENTS**

**ATTACHMENT**

Plea Agreement, Doc. 28 .....A

Plea Hearing Transcript.....B

Sentencing Hearing Transcript.....C

**ATTACHMENT A**

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ALABAMA  
WESTERN DIVISION**

**UNITED STATES OF AMERICA**            )  
  )  
  )  
  )  
  )  
  )  
**vs.**    )  
  )  
**ROBERT D. SMITH**                            )  
  )

**Case 7:23-CR-00144-LSC-GMB**

**PLEA AGREEMENT**

The United States Attorney’s Office for the Northern District of Alabama and the Criminal Section of the Civil Rights Division of the U.S. Department of Justice (hereinafter referred to as the “Government” or “United States”) and the Defendant, Robert D. Smith (the “Defendant), (collectively, the “Parties”), hereby acknowledge the following plea agreement in this case:

**PLEA**

The Defendant agrees to plead guilty to Count One of the Indictment, Doc. 1. In exchange, the Government agrees to dismiss Count Two of the Indictment, Doc. 1. The Government has made no other promises to the Defendant.

**TERMS OF THE AGREEMENT**

**I. MAXIMUM PUNISHMENT**

The Parties understand that the maximum statutory punishment that may be imposed for the crime of Sexual Abuse of a Ward, in violation of Title 18, United

States Code, Section 2243(b), as charged in **COUNT ONE**, is:

- a. Imprisonment for not more than fifteen years;
- b. A fine of not more than \$250,000, or,
- c. Both (a and b);
- d. Supervised release of not more than three years; and
- e. A Special Assessment Fee of \$100.

## **II. FACTUAL BASIS FOR PLEA**

The Government is prepared to prove the following facts beyond a reasonable doubt at the trial of this case:

The Defendant was a corrections officer with the Federal Bureau of Prisons (BOP). He was assigned to the Federal Correctional Institution, Aliceville (“FCI-Aliceville”), which is a federal prison, in the Northern District of Alabama. As part of his duties, the defendant was to ensure the safety and security of inmates housed at FCI-Aliceville, and to uphold the United States Constitution.

While acting in his capacity as a corrections officer, in or around February 2019, the Defendant knowingly engaged in a sexual act with T.M., a female inmate in official detention, who was under the custodial, supervisory, or disciplinary authority of the Defendant. Specifically, the Defendant penetrated T.M.’s vulva with



his penis, while they were in his office in the facilities department, which was away from cameras and other inmates and officers.

Further, also while acting in his capacity as a corrections officer, between on or about July 6, 2018, and November 15, 2018, the Defendant knowingly engaged in a sexual act with R.R-L., a female inmate in official detention, who was under the custodial, supervisory, or disciplinary authority of the Defendant. Specifically, the Defendant penetrated R.R-L.'s vulva with his penis, while they were in the mechanical room, which the Defendant accessed with a key, and which was also away from cameras and other inmates and officers.

**The Defendant hereby stipulates that the facts stated above are correct and that the Court can use these facts in calculating the Defendant's sentence. The Defendant further acknowledges that these facts do not constitute all of the evidence of each and every act that the Defendant may have committed.**



**ROBERT D. SMITH**

### **III. RECOMMENDED SENTENCE**

Subject to the limitations in paragraph VIII below regarding subsequent conduct, the Parties agree to the following:

- a. That the Defendant be awarded an appropriate reduction in offense level for acceptance of responsibility. The United States may oppose any adjustment for acceptance of responsibility if the Defendant (a) fails to admit to each and every item in the factual basis; (b) denies involvement in the offenses; (c) gives conflicting statements about the Defendant's involvement in the offenses; (d) is untruthful with the Court, the Government, or the United States Probation Officer; (e) obstructs or attempts to obstruct justice prior to sentencing; (f) engages in any criminal conduct between the date of this agreement and the date of sentencing; or (g) attempts to withdraw the plea of guilty for any reason other than those expressly enumerated in the Limited Waiver of Right to Appeal and Post-Conviction Relief section of this plea agreement;
- b. That the United States and defense counsel will be free to recommend any lawful sentence;
- c. That the Defendant be remanded to the custody of the Bureau of Prisons as ordered by the Court;
- d. That no promises have been made by any representative of the United States to the Defendant as to what the sentence will be in this case. Any estimates or predictions made to the Defendant by defense counsel or any other person

regarding any potential sentence in this case are not binding on the Court and may not be used as a basis to rescind this plea agreement or withdraw the Defendant's guilty plea.

- e. That the Defendant understands that the sentence in this case will be determined by the Court after it receives the presentence investigation report from the United States Probation Office and any information presented by the Parties. The Defendant acknowledges that the sentencing determination will be based upon the entire scope of the Defendant's criminal conduct, the Defendant's criminal history, and pursuant to other factors and guidelines as set forth in the Sentencing Guidelines and the factors set forth in 18 U.S.C. § 3553.
- f. That, following any term of imprisonment imposed by the Court, the Defendant be placed on supervised release for a period to be determined by the Court, subject to the standard conditions of supervised release as set forth in U.S.S.G § 5D1.3;
- g. That the Defendant pay a special assessment fee of \$200.00, said amount due and owed as of the date the sentence is pronounced;
- h. That the Defendant be required to pay restitution to the victims as ordered by the Court; and,

- i. That the Defendant agrees to surrender any law enforcement certification and/or licenses.

#### **IV. WAIVER OF RIGHT TO APPEAL AND POST-CONVICTION RELIEF**

In consideration of the recommended disposition of this case, the Defendant, **ROBERT D. SMITH**, waives and gives up his right to appeal his conviction and/or sentence in this case, as well as any fines, restitution, and forfeiture orders the Court might impose. Further, he waives and gives up the right to challenge the conviction and/or sentence, any fines, restitution, and forfeiture orders imposed and the manner in which the conviction and/or sentence, any fines, restitution, and forfeiture orders were determined in any post-conviction proceeding, including, but not limited to, a motion brought under 28 U.S.C. § 2255.

The Defendant also knowingly and voluntarily waives the right to raise on appeal or on collateral review any argument (1) that the statute to which the Defendant is pleading guilty is unconstitutional and (2) that the admitted conduct does not fall within the scope of the statute.

The Defendant reserves the right to contest in an appeal or post-conviction proceeding the following:

- (a) Any sentence imposed in excess of the applicable statutory maximum sentence(s);
- (b) Prosecutorial misconduct; and
- (c) Ineffective assistance of counsel.

The Defendant acknowledges that, before giving up these rights, the Defendant discussed the Federal Sentencing Guidelines and their application to the Defendant's case with the Defendant's attorney, who explained them to the Defendant's satisfaction. The Defendant further acknowledges and understands that the Government retains its right to appeal where authorized by statute.

I, ROBERT D. SMITH, hereby place my signature on the line directly below to signify that I fully understand the foregoing paragraphs, and that I am knowingly and voluntarily entering into this waiver.

  
\_\_\_\_\_  
ROBERT D. SMITH

#### V. UNITED STATES SENTENCING GUIDELINES

Defendant's counsel has explained to the Defendant that, in light of the United States Supreme Court's decision in United States v. Booker, the federal sentencing

guidelines are **advisory** in nature. Sentencing is in the Court's discretion and is no longer required to be within the guideline range. The Defendant agrees that, pursuant to this agreement, the Court may use facts it finds by a preponderance of the evidence to reach an advisory guideline range, and the Defendant explicitly waives any right to have those facts found by a jury beyond a reasonable doubt.

#### **VI. AGREEMENT NOT BINDING ON COURT**

The Defendant fully and completely understands and agrees that it is the Court's duty to impose a sentence upon the Defendant, and that any sentence recommended by the Government or the Defendant's counsel is **NOT BINDING UPON THE COURT**, and that the Court is not required to accept the Government or defense counsel's recommendation. Further, the Defendant understands that, if the Court does not accept the Government or defense counsel's recommendation, the Defendant does not have the right to withdraw the guilty plea.

#### **VII. VOIDING OF AGREEMENT**

The Defendant understands that, should the Defendant move the Court to accept the Defendant's plea of guilty in accordance with, or pursuant to, the provisions of *North Carolina v. Alford*, 400 U.S. 25 (1970), or tender a plea of *nolo contendere* to the charges, this agreement will become NULL and VOID. In that

event, the Government will not be bound by any of the terms, conditions, or recommendations, express or implied, which are contained herein.

#### **VIII. SUBSEQUENT CONDUCT**

**The Defendant understands that, should the Defendant violate any condition of pretrial release or violate any federal, state, or local law, or should the Defendant say or do something that is inconsistent with acceptance of responsibility, the United States will no longer be bound by its obligation to make the recommendations set forth in the agreement, but instead, may make any recommendation deemed appropriate by the United States Attorney or the Assistant Attorney General for the Civil Rights Division in their sole discretion.**

#### **IX. OTHER DISTRICTS AND JURISDICTIONS**

The Defendant understands and agrees that this agreement **DOES NOT BIND** any other United States Attorney in any other district or component of the U.S. Department of Justice, or any other state or local authority.

#### **X. COLLECTION OF FINANCIAL OBLIGATION**

In order to facilitate the collection of financial obligations to be imposed in connection with this prosecution, the Defendant agrees to fully disclose all assets in which the Defendant has any interest or over which the Defendant exercises control,

directly or indirectly, including those held by a spouse, nominee or other third party. The Defendant also will promptly submit a completed financial statement to the United States Attorney's Office, in a form that it provides and as it directs. The Defendant also agrees that the Defendant's financial statement and disclosures will be complete, accurate, and truthful. Finally, the Defendant expressly authorizes the United States Attorney's Office to obtain a credit report on the Defendant in order to evaluate the Defendant's ability to satisfy any financial obligation imposed by the Court.

**XI. AGREEMENT REGARDING RELEVANT CONDUCT AND RESTITUTION**

As part of the Defendant's plea agreement, the Defendant admits to the above facts associated with the charges and relevant conduct for any other acts. The Defendant understands and agrees that the relevant conduct contained in the factual basis will be used by the Court to determine the Defendant's range of punishment under the advisory sentencing guidelines. The Defendant admits that all of the crimes listed in the factual basis are part of the same acts, scheme, and course of conduct. This agreement is not meant, however, to prohibit the United States Probation Office or the Court from considering any other acts and factors which may constitute or relate to relevant conduct.



