

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT BERNAL, JR.,

Defendant.

Criminal Action

No. 16-148

Transcript of proceedings on May 23, 2019,
United States District Court, Pittsburgh, Pennsylvania,
before Cathy Bissoon, District Judge

APPEARANCES:

For the Government: Carolyn J. Bloch, Esq.

For the Defendant: Andrew Lipson, Esq.

Court Reporter: Richard T. Ford, RMR, CRR
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(Proceedings held in open court; May 23, 2019.)

THE COURT: Now is the time for the sentencing in United States of America versus Robert Bernal, Jr., Criminal Case No. 16-148.

Can counsel please identify themselves for the record.

MS. BLOCH: On behalf of the United States, Carolyn Bloch.

MR. LIPSON: Andrew Lipson from the Federal Public Defender's office on behalf of Mr. Bernal, Jr.

THE COURT: On June 18th, 2018, the defendant pleaded guilty to the charge at Count 1 of the indictment against him which charged him with on or about December 3rd, 2015, knowingly using a computer to distribute an image depicting prepubescent minors engaging in sexually explicit conduct, in violation of Title 18 United States Code Section 2252(a)(2). That day I accepted the defendant's plea and adjudged him guilty of that offense.

At that time while not pleading guilty to Counts 2 and 3 of the indictment, defendant acknowledged his responsibility for the conduct charged in those counts and stipulated that the Court may consider it in imposing a sentence.

Also at the hearing on June 18th the parties informed the Court that the government and Mr. Bernal had

1 entered into a plea agreement. Thereafter, I ordered that a
2 presentence investigation be completed by the United States
3 probation office. The final presentence investigation report
4 was prepared on November 9th, 2018, and was disclosed to me,
5 defendant and his counsel, and to counsel for the government.

6 On October 12th, 2018, and November 19th, 2018,
7 the Court received victim impact statements from the probation
8 office.

9 Initially only the government submitted a position
10 with respect to sentencing factors, noting on November 29th,
11 2018, that it had no objections to the presentence report. On
12 January 15th, 2019, the probation office filed an addendum
13 to the presentence investigation report memorializing the
14 government's lack of objections and defendant's non-filing.

15 On January 9th, 2019, the government filed its
16 sentencing memorandum discussing how the factors cited in
17 Title 18 United States Code Section 3553 apply to defendant.
18 The government's memorandum noted that defendant's admission
19 that he is addicted to viewing child pornography and his
20 possession of over 90 videos and 550 image files depicting
21 minors engaged in sexually explicit conduct, including bondage
22 and bestiality, indicated that he should receive a higher end
23 sentence.

24 The government argued defendant's status as a
25 regular purchaser of child pornography who shared those images

1 with other like-minded individuals supports a significant term
2 of imprisonment in the case.

3 On January 23rd, an additional victim impact
4 statement was forwarded to the Court by the probation officer.

5 On January 24th, the Court ordered that the
6 parties indicate their positions on the appropriate scope of
7 restitution in this case. Specifically, the Court asked the
8 parties to articulate their respective positions as to whether
9 the Court may order restitution for the victims of Counts 2
10 and 3 based on the plea agreement in this case.

11 On February 1st, both the government and
12 defendant filed responses to the Court's January 24th order.
13 The government's position was that the victims of conduct
14 underlying Counts 2 and 3 are not entitled to restitution.

15 Defendant's response indicated his agreement with
16 the government's confirmed position that victims outside of
17 the count of conviction do not have standing to seek
18 restitution.

19 On March 28th, the Court ordered the probation
20 office to submit a supplemental report regarding the amount of
21 restitution requested by Sarah of the Marineland series. The
22 probation office's supplemental report filed on April 10th
23 clarified that while it was originally believed that Sarah was
24 the victim depicted in the image from the Marineland series
25 possessed by defendant charged in Count 1, after further

1 review it is in fact a different Marineland series victim.
2 The probation office noted that the US Attorney's office
3 confirmed with counsel for the victim that she is not
4 currently seeking restitution in this matter.

5 On April 8th, defendant filed his written
6 position with respect to sentencing factors, noting that --
7 notifying the Court of his intention to argue that various
8 enhancements applied by the probation office over-represent
9 the defendant's culpability in this case. As such,
10 defendant's counsel believes a downward variance from the
11 guideline range is necessary to avoid an overly punitive
12 sentence.

13 On April 10th, defendant filed his sentencing
14 memorandum describing the physical and sexual abuse defendant
15 endured as a child as well as his subsequent drug and alcohol
16 abuse and persistent suicidal ideation and other mental health
17 issues defendant faced in his teenage and young adult years.

18 Defendant's memorandum stressed his transformation
19 since his arrest and his placement at Remnant House, in part
20 due to his abstinence from substance abuse. Defendant has
21 taken on leadership roles within Remnant House and has earned
22 praise from its founder for his behavior, he has followed all
23 the conditions of his bond for the last 32 months, and he has
24 maintained his sobriety and worked productively. For these
25 reasons defendant argued that a downward variance is

1 warranted.

2 Additionally, defendant's memorandum argued that
3 the Court should not give the same weight to the advisory
4 guideline range in this case as it would in others because the
5 child pornography guideline is fundamentally flawed.
6 Specifically, the defendant argues that the guideline is not
7 the product of the typically reasoned approach taken by the
8 Sentencing Commission but, rather, has overly punitive results
9 motivated by an aversion to the underlying facts.

10 Defendant also argues that the enhancements for the
11 use of a computer and number of images constitute double
12 counting because the ease by which persons could obtain child
13 pornography via computer have resulted in large increases in
14 the volume and accessibility of child pornography for entry
15 level offenders.

16 Defendant extended his double counting argument to
17 the enhancement for distribution, arguing that the guideline
18 range already increases his base offense level from 18 for
19 possession to 22 for distribution.

20 The defendant argues that all the enhancements
21 applied are nearly ubiquitous in child pornography cases and,
22 therefore, obscure the history and characteristics of the
23 individual defendant before the Court and his specific
24 offense, contrary to Section 3553's purpose.

25 Defendant's memorandum also argues that he does not

1 have the means to pay the additional \$5,000 assessment under
2 the Justice for Victims of Trafficking Act.

3 Attached to defendant's memorandum are a summary of
4 the history of the child pornography guideline and amendments
5 as well as letters of support from his managers and co-workers
6 at Uno Chicago Grill and the founder of Remnant House,
7 Dr. David Sutton.

8 On April 15th, the government filed an amended
9 position regarding restitution. The government stating that
10 it recently reviewed the Third Circuit opinion in United
11 States v. Mentzer and concluded that the Court may exercise
12 its discretion in this case to award restitution to the
13 victims of Counts 2 and 3 and changed its previous position
14 with respect to restitution.

15 Specifically, the government points to the plea
16 agreement in the case, which includes broad language leaving
17 it to the Court to determine the victims and/or other persons
18 or parties who will receive restitution authorized by law.

19 As the plea agreement is silent as to whether this
20 determination is limited to the count of conviction, the
21 government argues that it allows the Court to award
22 restitution to victims of the conduct charged in Counts 2 and
23 3.

24 Having reached this conclusion, the government
25 provided information regarding the restitution claimants whose

1 images defendant received and possessed as charged in Counts 2
2 and 3. For each claimant the government provides all the
3 information it had obtained regarding total amount of loss,
4 the number of prior restitution orders, and total amount of
5 restitution ordered, and the mean, median, and mode amounts
6 for past restitution orders as of April 10th, 2019.

7 The following day, April 16th, defendant filed a
8 response to the government's amended position, characterizing
9 the government's amended position as an about-face, which is
10 contrary to law and a breach of the parties' plea agreement.
11 Defendant argues the government's original position -- that no
12 restitution could be ordered for Counts 2 and 3 based on the
13 plea agreement -- was submitted after Mentzer was decided and
14 demonstrated that the parties' agreement did not constitute
15 restitution outside the counts of conviction -- the count of
16 conviction. Therefore, defendant stated that no restitution
17 should be awarded in this case.

18 Finally, on May 1st, 2019, an additional victim
19 impact statement was forwarded to the Court by the probation
20 office.

21 With that, I will invite Mr. Lipson, Mr. Bernal,
22 and Ms. Bloch to the podium.

23 Jim, would you please swear in Mr. Bernal.

24 THE DEPUTY CLERK: Yes, Your Honor.

25 (Defendant duly sworn.)

