

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2022

DAVID E. MERRY, PETITIONER

v.

UNITED STATES OF AMERICA

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

APPENDIX TO THE PETITION

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Dated: February 12, 2023

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 21-12926

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

versus

DAVID E. MERRY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 3:19-cr-00157-MCR-1

Before WILSON, JILL PRYOR and ANDERSON, Circuit Judges.

PER CURIAM:

David Merry appeals his 120-month sentence, which the district court imposed after he pled guilty to two counts of receipt of child pornography. On appeal, Merry argues that the district court erred in applying a 5-level “pattern of activity” enhancement under § 2G2.2(b)(5) of the Sentencing Guidelines based on his alleged prior sexual abuse of a minor. After careful review, we affirm.

I.

Merry pled guilty pursuant to a plea agreement to two counts of receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(2), (b)(1). In anticipation of sentencing, the probation office prepared a presentence investigation report (“PSR”). The PSR calculated a base offense level of 22 under § 2G2.2(a)(2) of the Sentencing Guidelines. As relevant to this appeal, the PSR applied a five-level increase under § 2G2.2(b)(5) because Merry had engaged in a pattern or activity involving the sexual abuse or exploitation of a minor. Specifically, the PSR explained that Merry had on four separate occasions sexually abused a minor, C.L. Merry was arrested in 2002, tried in 2004, and ultimately acquitted. Based on other reductions and increases not relevant to this appeal, the PSR calculated Merry’s total offense level to be 36. With a criminal history category of I, Merry’s resulting guidelines range was 188 to 235 months’ imprisonment.

21-12926

Opinion of the Court

3

Merry objected to the five-level increase under § 2G2.2(b)(5). At a sentencing hearing, the government offered testimony from C.L. about the alleged assaults and the trial. The government also filed a memorandum highlighting additional evidence of the assaults from the 2004 trial, including trial testimony of C.L.'s mother, C.L.'s pastor, and law enforcement, to all of whom C.L. made contemporaneous disclosures about the assaults; and trial testimony by law enforcement that Merry did not initially deny the assaults but claimed to have forgotten the acts.

The district court overruled Merry's objection, concluding that the government had demonstrated by a preponderance of the evidence that Merry had engaged in a pattern of activity involving the sexual abuse or exploitation of a minor. At a second hearing, the court sentenced Merry to 120 months' imprisonment.

This is Merry's appeal.

II.

Merry challenges the district court's application of the § 2G2.2(b)(5) enhancement.¹ Acknowledging that "[t]he law of this circuit, and every circuit, and the United States Sentencing Guidelines[] provide that acquitted conduct may be considered in

¹ When determining whether the district court properly applied a sentencing enhancement, "we review legal questions *de novo*, factual findings for clear error, and the district court's application of the guidelines to the facts with due deference, which is tantamount to clear error review." *United States v. Isaac*, 987 F.3d 980, 990 (11th Cir. 2021) (internal quotation marks omitted).

determining a sentence for a defendant,”² Appellant’s Br. at 23, Merry contends that the enhancement should not have been applied in his case because the alleged conduct was not related to the instant offenses. We disagree.

Section 2G2.2 of the Sentencing Guidelines provides for a five-level increase to a defendant’s offense level “[i]f the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor.” U.S. Sent’g Guidelines Manual § 2G2.2(b)(5) (U.S. Sent’g Comm’n 2018). Application Note 1 to § 2G2.2 defines a “[p]attern of activity involving the sexual abuse or exploitation of a minor” as:

any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same minor; or (C) resulted in a conviction for such conduct.

Id., cmt. n.1. The commentary further provides that “[s]exual abuse or exploitation’ does not include possession, accessing with

² Merry nonetheless challenges this rule as violating the Fifth Amendment’s Due Process Clause and the Sixth Amendment’s right to a jury trial. Although we acknowledge that Merry’s challenges are preserved for further appellate review, we reject them as conflicting with binding precedent. *See United States v. Watts*, 519 U.S. 148, 157 (1997) (holding that, consistent with due process, a sentencing court may consider acquitted conduct so long as it finds by a preponderance of the evidence that the conduct occurred); *United States v. Faust*, 456 F.3d 1342, 1347–48 (11th Cir. 2006) (rejecting a Sixth Amendment challenge to the use of acquitted conduct to enhance a guidelines sentence).

intent to view, receipt, or trafficking in material relating to the sexual abuse or exploitation of a minor.” *Id.*

Merry does not challenge that the alleged conduct he committed that resulted in his acquittal was sexual abuse or exploitation of a minor. Nor does he argue that there were fewer than two alleged instances of sexual abuse or exploitation. Rather, he argues that the alleged conduct was too remote in time and too different in nature to warrant the enhancement. This Court has previously rejected arguments similar to Merry’s, however.

In *United States v. Turner*, we held that there is no temporal limitation on the conduct that district courts can consider under § 2G2.2(b)(5). 626 F.3d 566, 572–73 (11th Cir. 2010). There, we upheld a district court’s application of the enhancement even when the pattern-of-activity conduct occurred 20 years before the defendant’s sentencing at which the enhancement was applied. *Id.* Under *Turner*, the district court was within its discretion to consider Merry’s two-decades-old conduct.

In *Turner* we further rejected the argument that there must be a connection between the child pornography offense and the prior sexual abuse or exploitation. *Id.* at 572. There, as here, the pattern-of-activity conduct did not involve the same victim and did not otherwise relate to the offense to which the enhancement applied. *See id.* Because Application Note 1 specifically excludes from the definition of sexual abuse or exploitation the receipt or possession of child pornography, we explained, there will always be some disconnect between the offense to which the enhancement applies and the pattern-of-activity conduct. *Id.* Applying this logic, which

binds us today, Merry’s argument that the pattern-of-activity conduct and instant offense must be connected is meritless. *See United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008) (explaining that, under the prior-panel-precedent rule, a prior panel’s holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by us sitting en banc).³

For the foregoing reasons, we affirm Merry’s sentence.

AFFIRMED.

³ Merry argues that “[a]n enhancement imposed pursuant to [this commentary] is invalid because the plain text of the guidelines limits the pattern of activity to acts committed in the course of the federal offense of conviction.” Appellant’s Br. at 29. Even assuming for the sake of argument that he is correct about the plain text of § 2G2.2(b)(5), we remain bound by *Turner’s* reliance on the commentary. *See United States v. Golden*, 854 F.3d 1256, 1257 (11th Cir. 2017) (explaining that the prior panel precedent rule applies even if a later panel believes the prior precedent to be analytically flawed).

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

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.call.uscourts.gov

August 19, 2022

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 21-12926-AA
Case Style: USA v. David Merry
District Court Docket No: 3:19-cr-00157-MCR-1

Electronic Filing

All counsel must file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Although not required, non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing are available on the Court's website. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@call.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call T. L. Searcy, AA at (404) 335-6180.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Djuanna H. Clark
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

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

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.call.uscourts.gov

November 18, 2022

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 21-12926-AA
Case Style: USA v. David Merry
District Court Docket No: 3:19-cr-00157-MCR-1

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: T. L. Searcy, AA/lt
Phone #: (404) 335-6180

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-12926-AA

UNITED STATES OF AMERICA,

Plaintiff - Appellee.

versus

DAVID E. MERRY,

Defendant - Appellant.

Appeal from the United States District Court
for the Northern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILSON, JILL PRYOR and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ORD-46

UNITED STATES DISTRICT COURT
Northern District of Florida

UNITED STATES OF AMERICA

v.

DAVID E. MERRY

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:19cr157-001/MCR

USM Number: 26746-017

Thomas S. Keith (Appointed - AFPD)
Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) One and Three of the Superseding Indictment on 6/17/2020

pleaded nolo contendere to count(s) _____
which was accepted by the court.

was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. §§ 2252A(a)(2) and 2252A(b)(1)	Receipt of Child Pornography	October 23, 2019	One
18 U.S.C. §§ 2252A(a)(2) and 2252A(b)(1)	Receipt of Child Pornography	January 30, 2020	Three

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count(s) Two and Four is are dismissed on the motion of the United States.

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

July 22, 2021
Date of Imposition of Judgment

M. Casey Rodgers
Signature of Judge

M. Casey Rodgers, United States District Judge
Name and Title of Judge

August 9th, 2021
Date

FILED USDC FLND PN
AUG 10 '21 AM 9:34
BR

DEFENDANT: DAVID E. MERRY
CASE NUMBER: 3:19cr157-001-MCR

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **120 months imprisonment as to Counts One and Three, with said terms to run concurrently, one with the other. This term of imprisonment is imposed pursuant to Order ECF No. 72 entered on 08/05/2021, that vacated and corrected the previous sentence imposed during the hearing held on 07/22/2021.**

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

The Court recommends that while the defendant is incarcerated, he participates in a Sex Offender Treatment Program or other such similar program offered through the Bureau of Prisons.