## **XII. TAX AND OTHER CIVIL, ADMINISTRATIVE, AND IMMIGRATION PROCEEDINGS**

Unless otherwise specified herein, the Defendant understands and acknowledges that this agreement does not apply to, or in any way limit, any pending or prospective proceedings related to the Defendant's tax liabilities, if any, or to any pending or prospective forfeiture or other civil or administrative proceedings.

### **Immigration**

The Defendant recognizes that pleading guilty may have consequences with respect to his immigration status if he is not a citizen of the United States. Under federal law, a broad range of crimes are removable offenses, including the offense(s) to which the Defendant is pleading guilty. Removal and other immigration consequences are the subject of a separate proceeding, however, and the Defendant understands that no one, including his attorney or the district court, can predict to a certainty the effect of his conviction on his immigration status. The Defendant nevertheless affirms that he wants to plead guilty regardless of any immigration consequences that his plea may entail, even if the consequence is his automatic removal from the United States.

### **XIII. SEX OFFENDER REGISTRATION AND NOTIFICATION ACT**

The Defendant understands and acknowledges that, under the Federal Sex Offender Registration and Notification Act, he must register as a sex offender and keep the registration current in each of the following jurisdictions: where he resides, where he is an employee, and where he is a student. The Defendant understands that the federal registration requirement and any state registration requirement may apply throughout his life. The Defendant further understands that the requirement to keep the registration current includes informing at least one of the aforementioned jurisdictions not later than three days after any change of name, residence, employment, or student status. The Defendant understands that failure to comply with these obligations subjects him to prosecution for failure to register under federal law, 18 U.S.C. § 2250, which is punishable by a fine, or imprisonment, or both.

### **XIV. DEFENDANT'S UNDERSTANDING**

I have read and understand the provisions of this agreement consisting of 15 pages. I have discussed the case and my constitutional and other rights with my lawyer. I am satisfied with my lawyer's representation in this case. I understand that, by pleading guilty, I will be waiving and giving up my right to continue to plead not guilty, to a trial by jury, to the assistance of counsel at that trial, to confront,

cross-examine, or compel the attendance of witnesses, to present evidence on my behalf, to maintain my privilege against self-incrimination, and to the presumption of innocence. I agree to enter my plea as indicated above on the terms and conditions set forth herein.

**NO OTHER PROMISES OR REPRESENTATIONS HAVE BEEN MADE TO ME BY THE PROSECUTORS, OR BY ANYONE ELSE, NOR HAVE ANY THREATS BEEN MADE OR FORCE USED TO INDUCE ME TO PLEAD GUILTY.**

I further state that I have not had any drugs, medication, or alcohol within the past 48 hours except as stated here: [REDACTED]. Nothing I have taken has affected my ability to knowingly, intelligently, and voluntarily enter into this plea agreement.

I understand that this plea agreement will take effect and will be binding as to the Parties **only** after all necessary signatures have been affixed hereto.

I have personally and voluntarily placed my initials on every page of this agreement, and I have signed the signature line below to indicate that I have read, understand, and approve all of the provisions of this agreement, both individually and as a total binding agreement.

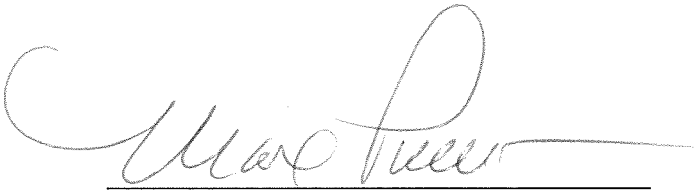
1-3-24  
DATE

  
\_\_\_\_\_  
ROBERT D. SMITH  
Defendant

**XV. COUNSEL'S ACKNOWLEDGMENT**

I have discussed this case with my client in detail, and I have advised my client of all of my client's rights and all possible defenses. My client has conveyed to me that my client understands this agreement and consents to all its terms. I believe the plea and disposition set forth herein are appropriate under the facts of this case and are in accord with my best judgment. I concur in the entry of the plea on the terms and conditions set forth herein.

1-3-24  
DATE

  
\_\_\_\_\_  
MAXWELL PULLIAM  
Defendant's Counsel

**XVI. GOVERNMENT'S ACKNOWLEDGMENT**

We have reviewed this matter and this agreement and concur that the plea and disposition set forth herein are appropriate and are in the interests of justice.

PRIM F. ESCALONA  
United States Attorney

1-3-24  
DATE

Michael Royster  
MICHAEL ROYSTER  
Assistant United States Attorney

KRISTEN CLARKE  
Assistant Attorney General  
Civil Rights Division

1-3-24  
DATE

Michael Royster for Anna Gotfryd  
ANNA GOTFRYD  
Trial Attorney  
Criminal Section, Civil Rights Division

**ATTACHMENT B**

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ALABAMA  
WESTERN DIVISION

UNITED STATES OF AMERICA,

7:23-CR-144-LSC

Plaintiff,

January 11, 2024

vs.

Tuscaloosa, Alabama

ROBERT D. SMITH,

9:00 a.m.

Defendant.

\* \* \* \* \*

REPORTER'S OFFICIAL TRANSCRIPT OF  
PLEA HEARING

BEFORE THE HONORABLE L. SCOTT COOGLER  
UNITED STATES DISTRICT JUDGE

Proceedings recorded by OFFICIAL COURT REPORTER, Qualified pursuant to 28 U.S.C. 753(a) & Guide to Judiciary Policies and Procedures Vol. VI, Chapter III, D.2. Transcript produced by computerized stenotype.

\* \* \* \* \*

A P P E A R A N C E S

\* \* \* \* \*

FOR THE UNITED STATES:

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Birmingham, Alabama 35203

FOR THE DEFENDANT:

Max Pulliam  
301 19th Street North  
Birmingham, Alabama 35203

Courtroom Deputy: Marley Shewmake

Court Reporter: Teresa Roberson, RMR



\* \* \* \* \*

P R O C E E D I N G S

\* \* \* \* \*

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2  
3  
4 THE COURT: This is United States of America vs.  
5 Robert Smith, Case Number 23-144. We are here for the purpose  
6 of allowing the defendant to enter a plea of guilty if he  
7 wishes to do that. Doesn't make any difference whatsoever to  
8 me. However, Mr. Smith, if you in fact are planning to enter  
9 a plea of guilty, I'm going to have questions to ask you and  
10 you're going to be placed under oath. Remember to tell me the  
11 truth because, if you don't, you could be charged with  
12 perjury. Do you understand that?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Is the government ready to proceed?

15 MR. ROYSTER: Yes, Your Honor.

16 THE COURT: Defense, you ready to proceed?

17 MR. PULLIAM: Yes, Your Honor.

18 ROBERT SMITH, SWORN

19 THE COURT: Tell me your full name.

20 THE DEFENDANT: Robert Douglas Smith.

21 THE COURT: Is your microphone on? You don't have  
22 to keep your hand up.

23 Tell me your name again.

24 THE DEFENDANT: Robert Douglas Smith.

25 THE COURT: Are you the same individual charged in

1 the indictment in this case?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: What's your date of birth?

4 THE DEFENDANT: [REDACTED]

5 THE COURT: How far did you get in school?

6 THE DEFENDANT: I got two years at Shelton.

7 THE COURT: So you can read, speak and understand  
8 the English language?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: I ask you that question because you've  
11 encountered various documents in this case.

12 Have you been able to read them and understand them?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: In the last two days, have you consumed  
15 any alcoholic beverage?

16 THE DEFENDANT: No, sir.

17 THE COURT: In the last two days, have you taken any  
18 drugs, legal or illegal?

19 THE DEFENDANT: No, sir.

20 THE COURT: Do you suffer from any mental  
21 impairment, physical illness or emotional impairment that  
22 might affect your ability to understand what we're doing here  
23 today?

24 THE DEFENDANT: No, sir.

25 THE COURT: We have talked about you, let's talk

1 about your lawyer for just a minute.

2 How has your lawyer done?

3 THE DEFENDANT: He's been great.

4 THE COURT: Do you have any complaints about his  
5 representation of you?

6 THE DEFENDANT: No, sir.

7 THE COURT: Good. I like to hear that.

8 There's a document your lawyer has filed with us,  
9 it's called a guilty plea advice of rights certification. I'm  
10 going to show you a picture of it. It should pop up there on  
11 your screen. That looks like your name right there  
12 (indicating). Is that your name?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Have you seen this document before?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Did you read it?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: As a matter of fact, it's got your  
19 initials down here, RDS; is that right?

20 THE DEFENDANT: Yes.

21 THE COURT: Those initials are on the left-hand side  
22 of each page along with your lawyer's initials; is that  
23 correct?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Did you lawyer go over this form with

1 you?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: And you read it; right?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Based upon that, do you understand the  
6 rights and the information contained in the document?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: I will go all the way to the end. At  
9 the end of this document, on the last page, it looks like it's  
10 got your signature. Is that your signature?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: The government, in just a minute, is  
13 going to explain to us the nature and material elements of the  
14 offense that your -- or offenses that you're going to plead  
15 guilty to, as well as the range of punishment, statutory range  
16 of punishment. And we'll go over that, okay?

17 But I want to make sure that you -- do you remember  
18 an occasion that you came before the Court for something we  
19 call an arraignment?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: At that time the Court should have given  
22 you a copy of the indictment. Did they do that?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Did you read that document, the  
25 indictment?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Did your lawyer go over it with you as  
3 well?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Based upon that, do you understand the  
6 charges that they have levied against you?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: All right. So, the government, one of  
9 the things they have to do is they have to prove you guilty  
10 beyond a reasonable doubt.

11 Now, that can be done many different ways in a  
12 trial. And if you do decide to go to trial, you would be  
13 represented by a constitutionally adequate attorney, such as  
14 the fellow sitting there with you -- as a matter of fact, even  
15 if you plead guilty, you have the right to continue to be  
16 represented by such an individual through the rest of the  
17 process.

18 But at trial, the government would have to prove you  
19 guilty beyond a reasonable doubt. They would put on evidence  
20 and witnesses and such and you would have the right to  
21 confront and cross-examine the witnesses and the evidence, ask  
22 questions through your attorney, and you would have the right  
23 to bring your own witnesses to come in and testify, take the  
24 witness stand, if you want to do that, only if you want to do  
25 that, but in the end, the jury would decide whether or not

1 you're guilty or innocent.

2 If the government failed to prove you guilty beyond  
3 a reasonable doubt, you would be entitled to a verdict of not  
4 guilty.