1 THE COURT: Mr. Bernal, prior to this hearing I
2 reviewed the entire file in your case, including the
3 presentence investigation report and the addenda thereto,
4 including the supplemental addendum regarding restitution; the
5 plea agreement between you and the government; the parties'
6 written position with respect to sentencing factors other than
7 restitution; the parties' sentencing memoranda and all the
8 attachments to defendant's sentencing memoranda; the victim
9 impact statements received by the probation office and
10 provided to the Court; the parties' original positions
11 regarding restitution, as well as the government's amended
12 position and defendant's response to that amended position;
13 the probation office's proposed application of the United
14 States Sentencing Guidelines; the guidelines themselves; and
15 the recommendation of the probation office with regard to an
16 appropriate sentence in this case.

17 Beginning with you, Mr. Lipson, have you reviewed
18 the presentence report and the addenda?

19 MR. LIPSON: I have, Your Honor.

20 THE COURT: Have you discussed and reviewed those
21 documents with Mr. Bernal?

22 MR. LIPSON: I have.

23 THE COURT: Are there any errors in those documents
24 that you have not called to the Court's attention?

25 MR. LIPSON: Not that I have not called to the

1 Court's attention, yes, Your Honor.

2 THE COURT: All right. Mr. Bernal, have you
3 reviewed the presentence report and the addenda?

4 THE DEFENDANT: I have.

5 THE COURT: Have you discussed and reviewed those
6 documents with Mr. Lipson?

7 THE DEFENDANT: I have.

8 THE COURT: Do you have any questions or concerns
9 about those documents that have not already been raised?

10 THE DEFENDANT: No.

11 THE COURT: Are you satisfied with the service,
12 advice, and representation provided to you in this case by
13 Mr. Lipson?

14 THE DEFENDANT: I am.

15 THE COURT: Are there any other materials the Court
16 should have received prior to sentencing but did not? From
17 the government?

18 MS. BLOCH: I don't believe so, Your Honor, no.

19 THE COURT: You, Mr. Lipson?

20 MR. LIPSON: No, Your Honor.

21 THE COURT: Does the government now move for the
22 additional one-point reduction under 3E1.1(b) of the
23 guidelines?

24 MS. BLOCH: Yes, the government does.

25 THE COURT: Okay. That motion is granted.

1 Before the Court lays out the guideline calculation
2 here, is there any additional argument beyond what's in the
3 papers which I already read regarding the guideline
4 calculations and the enhancements?

5 MS. BLOCH: No, Your Honor.

6 MR. LIPSON: No, Your Honor.

7 THE COURT: Defense counsel's objections to the
8 probation office's applied enhancements are overruled. The
9 facts indicate that defendant was a regular consumer of child
10 pornography, purchasing hundreds of photos and videos of
11 children engaged in sexual conduct over the Internet and
12 storing that content on his phone and computer.

13 Further, defendant admitted to the FBI that he
14 shared child pornography with other Skype users. Under these
15 facts the enhancements for number of images, distribution, use
16 of computer plainly apply.

17 Additionally, the Court will note for the record
18 that the defendant and the government have stipulated to the
19 application of those enhancements in their plea agreement.

20 With that, the Court hereby adopts the factual
21 findings and the guideline applications in the presentence
22 report and supplemental addendum and makes the following
23 advisory sentencing guideline calculations:

24 Defendant's offense level is governed by Guideline
25 Section 2G2.2. Pursuant to Guideline Section 2G2.2(a)(2),

1 defendant's base offense level is 22.

2 Because the material involved a prepubescent minor,
3 defendant's offense level is increased two levels to 24 under
4 Section 2G2.2(b) (2) .

5 Because the offense involved distribution, the base
6 offense level is increased again by two levels to 26 under
7 2G2.2 (b) (3) (F) .

8 Pursuant to Section 2G2.2(b) (4), defendant's
9 offense level is increased by four levels to 30 because the
10 images contained sadistic or masochistic conduct.

11 As the offense involved the use of a computer,
12 defendant's offense level is increased by two levels to 32
13 under Section 2G2.2(b) (6) .

14 Pursuant 2G2.2(b) (7) (D), defendant's offense level
15 is increased by five levels to an adjusted level of 37 because
16 the offense involved 600 or more images.

17 Defendant's offense level is lowered by three
18 levels to a total of 34 because of his acceptance of
19 responsibility under Sections 3E1.1(a) and (b) of the
20 guidelines.

21 As set forth in the presentence investigation
22 report, defendant's relevant criminal convictions compute to a
23 criminal history score of six. Pursuant to the sentencing
24 table contained in Chapter 5, Part A, a criminal history score
25 of six establishes a criminal history category of three.

1 According to the sentencing table in Chapter 5,
2 Part A, a total offense level of 34 and a criminal history
3 category of three results in a guideline range of 18 [sic] to
4 235 months' incarceration.

5 According to Section 5D1.2(b) (2) and Title 18
6 United States Code Section 3583(k), the guideline range for
7 supervised release is five years to life.

8 According to Section 5E1.2(c) (3), as limited by
9 Title 18 United States Code Section 3571(b), the guideline
10 range for a fine in this case is between 35,000 and \$250,000.

11 With that, I will see everyone at sidebar.

12 (Sidebar conference held.)

13 (Sidebar conference concluded.)

14 THE COURT: Just so it is clear for the probation
15 office and everyone who is here, the correct guideline range
16 for the case is between 188 and 235 months' incarceration.

17 Starting with you, Ms. Bloch, do you have anything
18 that you would like to bring to the Court's attention prior to
19 sentencing that you did not raise at sidebar? Do you have any
20 additional arguments with regard to restitution or any victims
21 present?

22 MS. BLOCH: I do not have any victims present,
23 Your Honor. I do want to talk about restitution a little bit.
24 In particular, in light of the Court's sort of reiteration of
25 what has transpired to date.

1 My re-review of the restitution situation and the
2 applicability of -- rather, whether or not the Court could
3 fashion a sentence that included restitution as to victims who
4 were not victimized as part of Count 2 of the indictment was
5 prompted in part by the Court revisiting that same issue in a
6 case of another attorney in my office.

7 So as the Court may well be aware, we sort of
8 convened as an office and allowed our -- the front office or
9 the United States Attorney to make a decision as to how to
10 move forward from here in light of Mentzer.

11 So I distinguish it in my filing because I do
12 believe that the terms of the plea agreement that was the
13 subject of that case in the Middle District of Pennsylvania
14 are, in my personal opinion, quite different than the terms of
15 our plea agreement in this case.

16 That said, the terms that -- we are now revisiting
17 all the language that we include and looking at it in a
18 different light. The United States Attorney takes the
19 position that the language as drafted in our plea agreement in
20 this case allows for the Court in its discretion to fashion a
21 restitution portion of the sentence as it applies to all
22 victims, even if they are not depicted specifically in the
23 count of conviction.

24 So I recognize the defense sees that as a,
25 quote-unquote, about-face. That's what's behind that change

1 in position.

2 That said, where I disagree with the defense on how
3 things played out here and how they play out in all of these
4 cases and have played out, ordinarily we receive requests for
5 restitution well after the plea has been entered. So the
6 terms of this particular plea agreement and all the other plea
7 agreements that address this very issue, there's no
8 understanding as to how much restitution will be due and owing
9 and how many victims may or may not -- who either have already
10 been identified or who will be identified will submit.
11 Because they submit to us -- they are allowed to submit to us
12 on the eve of sentencing. Frequently they come after
13 sentencing and then it's too late.

14 So at the time that we enter into these plea
15 agreements, neither party knows what the situation is unless
16 it's a very unique case where there might be a particular
17 victim who has articulated that they are not going to seek
18 restitution.

19 THE COURT: Although in the context of child
20 pornography cases, it is not uncommon for the Court to receive
21 and for the probation office to receive these types of victim
22 statements from folks who have been featured in this child
23 pornography many years ago.

24 MS. BLOCH: Absolutely.

25 THE COURT: So it seems like a very common

1 occurrence.

2 MS. BLOCH: It is very common. What is also common
3 is the pace with which we get them and when they tend to
4 arrive. Some of that is driven by when the NCMEC report is
5 completed. Some of that is driven by how responsive the
6 particular victim, their guardians, and/or lawyers respond to
7 us. I mean, the reality is most of the victims now who seek
8 restitution have acquired counsel. They are sometimes fast
9 and they are sometimes slow in realizing there is a case
10 pending in a particular district and provide it.

11 So I only disagree with Mr. Lipson in the sense
12 that there's been somehow some understanding at the time the
13 plea agreement was entered as to how restitution would play
14 out. I would argue to the Court that nobody had an
15 understanding at that point other than the defendant
16 recognized that any one of those victims could request a
17 payment of restitution under the law and it would be for the
18 Court to consider it as reflected in the terms of the plea
19 agreement in this case. So I want to say that.