The Court recommends that the defendant be designated to serve this sentence at a BOP facility as near to Northern Virginia or Connecticut as reasonably possible, so that he may receive visitation from family.

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

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

at _____ a.m. p.m. on _____ .

as notified by the United States Marshal.

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

before 2 p.m. on _____ .

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

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

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: DAVID E. MERRY
CASE NUMBER: 3:19cr157-001-MCR

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

LIFE as to Counts One and Three, with said terms to run concurrently, one with the other.

MANDATORY CONDITIONS

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

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

DEFENDANT: DAVID E. MERRY
CASE NUMBER: 3:19cr157-001-MCR

STANDARD CONDITIONS OF SUPERVISION

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

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

U.S. Probation Office Use Only

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

Defendant's Signature _____

Date _____

DEFENDANT: DAVID E. MERRY
CASE NUMBER: 3:19cr157-001-MCR

SPECIAL CONDITIONS OF SUPERVISION

You must not possess or use a computer without the prior approval of the probation officer. “Computer” includes any electronic device capable of processing or storing data as described at 18 U.S.C. § 1030, and all peripheral devices.

As directed by the probation officer, you must enroll in the probation office’s Computer and Internet Monitoring Program (CIMP), and shall abide by the requirements of the CIMP program and the Acceptable Use Contract.

You must not access the Internet or any “on-line computer service” at any location (including employment) without the prior approval of the probation officer. “On-line services” include any Internet service provider, or any other public or private computer network. As directed by the probation officer, you must warn your employer of restrictions to his computer use.

You must consent to the probation officer conducting periodic unannounced examinations of his computer equipment, which may include retrieval and copying of all data from his computer(s) and any peripheral device to ensure compliance with this condition, and/or removal of any such equipment for the purpose of conducting a more thorough inspection. You must also consent to the installation of any hardware or software as directed by the probation officer to monitor the defendant’s Internet use.

You must not possess or use any data encryption technique or program.

You must not have any unsupervised contact with minors. You must not communicate in any fashion with any other persons having sexual interest in minors. You must not frequent places where minors play, congregate, or meet.

Your employment and/or residence must be approved by the Probation Officer, and any change in employment and/or residence must be pre-approved by the Probation Officer. You must submit the name and address of the proposed employer and/or residence to the Probation Officer at least 10 days prior to any scheduled change.

You must not possess, in any form, materials depicting child pornography, child erotica, or nude or sexual depictions of any child; or any materials described at 18 U.S.C. § 2256(8).

You must refrain from accessing, via the Internet, any pornography or other materials depicting sexually explicit conduct as defined at 18 U.S.C. § 2256(2), without the prior approval of the probation officer.

You must participate in sex offender-specific treatment, as directed by the probation officer. You must pay part or all of the cost of this treatment, at an amount not to exceed the cost of treatment, as deemed appropriate by the probation officer. The actual co-payment schedule shall be determined by the probation officer. The probation officer shall release the presentence report and all previous mental health evaluations to the treatment provider. As part of the treatment program, you must submit to polygraph or other psychological or physiological testing as recommended by the treatment provider.

DEFENDANT: DAVID E. MERRY
CASE NUMBER: 3:19cr157-001-MCR

ADDITIONAL CONDITIONS OF SUPERVISION

You must submit to periodic polygraph testing at the discretion of the probation office as a means to ensure that you are in compliance with the requirements of your supervision or treatment program.

You must be evaluated for mental health and referred to treatment as determined necessary through an evaluation process. Treatment is not limited to, but may include, participation in a Cognitive Behavior Therapy program.

You must submit your person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that you have violated a condition of your supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

Any unpaid restitution balance must be paid in monthly installments of an amount to be determined by the Court to commence within three months of your release from custody.

You must provide the probation officer with access to any requested financial information and report the source and amount of personal income and financial assets to the supervising probation officer as directed.

You must not incur new credit charges or open additional lines of credit without the approval of the probation officer unless you have satisfied your restitution obligation.

You must not transfer or dispose of any asset, or your interest in any asset, without the prior approval of the probation officer unless you have satisfied your restitution obligation.

DEFENDANT: DAVID E. MERRY
CASE NUMBER: 3:19cr157-001-MCR

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>JVTA Assessment</u>	<u>Fine</u>	<u>AVAA/ 18 U.S.C. § 2259A</u>	<u>Restitution</u>
TOTALS	\$200.00	\$0 - waived	\$0 - none	\$500.00	Deferred for 90 days

The determination of restitution is deferred for 90 days. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

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

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

TOTALS \$ _____ \$ _____

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the Fine

the interest requirement for the fine restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

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

DEFENDANT: DAVID E. MERRY
CASE NUMBER: 3:19cr157-001-MCR

SCHEDULE OF PAYMENTS

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

- A Lump sum of \$ 700.00 Special Monetary Assessment and AVAA/U.S.C. § 2259A, due immediately
 not later _____, or
 in accordance with C, D, E, or F below; or
- B Payment to begin immediately (may be combined with C, D, or F below); or
- C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D Fine payment in equal monthly (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ years (e.g., months or years), to commence within three months after release from imprisonment to a term of supervision; or
- E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

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

Joint and Several

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

The defendant shall pay the cost of prosecution.

The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States:
See Final Order of Forfeiture (doc. #68).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION**

UNITED STATES OF AMERICA

v.

DAVID E. MERRY
_____ /

**SUPERSEDING
INDICTMENT
3:19cr157/MCR**

THE GRAND JURY CHARGES:

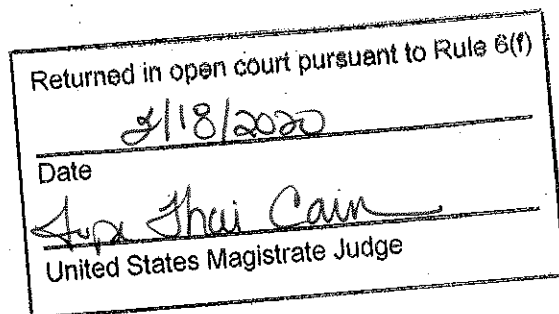
COUNT ONE

Between on or about October 1, 2017, and on or about October 23, 2019, in the Northern District of Florida and elsewhere, the defendant,

DAVID E. MERRY,

did knowingly receive, and attempt to receive, material containing child pornography, as defined in Title 18, United States Code, Section 2256(8)(A), that had been shipped and transported using any means and facility of interstate and foreign commerce.

In violation of Title 18, United States Code, Sections 2252A(a)(2) and 2252A(b)(1).



COUNT TWO

On or about October 23, 2019, in the Northern District of Florida, the defendant,

DAVID E. MERRY,

did knowingly possess and access with intent to view material containing child pornography, as defined in Title 18, United States Code, Section 2256(8)(A), that involved a prepubescent minor and a minor who had not attained 12 years of age, that had been shipped and transported using any means and facility of interstate and foreign commerce.

In violation of Title 18, United States Code, Sections 2252A(a)(5)(B) and 2252A(b)(2).

COUNT THREE

Between on or about November 1, 2019, and on or about January 30, 2020, in the Northern District of Florida and elsewhere, the defendant,

DAVID E. MERRY,

did knowingly receive, and attempt to receive, material containing child pornography, as defined in Title 18, United States Code, Section 2256(8)(A), that had been shipped and transported using any means and facility of interstate and foreign commerce.

In violation of Title 18, United States Code, Sections 2252A(a)(2) and 2252A(b)(1).

COUNT FOUR

On or about January 30, 2020, in the Northern District of Florida, the defendant,

DAVID E. MERRY,

did knowingly possess and access with intent to view material containing child pornography, as defined in Title 18, United States Code, Section 2256(8)(A), that involved a prepubescent minor and a minor who had not attained 12 years of age, that had been shipped and transported using any means and facility of interstate and foreign commerce.

In violation of Title 18, United States Code, Sections 2252A(a)(5)(B) and 2252A(b)(2).