5 The only way then that you would be convicted of  
6 anything is if, one, the government proved you guilty beyond a  
7 reasonable doubt at a trial; or, we went through this process  
8 and at the conclusion you pled guilty and I accepted your  
9 guilty plea. Do you understand that?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: So, part of me accepting a guilty plea,  
12 I need to make sure that you understand what the government --  
13 we call it your free and voluntary act. And in order for it  
14 to be your free and voluntary act, you have to understand what  
15 the government has to prove to prove the case against you, and  
16 you have to understand the basics of what they're going to put  
17 on as far as testimony, and you have to understand the  
18 ramifications, things that might happen to you, the punishment  
19 range, if you will.

20 So I'm going to shut up and I'm going to listen to  
21 what the government says is what we call the nature and  
22 material elements of the offenses that they've got to show,  
23 what they've got to prove.

24 Go ahead, government.

25 MR. ROYSTER: Judge, if we had proceeded to trial,

1 we would have proven the following elements: As to Count One,  
2 sexual abuse of a ward. That the defendant, Mr. Robert Smith,  
3 knowingly engaged in a sexual act with the person identified  
4 in the indictment with the initials of TM; that at the time  
5 the person identified in the indictment was in official  
6 detention at the Federal Correctional Institute in Aliceville  
7 Women's Prison, and at the time the victim, a person  
8 identified in the indictment, was under the custodial  
9 supervisory or disciplinary authority of the defendant.

10 Judge, in terms of knowingly, we would have to show  
11 that the defendant, his act was done voluntarily and  
12 intentionally and not because of mistake or by accident.

13 Sexual act, we would have to show that there was an  
14 interaction involved, penis in the vulva, involving  
15 penetration, however slight.

16 In terms of official detention, Your Honor, we would  
17 have to show that the defendant or the victim was under the  
18 supervisory -- supervision of the defendant who was a federal  
19 officer, employee at the time.

20 Also, Your Honor, the defendant had to have  
21 supervised, had discipline or had authority over the victim in  
22 this case who was an inmate in custody at the prison at  
23 Aliceville.

24 Your Honor, although we will be dismissing Count Two  
25 at sentencing, defendant is admitting to sexually assaulting

1 victim one, initial TM, as well as victim two, RRL.

2 In addition, Your Honor, in terms of the penalties,  
3 if convicted, and pleading guilty today, there will be an  
4 imprisonment for not more than fifteen years, a fine of not  
5 more than two hundred and fifty thousand dollars, and  
6 supervised release of not more than three years, and a special  
7 assessment fee of one hundred dollars which will be due at the  
8 date of sentencing.

9 Your Honor, those are the elements as well as the  
10 penalty of Count One.

11 THE COURT: Do you understand what the government  
12 said the nature and material elements of the offense that you  
13 are going to plead guilty to or we understand you are going to  
14 plead guilty to?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: And do you understand the government has  
17 to prove all those things?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: So, another thing that we need to do is  
20 make sure you understand the range of punishment.

21 There's two ranges of punishment: There's a  
22 statutory range as well as the sentencing guideline range.  
23 The sentencing guideline range is advisory.

24 I assume your lawyer has told you what he thinks  
25 that will end up being in your case. Has he done that?



1 THE DEFENDANT: Yes, sir.

2 THE COURT: He might have it wrong, he might have it  
3 right. Nobody can tell you for sure what your guideline range  
4 will be until we have your sentencing hearing and I rule on  
5 what comes in and what doesn't.

6 But, with that said, we can tell you the statutory  
7 range of punishment.

8 The government is now going to tell us what the  
9 statutory range of punishment is. Listen to what the  
10 government has to say.

11 MR. ROYSTER: Judge, the statutory range of  
12 punishment is imprisonment for not more than fifteen years,  
13 fine of not more than two hundred fifty thousand, supervised  
14 release of not more than three years, and special assessment  
15 fee of one hundred dollars.

16 Judge, I did forget to indicate that this offense  
17 for Count One occurred in or around February 2019 in the  
18 Northern District of Alabama here in the Western Division,  
19 Your Honor.

20 THE COURT: Did you hear what the government said?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Do you understand it?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Okay. Now, plea agreements are  
25 permissible. You can have a plea agreement. It's an

1 agreement with the government, not with me. Do you understand  
2 that?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: And the government and your lawyer have  
5 filed a document called plea agreement that appears to have  
6 your signature and whatnot on it.

7 I'm going to show you that document, okay, take a  
8 look at it with me so we can go over it.

9 Tell me when you see it.

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Is that you (indicating)?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Have you seen this before?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: In fact, it looks like it's got your  
16 initials at the bottom right corner of each page. Are those  
17 your initials?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Did you read this document?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Did your lawyer go over it with you as  
22 well?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Does this document state the entire  
25 agreement you have with the government?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: I'll ask your lawyer: Does this  
3 document state the entire agreement that your client has with  
4 the government?

5 MR. PULLIAM: It does, Your Honor.

6 THE COURT: I'll ask the government: Does this  
7 document state the entire agreement the government has with  
8 the defendant?

9 MR. ROYSTER: It does, Your Honor.

10 THE COURT: Page two, there's a section, says  
11 factual basis for plea, do you see that?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Okay. That's where it goes through and  
14 it states what the government alleges they will prove at  
15 trial. And at the end of that section, which is on the next  
16 page, page three toward the bottom, it appears to me that  
17 you're stipulating and agreeing that the factual basis as  
18 stated in the plea agreement is true and accurate. Is that  
19 what you were doing?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: And you intend for me to reply upon it;  
22 correct?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Let's go on further down, there is a  
25 section called -- right there on page six -- waiver of right

1 to appeal and post conviction relief. Do you see that?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: At the end of that section -- that's a  
4 section where you're waiving and giving up your right to  
5 appeal or file a post conviction petition. And it looks like  
6 to me, from this section right here, that you knew that and  
7 you were signing this to acknowledge that you understood that  
8 was there in the document; is that what you were doing?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Is that your signature there, I'm  
11 highlighting on page seven toward the bottom (indicating)?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Okay. Go all the way to the end of the  
14 document, top of page fourteen. That looks like your  
15 signature; is that your signature?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Has anybody threatened you or forced you  
18 or coerced you in any way to get you to plead guilty?

19 THE DEFENDANT: No, sir.

20 THE COURT: Are you wanting to plead guilty because  
21 you are in fact guilty?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Let me ask your lawyer: Do you know any  
24 reason I should not accept his guilty plea if he offers it?

25 MR. PULLIAM: I do not, Your Honor.

1 THE COURT: Government, do you know any reason I  
2 should not accept his guilty plea if he offers it?

3 MR. ROYSTER: No, Your Honor.

4 THE COURT: To the offense charged -- first, do you  
5 understand you do not have to plead guilty?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Do you have any questions you want to  
8 ask me before I ask you how you plead?

9 THE DEFENDANT: No, sir.

10 THE COURT: To the charge levied against you in  
11 Count One of the indictment, as it's been explained to you,  
12 how do you plead?

13 THE DEFENDANT: Guilty.

14 THE COURT: It is the finding of this Court the  
15 defendant is fully competent and capable of entering an  
16 informed plea, that he's aware of the nature of the charge and  
17 the consequences of his plea, the plea of guilty is a knowing  
18 and voluntary plea supported by an independent basis in fact  
19 containing each of the essential elements of the offense, the  
20 plea is therefore accepted.

21 The defendant is now adjudged guilty of that  
22 offense.

23 Government, are you asking I leave him out on bond?

24 MR. ROYSTER: No objection, Your Honor.

25 THE COURT: Yes, you are asking me to leave him out

1 on bond?

2 MR. ROYSTER: That's correct, Your Honor.

3 THE COURT: You're going to be out on bond. Don't  
4 get in trouble, okay, between now and whenever we have your  
5 sentencing, it will probably be about one hundred and twenty  
6 days.

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Have a nice day.

9 (End of hearing.)

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C E R T I F I C A T E

I hereby certify that the foregoing is a correct transcript from the record of the proceedings in the above-referenced matter.

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Teresa Roberson, RPR, RMR

**ATTACHMENT C**



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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
WESTERN DIVISION

UNITED STATES OF AMERICA,           \*  
  Plaintiff,                           \*Case Mo.  
  \*7:23-cr-00144-LSC-GMB-1  
vs.   \*May 23, 2024  
  \*Tuscaloosa, Alabama  
ROBERT D. SMITH,                     \*9:00 a.m.  
  Defendant.                           \*  
\*\*\*\*\*

TRANSCRIPT OF SENTENCING HEARING  
BEFORE THE HONORABLE L. SCOTT COOGLER  
UNITED STATES DISTRICT JUDGE

Proceedings recorded by OFFICIAL COURT REPORTER, Qualified  
pursuant to 28 U.S.C. 753(a) & Guide to Judiciary Policies and  
Procedures Vol. VI, Chapter III, D.2. Transcript produced by  
computerized stenotype.

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COURTROOM DEPUTY: MARLEY SHEWMAKE

COURT REPORTER: LAUREN SHIRLEY, RPR, CRR

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**P R O C E E D I N G S**

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(In open court at 9:00 a.m. Defendant present.)

THE COURT: All right. This is United States of America versus Robert D. Smith, case number 23-144. We're here for the purpose of sentencing the defendant. Is the government ready to proceed?

MS. GOTFRYD: We are, Your Honor.

THE COURT: Defense, are you ready to proceed?

MR. PULLIAM: Yes, Your Honor.

THE COURT: Have you and your client had at least 35 days to review the presentence report?

MR. PULLIAM: We've had at least 35 days to review the initial presentence report. There has been an addendum to the presentence report, Your Honor, to which we filed an objection.

THE COURT: Okay. As I understand your objection -- I'm going to be asking the government to respond to this -- that the defense believes that, under 4C1.1 amendment, they would be due to have a reduction of two levels, I believe it is.

MR. PULLIAM: Yes, Your Honor.

THE COURT: Ultimately, resulting in a total offense level of 10 and a criminal history category of I. That is because they contend that the definition for sex offense did not include this particular charge and still doesn't, for that matter, because the change in the sentencing guidelines, the

1 retroactive amendment, if you will, doesn't even -- or not  
2 retroactive -- the amendment doesn't even go into effect until  
3 November or something; is that right?

4 MR. PULLIAM: Yes, Your Honor.

5 THE COURT: Max?

6 MR. PULLIAM: If Congress passes, may it please the  
7 court.

8 THE COURT: I know. They have to review -- they have  
9 to deny it, I think. If they're don't act, its adopted, but  
10 maybe I've got that wrong. Is that correct, that y'all's  
11 objection was based on something that's not even in effect yet?