20 With respect to obviously -- even prior to the
21 filing of the government's amended position we were still
22 acknowledging that the Court could consider in fashioning the
23 actual sentence, separate and apart from the order of
24 restitution, all of the information set forth in each of the
25 individual victim impact statements and/or requests for

1 restitution. Meaning sometimes in those requests the victims
2 are articulating the kinds of harms and losses they have
3 incurred even if they are not to be awarded an actual payment.
4 That there are losses, their emotional harm, their prospects
5 for employment, all of those things are still fair game I
6 think for the Court in fashioning a fair and just sentence to
7 consider. I wouldn't want anything I say here today to not
8 properly advocate on their behalf that the Court consider each
9 one of these many impact statements and the effect of
10 Mr. Bernal's conduct on them, both in the past and going
11 forward.

12 Obviously there's a number that have been submitted
13 in this case, and I won't read them specifically, but I think
14 the Court is well aware of the consequences of the receipt,
15 possession, and distribution of images of children being --
16 you know, their suffering and they have articulated very
17 clearly and repetitively just how harmful it is to their
18 mental and physical well-being and their emotional health
19 going forward to know that individuals such as Mr. Bernal are
20 continuing to view and get pleasure and share obviously the
21 imagery of their suffering essentially.

22 As you indicated, the government's amended position
23 with regard to restitution, I can sort of articulate for the
24 record very simply that what I have alluded to in my amended
25 position, there are six victims: At School, Blue Pillow,

1 Jenny, Marineland, Sweet Sugar, and Tara. Those series, some
2 of those series obviously include more than one victim. So
3 there are essentially six victims who have requested
4 restitution.

5 As it relates to At School, the victim known as
6 Violet, there was one video.

7 In Blue Pillow, there were six still images.

8 In Jenny, one video.

9 Sarah, one of the victims depicted in Marineland,
10 there were ten stills.

11 Pia depicted in Sweet Sugar series, Mr. Bernal had
12 one still.

13 In the Tara series, he had four stills.

14 What the government's position is, which inures to
15 the benefit of the defendant actually, is that based upon all
16 of the information set forth in our pleading, we believe that
17 the Court should fashion, if it elects to do so in its
18 discretion in this case, a restitution requirement as to each
19 of the six that is at the median awarded, which is actually
20 the less severe amount than could be calculated. Although I
21 have listed it here, it is embodied in a specific amount that
22 the government is suggesting that the Court, if it fashions a
23 sentence that includes this, would award.

24 Those numbers obviously range anywhere from \$1,100
25 to as much as 4500 as it relates to Sweet Sugar based upon all

1 of the factors that Paroline dictates that the Court look to
2 in guidance for fashioning restitution portions of the
3 sentence.

4 THE COURT: Okay.

5 MS. BLOCH: If there is anything the Court wants me
6 to speak to that's not been covered either in what I have just
7 shared or in my written filing, I would be happy to address
8 that.

9 THE COURT: No. Is there anything more that you
10 have on sentencing beyond restitution?

11 MS. BLOCH: There is not, Your Honor. I will say
12 to the defendant's credit, obviously in this particular
13 instance the fact that he has been on bond for so long, given
14 the postponements, he has had the opportunity to work and to
15 function in the regular world for an extended period of time,
16 and I will say that to his credit he has used that time very
17 wisely and he has been -- there have been no infractions,
18 there has been no other criminal conduct that we are aware of.
19 He has stayed the course. For that I do think the Court
20 should certainly factor that in in fashioning a sentence.

21 THE COURT: Thank you. Mr. Lipson, any legal
22 reason why sentence cannot be pronounced or anything that you
23 would like to offer on your client's behalf, including any
24 additional argument regarding restitution?

25 MR. LIPSON: Yes, Your Honor. I would like to

1 start with restitution. I would like to deal with that,
2 compartmentalize it, then put it to the back burner, then
3 focus on Mr. Bernal because I do think that the issues that we
4 are discussing today, although restitution to the victims of
5 this offense is important, I do believe that the gravamen of
6 what we are seeking to accomplish here today is about what
7 should happen with Mr. Bernal over the course of the years to
8 come.

9 With respect to restitution, as an advocate for
10 Mr. Bernal, I have the luxury to focus on his legal and
11 pecuniary interests. I do want to say that Mr. Bernal at the
12 outset acknowledges the harm that he caused with this offense.
13 He took responsibility for this offense when law enforcement
14 came to his home. He admitted the extent of his involvement
15 to this Court, he pled guilty to Count 1 of the indictment of
16 distribution of child pornography and accepts responsibility
17 for his actions.

18 And being a victim of child -- of sexual abuse as a
19 minor, as he did, he understands the abuse that those that
20 were in positions of trust cause on those victims and the
21 effect that his actions had in perpetuating that harm into the
22 future.

23 That said, the parties' agreement contemplated
24 dismissal of two counts, the receipt and the possession counts
25 in this case. The restitution claims that are made today are

1 based on individuals that were harmed as a result of conduct
2 on Counts 2 and 3 of the indictment. The parties agreed that
3 no restitution would apply here.

4 THE COURT: That is not what the agreement says.

5 MR. LIPSON: Your Honor, at the very most,
6 Your Honor, the plea agreement is silent on that issue and the
7 government acknowledges that both in its papers and here
8 today.

9 As the government explained --

10 THE COURT: Let's clarify it. The plea agreement
11 is not silent as to restitution. The plea agreement is silent
12 as to which count the restitution should apply.

13 MR. LIPSON: That is correct, Your Honor. And
14 Mr. Bernal concedes that. However, as the Court is well
15 aware, the Supreme Court's decision in Paroline and Hughey
16 establish that restitution can only be ordered for victims of
17 the count of conviction. The restitution statute permits
18 parties to contract effectively that other victims of
19 different conduct that is not in the offense of conviction can
20 be entitled to restitution. That's under 18 United States
21 Code Section 3663A(a) (3) .

22 That section in particular says: The Court shall
23 also order, if agreed to by the parties in a plea agreement,
24 restitution to persons other than the victims of the offense.

25 The government has conceded as one of the parties

1 to this agreement that there was no meeting of the minds that
2 victims for the dismissed conduct were entitled to
3 restitution. They say that the plea agreement is silent on
4 that issue. That the Court is well aware that Mr. Bernal
5 cites to numerous cases that say: Any ambiguity in an
6 agreement or a plea agreement between the government and a
7 must be construed in favor of the defendant in light of the
8 disparity of bargaining power between those two parties.

9 THE COURT: This is a special plea agreement,
10 though. This is not a plea agreement where the individual is
11 pleading guilty to one count and the agreement itself does not
12 contemplate me considering the other counts to which he did
13 not plead guilty.

14 In this particular agreement Mr. Bernal agreed that
15 I could take into account Counts 2 and 3 for the purposes of
16 fashioning a sentence. One of the things I do in fashioning a
17 sentence is decide on the issue of restitution.

18 MR. LIPSON: Yes, Your Honor. And I do want to
19 address the nature of what was in the plea agreement between
20 Mr. Bernal and the government, what was in the plea agreement
21 between the parties in United States versus Mentzer, and what
22 is in this district the way in which this US Attorney's office
23 deals with specific plea agreements that contemplate conduct
24 outside the offense of conviction for purposes of restitution.

25 THE COURT: I only get to that point if I decide

1 there is an ambiguity in the agreement, and I don't believe
2 the agreement is ambiguous. I can consider Counts 2 and 3 in
3 fashioning a sentence.

4 MR. LIPSON: But, Your Honor, I believe that it is
5 instructive to the Court's analysis of ambiguity the parties
6 own statements about that agreement. The government in its
7 19-page renewed position on restitution states that it was
8 silent on that issue. The government after entering the plea
9 agreement, after Mentzer comes out, and well after the passage
10 of Section 3663A(a) (3), stated that no restitution was due and
11 owing in a filing to this Court, thus reflecting its own view
12 of what the parties agreed to in the plea agreement.

13 And a party adverse to the defendant is repeatedly
14 indicating to the Court that there is no explicit agreement
15 that restitution should apply to the dismissed counts. And
16 learning that Court took a contrary position in another case,
17 I believe it's the Goehring case, that occurred the Friday
18 before the Monday filing the government made, Your Honor, I
19 think that the government's position is wholly inconsistent
20 with what had transpired in this case prior to that.

