

**IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION 11**

STATE OF KANSAS,)
-----Plaintiff,)
 vs.)
HAROLD D. SPENCER,)
-----Defendant.)

Case No.: 07-CR-2444

TRANSCRIPT OF SENTENCING

PROCEEDINGS had before the Honorable Matthew J. Dowd, Judge of Division 11 of the District Court of Shawnee County, Kansas, at Topeka, Kansas, on the 27th day of June, 2008.

APPEARANCES:

The Plaintiff, State of Kansas, appeared by and through Mr. Jason Hart, District Attorney's Office, 200 East 7th Street, Room 214, Topeka, Kansas 66603.

The Defendant, Mr. Harold D. Spencer, appeared in person and by and through his counsel, Ms. Cynthia Sewell, Public Defender Office, 701 SW Jackson, Third Floor, Topeka, Kansas 66603.

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THE COURT: I have *State of Kansas vs. Harold Dean Spencer*, 2007-CR-2444. And the appearances, please.

MR. HART: May it please the Court, State of Kansas appears by and through Jason Hart, Assistant District Attorney.

MS. SEWELL: Your Honor, Mr. Spencer is present with his lawyer, Cindy Sewell.

THE COURT: Okay. The defendant is before the Court for a sentencing on agg indecent liberties with a child and there are two counts of that particular offense. The presentence investigation indicates that the defendant is a criminal history "I", that the sentence is life with a presumption of prison, and there has been a motion to depart on behalf of the defendant for a durational and a dispositional departure. Is that a correct rendition of the current information?

MR. HART: Yes, Your Honor. I think it would be appropriate though to point out that as far as the PSI goes, count 2 of the PSI which is on the second page indicating agg indecent liberties with a child as a severity level 3 offense is incorrect. It should also be an off-grid offense as in the first count, which the reason being is that the offender is over 18. Effectively, it makes count 2 the same as count 1.

THE COURT: All right.

MR. HART: And that was also what was enumerated in the plea agreement that was signed and presented to the Court on May 13.

THE COURT: Okay. We'll note that correction then for the record.

MR. HART: State has no objection to his criminal history as presented.

MS. SEWELL: Neither does the defendant.

THE COURT: All right. I should also note that I have received a packet of numerous letters from friends and family of the defendant indicating that he is a good citizen, a good person, and a suitable candidate for some sort of leniency.

So I guess, Ms. Sewell, did you want to proceed on that issue?

MS. SEWELL: I will, Judge.

MR. HART: Your Honor, if I may just before we get there, I know the Court had inquired about additional victim impact statements. I provided a copy to Ms. Sewell and am providing the Court a copy. I've requested that the court services officer that prepared the PSI bring the original up to you so that you have the original in your file.

THE COURT: I think I have that after all.

MR. HART: Okay.

THE COURT: I didn't realize that I did, but I do.

Okay. Ms. Sewell, you may proceed.

MS. SEWELL: Thank you, Judge. As you can see, there's quite a courtroom here and all of them, except the court services and police personnel in that front row, are in support of Mr. Spencer. He has seven kids, he has 16 grandkids, and he has 16 or 17— he couldn't remember— great-grandkids. His siblings— brothers are

here. They are all in support of him.

I can't begin to tell you how close-knit this family was. I mean, you talk about a clan, that's what this family is. And when these allegations arose, it just tore, literally tore the fabric of this family of which he was the patriarch. I mean, anyway, they are devastated. They are traumatized. They were disbelieving. They have gone the whole route of denial, of anger, of all of those emotions based upon Harold's actions.

And I'm not here to say that he's not at fault because clearly, he is. I have fielded I can't tell you how many telephone calls from this family. They've been angry, disbelieving, accusatory. It's been hell. And I can tell you that Harold feels the brunt of that because he, because he knows that it all relates back to him.

This family is law-abiding. They are upstanding. They rarely, if ever, have been in a courtroom before. Then to have to come here in support of someone accused and convicted and admitting guilt on a sex offense is just more than they can fathom.

But in my motion for departure, I've asked the Court to consider a dispositional departure from the life sentence for this 76-year-old man to probation. There was a time in our system where diversion was granted to situations like this and this would have been the classic example of why they do that.