CRIMINAL FORFEITURE

The allegations contained in Counts One through Four of this Indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeiture, pursuant to the provisions of Title 18, United States Code, Section 2253. From his engagement in the violations alleged in Counts One through Four of this Indictment, the defendant,

DAVID E. MERRY,

shall forfeit to the United States, pursuant to Title 18, United States Code, Section 2253, all of his interest in:

A. Any visual depiction described in sections 2251, 2251A, 2252, 2252A, 2252B, or 2260 of Chapter 110 of Title 18, United States Code, or any book, magazine, periodical, film, videotape, or other matter which contains any such visual depiction, which was produced, transported, mailed, shipped, or received in violation of Chapter 110 of Title 18, United States Code;

B. Any property, real or personal, constituting or traceable to gross profits or other proceeds obtained from the offenses alleged in Counts One through Four of this Indictment; and

C. Any property, real or personal, used, or intended to be used, to commit or promote the commission of the offenses alleged in Counts One through Four of this Indictment.

D. The property referenced in subparagraphs A, B, and C above includes, but is not limited to, computer hardware such as monitors, central processing units, keyboards, computer programs, software, computer storage devices, such as disk drive units, disks, tapes, and hard disk drives or units, peripherals, modems and other telephonic and acoustical equipment, printers, contents of memory data contained in and through the hardware and software mentioned above, tools,

equipment, and manuals and documentation for the assembly and use of the hardware and software mentioned above.

If, as the result of any act or omission of the defendant, any of the property described above as being subject to forfeiture:

- i. cannot be located upon the exercise of due diligence;
- ii. has been transferred or sold to, or deposited with, a third person;
- iii. has been placed beyond the jurisdiction of the Court;
- iv. has been substantially diminished in value; or
- v. has been commingled with other property that cannot be divided without difficulty,

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 18, United States Code, Section 2253(b), and by Title 28, United States Code, Section 2461(c), to seek forfeiture of any

other property of the defendant up to the value of any forfeitable property described above.

A TRUE BILL:



FOREPERSON

02-18-2020

DATE

Handwritten signature of Lawrence Keeffe in black ink.

LAWRENCE KEEFE
United States Attorney

Handwritten signature of Meredith L. Steer in black ink.

MEREDITH L. STEER
Assistant United States Attorney

Handwritten signature of David L. Goldberg in black ink.

DAVID L. GOLDBERG
Assistant United States Attorney

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
)	Case No. 3:19cr157/MCR
)	
vs.)	Pensacola, Florida
)	January 13, 2021
)	9:13 a.m.
)	
DAVID E. MERRY,)	
)	
Defendant.)	
_____)	

TRANSCRIPT OF **SENTENCING** PROCEEDINGS
BEFORE THE HONORABLE M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE
(Pages 1-44)

FOR THE GOVERNMENT: Jason R. Coody
Acting United States Attorney
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FOR THE DEFENDANT: Randolph Murrell
Federal Public Defender
by: **THOMAS S. KEITH**
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Pensacola, Florida 32502

P R O C E E D I N G S

(Court called to order; Defendant present with counsel.)

09:10:58 3 **THE COURT:** Good morning. I apologize for the delay.
09:11:00 4 I have a slight emergency at my home this morning that I was
09:11:03 5 trying to take care of.

09:11:04 6 We're here for sentencing hearing in Mr. David Merry's
09:11:09 7 case. Mr. Merry is present along with Mr. Keith, his attorney;
09:11:13 8 Mr. Goldberg and Ms. Steer are present representing the United
09:11:17 9 States; and Officer Dancy is here from Probation.

09:11:21 10 I understand there is evidence to be presented, Mr.
09:11:25 11 Goldberg, by the government on the pattern and practice, the
09:11:31 12 5-level adjustment?

09:11:32 13 **MR. GOLDBERG:** That's correct, Your Honor.

09:11:34 14 **THE COURT:** We want to start with that?

09:11:34 15 **MR. GOLDBERG:** Yes, Your Honor. I believe that is the
09:11:35 16 only outstanding objection.

09:11:36 17 **THE COURT:** That's my understanding.

09:11:37 18 Is that correct, Mr. Keith?

09:11:38 19 **MR. KEITH:** That's correct, Your Honor.

09:11:39 20 **THE COURT:** All right, then. Go ahead, Mr. Goldberg.

09:11:42 21 **MR. GOLDBERG:** Yes, Your Honor. For purposes of the
09:11:43 22 record and so Your Honor is aware, my colleague, Ms. Steer, is
09:11:47 23 going to inquire of the witness, and then I will handle
09:11:51 24 argument as to the objection itself and ultimate sentence.

09:11:54 25 **THE COURT:** All right. Ms. Steer?

09:11:57 1 **MS. STEER:** United States calls C.L.

09:12:22 2 **C.L., GOVERNMENT WITNESS, DULY SWORN**

09:12:43 3 **MADAM CLERK SIMMS:** Be seated. Please state your full
09:12:50 4 name and spell your last name for the record.

09:12:52 5 **THE WITNESS:** C.L.

09:13:04 6 **THE COURT:** All right, Ms. Steer, go ahead.

09:13:06 7 **MS. STEER:** Thank you, Your Honor.

09:13:07 8 **DIRECT EXAMINATION**

09:13:08 9 **BY MS. STEER:**

09:13:09 10 **Q.** C.L., how old are you today?

09:13:12 11 **A.** 27.

09:13:13 12 **Q.** And where do you currently live?

09:13:16 13 **A.** Meriden, Connecticut.

09:13:17 14 **Q.** What is your date of birth?

09:13:19 15 **A.** █/█/1993.

09:13:22 16 **Q.** 1993?

09:13:22 17 **A.** Yes.

09:13:22 18 **Q.** And are you currently a college student?

09:13:25 19 **A.** Yes.

09:13:25 20 **Q.** What college are you attending?

09:13:27 21 **A.** Middlesex Community College.

09:13:28 22 **Q.** And what type of degree are you pursuing?

09:13:31 23 **A.** Criminal justice.

09:13:32 24 **Q.** How did you -- first, do you see the defendant, David
09:13:39 25 Merry, in the courtroom today?

09:13:40 1 **A.** Yes.

09:13:40 2 **Q.** And could you please identify him by something he's wearing

09:13:43 3 or something that you recognize about him?

09:13:47 4 **MR. KEITH:** We'll stipulate that she knows Mr. Merry.

09:13:49 5 **THE COURT:** And that he's present in the courtroom?

09:13:51 6 **MR. KEITH:** And recognizes him.

09:13:54 7 **THE COURT:** All right. The stipulation will be

09:13:55 8 reflected in the record.

09:13:56 9 **MS. STEER:** Thank you, Your Honor.

09:13:57 10 **BY MS. STEER:**

09:13:58 11 **Q.** C.L., when is the last time that you saw David Merry?

09:14:01 12 **A.** I saw him back when I testified against him when I was ten

09:14:06 13 years old.

09:14:07 14 **Q.** And was that the year 2004?

09:14:09 15 **A.** Yes.

09:14:09 16 **Q.** Now, how did you find out about today's sentencing hearing?

09:14:13 17 **A.** I had the Homeland Security come to my house, I believe it

09:14:20 18 was back in June. They knocked on my door, and they asked me

09:14:26 19 if I knew someone by the name of David Merry, and I answered

09:14:31 20 yes.

09:14:33 21 **Q.** And was that June of 2020?

09:14:35 22 **A.** Yes.

09:14:36 23 **Q.** How did you feel when the agents asked you if you knew --

09:14:42 24 **MR. KEITH:** Objection, Your Honor, irrelevant.

09:14:44 25 **THE COURT:** Sustained.

09:14:47 1 **BY MS. STEER:**

09:14:49 2 **Q.** C.L., I'm going to take you back to 2002. Did you know the

09:14:52 3 defendant then?

09:14:53 4 **A.** Yes.

09:14:53 5 **Q.** And how did you know him?

09:14:54 6 **A.** He was my mother's fiancé.

09:14:59 7 **Q.** Where were you living in 2002?

09:15:02 8 **A.** In Meriden, Connecticut, in Yellow Acres.

09:15:07 9 **Q.** And you said your mother's fiancé. What is your mother's

09:15:11 10 name?

09:15:12 11 **A.** V.L.

09:15:13 12 **Q.** And did the defendant end up living with you as your

09:15:18 13 mother's fiancé?

09:15:19 14 **A.** Yes, for three months.

09:15:21 15 **Q.** Now, when the defendant moved in with you at the time, how

09:15:28 16 were things initially?