21 Your Honor, I think that there are also some
22 practical difficulties with how this played out. The way the
23 sausage is made typically is that there are restitution claims
24 made. They're submitted to the probation office. They are
25 then forwarded onto the Court, the US Attorney's office, and

1 to my office so that the defense attorney can then reach out
2 to plaintiff's counsel who submitted that claim to discuss
3 what their position is and what Mr. -- and our office's
4 client's positions are.

5 When the government takes a position that
6 restitution is not due and owing to those claimants because
7 they are claiming on dismissed counts, defense counsel will
8 rely on that and not engage in those negotiations when the
9 government, who is a party to the agreement, is already taking
10 that position with the Court.

11 I understand the government has offered a revised
12 calculation, which took the median amount of each of these,
13 which they claim now is the lower amount, but I can assure
14 you, Your Honor, that in my experience when negotiating with
15 these plaintiff counsel that represent these victims, the
16 resolution is either reduced to zero or far lower than what's
17 presented by the government today. I think that by the
18 process in this case, I think there is --

19 THE COURT: So are you suggesting you did not have
20 an opportunity to engage in that process?

21 MR. LIPSON: Your Honor, I am.

22 THE COURT: If I were to indicate that it was the
23 Court's inclination to grant restitution in this case, are you
24 suggesting that you are not prepared to go forward today?

25 MR. LIPSON: Your Honor, I think -- I would suggest

1 that we deal with the sentencing of Mr. Bernal today. I know
2 that through all the continuations of this that has wreaked
3 havoc I think -- it has wreaked havoc on my client's mental
4 stability and well-being. I think he is prepared to go
5 forward, accept the Court's judgment with respect to the
6 incarceration piece today. But if the Court's position is
7 that it is going to order restitution, Your Honor, I would ask
8 that that amount be determined at a later date which I believe
9 can be extended either 60 or maybe up to 90 days after
10 sentencing hearing. I would ask that that be done to give me
11 additional opportunity.

12 I will say that the bargaining power is a bit
13 different in this context than it would be prior to
14 sentencing. However, if that is the -- if the Court does
15 intend to rule that way, then I will do my best to represent
16 my client in that process.

17 Your Honor, I do want to state that I don't believe
18 Mentzer applies to this case. I believe Mentzer had an
19 explicit agreement under 3663A(a)(3) that said that where the
20 parties referred directly to relevant conduct, that that can
21 be considered specifically for restitution. That is not the
22 situation that we have here.

23 In light of the government's previous position,
24 which reflect what the meetings -- the meeting of the minds
25 were for this plea agreement, that there was no agreement that

1 the Court could consider relevant conduct for purposes of
2 restitution.

3 At the very -- the government concedes there was
4 silence on that issue. That is not what 3363A(a) (3)
5 contemplates, an implied agreement on restitution with the
6 Supreme Court's decisions in Paroline and Hughey, 3663A(a) (3)
7 contemplates an explicit agreement that was bargained for at
8 arms' length by each party and contemplated by the parties
9 when they entered into that agreement.

10 That isn't what we have here, Your Honor, and I
11 believe that -- I believe the government's change of position
12 should not be countenance.

13 THE COURT: I will hear whatever additional
14 argument you have with respect to sentencing.

15 MR. LIPSON: All right. Thank you, Your Honor.
16 Mr. Bernal has no prior record of child sexual abuse. He is a
17 man who has worked consistently since he obtained his GED in
18 2009. He is a recovering alcoholic. He is a victim of sexual
19 abuse at the hands of his own mother.

20 Over the last 32 months Mr. Bernal has had an
21 exemplary record. Certainly exemplary compared to his conduct
22 immediately prior to that. He has had no violations on his
23 bond conditions, he has no violations under the Remnant House
24 rules, a home that is run by Pastor David Sutton who is here
25 in the court today to show his support for Mr. Bernal, who has

1 resided at his home for over two and a half years.

2 He has had no transgressions related to child
3 pornography. He has not even had an unauthorized access of
4 the Internet during this time, Your Honor. He in that sense
5 has had complete control of his impulses in this area.

6 I think that's very important, Your Honor, because
7 in these kinds of cases I think the elephant in the room is
8 this is an individual that can control these impulses because
9 it relates to sexual desire and attraction, and what he has
10 demonstrated is that out on electronic monitoring, Your Honor,
11 and under close supervision by the probation office and by the
12 folks at Remnant House, he has been able to exist within that
13 highly structured environment and has been able to live a
14 law-abiding, hard working life.

15 At the Remnant House he found that structure and
16 community that would allow him to confront his alcoholism and
17 his childhood trauma and he is living the very best life that
18 he has lived in his life to this point.

19 Your Honor, as I spent much of my sentencing memo
20 discussing, the advisory guidelines prescribe an advisory
21 guideline range of 188 to 235 months. This is despite
22 Mr. Bernal having no prior previous similar offenses and the
23 fact that his offense falls within the mine-run of child porn
24 distribution offenses.

25 For the reasons that follow, the Court should

1 reduce Mr. Bernal's offense score from 34 down to 27. The
2 Court should sentence him to the bottom of the new range that
3 is created by that new offense score, which is 87 to 108
4 months, for a total sentence of 87 months, and a prolonged
5 term of supervised release.

6 Such a sentence would be sufficient but not greater
7 than necessary to give effective punishment in this particular
8 case. It will acknowledge the seriousness of his offense with
9 a seven and a quarter year sentence, it will reflect his
10 relative culpability as compared to other distributors of
11 child pornography, and will permit Mr. Bernal to return home
12 and to remain on this path of rehabilitation and to continue
13 to contribute to society.

14 Your Honor, as I discussed in my -- in the
15 sentencing memo, sentencing memorandum, Section 2G2.2 of the
16 United States Sentencing Guidelines should be afforded less
17 deference by this Court. Congress is not, although they have
18 the power, is not intended to meddle in the guidelines
19 associated with a particular type of offense. This is an
20 offense that evokes emotion. But the decisions by this
21 circuit in Grove and the Second Circuit in Dorvee talk about
22 how courts have to be remove themselves from the emotion of
23 these cases, and that's something that Congress was not able
24 to do. For that reason, since 1987 this guideline has been
25 amended nine times by congressional mandate, which has served

1 to exponentially increase penalties under the sentencing
2 guidelines for defendants accused and convicted of these
3 offenses.

4 In that sense, what Congress has done is
5 marginalize the role of the Sentencing Commission and made
6 this guideline one that is not the product of empirical data
7 and national experience.

8 Courts around the country have determined that
9 because of that meddling, it should be afforded less
10 deference, both around the country and within this courthouse.

11 As the Third Circuit explains in *United States*
12 *versus Arrelucea-Zamudio*, an advisory guideline represents a
13 rough approximation of sentences that might achieve
14 Section 3553(a)'s objective only when it is the product of
15 empirical data and national experience guided by a
16 professional staff with appropriate experience. That is at
17 581 F.3d 142, Page 155, Note 12. It is a Third Circuit 2009
18 opinion.

19 It is with that backdrop that the Court should
20 determine the appropriate offense score to both reflect the
21 seriousness of Mr. Bernal's offense and his relative
22 culpability to other defendants in these cases.

23 As the Court noted at the outset of this hearing, I
24 argue that there is impermissible double counting with how the
25 guidelines are calculated in this case. First --

1 THE COURT: I am familiar with your arguments on
2 this point. If you want to go beyond them, that's fine, but
3 to the extent that you were just talking about what you have
4 already written, I feel pretty good about it.

5 MR. LIPSON: Understood, Your Honor. I would just
6 note that this is an Internet crime. The ability -- over
7 95 percent of people who are convicted of this use a computer.
8 That applies in all of these cases. Because a computer is the
9 basis of using this, the ability to get from zero to 90 videos
10 is very easy, Your Honor. The packages, zip files, the manner
11 in which these files can be purchased online just will bring
12 you to the top of the guidelines in a matter of clicks. In
13 that sense, Your Honor, I think that these guidelines create
14 an incongruency with the realities of how these offenses are
15 committed.

16 Your Honor, I do want to make a note, though, about
17 the double counting as it relates to the distribution here. I
18 think that with an increased base offense level that is
19 specifically tailored for distribution, Your Honor, I think
20 that the two-point enhancement for distribution is being
21 double counted based on that four additional points that come
22 in the base offense level. To the extent that it's, well,
23 that could really be counted for receipt and not distribution
24 because that also starts at a 22, the guidelines account for
25 that, Your Honor, by doing a two-point reduction for

1 individuals who just had receipt with no distribution
2 behavior.

3 So the guidelines as currently situated acknowledge
4 that at least two of those four points are already applied to
5 a base offense level because of distributive behavior. So an
6 additional two points, Your Honor, I think is about as plain
7 double counting as we can see.