We've got two little girls here that at first were disbelieved and then were believed and then Harold admits it. So you get to the point where they feel like everybody is looking at them. The family members are crying, they are upset, they are angry and it's my fault. And that is why the Court is given the option of imposing something less than what the law presumes.

It's my opinion that prison time is only going to worsen the mess that Harold has created. If he will go away, his wife— who you can see over in the corner— is extremely ill. He's the caretaker. Family members have had to manipulate time and energy away from their own families to take care of her. In my opinion, I think it's just going to make it worse.

There are several people here that want to talk to the Court and tell you exactly what you're dealing with with Harold. I think I'll start with whoever wants to start.

Judge, I believe this is a grandson and a daughter-in-law.

REBECCA McPHAIL: No, daughter.

THE COURT: You can stay right there.

MS. SEWELL: Speak real clear and talk to the Judge.

REBECCA McPHAIL: He got braces yesterday.

BRANDON McPHAIL: Hi, my name is—

THE REPORTER: I'm sorry?

BRANDON McPHAIL: Hi, my name is Brandon. I'm here to tell you about my grandpa. He's a good guy and I love him. When I was sad, he would make me laugh by telling me jokes and making funny faces. When I broke my collar bone, he stopped what he was doing to come get me. He's shown me cool things. He always had time to talk to me when I was—

(THEREUPON, Ms. Rebecca McPhail continued reading for Brandon McPhail as follows:)

REBECCA McPHAIL: When I know he didn't know anything about video games or what I was talking about, when I needed help, he helped me. Don't put my grandpa in jail. He's the only grandpa I ever had and I wish I could give him a hug and tell him I love him one more time.

THE COURT: Okay. Thank you.

Ma'am, did you have anything?

REBECCA McPHAIL: I'm Rebecca McPhail. I'm his youngest daughter. I would like to take a few minutes to talk about a man that has sacrificed—made sacrifice after sacrifice for his family. There are times when he would go weeks without a cent in his pocket so his grown children could have whatever they wanted, and not once did he complain. He has been there every time the kids or grandkids needed a ride or something else. I remember a time when all he ate for a week was a potato because that was all he had to eat. But do you think he would come to his kids?

THE REPORTER: A little slower, please.

REBECCA McPHAIL: He did not want to worry them. I'm sorry. That takes a special man to give so much of himself and not ask for anything in return.

I have four boys. Some of them have moved away now but if you ask them what their grandpa has taught them, they will tell you that they have learned a lot from him. One is that it doesn't take money to make a rich man, it takes the love of a family and friends. That's what makes their grandpa a very rich man.

If you work hard and treat people fair and learn to stand on your own two feet, you can accomplish anything in life. One of my grandsons graduated from college in May. He said it was supposed to have been "the happiest time in my life," but it was a sad day because his grandparents weren't there to see him walk across the stage. Now he has moved away and couldn't even say good-bye. I have one more grandson that graduates in December. Is it going to be the same for him too?

My kids have always been taught to respect their elders, but they never had to be told to respect their grandpa. He earned that himself.

With this, Your Honor, please consider his age and his health. We don't have much time left with him and the family needs him as much as he needs us. He's the only person that can help put the family back together and heal us.

MS. SEWELL: You are Pastor John Cross.

JOHN CROSS: Your Honor, I am Pastor John Cross from Carbondale and on several visits with Harold while he was incarcerated, I visited with him and I feel his sorrow, his forgiveness. He's sorry for what part he had done and I pray for leniency here in the court system upon what charges are held against him. And I know that the Lord, our God, tells us to forgive one another our sins and that's where the healing is coming in, the forgiveness, and knowing that they love their loved one here and I pray you have mercy on him.

THE COURT: Thank you.

MS. SEWELL: Just speak up.

DONNA SPENCER: He is the most wonderful man you'll ever meet. I have never had a problem, any problems with him. He's always been there for me. I've known him for 57 years. We've been married for 55. You couldn't ask for a more wonderful man, and I don't believe what they are accusing him of. I really don't. He was with me most of the time when we were home because I needed his care.

THE COURT: All right. That's missis—

MS. SEWELL: Yes, that's his wife.