09:15:29 17 **A.** I remember waiting for -- I was very excited for when he

09:15:42 18 came to our house. I remember that he was coming down from --

09:15:46 19 up from Florida, and I kept asking my mom when is he going to

09:15:51 20 get here, when is he going to get here. I was so excited. And

09:15:58 21 I was excited to meet him because I thought that -- well, you

09:16:06 22 know, my mom is getting married and, you know, it was going to

09:16:11 23 be exciting because I never had a father. He left before I was

09:16:19 24 born. And so I thought that -- I thought that it would have

09:16:29 25 been great to have a father figure because I never had one like

09:16:33 1 other kids did.

09:16:35 2 **Q.** And did the defendant initially act like a father figure to
09:16:39 3 you? When he first moved in, when I say initially -- it may be
09:16:45 4 hard to hear me.

09:16:47 5 When he first moved in, was he a father figure for you?

09:16:50 6 **A.** At the time, I saw him as an adult that I looked up at.

09:16:58 7 **Q.** Okay. And did you all ever do anything that was fun
09:17:02 8 together?

09:17:05 9 **A.** Yes.

09:17:05 10 **Q.** Like what? Can you give us an example?

09:17:08 11 **A.** Yeah. We used to play games, like we used to play
09:17:11 12 hide-and-peek. And I remember he used to carry me in the
09:17:16 13 laundry basket, and I used to think it was really fun to do
09:17:21 14 that.

09:17:22 15 **Q.** Now, at any point did David touch you inappropriately?

09:17:27 16 **A.** Yes.

09:17:27 17 **Q.** And what's one of those times or what time did he do that?

09:17:32 18 **A.** I remember the most vivid time, I fell asleep in the car,
09:17:45 19 and he picked me up and carried me into the house, and I had
09:17:51 20 woken up. And we got to the top of the stairs -- he was going
09:17:55 21 to bring me to my bedroom -- and I remember at the top of the
09:18:01 22 stairs, I remember that he put his hands down my pants and he
09:18:14 23 touched my back side, he stuck his fingers up my butt.

09:18:22 24 **Q.** And I'm going to use some graphic language here just so
09:18:25 25 that we identify this for the Court. When you say up your

09:18:28 1 butt, do you mean inside of your anus?

09:18:31 2 **A.** Yes.

09:18:31 3 **Q.** Now, do you remember David doing anything else that was

09:18:35 4 inappropriate?

09:18:35 5 **A.** I remember that he used to touch me in the front, too, and

09:18:46 6 -- I remember a lot of things. I remember that there was a

09:18:50 7 time that I was playing in my room, and David was -- he had

09:19:01 8 taken a shower, and he walked into my room and he pointed at

09:19:11 9 himself down there, and he asked me to -- to look at it. And I

09:19:17 10 wasn't looking right away when he walked and asked me, and I

09:19:21 11 turned around and he was completely naked.

09:19:27 12 **Q.** And so, when he pointed at himself, was he pointing at his

09:19:30 13 penis?

09:19:31 14 **A.** Yes.

09:19:31 15 **Q.** And had you ever seen a naked man before?

09:19:34 16 **A.** No.

09:19:34 17 **Q.** And this is when you were eight years old?

09:19:38 18 **A.** Yes.

09:19:38 19 **Q.** And I just want to back up for a minute. You said there

09:19:42 20 are times when he also touched you on the front side. Can we

09:19:47 21 talk about that just a little bit?

09:19:48 22 **A.** Yes.

09:19:48 23 **Q.** How would those times begin? How did -- what was going on

09:19:54 24 where he would touch you on the front side?

09:19:56 25 **A.** I remember there were times that we would get into tickle

09:20:05 1 fights and that he would touch me there. I remember there was
09:20:16 2 a time that my mom had to work, so she left the house. And,
09:20:27 3 um, there was a hallway that was leading towards the door to
09:20:32 4 get out of the house, and I was in that hallway saying bye to
09:20:38 5 my mom, or my mom was saying bye to me. And I remember David
09:20:42 6 came up behind me and he grabbed me, and my mom left the house,
09:20:47 7 as she left the house, the door closed, and I started screaming
09:20:51 8 for her, I was like, Mom, help me! And he was like, Your mom
09:20:57 9 is not here, you can't help me *[sic]*.

09:20:59 10 And he started squeezing me and we were -- you know, he was
09:21:04 11 trying to play with me and tickle fight me, and I was like,
09:21:07 12 okay, I can't breathe, I can't breathe, because he was tickling
09:21:08 13 me so hard, and I was laughing, but I started screaming because
09:21:11 14 I couldn't breathe. And he just like took me and balled me up
09:21:18 15 and squeezed me really hard, and I was trying to get away, and
09:21:21 16 I was like, okay, let me know, you know, I'm not -- I don't
09:21:24 17 want to play anymore. And that's when he started touching me.

09:21:29 18 **Q.** Okay. And when you say he was touching you, where was he
09:21:33 19 touching you?

09:21:33 20 **A.** In the front.

09:21:34 21 **Q.** And in the front, are we talking about your vagina?

09:21:38 22 **A.** Yes.

09:21:38 23 **Q.** And are we talking about inside of your vagina?

09:21:43 24 **A.** Yes.

09:21:43 25 **Q.** So, underneath your clothing?

09:21:49 1 **A.** Yes.

09:21:49 2 **Q.** Thank you. Now, you ended up telling your mother -- or in

09:21:54 3 some way you told your mother that David was doing these things

09:21:57 4 to you?

09:21:58 5 **A.** Yes.

09:21:58 6 **Q.** And then did you talk to the police?

09:22:04 7 **A.** Yes.

09:22:04 8 **Q.** At the time that this was all going on, did you start

09:22:09 9 having anything like nightmares or other things going on that

09:22:14 10 were bothering you?

09:22:15 11 **A.** I did.

09:22:16 12 **Q.** Do you remember anything else besides nightmares?

09:22:22 13 **A.** I remember that I was having nightmares. I also remember

09:22:28 14 that I was -- I had wet my bed until I was 12 years old because

09:22:38 15 of the PTSD that had happened. I was having a lot of

09:22:46 16 flashbacks and a lot of anxiety. I was really affected by

09:22:53 17 this. I really, for the longest time, hated to hear his name,

09:22:59 18 and I wouldn't talk about it because I would get so angry about

09:23:03 19 it. And I just tried to forget it, I tried to forget it.

09:23:11 20 **Q.** Do you remember what type of pajamas you liked to wear when

09:23:22 21 David was living with you?

09:23:24 22 **A.** I remember that I used to wear the onesie pajamas that

09:23:32 23 would zip up from the feet all the way to the neck. I do know

09:23:36 24 that those were my favorite types of pajamas. But I also think

09:23:44 25 that -- thinking back as an adult mind, I also think that I

09:23:50 1 subconsciously knew that it was harder for him to touch me
09:23:55 2 under those clothes because they had zipped all the way up.
09:24:00 3 And my mom had asked me, oh, you know, why are you wearing long
09:24:05 4 sleeves in the middle of summer, and I said, well, I'm just
09:24:09 5 cold. And I didn't really know how to explain it, but I was
09:24:12 6 cold, and that's what I said, I was just cold.

09:24:16 7 **Q.** Now, after you told your mother and then the police and
09:24:19 8 other people, what happened? Was there an investigation that
09:24:26 9 occurred?

09:24:28 10 **A.** Yes.

09:24:28 11 **Q.** And then, as a result of that investigation, was there a
09:24:31 12 trial?

09:24:31 13 **A.** Yes.

09:24:32 14 **Q.** Now, during that trial, how did you feel as you were
09:24:38 15 testifying against --

09:24:39 16 **MR. KEITH:** Objection.

09:24:40 17 **THE COURT:** I don't see the relevance.

09:24:48 18 **BY MS. STEER:**

09:24:49 19 **Q.** I want to ask you then about some specific things that
09:24:51 20 happened during that trial. When the word "butt" was used in
09:24:58 21 court, do you remember laughing at that word?

09:25:01 22 **A.** Yes.

09:25:01 23 **Q.** Why did you laugh at the word "butt"?

09:25:03 24 **A.** I laughed at it because I was 10 years old and 10-year-olds
09:25:10 25 think that the word "butt" is funny for some reason. I just --

09:25:15 1 I thought it was a funny word, so I kept laughing about it.
09:25:18 2 And I was also really nervous up there, so I think I was
09:25:24 3 laughing because I was nervous, too. And I remember that -- I
09:25:33 4 remember looking at David during the court when I was 10, and I
09:25:40 5 remember that I had -- I normally wouldn't do this, but I was
09:25:45 6 so nervous that I was -- I was sucking my thumb. I didn't want
09:25:54 7 to say the wrong thing or -- and -- but yeah, when -- when I
09:26:03 8 was questioned about how he touched me, I said, yeah, he
09:26:08 9 touched me in my butt, and I started laughing after I said the
09:26:11 10 word butt, and actually I hesitated to say it because I thought
09:26:16 11 it was funny, but, you know --

09:26:20 12 **Q.** Now, you said that for a long time you hated the name
09:26:24 13 David. How else has what happened to you as a child impacted
09:26:29 14 you?