8 Your Honor, I do think that the number of courts
9 that have found that the guidelines in this case that place
10 people at or near the statutory maximum is problematic at the
11 very least. In light of the history of this guideline, it
12 only becomes more troublesome. What courts have to sift
13 through because of how difficult this guideline operates is
14 how do they apply Section 3553(a) to acknowledge what
15 actual -- the seriousness, nature and seriousness of the
16 offense when the guidelines obscure that. That makes your job
17 far more difficult, Judge, because it is difficult to place
18 this on the spectrum of seriousness.

19 And, Your Honor, I do believe that because there
20 was no -- Mr. Bernal did not individually harm the victims in
21 these photos, he was not directing harming them and causing
22 these videos to occur, that a sentence that approaches the
23 statutory maximum -- I want to be clear, Your Honor, there is
24 harm associated with Mr. Bernal's behavior. I don't mean to
25 make light of that. But the practical reality is that

1 individuals that are charged in the state for committing --
2 for creating these videos and for actually sexually abusing
3 these children are far -- are lower than the guidelines that
4 are prescribed by the Sentencing Commission, Congress' mandate
5 for distributing these videos.

6 As you will hear from Mr. Bernal, he understands
7 the harm that is caused by his actions. I don't mean to
8 minimize that. All I am trying to do is work today with the
9 Court to fashion a sentence that is sufficient but not greater
10 than necessary.

11 Your Honor, tabling the discussion of the
12 guidelines, which is really set forth in my papers and I
13 suppose I have been a bit redundant explaining that again to
14 the Court, what Mr. Bernal has done since his arrest in this
15 case I think has been out of the ordinary. Someone does not
16 deserve accolades for merely following the law. That is not
17 my point. My point is that the nature of this offense
18 contemplates a defendant, an individual, a young man that is
19 not capable of controlling their urges, that is a danger to
20 the community, that could potentially be a predator to one of
21 the most vulnerable classes of citizens in our country and
22 that is minors.

23 Your Honor, for 32 months Mr. Bernal -- and it is
24 sad that it took this, but it took being arrested in this
25 case, it took being discovered for these crimes and his

1 admission to these crimes for him to really get that wake-up
2 call. It is too late for Mr. Bernal to escape punishment, of
3 course, Your Honor. But despite that punishment hanging over
4 him, despite knowing that he was facing at least five years
5 incarceration for his penalties after I explained to him the
6 realities of charging decisions by the US Attorney's office
7 and what Congress has mandated that you sentence him to, he
8 didn't give up. He doubled down and said, I have to confront
9 what's been happening in my life since I was ten years old.

10 At the Remnant House with Pastor Sutton, he found a
11 community of men that have either been charged or convicted
12 with these kinds of offenses, many of whom have also suffered
13 some sort of abuse as a child or even into adulthood. In that
14 sense, there was a community for the first time that
15 Mr. Bernal felt comfortable opening up to. It was a community
16 for the first time where he was surrounded by other men that
17 understood his position.

18 I would like to thank Pastor Sutton for providing
19 such an environment for Mr. Bernal and other clients that I
20 have and the work that he does there. But in particular, the
21 process there to get people to buy-in to this community and
22 buy-in to living a different sort of lifestyle has worked
23 wonders for Mr. Bernal. The foundation for that is through
24 spirituality, Your Honor, but you can lead a horse to water,
25 someone's got to walk through that door. Mr. Bernal did and

1 how.

2 He has maintained consistent employment during that
3 time, aside from the first six-month period where he had
4 trouble finding a job. As the Court is aware, there are three
5 letters from managers that have worked with Mr. Bernal that
6 really do speak wonders about the type of employee he is and
7 can kind of I believe give the Court an imagery of the type
8 of -- the way he came to work every day, ready to work, ready
9 to do whatever is necessary, respectful to his fellow
10 employees, men and women alike, and willing to do what it
11 takes to get the job done.

12 I think that that renewed sense of self,
13 Your Honor, that has been afforded to him through this process
14 should show the Court that this is someone that is amenable to
15 supervision, that is amenable to treatment, that is amenable
16 to rehabilitation, Your Honor. So I think concerns about
17 incapacitation that sometimes pervade these kinds of cases
18 should be reduced in this particular case.

19 Your Honor, I do want to draw the Court's attention
20 to the letter submitted at Exhibit C. This is by Jennifer
21 Yoha. What I didn't quote in my sentencing memo,
22 Your Honor -- and I know the Court, as it always does, read
23 the letter fully. But this is a mother of a four-year-old and
24 a woman that was pregnant with a second child when she wrote
25 this letter for Mr. Bernal. She writes that she would never

1 as a mother be comfortable advocating for someone that could
2 have done this offense, but knowing Mr. Bernal and seeing the
3 way he is and seeing the way he's making positive changes in
4 his life day to day, taking each day one by one, she felt
5 compelled to write this.

6 I thought that was very powerful because as an
7 advocate in this process, I try to see the positive in all of
8 my clients, Your Honor. But as a mother and an employee that
9 saw him day in and day out, to write this letter and to write
10 the letter in the way that she did, I think it is telling
11 about the way he has been living his life for the last two and
12 a half years.

13 For that, Your Honor, I do believe a variance is
14 warranted. Not because he deserves credit for merely
15 following the rules, but in this kind of case and for this
16 particular defendant, this establishes that incapacitation is
17 not as big a concern for the Court and, therefore, the
18 guidelines, which take into account incapacitation, certainly
19 with this guideline should be -- that concern should be
20 reduced.

21 Your Honor, I think that, turning to the special
22 assessment, Your Honor, in this case, Mr. Bernal does work
23 hard. He is living paycheck to paycheck effectively. He pays
24 for both his room, board, and treatment at the Remnant House,
25 which I think is something that should also be acknowledged by

1 the Court. This is something he paid for out of pocket. That
2 is something -- he is indigent, he is presently indigent.

3 I think that when he emancipates out of the Bureau
4 of Prisons, he will continue to get the same kind of
5 employment, this cooking/chef work in restaurants. It is not
6 a lucrative profession. It sustains you I suppose,
7 Your Honor, if you have few expenses, but after this I imagine
8 he will have expenses at least through his supervision.
9 Your Honor, in that sense I do believe the indigency finding
10 has been met in this case and that that \$5,000 special
11 assessment should not be levied.

12 Your Honor, the guidelines in this case are
13 extraordinarily high. Who stands before you today is not the
14 individual that committed this offense and it's an individual
15 that has taken serious strides in his life.

16 I do believe that a variance, despite the technical
17 applicability of those enhancements, should be made by the
18 Court to the tune of seven points. That takes him to a range
19 of 87 to 108 months. I ask that Your Honor sentence him to
20 the low end of that guideline range for an 87-month sentence.

21 THE COURT: Do you have any recommendations that
22 you wish for the Court to make?

23 MR. LIPSON: Your Honor, I believe that a facility
24 that will address not only -- I imagine that the Court would
25 already make -- the BOP will look for a facility that has sex

1 offender treatment, but perhaps one, Your Honor, that is a
2 facility that offers vocational training so Mr. Bernal can
3 look into other forms of employment if he's interested or a
4 place where he could perhaps work in the kitchen as a chef and
5 cook for himself and fellow inmates.

6 As detailed in the sentencing memo, Mr. Bernal
7 still has an estranged relationship with much of his family,
8 including his mother, although he does speak with his father
9 occasionally, so I think the location of his incarceration is
10 less important in this case.

11 THE COURT: Mr. Bernal, is there anything that you
12 would like to say on your own behalf prior to sentence?

13 THE DEFENDANT: Yes. I would first like to
14 acknowledge I know what I did was wrong and it has affected
15 many people. I am truly sorry to all that have been harmed by
16 my actions. I am sorry to the victims that I perpetuated this
17 crimes against them. I am sorry to the Court that it has to
18 spend time and money to apprehend me.

19 I have had three years to reflect, and this time I
20 know that I'm not the person I was. I spent years of alcohol
21 and drug abuse and low moral character. I caused a lot of
22 pain through the years to my family, friends, and to myself.
23 I burned bridges that can never be repaired. I see now that
24 all I did in those years was to hide from pain and emotion I
25 didn't know how to deal with.

1 As a child, I dealt with emotional and physical
2 abuse, and in my young teens sexual abuse at the hands of my
3 mother. I know the pain of abuse from my mother is similar to
4 the pain inflicted in the children in the photos I possessed.

5 I began huffing at the age of 11 to numb myself.
6 It seemed to be the only time I was right was when I felt
7 nothing at all. For years I found ways to escape through
8 drugs and sexuality, anything that would keep me numb.