THE COURT: Now, I have, I have everybody's letter here so I don't know that we need to be repetitive here.

MS. SEWELL: Anyone else?

THE COURT: Let's take one more.

ROBERT McPHAIL: Yes, sir. My name is Robert McPhail.

THE COURT: You're the Marine?

ROBERT McPHAIL: Everybody has got to have a hobby.

THE COURT: Well, I'm Army, but my stepson is a Marine.

ROBERT McPHAIL: I won't hold it against him. Harold is my father-in-law. We've always taught my kids to respect Harold, but he's never needed to be told to respect his grandfather. He earned the respect of his actions. I've known the man for over 25 years and I've never seen the man give up more of himself, his time, his money, his life to make things easier for his kids, his grandkids or his great-grandkids. He is one of the stabilizing forces in this family. When he stops and says that's enough, it's enough.

The amazing thing is I've never seen him lack honor or integrity in his actions, even to the point that I'm right over one of his kids in the past. You know, every family has problems. Anytime he puts his foot down, it's a done deal. No one questions it. I just wish I could emulate some of his actions for my own family.

Without his direct presence, this family is falling apart. The stability, the sensibility, that's him. He's the rock that holds the whole thing together. You take him away, this family will become more dysfunctional and continue on a direct path towards self-destruction. Again, Harold is the rock that this family is built on. Even his recent actions and decisions that brought us here today was done to help stop a widening chasm in his family. Again, just another sacrifice for him that he's willing to make for his family. The last seven months that he spent in jail, he has spent that whole time worrying about his family and how he can fix the problem. He is willing to accept whatever the outcome is here today if it will bridge the gap and help heal his family. To him, just another sacrifice he's willing to make. To us, a loss we can't accept. Thank you.

THE COURT: Let's go to, let's go to Mr. Spencer. Do you yourself have any comment to make?

DEFENDANT SPENCER: Beg your pardon?

MS. SEWELL: Do you have anything to say?

DEFENDANT SPENCER: I just wish I could undo it.

THE COURT: Okay. Ms. Sewell, do you have anything additional?

MS. SEWELL: Nope.

THE COURT: I know, Mr. Hart, you've agreed to stand silent at sentencing, however, we did have a conversation in chambers and I want you to make a record. Your interpretation of the departure, assuming the Court would depart durationally, where we would go versus Ms. Sewell's interpretation.

MR. HART: Your Honor, as I read the statute related to departures for the off-grid felonies, the way the language reads is— the departure to the guidelines' grid, the way that I have interpreted that is for the operative offense; that if the Court were to depart from life with parole at 25, the departure is to the guidelines' grid at the box, the severity level 1, and whatever the criminal history is. Part of the reason for my thought process on that is that is effectively reducing it by half, if you were to look at 25 and then category "I", 1 is about 12, 13 years. And that makes sense to me that the legislature, if they are doing a departure like that, would have put that in place as opposed to letting you depart to anywhere on the grid. In theory, if you interpret it that way, you could go to level "I" at the 10 box and give somebody five months and I don't think the legislature intended that.

And I think you also spoke as to— you had inquired about my view of Ms. Sewell's interpretation of approaching the departure sentence as using some other level for the conviction offense, in this case using a level 3 aggravated indecent liberties, and my view on that is that is not contemplated in the departure language for the statute. That would also then require the Court to essentially convict him under some other offense.

THE COURT: All right. Thank you.

Okay. Ms. Sewell, do you have anything else?

MS. SEWELL: I do, Judge. This is Mr. Hart standing silent at sentencing, and it's also open for interpretation. What the statute says, it says go to the guidelines. I'm not asking for some irrational number from level 1 to level 10, I'm asking for a rational basis which is the underlying actions of what he's been convicted of. And if the Court does want to give him prison, then it would be an agg indecent liberties, lewd fondling which is a level 3, not a level 1 which would be rape.

THE COURT: I understand both counsel's theory. Okay. Anything else? All right.

Certainly, this is always a serious situation, a serious crime. I am very aware of the impact it's had on the defendant's family, on his friends, and on the community. There's a kind of a mixed input in regard to the harm that was done to these young ladies. It does not appear that the harm was terribly significant. The mom of the children herself says that they have dealt with this fairly well. And so I think the victim, the victim impact is not as serious as it would be in an ordinary case of this nature.