09:26:32 15 **MR. KEITH:** Your Honor, I'm going to object. We're
09:26:34 16 here to decide this issue of the pattern. I don't believe this
09:26:38 17 is relevant how it's affected her. She's not a victim in this
09:26:42 18 case.

09:26:44 19 **THE COURT:** Ms. Steer, how is that relevant?

09:26:47 20 **MS. STEER:** Well, Your Honor, I think part of that is
09:26:51 21 that she ended up going into counseling and then was eventually
09:26:55 22 diagnosed with being autistic, so I was moving on to her
09:27:02 23 diagnosis.

09:27:02 24 **THE COURT:** All right. Well, that could certainly be
09:27:04 25 relevant for purposes of her testimony here, so I'll allow it.

09:27:07 1 Overruled.

09:27:09 2 **BY MS. STEER:**

09:27:09 3 **Q.** C.L., you just heard my explanation to the Court, but were
09:27:15 4 you eventually diagnosed as being autistic?

09:27:18 5 **A.** Yes.

09:27:18 6 **Q.** And how old were you when that diagnosis occurred?

09:27:21 7 **A.** 20.

09:27:22 8 **Q.** Do you -- just in your treatment for being autistic, have
09:27:27 9 you learned about how that might impact your ability to
09:27:31 10 function in society?

09:27:32 11 **A.** Yes.

09:27:32 12 **Q.** And as part of that, have you learned that you have to
09:27:38 13 maybe control your reactions to things differently?

09:27:42 14 **A.** Yes.

09:27:42 15 **Q.** So, with that in mind, do you think that your being
09:27:49 16 autistic had an impact on how you --

09:27:51 17 **MR. KEITH:** Objection, Your Honor.

09:27:52 18 **MS. STEER:** Your Honor, I'm asking for her opinion and
09:27:55 19 knowledge based off of her diagnosis on how that may have
09:27:58 20 impacted her reactions as a child.

09:28:02 21 **THE COURT:** Why is her opinion relevant? I can see
09:28:05 22 you making the argument. But her opinion about that I'm not
09:28:09 23 sure is relevant. Sustained.

09:28:14 24 **MS. STEER:** Your Honor, may I have a minute?

09:28:20 25 **THE COURT:** Yes.

09:28:31 1 **MS. STEER:** Thank you, C.L. Mr. Keith might have some
09:28:34 2 questions for you, and then I may follow-up with even more,
09:28:37 3 okay?

09:28:38 4 **THE COURT:** Thank you.
09:28:39 5 Mr. Keith?

09:28:40 6 **CROSS-EXAMINATION**

09:28:40 7 **BY MR. KEITH:**

09:28:45 8 **Q.** Good morning, Ms. C.L.

09:28:49 9 **A.** Good morning.

09:28:50 10 **Q.** I'm Tom Keith. I represent Mr. Merry. We haven't spoken
09:28:55 11 before, have we? Right?

09:28:58 12 **A.** Yes.

09:28:58 13 **Q.** You have spoken to Ms. Steer here, the prosecutors here,
09:29:04 14 ahead of time and --

09:29:06 15 **A.** Yes.

09:29:06 16 **Q.** -- talked about testifying and maybe some of the questions
09:29:10 17 they would ask you and kind of go over that with you; is that
09:29:13 18 correct?

09:29:13 19 **A.** Yes.

09:29:13 20 **Q.** And that's the same thing that happened back in 2004 in
09:29:19 21 Connecticut in the trial, the prosecutor, I'm sure, talked to
09:29:23 22 you ahead of time?

09:29:25 23 **A.** No.

09:29:25 24 **Q.** No talking ahead of time with the prosecutor?

09:29:27 25 **A.** No, I don't remember them talking to me. I was in the

09:29:34 1 Department of Children Services, in DCF as we call it in
09:29:39 2 Connecticut. I was under the state's custody. I remember that
09:29:44 3 when I was 10 I was being -- I was told that I was going to
09:29:47 4 trial and -- well, that I was going to testify against David in
09:29:52 5 trial. And I remember walking into the Court and making my
09:29:59 6 testimony. They did not tell me what was going on. I was very
09:30:10 7 in the dark.

09:30:12 8 **Q.** Have you read the transcript of that trial?

09:30:14 9 **A.** No.

09:30:14 10 **Q.** Have you seen any of it?

09:30:16 11 **A.** No.

09:30:17 12 **Q.** Your testimony, you haven't reviewed that --

09:30:21 13 **A.** No.

09:30:21 14 **Q.** -- ahead of time?

09:30:23 15 Do you remember Mr. Alexi being the prosecutor? Do you
09:30:27 16 remember that name?

09:30:28 17 **A.** No.

09:30:28 18 **Q.** And you're saying that the prosecuting attorney never spoke
09:30:32 19 to you ahead of time to talk to you about the questions he
09:30:35 20 might ask you and things of that nature? You just were brought
09:30:39 21 in cold, is that what you're saying?

09:30:41 22 **A.** Yep. I remember -- the only people that I remember talking
09:30:46 23 to in law enforcement were the Child Protective Services. I
09:30:55 24 remember talking to the counselor about what had happened.
09:30:57 25 They did ask me what happened. I did tell them what happened.

09:31:02 1 And they wanted to show me -- or ask me what happened in a way
09:31:09 2 that I could show them visually, so they asked me through
09:31:13 3 children's toys such as a dollhouse.

09:31:17 4 **Q.** And that was well before the trial because this is reported
09:31:22 5 I think around the first of September of 2002 to the
09:31:26 6 authorities -- your pastor initially, I guess?

09:31:31 7 **A.** Yes.

09:31:31 8 **Q.** And then to DCF and the police got involved, right?

09:31:35 9 **A.** Yes.

09:31:35 10 **Q.** And the trial was in 2004, a long time after the incidents
09:31:41 11 were reported, right, the alleged incidents?

09:31:45 12 **A.** Yes.

09:31:45 13 **Q.** So the investigation was back a long time before the trial,
09:31:51 14 correct?

09:31:52 15 **A.** Yes.

09:31:52 16 **Q.** And you're saying -- was there anything going on before the
09:31:55 17 trial at all, I mean, or was it, like you say, you were just
09:32:00 18 called in without anybody discussing it with you at all?

09:32:02 19 **A.** If they had spoken to me, I don't remember it, because I,
09:32:10 20 as an adult, tried to forget about the trial. And the most
09:32:16 21 vivid thing that I can think of as a 10-year-old was me being
09:32:23 22 up on that stand and staring at the Defendant and all of these
09:32:27 23 lawyers and seeing the judge up there and being a terrified
09:32:31 24 child. That is what I remember.

09:32:32 25 **Q.** Well, I mean, that's understandable, if what you're saying

09:32:36 1 is true about not being prepped, not being discussed with you,
09:32:40 2 and you just being called out of the blue into the courtroom --

09:32:44 3 **MR. GOLDBERG:** Objection. Argumentative. That's not
09:32:46 4 a question.

09:32:47 5 **THE COURT:** Mr. Keith, is there a question?

09:32:56 6 **MR. KEITH:** I'll withdraw.

09:32:56 7 **THE COURT:** Mr. Goldberg, I need Ms. Steer to handle
09:32:58 8 this, please.

09:32:59 9 **MR. GOLDBERG:** I apologize, Your Honor.

09:32:59 10 **BY MR. KEITH:**

09:33:03 11 **Q.** Mr. Merry and your mother knew each other quite some time
09:33:06 12 before he actually moved into the residence, correct?

09:33:09 13 **A.** Yes.

09:33:09 14 **Q.** And so you knew Mr. Merry before he moved into the
09:33:12 15 residence, correct?

09:33:13 16 **A.** I don't remember meeting him anytime before that.

09:33:15 17 **Q.** You don't remember meeting Mr. Merry anytime before that?

09:33:18 18 **A.** No. My mom told me that she had a boyfriend and -- well,
09:33:24 19 and a fiancé and that he had proposed to her and that she was
09:33:28 20 going to get married. And she explained to me that she had
09:33:32 21 been seeing him for a while but, because he was in Florida, I
09:33:36 22 had never met him. I didn't meet him until he came to
09:33:40 23 Connecticut.