12 MS. GOTFRYD: Your Honor, the government's objection  
13 is that even if the court --

14 THE COURT: Was. Because you originally objected that  
15 it was calculated the way the defense wanted it, and then it  
16 appears to me that the government filed an objection saying,  
17 Wait just a minute. The defense needs to raise this.

18 And I understand that part of your objection, that they  
19 have the obligation to raise it and demonstrate it, okay? But  
20 then you said, as an additional argument besides the defense  
21 needs to raise it, that this is a sex offense, and because it  
22 meets that category, they're not entitled to it.

23 MS. GOTFRYD: And, Your Honor, that is correct.

24 However, the defendant's burden is to show that he qualifies  
25 for the zero-point offender adjustment under each and every

1 provision that is listed under 4C1.1. And, of course, that is  
2 more than just showing that his crime of conviction is not what  
3 is, quote, a sex offense, in the way that it was defined at the  
4 time.

5 So if the court would like to proceed under a different  
6 provision, certainly the government outlined in its initial  
7 objection how the defendant, likewise, doesn't qualify because  
8 his crime of conviction involved --

9 THE COURT: All right. Let's take one thing at a  
10 time, okay? The court doesn't want to proceed on anything.  
11 I'm just reacting to arguments, first off.

12 Secondly, do you acknowledge that your argument and  
13 representation to the court that this is not a -- that it is a  
14 sex offense is not consistent with the current status of the  
15 guidelines?

16 MS. GOTFRYD: Yes, Your Honor. The way that sex  
17 offense is currently defined under 4C1.1 applies only to  
18 minors; therefore, it would not capture the defendant's  
19 conduct.

20 THE COURT: Okay. So why did you argue it to me?

21 MS. GOTFRYD: Your Honor, we argued that because of  
22 the recent change to show that simply -- they were mistaken.  
23 The commission was mistaken in the way that it defined it  
24 originally, and we know that because within a year of its  
25 enactment they sought to change the definition.

1 THE COURT: Okay. I got it. And I understand that.  
2 They went back and said, Wait a minute. We made a mistake.  
3 We're going to fix this.

4 I got that. But isn't the law such that I cannot apply  
5 something that's not in effect?

6 MS. GOTFRYD: Your Honor can act under the other  
7 provisions.

8 THE COURT: Stop jumping to that. I'm going to go to  
9 that. I promise. Okay. So do you agree with the defense's  
10 argument that that is not something that should bar them from  
11 receiving that treatment?

12 MS. GOTFRYD: Yes, Your Honor, under the current  
13 definition.

14 THE COURT: Okay. Let's -- good. Now -- because  
15 that's clear to me, okay? Let's go to the rest of the -- and  
16 there's, what, nine -- how many different factors are there?  
17 What is it that the defense has failed to establish?

18 And I'll say this: Their objection saying that they meet  
19 this and combined with the presentence report, I have to weigh  
20 all of that in deciding whether the defense has met their  
21 burden. And I'm going to ask you to tell me where they did not  
22 meet it. And then, once you do that, then I'll turn to the  
23 defense and ask them to, you know, tell me how they did meet  
24 it, okay?

25 MS. GOTFRYD: Yes, Your Honor.

1 THE COURT: So, and again, I assure you, it's not me  
2 that -- you said the court wants to proceed on that. I don't.  
3 But I'm looking at 4C1.1 adjustment for certain zero-point  
4 offenders, and there is ten criteria. Which one did they not  
5 meet, he not meet?

6 MS. GOTFRYD: Your Honor, the defense has the burden  
7 to show that the they qualify under all ten factors, and they  
8 can't show by a preponderance that they qualify under  
9 4C1.1(a)(3) as well as under 4C1.1(a)(4).

10 THE COURT: All right. Let's take 4 because it  
11 appears to be the easiest. You know, I've read the material.  
12 Where was there a -- the conduct was horrendous, okay? But  
13 where was there death or serious bodily injury as defined by  
14 the guidelines?

15 MS. GOTFRYD: So --

16 THE COURT: How do they define -- a death's pretty  
17 obvious. They stop breathing. They fall out. They're dead.  
18 That didn't happen here, right?

19 MS. GOTFRYD: So --

20 THE COURT: So where is serious bodily injury? How is  
21 that defined under the regulation?

22 MS. GOTFRYD: So the defendant pled guilty under a  
23 2243, which doesn't require proof of serious bodily injury, and  
24 it doesn't require conduct that rises to the level of criminal  
25 sexual abuse. But the application notes here point us to the

1 defendant's conduct. And it states that if the defendant's  
2 conduct constitutes criminal sexual abuse under the listed  
3 statute, then he cannot receive that two-level adjustment.

4 THE COURT: If the defendant's conduct constitutes  
5 what?

6 MS. GOTFRYD: Criminal sexual abuse, Your Honor.

7 THE COURT: Okay. Where is there -- and maybe I'm not  
8 making myself clear. Where is there serious bodily injury?  
9 How is that defined under the regulations, under the  
10 guidelines?

11 MS. GOTFRYD: Well, and it is confusing because, over  
12 here, it states that if it constitutes that conduct, which is  
13 defined as knowingly causing another person to engage in a  
14 sexual act by using --

15 THE COURT: Let me -- Court Reporter, would you please  
16 read back my question to her because she apparently isn't  
17 getting my question.

18 (Court reporter read back.)

19 THE COURT: Do you understand my question?

20 MS. GOTFRYD: Yes, Your Honor.

21 THE COURT: I would like you to answer my question.  
22 You and I will get along a whole lot better if you will listen  
23 to what I'm asking, okay? I'm the one that has to make this  
24 decision, not you.

25 Now, I asked you the question: How is it defined, serious



1   bodily injury? Do you know?

2           MS. GOTFRYD: May I have a moment, Your Honor?

3           THE COURT: Yeah. If you want to look at 1B1.1, you  
4 can find your definition. And, Defense, you need to be looking  
5 at that well because, once she reads this definition out, the  
6 last part, I'm going to ask you why do you not meet that, okay?

7           MR. PULLIAM: Yes, sir.

8           THE COURT: Let me just skip to it because we've got a  
9 lot of things to do today. The end of it says, in addition,  
10 serious bodily injury is deemed to have occurred if the offense  
11 involved -- if the offense involved conduct constituting  
12 criminal sexual abuse under 18 U.S.C. Section 2241 or 2242 or  
13 any similar offense under state law. Is that what you're going  
14 with?

15          MS. GOTFRYD: Yes, Your Honor.

16          THE COURT: Okay. All right. How does it not meet  
17 that? Wouldn't that -- I mean, that's 1B1.1 was adopted -- how  
18 long has that been in effect? A long time, right?

19          MR. PULLIAM: Awhile, Your Honor.

20          THE COURT: Yeah. So I don't see how his conduct  
21 doesn't meet that. He physically forced the inmate into a  
22 situation where he had sexual relations with her, and that's  
23 what he admitted to.

24          MR. PULLIAM: May it please the court.

25          THE COURT: Sure. Yeah, I want you to.

1           MR. PULLIAM: He didn't admit to forcing anything, may  
2 it please the court. If there was evidence of force, it would  
3 have been in the indictment; it would have been in the plea  
4 agreement; and it would have been in Officer Birdsong's report.  
5 I submit that Your Honor ought to consider a definition at  
6 5K2.2 -- 5K2.2, which describes physical injury as to include  
7 victim suffering major permanent disability. And that's not  
8 what's here. And there is no -- there is no reference.

9           There are no facts. We stand on the facts in the  
10 indictment; we stand on the facts in the plea agreement; and we  
11 stand on the facts in Officer Birdsong's April report, none of  
12 which, may it please the court, mention any force or forcible  
13 conduct.

14           And here at the ninth hour, the government is overreaching  
15 and is attempting to take away the two points that my client  
16 deserves. But specifically, there was not, at 4C1.1 or, Your  
17 Honor, death or bodily injury. I would say the court should  
18 consider 5K2.2 of the guidelines that describe it, as I've  
19 read, major permanent disability.

20           THE COURT: All right. But 22 -- I want you to look  
21 at -- do you have 2241 and 42 there?

22           MR. PULLIAM: I don't have those statutes in front of  
23 me, Your Honor.

24           THE COURT: Would you carry him that, please?  
25 Government, do you have that?

1 MS. GOTFRYD: Yes, sir.

2 THE COURT: And my question to both of you is going to  
3 be, does it fit this conduct, 2241 or 2242, because the person  
4 was in custody? I heard what you said, that you believe that  
5 there was no force. The description is as it is. But my  
6 question is, even, let's say, there is absolutely no force,  
7 because she was an inmate confined under his care, would it  
8 meet the definition or meet that statute, 2241 or 2242 or some  
9 similar state statute?

10 MR. PULLIAM: Not as I read it, Your Honor, if you're  
11 asking defense.

12 THE COURT: Now, I want you to read it carefully, and  
13 then I'm going to ask the government to tell us where does it  
14 fit, okay? When you get through, Government, I want you to  
15 tell me where does it fit that definition or that statute,  
16 okay?

17 You can stay seated if you'd like to talk in the mic  
18 because it might be easier to read when you do that.

19 MS. GOTFRYD: Your Honor, Section 2241 states that it  
20 was a crime to knowingly cause another person to engage in a  
21 sexual act by using force against that other person. I agree  
22 with counsel that we look at the record before the court. We  
23 look at the presentence investigation report. And that  
24 presentence investigation report outlines the allegations that  
25 TM made that includes the defendant placing both of his hands

1 on her neck and shoulder area, putting his body weight on top  
2 of her such that she had to push up on the desk using her own  
3 two hands to prevent her face from hitting the desk.

4 And she stated that she felt she had no choice but to  
5 submit to that sexual intercourse because, both, he was a  
6 corrections officer and because he was so physically strong.  
7 And so the question is whether using force such that it  
8 overcomes someone's will, as in the presentence investigation  
9 report, constitutes knowingly causing another person to engage  
10 in that sexual act using force.

11 Government states that it does. And if the court agrees,  
12 then we look to -- then serious bodily injury is deemed to have  
13 occurred. It's presumed. And therefore, the defendant has not  
14 met his burden.

15 THE COURT: Okay. So you're relying on the term  
16 "force" being consistent with what I read in the description of  
17 the facts and you just read -- sounded like, anyway, you read  
18 it. You're not relying at all on the fact that it was an  
19 inmate.