MR. HART: Your Honor, if I may, there's two different mothers.

THE COURT: I'm sorry?

MR. HART: I wanted to make sure the Court was clear.

THE COURT: One says one thing and one says another, I guess.

MR. HART: I think that would be a fair characterization of the victim impact statements.

THE COURT: Okay. In any event, I think what I've heard here today would seem to indicate that a departure is necessary, appropriate, and there are substantial and compelling reasons to depart. I think the age of the defendant, his prior record, and his support from his family and friends would lead the Court to believe that this might have been an aberration or a momentary lapse in an otherwise good life, so I am going to depart.

I am going to adopt— since I'm going to also depart durationally, I think it's really not terribly significant how many years or months we give, because I am going to depart dispositionally. But I will adopt the State's theory and go from life imprisonment to a number of years— or pardon me, a number of months as indicated on the guideline grid for the severity level 1. So I'm going to impose a 155-month sentence to the Secretary of Corrections. The defendant's criminal history is "I" and that's the low range on the severity level number 1, 155 months.

I'm also going to depart dispositionally. I think that it would not, it would not serve the end of justice to incarcerate the defendant. I think that a significant amount of time in prison would be tantamount to a life sentence for this man in light of his age, and age is listed as one of the reasons to depart. Usually we think of that as a young person not really aware of his responsibilities, but I think it also can be interpreted as age in the sense of an elder person.

In any event, I'm going to impose the 155 months, 36 months of post-release supervision and 36 months supervised probation. Any thought of community corrections versus court services?

MS. SEWELL: Judge, he will do either one. I know that he's in and out of appointments with his wife, so he will do either one. Their home is open to visits. I don't have a preference either way.

THE COURT: Mr. Hart, any thought?

MR. HART: Your Honor, given the departure is from an off-grid offense, I am at a loss as to give the Court any direction as to community corrections or court services.

THE COURT: All right. Okay. Let's go with court services then. The defendant will be charged the costs of the case and the probation fee which is \$50. And what is his financial situation in regard to payment?

(THEREUPON, an off-the-record discussion was held between defense counsel and the defendant, WHEREUPON, the proceeding continued as follows:)

MS. SEWELL: \$1,283; \$485 for her.

THE COURT: Well, I think the defendant is financially capable of paying some attorney fees. He will also be required to submit to DNA and register as a sexual offender. I'll waive the application fee. I'll impose a \$300 attorney fee.

Is there any restitution here?

MR. HART: I'm not aware of any, Your Honor.

THE COURT: All right. The defendant will have the right to appeal, as will the State, within ten days of the date of this decision and the right to expungement of the conviction according to law.

Mr. Spencer, are you willing to accept probation under these terms and conditions?

DEFENDANT SPENCER: Yes.

THE COURT: All right. And also, we should impose the same sentence on count 2. And they will run concurrent. That will be the order of the Court.

MR. HART: Your Honor, is the Court making any order in reference to contact with the victim witnesses?

MS. SEWELL: Judge, I would ask that there be no contact with children under 18 unless supervised.

THE COURT: Okay. That's appropriate under the circumstances. That will be all.

(THEREUPON, the sentencing proceeding concluded.)

C E R T I F I C A T E

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

I, Jennifer L. Olsen, CSR, a Certified Shorthand Reporter, and the regularly appointed, qualified and acting official reporter of Division No. 12 of the Third Judicial District of the State of Kansas, do hereby certify that as such Official Reporter, I was present at and reported in Stenotype shorthand the above and foregoing proceedings in Case Number 07-CR-2444, *State of Kansas vs. Harold Dean Spencer*, heard on June 27, 2008, before the Honorable Matthew J. Dowd, Judge of Division Number 11 of said Court.

I further certify that at the request of The Honorable Nancy E. Parrish, a transcript of my shorthand notes was typed and that the foregoing transcript, consisting of 9 typewritten pages on the Word Perfect Version 12 software, is a true copy of the said **SENTENCING HEARING**.

SIGNED, OFFICIALLY SEALED, AND DELIVERED this 1st day of July, 2008.

Jennifer L. Olsen, CSR, RPR, CRI