9 These three years have been the longest time I have
10 spent sober and have opened my eyes to a new way of living
11 through the help and guidance of the Remnant Ministries. I
12 have learned to cope with my emotions in a more practical
13 manner, not holding in anger and exploding, not hiding from
14 sadness and blocking it, but letting things be to God.

15 The Remnant House gave me a structure and family,
16 things I never had growing up. I had real people to teach me
17 how to deal with my issues in a nondestructive manner, people
18 who I felt genuinely cared for me, people I didn't want to let
19 down.

20 Through our early morning devotions reading the
21 Bible I learned to battle selfishness, battle unforgiveness,
22 be more patient, and really care for others.

23 I know I can't undo the things I have done and the
24 harm I have caused through my offense. I know time will
25 change me and I will be sure to change for the better as I

1 have these three years.

2 THE COURT: Thank you.

3 Ms. Bloch, I will give you an opportunity because
4 there was a lot said, is there anything that Mr. Lipson said
5 that you would like to address?

6 MS. BLOCH: Actually, Your Honor, really the only
7 things I want to make sure the record is clear on is --
8 because this is sort of a novel restitution issue that we are
9 dealing with. One, the law allows for bifurcation if the
10 Court believes that is warranted here.

11 I will say, however, that the Court did grant an
12 extension of time for Mr. Lipson to handle the restitution
13 matter, and I would argue that he had plenty of time to confer
14 with defense counsel -- rather, excuse me, counsel for victims
15 who have submitted requests for restitution in an effort to
16 negotiate a resolution if that's what he wished to do.

17 Three, I just want to make sure it is clear to the
18 Court today and going forward that the way Mr. Lipson on the
19 record was incorrect about how victim impact statements are
20 acquired and shared. There is an electronic process that
21 ensures the anonymity of all of these child victims.

22 So the process actually is that the victim
23 coordinator in my office communicates with a special office
24 designated for this purpose at the Department of Justice. So
25 once the National Center for Missing and Exploited Children

1 have prepared a report and indicated whether there are any
2 identified victims, there is then communication between my
3 office and the Department of Justice to acquire sufficient
4 information about those individuals, not their real names, but
5 sufficient information to allow for notification to those
6 victims and/or the representatives or lawyers so that they can
7 submit for restitution.

8 All of that is a fluid process as I indicated.
9 This happens over time. It is very hard for the government to
10 ever say that there is -- that restitution requests are
11 completed because in many of these cases there are thousands
12 of images involving so many children, many of whom are never
13 identified, but many of whom are.

14 So the actual -- particularly when the victim is
15 represented by counsel, those are submitted almost always to
16 the United States Attorney's office, specifically me if they
17 realize it's my case, for example, electronically. These
18 lawyers' offices send the package, it generally includes all
19 of the various exhibits that support their claim and the
20 amount of their claim.

21 Then the victim coordinator in my office then
22 shares those requests with the probation office with the
23 understanding that they will in turn share it with the Court
24 and with defense counsel. So that's the process we use every
25 time.

1 I want it to be clear on the record that I
2 thoroughly disagree with Mr. Lipson's representation that
3 there was some meeting of the minds and that the plea
4 agreement is silent because there was some joint understanding
5 at the time the plea was entered and at the time the language
6 of that plea agreement was drafted regarding restitution in
7 this detail.

8 That's why the terms of the plea agreement are so
9 open-ended in that at the time we have -- like I said, at the
10 time we enter pleas in these cases, we have no way of knowing
11 whether there is going to be continuing requests for
12 restitution either by the victims that are depicted in the
13 count of conviction and/or the counts for which the defendant
14 agrees to accept responsibility.

15 So throughout this plea agreement there's no
16 question that Mr. Bernal has acknowledged his responsibility
17 for the conduct in the counts that are to be dismissed and
18 understands that the Court will fashion a sentence that
19 factors in that conduct the relevant conduct for purposes of
20 the guidelines.

21 It is abundantly clear right from the get-go the
22 number of images applies beyond the one that is distributed.
23 There is no indication that the defendant didn't understand
24 that the ultimate sentence imposed would reflect the conduct
25 in those other charges. Because the restitution language is

1 open, the government is now taking the position that the Court
2 can in its discretion order restitution as to the victims
3 associated with Counts 2 and 3.

4 THE COURT: Thank you.

5 MR. LIPSON: Your Honor, if I may. I understand in
6 the course of the discussion I had mentioned that the
7 US Attorney's office when it does come to an explicit
8 agreement about restitution in another case has a different
9 process for agreeing to it. I do want to put it on the record
10 and would ask that this exhibit be submitted to the record
11 under seal in light of the fact -- I did redact key
12 identifying features of this agreement, but it is -- it does
13 show the type of paragraph that this US Attorney's office uses
14 when contemplating an explicit agreement about restitution and
15 taking responsibility for dismissed counts. I do believe that
16 is instructive to determining the extent of really is there
17 ambiguity here or was there in fact a meeting of the minds.

18 THE COURT: Do you want to pass it up.

19 MS. BLOCH: Is that a child exploitation case?

20 MR. LIPSON: It is not.

21 THE COURT: Have you seen this?

22 MS. BLOCH: No.

23 THE COURT: Perhaps you should before.

24 MR. LIPSON: I direct the Court's attention to
25 Paragraph C5 on Page 4 of the plea agreement.

1 THE COURT: This is to the point that Ms. Bloch was
2 alluding to, this is obviously a different situation insofar
3 as the victims in these cases are not known prior to the
4 drafting of the plea agreement.

5 MR. LIPSON: Your Honor, I would argue that as
6 fluid as the situation might have been, in light of the
7 government's vast experience in this area, restitution claims
8 are made in these cases quite frequently. The decision to
9 draft the plea agreement in the way it was was not on the
10 likelihood or lack thereof that a restitution claim would have
11 been made. The government's position after -- the position on
12 restitution was made after claims had already been made in
13 this case. That only -- that --

14 THE COURT: Some, not all.

15 MR. LIPSON: Some, that's true, some but not all.
16 But as soon as there's one and it takes that position,
17 Your Honor, it reflects what the government's intent was when
18 it entered into this agreement.

19 So to the extent that the Court finds an ambiguity,
20 I think that's cleared up by the government's own words.
21 Restitution is not due and owing to the victims in Counts 2
22 and 3 of this indictment. That's what they said explicitly in
23 Docket No. 100. That is also reflected in the government's
24 statement in its restitution -- its renewed position on
25 restitution, its most recent filing, where it said that the

1 plea agreement is silent on this issue.

2 Your Honor, there was no explicit agreement about
3 restitution on dismissed counts. To that extent, 3663A(a)(3)
4 does not apply and the rules in Paroline and Hughey should
5 control, and as is shown in the plea agreement that I just
6 submitted and which I would like to mark as defense Exhibit A
7 and would like to move for its admission under seal in light
8 of the fact that it is a plea agreement in another case in
9 this district, what that plea agreement shows is that when
10 this US Attorney's office is making an explicit agreement
11 pursuant to 3663A(a)(3) for restitution in a dismissed count,
12 that they explicitly state it. Here that's not what was done
13 because that was not the agreement, there was no meeting of
14 the minds, and for that -- in that sense, Your Honor, I
15 believe no restitution is owing.

16 But I didn't want to end this part of the hearing
17 like this. Mr. Bernal does take responsibility for his
18 offense. I as his advocate can be dispassionate about the
19 effect that his harm caused to the victims of these -- in
20 these videos who are represented by their own counsel. My job
21 is just to represent my client's legal and pecuniary
22 interests. So I feel compelled to argue these more as a --
23 what's the word? -- more legal and litigious side of this
24 hearing.

25 THE COURT: Is there something -- you look like you

1 want to say something.

2 MS. BLOCH: I want to make it clear too on the
3 record that from a time standpoint, the government's initial
4 position as requested by the Court was filed well after the
5 plea agreement was drafted, well after the plea was actually
6 entered. So to the extent that it reflects back on the
7 specific terms of the plea agreement I would disagree.

8 I was searching for it, and I know I saw it today
9 and now I can't find it, but my recollection was that the
10 Court -- the government was relying in preparing and filing
11 that response strictly on Paroline, and maybe in light of the
12 terms of the plea agreement that was -- we have now come to
13 sort of an enlightened understanding that it was not -- that
14 the Court could order restitution in light of the terms of the
15 plea agreement even though Paroline didn't speak to that
16 piece. That Paroline was only speaking to proximate harm and
17 not the terms of an agreement that deals with harm as it's
18 done in -- perpetrated in conduct that is not the count of
19 conviction.