20 MS. GOTFRYD: That's correct.

21 THE COURT: And he was a prison guard.

22 MS. GOTFRYD: Yes, Your Honor. I'm relying on the  
23 facts constituting the offense.

24 THE COURT: I'm sorry.

25 MS. GOTFRYD: Yes, Your Honor. I'm relying on the

1 facts that constitute the defendant's offense. And part of  
2 that is that he was a corrections officer, but more so what I'm  
3 relying on is actually the conduct, him using his body weight,  
4 and the way that he was holding her in a way that overcame her  
5 resistance.

6 THE COURT: And again, I'm just trying to make sure I  
7 understand. My question to you is: Are you strictly relying  
8 on the physical force that you're describing to say that  
9 conduct would meet the type sex abuse that's described in these  
10 statutes?

11 MS. GOTFRYD: Yes, Your Honor.

12 THE COURT: Not the fact that he was a prison guard?

13 MS. GOTFRYD: That's correct, Your Honor.

14 THE COURT: Okay. All right. Would you please  
15 respond to that?

16 MR. PULLIAM: May it please the court, I do not  
17 believe that the facts that are contained in the indictment, in  
18 the plea agreement, or in the presentence report meet the  
19 definition of what the court has directed us to, which is  
20 section -- Title 18 Section 2241 or 2242.

21 THE COURT: But do they have to?

22 MR. PULLIAM: In my opinion they do not, Your Honor.

23 THE COURT: No, hang on. Let me make sure that you  
24 understand my question.

25 MR. PULLIAM: Yes, sir.

1 THE COURT: Is it sufficient -- because there was a  
2 plea agreement in this case, right?

3 MS. GOTFRYD: Yes, Your Honor.

4 THE COURT: And your client stipulated that the facts  
5 as stated were true and correct. Were those facts, putting the  
6 body weight and all of that stuff, her holding her face up off  
7 the table, the desk, all of that, was that in the stipulated  
8 facts, first. And secondly, is that sufficient for me to  
9 consider whether or not it meets this statute, or does it have  
10 to be in the indictment and, thus, found or admitted as an  
11 element of the offense some way or another?

12 I mean, I'm asking the question because I think that when  
13 we're dealing with this type issue on a guidelines calculation,  
14 it's fair game for me to make the decision as opposed to it  
15 being, like, an element that changes the actual punishment,  
16 statutory range of punishment that's available. Does that make  
17 sense?

18 MR. PULLIAM: It does, Your Honor.

19 THE COURT: And which do you maintain is accurate?

20 MR. PULLIAM: The answer to Your Honor's first section  
21 of the first question is that it is not a stipulation within  
22 the plea agreement. There is no reference to any force,  
23 holding down, anything in what Mr. Smith pled to in Document 28  
24 on January 3rd, 2024.

25 THE COURT: Hang on. Let me get that document up,

1 okay?

2 MR. PULLIAM: Yes, sir.

3 THE COURT: And, Government, you know my automatic  
4 next question to you is going to be, Is there anything in front  
5 of me that I can make that finding based on, okay?

6 MS. GOTFRYD: Yes, Your Honor.

7 THE COURT: And not yet. I'm not there yet. But if  
8 so, what? All right. I've looked at the facts as stipulated.  
9 They don't have any of that in there. So where is the evidence  
10 that I can rely upon that?

11 MS. GOTFRYD: Your Honor can rely on the revised  
12 presentence investigation report in Paragraphs 12 and 13. Your  
13 Honor can also find facts by a preponderance of the evidence at  
14 sentencing. And Your Honor has incorporated into the record  
15 both memoranda of investigation of when the Officer of the  
16 Inspector General spoke with this woman and where she made  
17 these allegations.

18 THE COURT: Okay. Other than as in the presentence  
19 report -- I assume the defense is objecting to it because  
20 they're saying there was no force. So I'm interpreting that as  
21 an objection to the amended presentence report. As a matter of  
22 fact, they have objected, actually, and said that, you know,  
23 they're due the reduction, two-level reduction. So I'm  
24 interpreting that as sufficiently objected to so that I can't  
25 just take those facts that were put in the presentence report

1 and presume them to be accurate because they weren't objected  
2 to. So do you have any evidence you want to submit as to these  
3 specific facts?

4 MS. GOTFRYD: Your Honor, we would like to submit the  
5 memoranda of investigation that were incorporated into the  
6 government's sentencing memo. The court can rely on the  
7 hearsay and indicia of reliability as they corroborate one  
8 another. They're also signed by the investigating agent and  
9 attested to close in time to when --

10 THE COURT: Do you have the agent here?

11 MS. GOTFRYD: We do, Your Honor.

12 THE COURT: Well, can she not just get on the stand  
13 and testify to what the victim told her?

14 MS. GOTFRYD: She absolutely can, Your Honor.

15 THE COURT: All right. Defense -- hang on, before you  
16 come up. Have you talked -- have you seen what she's talking  
17 about?

18 MR. PULLIAM: I've seen the attachments, yes, sir.

19 THE COURT: And do you want this officer to get on the  
20 stand and testify about these facts, or do you just want to  
21 stipulate that, yeah, the victim said those things, that he put  
22 his weight on her and whatever, and continue with your argument  
23 that that's not sufficient to be force?

24 MR. PULLIAM: I will stipulate that if the agent is  
25 called to testify before Your Honor --



1 THE COURT: Called over here.

2 MR. PULLIAM: Please excuse me. Called over there,  
3 that she's going to recite what's in her report.

4 THE COURT: And that that's what's in there.

5 MR. PULLIAM: And that that's what's in there.

6 THE COURT: Is that sufficient for you, Government?

7 MS. GOTFRYD: Yes, Your Honor.

8 THE COURT: All right. Now, so I find that that's  
9 what the victim said, okay? And that he put his weight on her  
10 and held her to the point where she had to use her hands to  
11 push up from the desk. I think it was a desk, to keep her face  
12 from being up against the desk or something like that. Any  
13 objection to that?

14 MR. PULLIAM: No, sir.

15 THE COURT: Government?

16 MS. GOTFRYD: No, Your Honor.

17 THE COURT: All right. So here's the question: Is  
18 that sufficient to be force such that would constitute a  
19 violation of 2241, 2242, or state statute that's similar?

20 MR. PULLIAM: No, sir.

21 MS. GOTFRYD: Yes, Your Honor.

22 THE COURT: Okay. I mean, does it say anywhere that  
23 he held her down or just that her -- his weight was on top of  
24 her?

25 MS. GOTFRYD: Your Honor, she describes that his hands

1 were on her neck and shoulder area, his body weight was on top  
2 of her, and that she had no choice because he was physically  
3 strong.

4 THE COURT: Okay. Defense, one last shot at it.

5 MR. PULLIAM: May it please the court, for the purpose  
6 of this guideline adjustment, Your Honor is correct in  
7 directing us to 4C1.1(4) which must have death or serious  
8 bodily injury. That phrase is, in fact, defined within the  
9 guidelines itself as one which would require major or permanent  
10 disability.

11 We argue that there are no facts which meet proof by a  
12 preponderance of the evidence that serious bodily injury did  
13 occur.

14 THE COURT: Okay.

15 MS. GOTFRYD: May I, Your Honor?

16 THE COURT: Why not.

17 MS. GOTFRYD: If Your Honor finds by a preponderance  
18 of the evidence that the defendant used force against this  
19 victim knowingly causing her to engage in that sexual act, then  
20 application note 1(m) states that serious bodily injury is  
21 deemed to have occurred. We're operating under a different  
22 definition of serious bodily injury.

23 THE COURT: Yeah, I know. But I still have to find  
24 force, right?

25 MS. GOTFRYD: Yes, Your Honor.

1           THE COURT: Right. Because the fact that he was the  
2 prison guard and, obviously, had the ability to exercise  
3 certain influences over her life and make her life very  
4 difficult for her in the prison if she didn't acquiesce would  
5 not be sufficient to meet what you're trying to get me to do,  
6 right?

7           MS. GOTFRYD: I agree with that, Your Honor.

8           THE COURT: Okay. I'm going to sustain the objection.  
9 Okay. Any other objections from the defense?

10          MR. PULLIAM: No other objections, Your Honor.

11          THE COURT: And I note the government's objection for  
12 the record. Total offense level will become 10; criminal  
13 history category I; the resulting guideline imprisonment range  
14 is 6 to 12 months; supervised release period is five years to  
15 life; fine range is 4,000 to 40,000; special assessment fee in  
16 the amount of \$100 is due.

17          All right. Anything you want to tell me in mitigation or  
18 otherwise before I pronounce the sentence of law upon your  
19 client? I know your client is going to want to speak, but  
20 anything else?

21          MR. PULLIAM: Nothing that I haven't put in the  
22 memorandum, Your Honor, may it please the court.

23          THE COURT: Okay. Mr. Smith, this is your opportunity  
24 to tell me anything you want to tell me in mitigation or  
25 otherwise before I pronounce the sentence of law upon you.

1 MS. GOTFRYD: Your Honor, I'm very sorry. Before we  
2 proceed, though, I would like to clarify on the record that, in  
3 the plea agreement, the parties were operating under a  
4 different provision of supervised release. And so we  
5 mistakenly wrote in there that the maximum term is three years  
6 of supervised release. I believe this has been resolved with  
7 counsel.

8 MR. PULLIAM: May it please the court. There was an  
9 error. It's a five year maximum supervised release.

10 MS. GOTFRYD: And it's a five year minimum.

11 THE COURT: Five to life. It's what I said.

12 MS. GOTFRYD: Yes, Your Honor.

13 THE COURT: Okay. All right. And you agree with  
14 that?

15 MR. PULLIAM: Yes, sir.

16 THE COURT: Anything you want to tell me in mitigation  
17 or otherwise before I pronounce the sentence of law upon you?

18 MR. PULLIAM: Not from counsel, Your Honor.

19 THE COURT: Yeah. I'm asking him.

20 MR. PULLIAM: Yes, sir.

21 THE DEFENDANT: Do you want me to stand or talk --

22 THE COURT: You can talk. Just get that mic over  
23 close to you if you want to talk.

24 THE DEFENDANT: Your Honor, I'm here today to take  
25 full responsibility. However, the earnest plea, Your Honor, to

1 consider the broader repercussions of my potential  
2 incarceration, particularly, the impact it would have on my  
3 family, both financially and emotionally. I have begun to  
4 reckon the consequences of my behavior and taken proactive  
5 steps to address them and to understand the underlining issues  
6 that have contributed to my actions. I just plead not to take  
7 me away from my family.