09:33:45 24 **Q.** Isn't it true that you would, even before he moved in, go
09:33:52 25 visit with his family, his parents?

09:33:58 1 **A.** I --

09:33:59 2 **Q.** There was testimony at the trial about that. You don't
09:34:03 3 recall visiting with his parents or family members even before
09:34:07 4 he came and moved into the house?

09:34:08 5 **A.** I do remember meeting with his family. I do remember
09:34:11 6 meeting his parents. I don't remember when it happened, but I
09:34:17 7 do remember that David was there with us when I did meet his
09:34:21 8 parents, yes.

09:34:23 9 **Q.** And it was more than one time? I mean, you would -- didn't
09:34:28 10 you go to Disney World, do you remember that, a Disney World
09:34:33 11 trip of some sort with Mr. Merry even before he moved in?

09:34:37 12 **A.** I did go to Disney World with him.

09:34:41 13 **Q.** And that was before he moved in, right?

09:34:44 14 **A.** Yes. I went to Disney World when I was five.

09:34:48 15 **Q.** With Mr. Merry?

09:34:50 16 **A.** With my mom and my grandmother, we went to go to Disney
09:34:57 17 World. I know that David was in Florida, and I remember seeing
09:35:01 18 him for a brief period of time, but I don't remember a lot
09:35:05 19 about it. I just remember that we went to Disney World, we
09:35:09 20 went on the rides. I didn't get to know him personally. I
09:35:13 21 didn't spend time alone with him. I was -- it was a family
09:35:16 22 trip. I was also five years old, so they wouldn't leave a
09:35:21 23 five-year-old alone in Disney.

09:35:25 24 **Q.** So Mr. Merry only resided in the residence for just three
09:35:35 25 months or so, I mean, just a short -- relatively short period

09:35:40 1 of time, right?

09:35:41 2 **A.** Yes.

09:35:41 3 **Q.** You testified, you know, at the trial about what you said
09:35:52 4 occurred. You were talking about -- you were asked about the
09:36:01 5 different alleged incidents.

09:36:06 6 Do you recall -- you talk about tickle fights. You've
09:36:11 7 testified you had tickle fights where he might have touched you
09:36:14 8 during tickle fights, is that what you're saying, touched you
09:36:19 9 inappropriately in tickle fights?

09:36:21 10 **A.** Yes.

09:36:21 11 **Q.** Do you recall ever testifying to that at all at the trial
09:36:28 12 and testifying about what Mr. Merry allegedly did? Are you
09:36:33 13 aware that you never said anything about that?

09:36:36 14 **A.** I didn't remember everything that -- when I had testified
09:36:42 15 because it had been a two-year-period of time, and I was only
09:36:45 16 eight years old when it did happen.

09:36:49 17 **Q.** I guess the question is, do you know, do you recall, would
09:36:55 18 you concede that you never said anything about tickle fights
09:36:58 19 when you testified at the trial? Can you remember?

09:37:01 20 **A.** No, I don't remember.

09:37:04 21 **Q.** You don't remember --

09:37:04 22 **MS. STEER:** Objection, Your Honor. Compound question.

09:37:08 23 **THE COURT:** It was a couple of questions in terms of
09:37:11 24 the tickle fights and then whether she remembers. So, if you'd
09:37:15 25 ask again, please, Mr. Keith.

09:37:17 1 **MR. KEITH:** I think it's pretty been covered.

09:37:21 2 **BY MR. KEITH:**

09:37:21 3 **Q.** But you don't remember what you testified to at the trial?
09:37:24 4 If I asked you what you testified to at the trial, would you
09:37:27 5 remember?

09:37:28 6 **A.** I remember some things that I testified to the trial. I
09:37:32 7 don't remember the whole -- all of the details. I just
09:37:36 8 remember the big picture.

09:37:38 9 **Q.** But, again, you haven't read the transcript to refresh your
09:37:43 10 memory about your testimony there, right?

09:37:45 11 **A.** No, sir.

09:37:45 12 **Q.** Nobody suggested that you do that?

09:37:47 13 **A.** No.

09:37:48 14 **Q.** Are you aware that -- what did you testify to, you were in
09:37:54 15 a hallway and he grabs you real hard and squeezes you and
09:37:59 16 you're screaming and somehow during that he touches you
09:38:03 17 inappropriately, is that what you're testifying to?

09:38:06 18 **A.** Yes.

09:38:07 19 **Q.** Are you aware that there was no testimony whatsoever about
09:38:11 20 that in your trial?

09:38:15 21 **A.** I believe so because there were things that I did not
09:38:19 22 remember that I had blocked out back then. But as an adult,
09:38:24 23 some memories have arose that I did not remember because I
09:38:30 24 thought that I was over it until now.

09:38:34 25 **Q.** At the trial you testified to this stairs -- we'll call it

09:38:41 1 the stairs incident. You testified that there was a sofa
09:38:47 2 incident?

09:38:49 3 **A.** Yes.

09:38:49 4 **Q.** And then there was a bathroom incident or something where
09:38:53 5 you said he showed himself or pointed to himself, correct?

09:38:57 6 **A.** Yes.

09:38:57 7 **Q.** Do you recall the order? What happened initially first? I
09:39:07 8 mean, what's the first thing?

09:39:09 9 **A.** I don't remember the order, but the most vivid one that I
09:39:18 10 remember was on the stairs.

09:39:20 11 **Q.** Now, you said you had been at a trip, you were in the car
09:39:25 12 asleep and he was carrying you up the stairs when this --

09:39:29 13 **MS. STEER:** Objection, Your Honor, asked and answered.

09:39:31 14 **THE COURT:** Overruled.

09:39:32 15 **BY MR. KEITH:**

09:39:33 16 **Q.** He was carrying up the stairs when this allegedly occurred
09:39:36 17 where he puts his finger in your --

09:39:40 18 Now, at the trial you used the term "butt crack." Do you
09:39:44 19 recall that, he put his finger in your butt crack?

09:39:48 20 **A.** I remember saying that he put his finger in my butt. I
09:39:55 21 don't remember butt crack.

09:39:55 22 **Q.** And that it caused some bleeding? Do you recall whether --

09:40:05 23 **A.** Yes.

09:40:05 24 **Q.** And you testified that you told your mother about that
09:40:08 25 right away, correct?

09:40:10 1 **A.** Yes.

09:40:12 2 **Q.** Did you tell your mother about that right away?

09:40:14 3 **A.** I did tell her after -- I believe it was after the first

09:40:22 4 time that I had told her because --

09:40:25 5 **Q.** I'm just talking about the stairs. Did you tell your

09:40:29 6 mother right away about that?

09:40:30 7 **A.** Yes, I did tell her.

09:40:32 8 **Q.** That's what you testified to at the trial, right, that you

09:40:37 9 told her about everything right away, right?

09:40:39 10 **A.** I told her after everything happened.

09:40:42 11 **Q.** As they happened, right? I mean, something would happen,

09:40:47 12 as you said, and you would tell your mother? Isn't that what

09:40:50 13 you testified to at the trial?

09:40:52 14 **A.** I told her after the first time something happened, and

09:40:58 15 then I told her later on after it had continued. I told her

09:41:04 16 twice that it had happened.

09:41:07 17 **Q.** And she didn't do anything after you told her the first

09:41:11 18 time? She didn't take any action from that?

09:41:15 19 **A.** After -- my mom and David do not know this. The first time

09:41:23 20 that I told her, she knows, obviously, that it had happened,

09:41:30 21 because I did tell her that he touched me inappropriately.

09:41:35 22 When David and my mom were both in the kitchen in my house, I

09:41:43 23 was around the corner in the hallway. I actually was on the

09:41:48 24 floor crawling and peeking into the kitchen because I was

09:41:54 25 curious about what they were talking about. I had heard people

09:41:57 1 talking, and I just wanted to know what they were talking
09:42:00 2 about, so I listened in on the conversation. And I saw my mom
09:42:08 3 and David sitting at the table. My mom asked David if he had
09:42:12 4 touched me inappropriately. He said, no, he did not. And she
09:42:19 5 said, are you sure. And he said, no, I didn't do it. And she
09:42:23 6 said, okay, well, I'll give you this one chance, but if it
09:42:27 7 happens again, then you're out of here.

09:42:30 8 So, yes, I did tell her, and my mom did give him another
09:42:35 9 chance. But I believe it was because she truly loved him that
09:42:41 10 she gave him another chance.

09:42:42 11 **Q.** Let me just ask you some questions. The incident you say
09:42:48 12 happened in the stairs, just to be clear, are you saying you
09:42:52 13 told her right away about that? She was there, right, in the
09:42:56 14 house?