20 So I think the plea agreement runs a little -- is
21 not completely reflective of the Paroline decision. But
22 that's where the government's mindset was in filing the
23 initial position. None of which was discussed beyond the
24 terms of the plea agreement prior to the defendant's entry of
25 that plea agreement.

1 I do think that the government has taken a very
2 reasonable approach at this point in filing an amended
3 position that does merely articulate that the Court, in light
4 of the sort of open-ended terms of the plea agreement, has
5 discretion in awarding restitution to the victims in the
6 relevant conduct.

7 THE COURT: Thank you. Pursuant to the Sentencing
8 Reform Act of 1984, it is the judgment of the Court that the
9 defendant, Robert Bernal, Jr., is hereby committed to the
10 custody of the Bureau of Prisons to be imprisoned for a term
11 of 132 months with credit for time served on any federal
12 detainer.

13 The Court will recommend to the Bureau of Prisons
14 that defendant participate in any and all available mental
15 health and sexual offender treatment programs while
16 incarcerated, and also that he be permitted to participate in
17 any vocational training and institutional work assignments
18 available.

19 As to restitution, the Court finds that the
20 mandatory restitution to victims under 18 United States Code
21 Section 2259 is not applicable because the statute applies
22 only to victims of the offense of conviction and no
23 restitution requests have been received as to the victims as
24 to Count 1.

25 In the wake of the Mentzer decision, however, it is

1 clear that restitution may be awarded to victims beyond those
2 impacted by the offense of conviction. That is, restitution
3 for victims beyond the count of conviction is authorized by
4 law when authorized by the plea agreement.

5 Here the plea agreement, which is the complete
6 agreement between the parties, is not ambiguous and requires
7 defendant to pay restitution under the Victim Witness
8 Protection Act, 18 United States Code Sections 3663, 3663A,
9 and 3664 to the victims and/or other persons or parties as
10 authorized by law in such amounts and such times and in
11 according to such terms as the Court shall direct.

12 The plea agreement also provides that the Court
13 shall determine the victims and/or other persons or parties
14 who will receive restitution authorized by law.

15 Defendant accepted responsibility for the conduct
16 charged in Counts 2 and 3 and stipulated that it may be
17 considered by the Court in imposing sentence.

18 Based on this language, which again the Court views
19 to be unambiguous, the Court concludes that despite the
20 government's original position, that it has the power to award
21 restitution to the victims of defendant's conduct charged in
22 Counts 2 and 3. Defendant affirmatively accepted
23 responsibility for the harm caused to those persons and the
24 Court finds that they are victims under Section 3663.

25 Therefore, pursuant to 18 United States Code

1 Section 3663(a) (1) and (3), the Court will order restitution
2 for victims of the offenses at Counts 2 and 3.

3 As to the amount of restitution that the Court will
4 award, notwithstanding the fact that Ms. Bloch is correct,
5 Mr. Lipson, that we did afford you an opportunity to engage in
6 whatever negotiations you believed to be necessary in this
7 case, will postpone and bifurcate a decision as to the amount
8 of restitution and give you an opportunity to engage in
9 whatever negotiations need to be engaged in for that point.

10 The Court finds that defendant does not have the
11 ability to pay interest on restitution. So, just so you know,
12 with respect to that issue in light of the restitution that
13 the government is seeking at this juncture, the Court will not
14 assess interest on that. The Court also finds that defendant
15 is not able to pay a fine. Therefore, no interest on
16 restitution will be ordered in this case once restitution is
17 established and no fine will be imposed.

18 For that same reason, the Court will not order the
19 \$5,000 special assessment be paid in this case in accordance
20 with the provisions of the Justice for Victims of Trafficking
21 Act of 2015. That assessment is not payable -- or the Court
22 has the discretion not to allow it to be payable in cases
23 where a defendant is indigent.

24 Defendant, however, shall pay to the United States
25 the additional \$100 special assessment. That shall be paid in

1 connection with his plea of guilty here.

2 MR. LIPSON: Your Honor, may I have a moment to
3 confer with my client? I want to discuss with him whether or
4 not we want to bifurcate or if he would like an order from the
5 Court today.

6 THE COURT: All right.

7 (Defendant and his counsel confer off the record.)

8 MR. LIPSON: Your Honor, may I ask a question of
9 the Court, and this is somewhat unconventional. Is the Court
10 inclined to accept the government's suggested amount of
11 restitution as it is stated in its paper, in its most recent
12 papers, or is the Court thinking about coming up with its own
13 calculation?

14 THE COURT: The Court will fashion its own
15 calculation.

16 MR. LIPSON: Okay. Your Honor, I think for that
17 reason we would like to continue bifurcation to see if an
18 agreement can be reached between myself and some of the -- and
19 counsel to the victim claimants in this case.

20 THE COURT: Okay. Additionally, as outlined in the
21 plea agreement, defendant shall forfeit to the United States
22 all property subject to forfeiture, including one HTC cell
23 phone, Serial No. H as in hotel, T as in tango, 3, B as in
24 bravo, L, S as in Sierra, 701303.

25 One HP laptop, Serial No. C as in Charlie, N as in

1 November, F as in foxtrot, 9432, R as in Romeo, 50.

2 And one HTC cell phone, Serial No. F as in foxtrot,
3 A as in alpha, 58, W as in whiskey, B as in bravo, A as in
4 alpha, 04186.

5 Upon his release from imprisonment defendant shall
6 be placed on a term of supervised release of ten years.

7 Within 72 hours of release from the custody of the
8 Bureau of Prisons defendant shall report in person to the
9 probation office in the district to which defendant is
10 released.

11 While on supervised release pursuant to this
12 judgment defendant shall not commit another federal, state, or
13 local crime; he shall comply with the standard conditions of
14 supervision recommended by the Sentencing Commission and
15 adopted by this Court; and shall comply with the following
16 additional conditions.

17 Now, I will note for the record that there will be
18 conditions that I read off here that do have to do with
19 restitution in the matter given the fact that I did already
20 order that restitution would take place with respect to
21 victims of Counts 2 and 3.

22 Defendant shall not illegally possess a controlled
23 substance.

24 Defendant shall not possess a firearm, ammunition,
25 destructive device, or any other dangerous weapon.

1 Defendant shall report any changes of address
2 within 30 days to the United States Attorney's office while
3 any portion of restitution remains outstanding.

4 Defendant is prohibited from incurring new credit
5 charges or opening additional lines of credit without prior
6 written approval of the probation office.

7 Defendant shall pay restitution that is imposed by
8 this judgment that remains unpaid at the commencement of the
9 term of supervised release at a rate of not less than
10 10 percent of his gross monthly earnings. The first payment
11 shall be due within 30 days from defendant's release from the
12 custody of the Bureau of Prisons.

13 Defendant shall provide the probation office any
14 access they request with respect to financial information.

15 Defendant shall submit his person, property, house,
16 residence, vehicle, papers, business, or place of employment
17 to a search conducted by the United States Probation and
18 Pretrial Services office at a reasonable time and in a
19 reasonable manner based upon reasonable suspicion of
20 contraband or evidence of a violation of a condition of
21 supervision. Failure to submit to such a search may be
22 grounds for revocation. Defendant shall inform any other
23 residents that the premises may be subject to searches
24 pursuant to this condition.

25 Defendant is permitted to possess or use a computer

1 and is allowed access to the Internet. However, defendant is
2 not permitted to use a computer or other electronic
3 communication or data storage devices, including a cell phone,
4 to access child pornography or to communicate with any
5 individual or group for the purpose of promoting sexual
6 relations with children. Defendant shall consent to the
7 installation of any hardware or software to monitor any
8 computer or other electronic communication or data storage
9 devices used by defendant to confirm compliance with this
10 condition.

11 Furthermore, defendant shall consent to periodic
12 unannounced examinations by Probation or Pretrial Services of
13 any computers, cell phones, or other electronic communication
14 or data storage devices that defendant has access to to
15 confirm compliance with this condition.

16 Additionally, defendant shall consent to the
17 seizure and removal of hardware and data storage media for
18 further analysis by the probation office based upon reasonable
19 suspicion of a violation of the conditions imposed in this
20 case or based upon a reasonable suspicion of unlawful conduct
21 by the defendant.

22 Failure to submit to that monitoring or search of
23 computers and other electronic communication or data storage
24 devices used by defendant may be grounds for revocation.

25 If defendant's employment requires the use of a

1 computer, defendant may use a computer in connection with the
2 employment approved by the probation office provided that the
3 defendant notify his employer of the nature of his conviction
4 or charge. The probation office shall confirm compliance with
5 this notification requirement.