8 THE COURT: All right. Government, what's your  
9 recommendation?

10 MS. GOTFRYD: Your Honor, we're recommending a  
11 sentence within 36 to 40 months.

12 THE COURT: All right. And I knew that from your  
13 filings. I assumed it would still be the same. You know, I'm  
14 charged with the responsibility of sentencing the defendant  
15 with a sentence that is sufficient but not more than necessary  
16 to accomplish the sentencing goals set forth in the federal  
17 statutes. The co-defendant, Mr. Ellis, was sentenced to  
18 18 months custody. What makes him different than this fella?

19 MR. PULLIAM: Are you looking at me, Your Honor?

20 THE COURT: I'm asking her first. I'll come to you.

21 MR. PULLIAM: Thank you, Judge. I couldn't see you.

22 THE COURT: Because, frankly, I don't think a sentence  
23 within the guideline range is sufficient, okay? So I'm going  
24 to give you an opportunity to tell me why it is.

25 MR. PULLIAM: Yes, sir.

1           THE COURT: And custody is going to be involved in  
2 this case. Why should I give more than the 18 months? Wasn't  
3 Mr. Ellis -- I hate to call him ringleader -- but the one who  
4 initially was doing this? And do I remember right somehow or  
5 another got this fella into doing it?

6           MS. GOTFRYD: Your Honor, it's the opposite.

7           THE COURT: Okay.

8           MS. GOTFRYD: Robert Smith was the ringleader, and he  
9 actually corrupted Eric Ellis into committing crimes of his  
10 own. And when he did that, he also told Eric Ellis, I'll cover  
11 for you if it came to that. The two are not similarly  
12 situated, both in the number of victims that they each had.  
13 The defendant here admitted to sexually abusing two inmates in  
14 his care.

15           Eric Ellis abused one, and he had a consensual sexual  
16 relationship with another woman who later became his  
17 girlfriend. So the number of victims is greater in this case.  
18 The conduct in a lot of ways is more egregious. The government  
19 submits that it did include coercion, at least, force,  
20 potentially.

21           Eric Ellis pled guilty pre-indictment. He came to the  
22 government. He accepted responsibility, and he cooperated. He  
23 proffered with the government. And we did not even know about  
24 Robert Smith's conduct until Eric Ellis came in and told us.  
25 So the number of victims, the type of offense, his remorse as

1 well, Your Honor.

2 Eric Ellis, when he proffered with the government,  
3 actually expressed some genuine remorse. He said he felt bad  
4 about it. He went to the defendant and told him he felt bad  
5 about what he had done and that he was afraid of getting  
6 caught. And in that conversation, he told the defendant, Man,  
7 we're scumbags.

8 The defendant responded to that, I know that I'm a  
9 scumbag, but I don't give a -- and, Your Honor, it was that  
10 last word. And so the demonstration of remorse between the two  
11 defendants is also different.

12 THE COURT: Can you tell me where the evidence of what  
13 you've said is that I can rely upon? Does that make sense?  
14 Because, normally, when we have these situations, we have a  
15 guilty plea; we have a detailed statement of facts; and the  
16 facts feed into the presentence report, okay?

17 MS. GOTFRYD: Yes, Your Honor. And the government  
18 submitted a lengthy sentencing memorandum in this case, as the  
19 court knows. So the facts are incorporated to that. We also  
20 included for Your Honor --

21 THE COURT: Is it such that the defendant was  
22 obligated to object to those facts before I -- or not object to  
23 them before I could consider it? Do you understand what I'm  
24 saying? Like, you're one side. You could write something and  
25 say anything under the sun.

1 I don't know that I could consider what you're saying  
2 unless it was agreed to by the defendant; the defendant was  
3 under an obligation, like it's detailed in the presentence  
4 report; and the defendant had to object to it and failed to  
5 object to it. You need to tell me, not just you put it in  
6 there.

7 I have an obligation to consider the evidence, okay? So  
8 you need to tell me where the evidence is, not just what you've  
9 put into an allegation that you stuck into a pleading.

10 MS. GOTFRYD: The evidence is in the memoranda of  
11 investigation. The evidence is in the text messages that the  
12 government submitted, and the evidence is in the Facebook  
13 messages that the government submitted. Right now, it's  
14 unrefuted. The defendant certainly can object and present his  
15 version of events right now, but the court can also rely on all  
16 of those materials that they government submitted and find  
17 those facts.

18 THE COURT: How can I rely upon it? You say I can  
19 rely upon it. Tell me how I, technically, can rely upon it.  
20 You're talking about -- are you talking about Document 34?

21 MS. GOTFRYD: Yes, Your Honor.

22 THE COURT: That was filed on the 16th day, so  
23 seven days ago. It had various exhibits attached.

24 How can the government just file a pleading and I get to  
25 rely upon what the government says? Do you understand my



1 question?

2 MS. GOTFRYD: I'm not sure I do, Your Honor.

3 THE COURT: All right. The government is not entitled  
4 to anything other than they can make an allegation. And then I  
5 have to have evidence in front of me, and I make the  
6 determination whether it's true or not. And it can contain  
7 hearsay. But it still has to be submitted in an appropriate  
8 fashion that I can consider it.

9 I can't just say, Well, the government said such and such  
10 so, therefore, I'm taking that as true, and I'm going to give  
11 the defendant a lot more time because of that. I'm not saying  
12 what you're saying is wrong. I'm asking you where is the law  
13 that says I can rely upon that without you putting a witness on  
14 the stand so that the evidence is before me. Okay?

15 Because if it was in the presentence report, the defendant  
16 would have had the obligation to object to it. It wasn't in  
17 the presentence report, was it?

18 MS. GOTFRYD: No, Your Honor.

19 THE COURT: Okay. I just want to make sure. I want  
20 to make sure I didn't miss it or something. So how can I rely  
21 upon it without you putting a witness on the stand to testify  
22 about it?

23 MS. GOTFRYD: And, Your Honor, the government cited  
24 cases in its sentencing memorandum from the Supreme Court and  
25 from the circuit explaining that, you know, highly relevant to

1 the judge's selection of an appropriate sentence is the  
2 possession of the fullest information possible concerning the  
3 defendant's life and characteristics and history and behavior.  
4 And there's also cases cited in the government's memorandum  
5 demonstrating that the court can rely on hearsay that is  
6 incorporated --

7           THE COURT: Nothing you've said, though, is answering  
8 my question. I agree. I'm a big believer in getting all the  
9 details. Your co-counsel sitting right beside you has called  
10 untold number of witnesses in sentencings where there was,  
11 like, for instance, new conduct, you know, new charges. And I  
12 wasn't about to just say, Well, he's got a new charge; so  
13 therefore, he's guilty of it. It either had to be stipulated  
14 by the parties or there needed to be some witness testifying  
15 about it.

16           And actually, the Eleventh Circuit recently affirmed it in  
17 a sentencing and said the court didn't just rely upon something  
18 stuck in the presentence report of a new charge, but actually,  
19 there was testimony that came in where the witness came in and  
20 testified about what actually occurred in the new arrest. So I  
21 understand the law. I promise you. I understand I can take  
22 hearsay, for instance, in this type of proceeding. I'm asking  
23 you where -- I mean, shouldn't you have to at least put on a  
24 witness to testify to this?

25           MS. GOTFRYD: Your Honor, we certainly can put on --

1 THE COURT: I'm not asking that question. Shouldn't  
2 you have to?

3 MS. GOTFRYD: I don't believe we do, Your Honor. I  
4 think the court has, as part of the sentencing record,  
5 memoranda of investigation, the victim impact statements, text  
6 messages, Facebook messages. That is evidence before the court  
7 that the court can consider.

8 THE COURT: I agree. Victim impact statements, I'm  
9 charged under the law to consider victim impact statements.  
10 Did the victims' impact statements include, for instance,  
11 statements where this guy was talking to his co-defendant?  
12 This guy was encouraging the co-defendant to do this? I'm  
13 trying to remember all that you said. That he didn't have the  
14 proper remorse, et cetera?

15 MS. GOTFRYD: Yes, Your Honor. I'd point the court to  
16 the victim impact statement from Officer E.H. and I can read  
17 portions of that for the court if Your Honor would like.

18 THE COURT: Victim impact from Officer E.H.

19 MS. GOTFRYD: Yes, Your Honor.

20 THE COURT: Who was a victim in our case?

21 MS. GOTFRYD: She was not a charged victim, Your  
22 Honor.

23 THE COURT: She was not what?

24 MS. GOTFRYD: She was not a charged victim, Your  
25 Honor. She's not in custody. She's a fellow officer.

1 THE COURT: How is she a victim?

2 MS. GOTFRYD: I apologize. Maybe I should use a  
3 different word for her.

4 THE COURT: I mean, because there's federal and,  
5 usually, state law that says a victim gets a right to make a  
6 statement at the time of sentencing. And usually, they do it  
7 in writing. But that's a very specific status, being a victim.

8 MS. GOTFRYD: And Your Honor will recall when this  
9 case was proceeding to trial, we noticed her under Rules 413  
10 and 404(b), and the court made certain statements and findings  
11 on the record as well where that type of evidence typically  
12 comes in in these types of cases as well.

13 THE COURT: If she testifies, it does.

14 MS. GOTFRYD: And so she was included for purposes of  
15 being heard before the court at the defendant's sentencing as  
16 well.

17 THE COURT: Okay. Yes. Were you going to say  
18 something?

19 MR. PULLIAM: I was, but perhaps, I shouldn't at this  
20 point. E.H. is not part of the charge. She's not a victim in  
21 this case.

22 THE COURT: Right. Well, collateral -- I mean,  
23 related relative conduct can come in. Is it relative conduct  
24 that he was abusing this prison guard?

25 MS. GOTFRYD: Yes, Your Honor. It shows his criminal

1 pattern of behavior.

2 THE COURT: Against her?

3 MS. GOTFRYD: It shows his disrespect for the law. It  
4 shows his pattern generally. He used a strikingly similar  
5 conduct against her, pinning her just as he was pushing down  
6 the victim that he admitted to and pled guilty to.

7 MR. PULLIAM: May it please the court.

8 THE COURT: Uh-huh.

9 MR. PULLIAM: I have a wife. I have a daughter, just  
10 like Your Honor. And in this instance, the conduct that  
11 counsel is describing against E.H. is not criminal conduct.  
12 They worked together. If they got together, it's not a crime.  
13 And it should not be considered by this court as relevant  
14 conduct in determining sentencing.