09:42:56 15 **A.** She was in the house, yes.

09:42:57 16 **Q.** And you testified at trial you told her right away and she
09:43:02 17 even helped clean blood or something, that you said you were
09:43:07 18 bleeding?

09:43:08 19 **A.** Yes.

09:43:08 20 **Q.** Is that accurate?

09:43:10 21 **A.** Yes.

09:43:10 22 **Q.** That you told her and she knew about that at that time?

09:43:14 23 **A.** She did know. I did tell her.

09:43:16 24 **Q.** Is that the first incident? Is that the first time
09:43:21 25 anything you say occurred that was inappropriate?

09:43:26 1 **A.** I don't remember the first time, sir.

09:43:29 2 **Q.** We're talking about a three-month period, right?

09:43:33 3 **A.** Yes.

09:43:33 4 **Q.** And so -- now, at trial you got a little confused, I think,
09:43:37 5 and you were talking about one incident occurred in 2003, over
09:43:44 6 a year apart. But that wasn't correct, obviously, right?

09:43:48 7 **A.** I don't understand, sir.

09:43:50 8 **Q.** I mean, at the trial you -- you were saying it happened
09:43:54 9 over like a year period of time, you know, and one incident
09:43:59 10 occurred one summer and the next summer another incident
09:44:04 11 occurred. Maybe you don't -- I guess you don't remember that,
09:44:07 12 but you got a little confused there. Because he only lived
09:44:10 13 there three months in the summer of 2002, right?

09:44:13 14 **A.** Yes.

09:44:13 15 **Q.** At trial do you recall testifying that you told a teacher
09:44:46 16 about David touching you inappropriately and they called DCF
09:44:53 17 and you were removed from the house because of that? Do you
09:44:55 18 recall that testimony? Do you recall that testimony?

09:44:59 19 **A.** I don't remember telling my teacher, but I do remember
09:45:03 20 being removed from the house.

09:45:04 21 **Q.** Around the time that you reported this to the pastor and
09:45:08 22 then the DCF, you got removed from the house?

09:45:12 23 **A.** Yes, right away, yes.

09:45:13 24 **Q.** And you stayed away from the house for a while or --

09:45:17 25 **A.** Yes, I did stay away from the house for a while. I don't

09:45:22 1 know how long it was. I do remember I did go home after the
09:45:26 2 trial, sometime after the trial, because I was still in foster
09:45:30 3 care -- during the trial I was still in foster care, I remember
09:45:36 4 that.

09:45:36 5 **Q.** Do you remember testifying that this alleged incident on
09:45:41 6 the stairs occurred in the wintertime?

09:45:45 7 **A.** Yes.

09:45:45 8 **Q.** You testify you remember that?

09:45:48 9 **A.** I think so.

09:45:50 10 **Q.** There was snow on the ground or something, you said -- you
09:45:54 11 testified? Now, this is in the summertime, though, right?
09:45:59 12 He's there in the summertime, right, living with you? Correct?

09:46:12 13 **A.** Yes.

09:46:12 14 **Q.** So it wouldn't have been wintertime?

09:46:17 15 **A.** It was during that three-month period that he was at my
09:46:20 16 house. I do know that within three months in Connecticut it
09:46:25 17 can get pretty cold, and we have been known to have snow in
09:46:31 18 October, sir.

09:46:32 19 **Q.** So, after you reported this to the pastor or reported
09:46:40 20 something to the pastor, he testified at the trial. I guess
09:46:45 21 you don't know who testified at the trial or --

09:46:47 22 **A.** I did not see anyone testify at the trial. I was just
09:46:51 23 there for my testimony, and I never went back to the court. I
09:46:54 24 only went there that one day.

09:46:56 25 **Q.** But you were interviewed by the police, the DCF, you were

09:47:00 1 taken for an examination, correct, at Yale University, some
09:47:07 2 place there?

09:47:07 3 **A.** I was.

09:47:08 4 **Q.** Do you remember that?

09:47:08 5 **A.** I remember that. I remember talking to the police and the
09:47:13 6 child care.

09:47:15 7 **Q.** And they would ask you what happened, you know, they would
09:47:18 8 ask you about what did David do, and you would tell them
09:47:24 9 whatever you remembered, right?

09:47:26 10 **A.** Yes.

09:47:26 11 **Q.** You don't remember what you told them, right?

09:47:32 12 **A.** I don't remember everything, but I do remember certain
09:47:35 13 incidents that I told them.

09:47:47 14 **Q.** You then --

09:48:00 15 **MR. KEITH:** Just one moment, Your Honor.

09:48:08 16 **BY MR. KEITH:**

09:48:09 17 **Q.** Again, you told your mother -- do you recall now, I mean,
09:48:13 18 telling your mother right away when something supposedly
09:48:21 19 occurred? For instance, him in the bathroom saying he pointed
09:48:25 20 at himself, do you remember telling your mother about that
09:48:27 21 right away?

09:48:28 22 **A.** I don't remember telling her right away, but I do remember
09:48:31 23 telling her. Twice I had a conversation with her about what
09:48:34 24 had happened. I told her specifically that he had touched me
09:48:38 25 in inappropriate places. And I do remember telling her about

09:48:41 1 the shower after it had happened. I must have told her the
09:48:46 2 next day probably. I did tell her within the next day or so
09:48:52 3 that -- after the first incident. And the second time I told
09:48:59 4 her it had happened -- it was -- it was progressive, and I told
09:49:06 5 her after it had progressed over a certain -- a certain time
09:49:11 6 within that three-month period.

09:49:14 7 **Q.** She -- she reported that, after you spoke to the pastor,
09:49:27 8 she called the DCF and made a report. Are you aware of that?

09:49:31 9 **A.** Yes.

09:49:31 10 **Q.** Are you aware that she told DCF that she was just aware of
09:49:37 11 one -- one time, one incident, or told them it was one
09:49:42 12 incident?

09:49:42 13 **A.** I don't know what she told DCF, but I do know that she
09:49:47 14 called DCF.

09:49:49 15 **Q.** And you were removed because of what happened, is that
09:49:53 16 right, that DCF removed you because of what you were alleging
09:49:57 17 against Mr. Merry, or for some other reason, or what?

09:50:02 18 **A.** I was told that I was being removed -- I was a child, so I
09:50:09 19 don't know if really it was the whole truth of why they removed
09:50:14 20 me but --

09:50:14 21 **MS. STEER:** Objection, Your Honor, relevance.

09:50:16 22 **THE COURT:** Overruled.

09:50:20 23 **THE WITNESS:** But they -- but my mom told me that --
09:50:29 24 that they removed me because she was having a hard time with
09:50:34 25 her anxiety, and she herself has PTSD from her life, and I

09:50:42 1 believe that she could have been triggered by this, and it was
09:50:46 2 harder for her to take care of me so she knew that the best
09:50:50 3 decision to do for me was to put me into child care so that she
09:50:55 4 could work on herself.

09:50:57 5 **BY MR. KEITH:**

09:50:58 6 **Q.** And that had happened before, too, right, DCF, you were in
09:51:01 7 child care?

09:51:02 8 **MS. STEER:** Objection, Your Honor, relevance. How
09:51:05 9 does this go to the actual conduct at issue?

09:51:07 10 **THE COURT:** Everything that went on in that house is
09:51:09 11 relevant. Overruled.

09:51:10 12 **BY MR. KEITH:**

09:51:11 13 **Q.** Before -- I mean, before -- I mean, you were in DCF or
09:51:17 14 foster care even before Mr. Merry, right?

09:51:20 15 **A.** Yes, I was in foster care when I was five years old.

09:51:24 16 **Q.** Did your mother remain living in the house that Mr. Merry
09:51:28 17 was at and you were in foster care? Is that what happened
09:51:34 18 afterwards?

09:51:35 19 **A.** Yes. I remember that David Merry was detained. I remember
09:51:39 20 that he had -- the day that I had been taken out of the house,
09:51:44 21 I remember that I was -- I was in the house, actually, when he
09:51:48 22 came to get his stuff, and I remember the police walking by
09:51:51 23 and --

09:51:55 24 **Q.** My question was, your mother remained living in the house
09:52:00 25 after you went to DCF, right?

09:52:03 1 **A.** Yes.

09:52:03 2 **Q.** And you would see her, I imagine?

09:52:04 3 **A.** I -- I would talk on the phone with her. I remember going
09:52:13 4 to school but -- and I remember -- in DCF I remember crying
09:52:18 5 that I wanted to see my mom. But I -- I don't recall seeing
09:52:23 6 her. I just remember talking on the phone with her.