6 Defendant shall provide the probation office with
7 accurate information about defendant's entire computer system,
8 both hardware and software, and other electronic communication
9 or data storage devices or media, to include all passwords
10 used and the name of the Internet service providers.

11 Defendant shall also abide by conditions of the
12 Computer Restrictions and Monitoring Program approved by the
13 Court.

14 Defendant shall not possess or access with the
15 intent to view any materials, including pictures, photographs,
16 books, writings, drawings, videos, or video games depicting
17 and/or describing child pornography as defined by 18 United
18 States Code Section 2256(8), or obscene visual representations
19 of the sexual abuse of children as defined by 18 United States
20 Code Section 1466(a).

21 With the exception of brief, unanticipated, and
22 incidental contacts that include defendant's place of
23 employment and/or volunteer activity, defendant shall not
24 associate with children under the age of 18 except for
25 immediate family members unless in the presence of an adult

1 who has been approved by the probation office.

2 Defendant shall participate in a mental health
3 and/or sex offender treatment program approved by the
4 probation officer, until such time as the defendant is
5 released from the program by the probation office.

6 Defendant shall abide by all program rules,
7 requirements, and conditions of the sex offender treatment
8 program, including submission to polygraph testing. Said
9 testing shall continue throughout the term of supervision in
10 order to monitor and ensure compliance with the conditions of
11 supervision.

12 The probation office is authorized to release
13 defendant's presentence report to the treatment provider if so
14 requested.

15 As required by 18 United States Code Sections
16 3563(a)(8) and 3583(d) and the Sex Offender Registration and
17 Notification Act, defendant shall report the address where he
18 will reside and any subsequent changes of residence to the
19 probation officer responsible for defendant's supervision;
20 and, further, he shall register as a convicted sex offender in
21 any state where he resides, is employed, carries on a
22 vocation, or is a student.

23 Defendant shall not enter into any rental agreement
24 and/or purchase computers, cell phones, or electronic
25 communication or data storage devices without the consent of

1 the probation office.

2 Furthermore, defendant shall not make excessive
3 and/or unexplained purchases of items ordinarily related to
4 children under the age of 18 without the approval of the
5 probation office.

6 Defendant shall not frequent and/or loiter within
7 500 feet of places where children congregate on a regular
8 basis, such as but not limited to schools, playgrounds,
9 children's toy and/or clothing stores, video arcades, daycare
10 centers, swimming pools, zoos, amusement parks, or other
11 places primarily used or that can reasonably be expected to be
12 used by children under the age of 18 without prior permission
13 of the probation office.

14 Defendant shall not photograph and/or videotape any
15 children under the age of 18 without the written consent of
16 their parent or legal guardian who is aware of the nature of
17 defendant's history, characteristics, and/or conviction and
18 has been approved by the probation office.

19 Defendant shall cooperate in the collection of DNA
20 as directed by the probation office.

21 Defendant shall not use or possess alcohol.

22 Defendant shall participate in a program of testing
23 and, if necessary, treatment for substance abuse -- said
24 program to be approved by the probation officer -- until such
25 time as defendant is released from the program by the

1 probation office.

2 Defendant shall submit to one drug urinalysis
3 within 15 days after being placed on supervision and periodic
4 tests thereafter.

5 Defendant shall not intentionally purchase,
6 possess, and/or use any substances designed to simulate or
7 alter in any way defendant's own urine specimen.

8 In addition, defendant shall not purchase, possess,
9 and/or use any devices designed to be used for the submission
10 of a third party urine specimen.

11 The reasons for the Court's imposition of sentence
12 are as follows:

13 The sentence imposed here adequately conforms with
14 the statutory requirements and represents a downward variance
15 from the guideline range.

16 Taking a holistic view of this case, including the
17 parties' plea agreement, a sentence of 132 months in prison
18 coupled with a ten-year period of supervised release does
19 balance on the one hand defendant's acceptance of
20 responsibility and his post-conviction rehabilitation with, on
21 the other hand, the very serious nature of his offense and the
22 needs for just punishment, deterrence, and appropriate
23 rehabilitative treatment.

24 Mr. Bernal, I have seen fit to sentence you below
25 the guideline range today. You should not interpret that to

1 suggest that this is not an exceptionally serious crime.
2 Children are sexually victimized every day in this country and
3 around the world.

4 The Court does know from reading the record in this
5 case and from hearing from you today that you yourself
6 understand the pain of being victimized as a child, and the
7 victim impact statements in your case reveal that the children
8 depicted in the pornography you possessed also experienced
9 this very real and horrifying trauma as a result. Your sexual
10 interest in children and pornography depicting children cannot
11 go unchecked.

12 Inasmuch as the sentence is designed to punish that
13 behavior and protect society, it is also designed to ensure
14 that you can receive the appropriate treatment and address
15 these criminal urges.

16 The Court's sentence acknowledges the compliant
17 behavior that you have shown while out on bond for the past
18 several months, including maintaining your sobriety, working
19 hard and regularly, and being a positive influence in the life
20 of other adults. I do hope sincerely that you take full
21 advantage of the treatment that I'm ordering today so that you
22 may continue to reckon with your past and have a productive
23 future once you are released from prison.

24 You will receive a copy of my judgment order which
25 will contain a written description of my judgment and all the

1 conditions that I have imposed. That document shall serve as
2 your guide for your conduct moving forward.

3 I do advise you that you have a right to file an
4 appeal. Your appeal rights, however, are limited to the
5 follow three situations pursuant to the terms of your plea
6 agreement:

7 If the government appeals this sentence, you may
8 appeal.

9 If the sentence exceeds the applicable statutory
10 limits set forth in the United States Code, you may appeal.

11 Or if the sentence unreasonably exceeds the
12 guideline range determined by me under the sentencing
13 guidelines, you may appeal.

14 Finally, you may appeal an error that has resulted
15 in a miscarriage of justice.

16 Additionally, pursuant to your plea agreement, you
17 have also waived your right to file a motion to vacate
18 sentence under 28 United States Code Section 2255 and a right
19 to file any other collateral proceeding attacking your
20 conviction or sentence.

21 If you do choose to file an appeal, you must do so
22 within 14 days.

23 If you are not able to pay costs, you may apply for
24 leave to appeal in forma pauperis. If you cannot afford a
25 lawyer, you may petition the Court of Appeals to appoint one

1 to represent you without cost.

2 If you are given leave to appeal in forma pauperis,
3 you must request the clerk of court to prepare and file
4 forthwith a notice of appeal on your behalf.

5 Do you understand those appeal rights?

6 THE DEFENDANT: Yes, Your Honor.

7 THE COURT: Ms. Bloch, will the government now move
8 to dismiss the remaining counts of the indictment, Counts 2
9 and 3?

10 MS. BLOCH: Yes, Your Honor, the government so
11 moves.

12 THE COURT: Okay. What is the government's
13 position regarding bond?

14 MS. BLOCH: The government's position is that the
15 defendant should be detained following this proceeding. I
16 conferred with the probation office prior to the commencement
17 of this hearing. It is my understanding that they are in
18 agreement with that position.

19 We take the position in large part because the law
20 demands that after conviction, sometimes even at the time of
21 the plea, that the defendant be incarcerated at this point and
22 begin -- certainly at this point begin to serve his sentence.
23 So we would ask that the Court order that he be detained at
24 this point.

25 THE COURT: Okay. Mr. Lipson.

1 MR. LIPSON: Mr. Bernal does not object.

2 THE COURT: I am sorry?

3 MR. LIPSON: He does not object.

4 THE COURT: Okay. Jim, I don't think we have our
5 marshal up here.

6 THE DEPUTY CLERK: Yes, Your Honor.

7 THE COURT: We need someone from the Marshal's
8 office. The Court will detain Mr. Bernal effective today.
9 You will be remanded to the custody of the United States
10 Marshal's Service, Mr. Bernal.

11 I do hope that you are able to defeat your demons
12 and make for a more productive life once you are released from
13 prison. With that, I wish you good luck.

14 Jim, if you can have the marshals come up here.

15 THE DEPUTY CLERK: Yes, Your Honor.

16 THE COURT: Court will stand in recess.

17 MS. BLOCH: Judge, can we ask you one question?
18 Will you be scheduling in the future a new hearing for the
19 restitution?

20 THE COURT: Yes.

21 MS. BLOCH: Thank you.

22 (Record closed.)

23 C E R T I F I C A T E

24 I, Richard T. Ford, certify that the foregoing
is a correct transcript from the record of proceedings in the
above-titled matter.

25 S/Richard T. Ford _____