15 THE COURT: Well, I'm not considering it anyway. Do  
16 you want to call your witness to talk about these exhibits?  
17 I've done everything except point and ask you that direct  
18 question. I mean, I'm not saying that these exhibits didn't --  
19 these things didn't happen. I'm saying, they're not before me  
20 in evidence format that's sufficient for me to consider them.  
21 That's what I've said.

22 MS. GOTFRYD: Yes, Your Honor. We would --

23 THE COURT: Is she able to testify about this?

24 MS. GOTFRYD: May I have a moment?

25 THE COURT: Yeah, sure.

1 MS. GOTFRYD: Your Honor, may we call Special Agent  
2 Nicole Mederos to the stand?

3 THE COURT: Come on.

4 MR. PULLIAM: May it please the court, we may shorten  
5 this.

6 THE COURT: Okay.

7 MR. PULLIAM: If counsel would stipulate that this  
8 agent is going to read these letters -- is that what she's  
9 about to do?

10 THE COURT: I don't know.

11 MS. GOTFRYD: I don't think she needs to read the  
12 letters. The court has them in evidence.

13 MR. PULLIAM: Then, I'll let her continue.

14 THE COURT: Are you wanting to put her on the stand to  
15 say, Yeah, these are the letters or statements we received from  
16 the victim in this case.

17 MS. GOTFRYD: Yes, Your Honor. And to give the court  
18 a summary of the evidence.

19 THE COURT: All right. And so that's one thing. The  
20 second thing is the text messaging.

21 MS. GOTFRYD: Yes, Your Honor.

22 THE COURT: She's going to say she got these from the  
23 cell phone of the other -- the female corrections officer?

24 MS. GOTFRYD: The male corrections officer, Eric  
25 Ellis.

1 THE COURT: Okay. And what else are you trying to get  
2 through this witness?

3 MS. GOTFRYD: That would be it, Your Honor.

4 THE COURT: Okay. Do you stipulate that those that  
5 have been filed as exhibits are true, at least that's what she  
6 would say she got from them and she got from the cell phone?

7 MR. PULLIAM: Yes, sir.

8 THE COURT: Okay. Does that take care of that?

9 MS. GOTFRYD: Yes, Your Honor.

10 THE COURT: All right. Thank you. You can step down.  
11 All right. The government wants 36 months or something close  
12 to that, right?

13 MS. GOTFRYD: Your Honor, something within 36 to 40,  
14 Your Honor.

15 THE COURT: 36 to 40. Defense, why should I not give  
16 that? Why is the current guideline calculation of -- I've got  
17 too many documents in front of me. What did I do with it? Six  
18 to ten; is that what it is?

19 MR. PULLIAM: Yes, sir. The court found the  
20 presumptive offense level to be 10, which under the sentencing  
21 table is 6 to 12.

22 THE COURT: 6 to 12, yeah. Five to life supervised  
23 release.

24 MR. PULLIAM: Yes, sir.

25 THE COURT: I've said to you I don't think that is

1 enough. I don't think that is sufficient to sentence the  
2 defendant. So why should -- why should I not give a sentence  
3 that's closer to the 36 months, then, to the -- I think you all  
4 asked for home confinement or something.

5 MR. PULLIAM: Yes, sir, we did.

6 THE COURT: Okay.

7 MR. PULLIAM: Because that's -- because that's what's  
8 necessary to achieve the ends of justice without doing too  
9 much. Mr. Smith came to the government when asked, pre-charge,  
10 and assisted them with the investigation of Eric Ellis, who  
11 Your Honor has mentioned and cited in the presentence report at  
12 Paragraph 6.

13 He agreed to work with the United States of America, who  
14 are now seeking an upward departure. If this is not a case of  
15 bait and switch, I don't know what is. And I'm sorry to be  
16 emotional about that, Your Honor. But he agreed to cooperate.

17 He made at least one telephone call that the agent or  
18 another agent or these lawyers listen to. And, in it, Ellis  
19 admitted his conduct, and that allowed the United States of  
20 America to achieve a conviction of Ellis. Now, Ellis wasn't  
21 just convicted of this charge, which is sexually abusing a  
22 ward --

23 THE COURT: Let me -- hang on just a second. And you  
24 know me. You know I'm fond of this, not fond of the  
25 proceeding, but fond of doing it in this way. Is it true that



1 you all had this fella first and asked him to help gather  
2 evidence on Mr. Ellis?

3 MS. GOTFRYD: No, Your Honor, that's not accurate.  
4 When the Officer of the Inspector General approached the  
5 defendant, we had absolutely no idea about his own criminal  
6 conduct. They approached him as a regular witness who happened  
7 to work with the defendant and know him. At the time, yes, he  
8 agreed to a voluntary interview just like any witness that the  
9 OIG approaches, and he agreed to do a controlled call with  
10 defendant Eric Ellis. So knowing what we know now about the  
11 defendant's own conduct, it wasn't all altruistic. We should  
12 view it with some skepticism.

13 THE COURT: All right. Hang on. I'm going to get  
14 back to his argument, okay? I just want to know if it's true.  
15 You're saying yes but no. He did -- y'all approached him  
16 before you had Ellis sewn up, but you didn't know he was doing  
17 the same thing.

18 MS. GOTFRYD: That's correct, Your Honor.

19 THE COURT: Okay. All right. Go ahead.

20 MR. PULLIAM: Thank you, Judge. So he did cooperate.  
21 He made the telephone call. He did what the government asked  
22 him to do. He consented to interviews, and that took care of  
23 Mr. Ellis, but Mr. Ellis did something else. Mr. Ellis  
24 tampered with a witness. Mr. Ellis pled guilty to witness  
25 tampering in addition to the sexual abuse of a ward. That's

1 why.

2 THE COURT: Was it obstruction of justice? Is that  
3 what he pled guilty to?

4 MS. GOTFRYD: It is, Your Honor.

5 THE COURT: Technical charge, but go ahead.

6 MR. PULLIAM: That's why Mr. Ellis received 18 months.

7 THE COURT: 18 months.

8 MR. PULLIAM: 18 months by Judge Axon in this  
9 district. It's different. He committed the act; then he  
10 attempted to cover it up; and he obstructed justice. That's  
11 what makes this different.

12 This man, when asked, didn't run and hide; didn't say, I'm  
13 not going to cooperate; didn't say, I'm not going to make a  
14 call; but he certainly didn't admit what he's now pleaded  
15 guilty to. And he ought to be given the benefit of telling the  
16 truth to Your Honor, pleading guilty, accepting responsibility.  
17 He's got to register as a sex offender. And we believe a  
18 punishment within the guideline range is satisfactory to  
19 achieve the ends of justice but not more than necessary, may it  
20 please the court.

21 THE COURT: Okay. All right. Government, what did  
22 you ask for on Mr. Ellis -- what was your recommendation on his  
23 sentencing? Did he get -- or, first, I'm bad about asking  
24 multiple questions, and I apologize. Did he get a 5K1?

25 MS. GOTFRYD: No, Your Honor, he got no benefit for

1 that.

2 THE COURT: All right. So what did you ask for in  
3 sentencing?

4 MS. GOTFRYD: We asked for a high end of the  
5 guidelines sentence. We asked for 18 months.

6 THE COURT: So, again, I'll ask you the same question  
7 I asked you before: What makes this one different? I heard  
8 what Defense said. Defense said they were both doing the same  
9 thing. You said he only had one victim; but yet, you admitted  
10 to a second victim when you were talking -- at least I think  
11 you did -- where you said that one turned out to be consensual  
12 and ended up being a girlfriend. But I assume she was in  
13 custody at one time. So there really technically is two  
14 victims in my -- that's my finding. It really doesn't matter,  
15 unless I'm wrong on the facts.

16 MS. GOTFRYD: And Your Honor is wrong -- Your Honor is  
17 right. And under the law, it doesn't matter because these  
18 women cannot consent due to the coercive environment.

19 THE COURT: I know that.

20 MS. GOTFRYD: But the conduct is still different.

21 THE COURT: What is -- how is it different? He  
22 obstructed justice by trying to convince this person not to  
23 testify against him or whatever he was doing, the witness.  
24 This guy doesn't have that kind of charge. But this guy, you  
25 said, got Ellis involved in it?

1 MS. GOTFRYD: Yes, Your Honor. And, Your Honor, the  
2 witness tampering charge -- the controlled call formed the  
3 basis of that.

4 THE COURT: So this guy actually helped you get a  
5 charge against Ellis?

6 MS. GOTFRYD: Yes.

7 MR. PULLIAM: Times two. Pardon me, Judge.

8 THE COURT: Not your turn yet.

9 MS. GOTFRYD: So this guy helped; but yet, you don't  
10 want to consider that.

11 MS. GOTFRYD: Your Honor, it's --

12 THE COURT: Why? I just need to understand because  
13 I'm trying -- I know what my job is, but I need to understand  
14 why is this guy is over twice the guideline calculation.

15 MS. GOTFRYD: He sexually abused two inmates in his  
16 care. He admitted to doing that in the plea agreement.

17 THE COURT: Same thing Ellis did.

18 MS. GOTFRYD: No, Your Honor.

19 THE COURT: You just said he did.

20 MS. GOTFRYD: Here's how it's different. This  
21 defendant's victims each stated they did not want what he was  
22 doing. They told him no. They stopped showing up to work, and  
23 they resisted. One of them physically pushed him off of her.

24 THE COURT: Right.

25 MS. GOTFRYD: And so the conduct was very much

1 unwanted, coercive here. And in addition to those --

2 THE COURT: And then, Ellis, both of them were  
3 absolutely consenting, and you're saying that they did not say  
4 no, either one of them.

5 MS. GOTFRYD: In Ellis, one of them said no and was  
6 not consenting, and the other was a willing participant.

7 THE COURT: Okay. All right. So I hate I have to  
8 pull this out of you. I really do, okay? Because I'm going to  
9 pull out whatever I need to pull out to get to the, you know,  
10 facts that I have to have. I'm trying to understand your  
11 believing this fella needs over twice the guideline range. The  
12 differences as I'm hearing them is one of the victims in Ellis  
13 was consensual, actually became a girlfriend later. But they  
14 both had two victims.

15 One of -- and Ellis tried to obstruct justice. He got an  
16 extra charge. And this guy helped you make that charge, but  
17 you still want to say that they're so different this guy should  
18 get over twice the guideline calculation.

19 MS. GOTFRYD: As part of the relevant conduct that  
20 Your Honor can consider, too, is the defendant's history and  
21 characteristics. And so Your Honor also has here an attempted  
22 sexual assault on a fellow officer. Eric Ellis did not have  
23 that.

24 THE COURT: Okay. Let's ask the defense about that,  
25 okay? Defense.

1 MR. PULLIAM: May it please the court.

2 THE COURT: You don't have to keep saying that, and  
3 you can talk in your microphone, or you can stand up, whatever  
4 you feel like.

5 MR. PULLIAM: While it is not relevant to the  
6 underlying charge, it was all consensual, if the truth want to  
7 be told. But what --

8 THE COURT: What did that officer say? Did she say it  
9 was consensual, or did she say he tried to force her?

10 MR. PULLIAM: May it please the court, I'm sorry.

11 THE COURT: What did she technically say?

12 MR. PULLIAM: Well, technically, I haven't talked to  
13 her.

14 THE COURT: No, in the statement.

15 MR. PULLIAM: She's going to say -- she's going to say  
16 it was against her will. She did say it was against her will.  
17 But I'm saying she's not telling the truth because Your Honor  
18 knows that if there was something that dealt with either  
19 violence or oppression, she's not a warden. So under the law,  
20 it -- there's nothing in the plea agreement, there's nothing in  
21 the indictment, that warrants this sort of ninth-hour request  
22 that he get more than twice the guideline. And but for him --

23 THE COURT: I'm not giving him twice the guideline.  
24 He's getting more than the guideline. Nothing you all have  
25 told me, by the way, I hadn't already pretty much known and

1 calculated into my dimly lit brain. I just wanted to confirm  
2 it.

3 MR. PULLIAM: May it please the court, and I know I  
4 don't need to say it, it's not dimly lit. You've done this a  
5 long time. We've both done this a long time. What is  
6 distinctive between Ellis and Smith is that Smith helped the  
7 United States of America from the beginning achieve a  
8 conviction of another person.

9 He has pled guilty and accepted responsibility. And we do  
10 not believe it is necessary to meet the ends of justice for  
11 Your Honor to sentence him to some level that the government is  
12 requesting.

13 THE COURT: Okay. Anything else? Last shot at me.

14 MS. GOTFRYD: Your Honor, he placed that controlled  
15 call so that the government would continue keeping its focus on  
16 Eric Ellis and not turn to his own crimes so that he could  
17 continue avoiding detection like he did very well and for a  
18 very long time.

19 THE COURT: Are you saying he continued his criminal  
20 conduct after he knew that y'all were investigating and he was  
21 making these calls?

22 MS. GOTFRYD: No. I'm saying he placed that call so  
23 that we continued focusing and investigating where we were.

24 THE COURT: I got you. I understand.

25 MS. GOTFRYD: And the government's request of

1 something within 36 to 40 months, we're simply asking the court  
2 to sentence this defendant in the same way that courts across  
3 America are sentencing defendants for similar conduct. These  
4 are similarly situated defendants, convicted under the same  
5 statute where the conduct was also similar. And the courts are  
6 doing 2 to 2.5 times those guidelines. And that's on average.

7 Of course, Your Honor has the litany of cases that the  
8 government cited in support of this position, as well as the  
9 courts that are doing much more than that, including the  
10 Mullins court who gave 84 months for one single act of  
11 penetration.

12 THE COURT: Is that California?

13 MS. GOTFRYD: No, Your Honor. That is New York.

14 THE COURT: New York. All right. Anything else you  
15 want to tell me?

16 MR. PULLIAM: A lot I'd like to tell you, Judge, but  
17 it's not necessary.

18 THE COURT: All right. Mr. Smith, my job is to  
19 sentence you to a sentence which is sufficient but not more  
20 than necessary to accomplish the sentencing goals set forth in  
21 the federal statute. My job is to wade through all of this and  
22 decide what is fair. It's not fair that you get a low end or  
23 even within the guidelines of 6 to 12 months. I don't believe  
24 that's fair.

25 You were a prison guard. You had individuals that you



1 were charged with responsibility of supervising and, yes,  
2 protecting. You took advantage of them. And that's, you know,  
3 that's unfortunate. I don't think that you're necessarily a  
4 bad person. I think, you know, you can get this behind you.

5 But I don't think it would -- I would be doing my job,  
6 when I consider the nature and circumstances of this offense,  
7 as well as your history and characteristics, as well as the  
8 need to hopefully keep individuals from -- prison guards from  
9 committing the offense -- if everybody that got caught got  
10 probation, guess what, you know, that would be a problem  
11 because then people would think, yeah, you could go ahead and  
12 do it. And that's not right either.

13 I do believe that an appropriate sentence to give you is  
14 24 months. I'm not going to 36 to 40 something. I think that  
15 is too much. But I believe a sentence of 24 months is  
16 sufficient but not more than necessary to accomplish the  
17 sentencing goals set forth in the federal statute. So I'm  
18 ordering you remanded to the custody of the Bureau of Prisons  
19 to be imprisoned for a period of 24 months.

20 You'll have supervised release for a period of 15 years  
21 once you complete your sentence. Fifteen years can be reduced  
22 down after you get out assuming that you maintain good conduct.  
23 I suspect within three years or so the probation office will be  
24 asking for your sentence to be changed to nonreporting or just  
25 totally dropped. It will be up to a different judge. It won't

1 be me making that decision.

2 I'm not going to impose a fine due to your inability to  
3 pay a fine. I do order that you pay the United States a  
4 special assessment fee in the amount of \$100. The special  
5 assessment fee is due immediately. While you are on supervised  
6 release, you will comply with the standard and mandatory  
7 conditions of supervised release of record in this court as  
8 well as the special conditions contained on Court's Exhibit 1.  
9 Did he read and sign that?

10 MR. PULLIAM: Yes, sir, Your Honor.

11 THE COURT: Okay. And just give that to us when  
12 you're through, and we'll give him a copy of it. Would you  
13 like that I ask you to be housed as close to Tuscaloosa -- I  
14 think you actually live in Northport -- as I can get you?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Okay. And I'll do that. This is an  
17 upward variance, not a departure. I don't believe a departure  
18 was warranted. I know you have alcohol abuse in your  
19 background. Is he asking for some type of treatment --

20 MR. PULLIAM: Yes, sir.

21 THE COURT: -- while he's there?

22 MR. PULLIAM: Yes, sir.

23 THE COURT: The extensive drug treatment program?

24 MR. PULLIAM: RDAP.

25 THE COURT: RDAP, yes. I'll ask for that. I don't

1 know that he'll get any time off his sentence. He's only got  
2 two years. I hate to say "only," but, you know, I doubt he'll  
3 get time under his belt to get that done in two years.

4 MR. PULLIAM: To the extent Your Honor may include  
5 that in his order, we'll appreciate it.

6 THE COURT: I will. I will. All right. Is there any  
7 objection from any party as to the findings of fact, the  
8 calculations, the sentence, or the manner in which the sentence  
9 was pronounced or imposed?

10 MR. PULLIAM: Yes, sir.

11 THE COURT: To the excessiveness of the sentence?

12 MR. PULLIAM: The defense objects to seven-level  
13 variance, as I recall the court finding that the recommended  
14 offense level was ten, and we've now moved up to 17, which is  
15 24 months.

16 THE COURT: Okay. All right. Any other objections?  
17 I'll note that I don't believe that the guideline calculation  
18 was sufficient. I think I already said that. I want to make  
19 sure the supervised release is subject to all the standard  
20 terms and conditions as well as those special conditions. Any  
21 objections?

22 MS. GOTFRYD: No, Your Honor.

23 THE COURT: All right. You have the right to appeal  
24 the sentence imposed if you believe it's in violation of the  
25 law. Even if you -- Government, you want to dismiss Count 2?

1 MS. GOTFRYD: Yes, Your Honor. We do move to dismiss  
2 Count 2.

3 THE COURT: Count 2 is dismissed.

4 MS. GOTFRYD: Your Honor, we also note on the record  
5 that the defendant will have to comply with sex offender  
6 registration requirements.

7 THE COURT: That should be in the special conditions.  
8 Is it Marley?

9 COURTROOM DEPUTY: I believe so.

10 THE COURT: Check it and see for me. Can you bring  
11 that to us?

12 MR. PULLIAM: Yes, sir.

13 THE COURT: Give it to the government. Let them look  
14 at it real quick. You're going to ask that he be left on the  
15 street until time to turn himself in?

16 MR. PULLIAM: Yes, sir. Yes, Your Honor.

17 THE COURT: Okay.

18 MS. GOTFRYD: It's in there, Your Honor.

19 THE COURT: All right. Any objection from the  
20 government?

21 MS. GOTFRYD: No, Your Honor.

22 THE COURT: All right. As I've said, you have the  
23 right to appeal the sentence imposed if you believe it's in  
24 violation of the law. Even if you did waive some or all of  
25 those rights to appeal as part of your plea agreement, it's

1 generally not enforceable under your agreement if I went above  
2 the guideline calculation, which I did. But you have to file a  
3 notice of appeal within 14 days of judgment being entered in  
4 your case.

5 If you do not have the ability to pay the cost of an  
6 appeal, you may apply for leave to appeal in forma pauperis and  
7 for the appointment of counsel. If granted, the Clerk of Court  
8 will assist you in preparing and filing your notice of appeal.

9 Now, the defense has asked that he be allowed to remain  
10 out and turn himself in later, delayed turn in. What is the  
11 government's position?

12 MS. GOTFRYD: Your Honor, he's complied with  
13 conditions. So we defer to the court.

14 THE COURT: Okay. He'll remain out on bond. Don't  
15 mess up between now and then, okay? I'll delay your turn in  
16 for 30 days. Give me a date, please.

17 COURTROOM DEPUTY: Monday, June 24th.

18 THE COURT: Monday, June 24th, by noon. He needs to  
19 report to the United States Marshals office downstairs or the  
20 facility designated to house you, Mr. Smith. If there's not  
21 one that's been designated, which they may have trouble doing  
22 that considering that you're -- you were originally serving as  
23 a prison officer, prison guard, your lawyer needs to file a  
24 motion for further delay. Don't just assume that that's been  
25 done. Make sure it's done, okay? And granted by me if it's

1 done. All right. We'll be in recess.

2 (Proceedings were adjourned at 10:04 a.m.)

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated: June 30, 2024

*Lauren Shirley*

Lauren Shirley, RPR, CRR  
FEDERAL OFFICIAL COURT REPORTER

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