09:52:26 7 **Q.** Now, has there been any other time that you have made any
09:52:34 8 allegation similar to what you made against Mr. Merry?

09:52:37 9 **MS. STEER:** Objection, Your Honor, relevance.

09:52:39 10 **THE COURT:** Overruled.

09:52:41 11 **THE WITNESS:** You mean --

09:52:43 12 **BY MR. KEITH:**

09:52:44 13 **Q.** That somebody had done something inappropriate to you
09:52:48 14 sexually, have you ever made a report about that other than as
09:52:51 15 to Mr. Merry?

09:52:52 16 **A.** You mean before or after?

09:52:54 17 **Q.** Before or after?

09:52:55 18 **A.** Before or after. As -- I'm sorry, sir, I don't understand.

09:53:01 19 **Q.** I'm just wondering if you've ever reported that somebody
09:53:05 20 other than Mr. Merry has done something inappropriate sexually
09:53:08 21 to you?

09:53:15 22 **A.** *(Witness crying.)* Yes, it did happen after -- later on in
09:53:18 23 life, yes, sir.

09:53:19 24 **Q.** I don't want to get into the details of it, I mean, but it
09:53:23 25 was a report of somebody doing something. Did it lead to any

09:53:27 1 charges against somebody else?

09:53:33 2 **THE COURT:** Ma'am, do you need a minute?

09:53:36 3 **THE WITNESS:** I'm sorry.

09:53:37 4 **THE COURT:** No, it's -- if you need a break, we can
09:53:40 5 take a short recess.

09:53:42 6 **THE WITNESS:** I'm sorry. No, it's fine.

09:53:50 7 Yes, sir, I did have another court case -- when I was
09:53:56 8 17, I had a court case with my father, and he did go to jail
09:54:03 9 for 15 months. He took a plea bargain and pled guilty.

09:54:08 10 **BY MR. KEITH:**

09:54:09 11 **Q.** Your biological father?

09:54:11 12 **A.** Yes, sir.

09:54:11 13 **Q.** So you -- I don't want to get into the details. You just
09:54:17 14 met him later in your life?

09:54:18 15 **A.** I did, I did, on my own account, yes.

09:54:21 16 **Q.** You sought after him and you found him?

09:54:24 17 **A.** Yes, I found him -- well, actually, he found me on social
09:54:28 18 media back when I was in high school, and I met him -- I met
09:54:33 19 him that May of when I was 16, and I -- I had told the police
09:54:42 20 when I was 17. I told -- I told the police a year later. And
09:54:48 21 we had gone to --

09:54:52 22 **Q.** We don't need to get into the details.

09:54:55 23 **A.** We went to court when I was --

09:54:56 24 **Q.** It was reported and he ended up going to jail or something;
09:54:59 25 is that right?

09:54:59 1 **A.** He did, he went to jail.

09:55:01 2 **Q.** And you're under -- okay. Anyway, you testified at the
09:55:04 3 trial. And you're aware that the jury heard your testimony and
09:55:09 4 the testimony of all the other witnesses at the trial, and
09:55:12 5 returned a not guilty verdict in the case? You're obviously
09:55:16 6 aware of that, right?

09:55:17 7 **A.** On David's case, yes.

09:55:20 8 **Q.** On Mr. Merry's case, right.

09:55:33 9 **MR. KEITH:** May I have a moment, Your Honor?

09:55:39 10 **THE COURT:** Yes.

09:56:06 11 *(Conference between Mr. Keith and Defendant.)*

09:56:12 12 **MR. KEITH:** Just one moment, Your Honor. I'm sorry.

09:56:14 13 **THE COURT:** That's fine.

09:56:44 14 **MR. KEITH:** I think that's all. Thank you.

09:56:45 15 **THE COURT:** Ms. Steer?

09:56:48 16 **MS. STEER:** Thank you, Your Honor.

09:56:49 17 **REDIRECT EXAMINATION**

09:56:50 18 **BY MS. STEER:**

09:56:58 19 **Q.** C.L., just so it's clear for the record, sitting here in
09:57:02 20 this courtroom today, do you remember David Merry putting his
09:57:06 21 fingers inside of you?

09:57:07 22 **A.** Yes.

09:57:07 23 **Q.** And that was in your anus?

09:57:09 24 **A.** Yes.

09:57:09 25 **Q.** And in your vagina?

09:57:11 1 **A.** Yes.

09:57:11 2 **Q.** And that happened multiple times?

09:57:14 3 **A.** Yes.

09:57:14 4 **MS. STEER:** Thank you, Your Honor.

09:57:17 5 **THE COURT:** Ms. C.L., in your trial testimony there
09:57:31 6 was a reference to an incident on the couch. I didn't hear you
09:57:36 7 discuss that here. Did that occur or not occur?

09:57:44 8 **THE WITNESS:** Yes, it did. That was the time that --
09:57:47 9 I didn't specify, that was the time when my mom had left the
09:57:50 10 house, and he had grabbed me and we got into a tickle fight,
09:57:55 11 and yes, that was in the living room on the couch. I was
09:57:58 12 sitting on top of him when that had happened.

09:58:01 13 **THE COURT:** So the tickle fight just preceded that in
09:58:05 14 sequence, but that was the same incident, is that what you're
09:58:08 15 saying?

09:58:09 16 **THE WITNESS:** Yes.

09:58:10 17 **THE COURT:** Any follow-up, Ms. Steer?

09:58:14 18 **MS. STEER:** No, Your Honor.

09:58:16 19 **THE COURT:** Mr. Keith?

09:58:17 20 **MR. KEITH:** No, Your Honor.

09:58:18 21 **THE COURT:** All right, ma'am, you may step down.
09:58:20 22 Thank you very much.

09:58:21 23 **THE WITNESS:** Thank you.

09:58:22 24 *(Witness excused.)*

09:58:27 25 **THE COURT:** Is there anything else?

09:58:28 1 **MR. GOLDBERG:** Your Honor, that's all as it relates to
09:58:31 2 evidence. The government just has argument as to why the
09:58:35 3 objection should be overruled.

09:58:36 4 **THE COURT:** I'll hear argument from both sides.

09:58:40 5 **MR. KEITH:** Your Honor, first I would like to just say
09:58:44 6 something before argument.

09:58:46 7 **THE COURT:** Okay. I'm sorry, Mr. Keith, I apologize.
09:58:56 8 Do you have evidence you want to put on?

09:58:57 9 **MR. KEITH:** Not a witness or testimony, Your Honor.
09:59:01 10 But I know the Court -- I filed the transcript of that trial.
09:59:03 11 I hope the Court has had a chance to read that transcript --

09:59:08 12 **THE COURT:** I did.

09:59:10 13 **MR. KEITH:** -- and go over that pretty carefully. So
09:59:11 14 that's in evidence for this issue, the transcript of that
09:59:14 15 trial, right?

09:59:16 16 **THE COURT:** Yes.

09:59:17 17 **MR. KEITH:** For argument purposes, I will address some
09:59:20 18 of the other things in the trial that was testimony at that
09:59:24 19 trial, and I'll may do that in argument, Your Honor.

09:59:27 20 **THE COURT:** All right. Well, let me hear from the
09:59:31 21 government first, please, Mr. Goldberg.

09:59:34 22 **MR. GOLDBERG:** Thank you, Your Honor. I'll actually
09:59:36 23 be very brief because I think it's relatively straightforward,
09:59:40 24 most respectfully because the Court simply just has to weigh
09:59:44 25 the credibility of the victim, the witness who just testified,

09:59:49 1 regarding this adjustment. And there is three things I request
09:59:52 2 Your Honor to consider.

09:59:53 3 First, she has nothing to gain here, all these years
09:59:57 4 later coming to testify again, traveling down from Connecticut
10:00:00 5 during a global pandemic just to essentially be revictimized
10:00:04 6 again, to relive it. She's not getting anything out of this.

10:00:10 7 Second, her testimony is consistent. It's basically
10:00:13 8 the same. She is not asserting any type of violent assault,
10:00:17 9 oral sex, rape. It's the same testimony. She is not confusing
10:00:22 10 what happened to her at eight years old and what happened to
10:00:24 11 her at 16 years old. She is testifying as to digital
10:00:27 12 penetration on multiple occasions. She remembers one in the
10:00:30 13 anus and a couple of times in her vagina. The winter -- or PJ
10:00:37 14 onesie pajamas makes sense. She even testified to it as to why
10:00:43 15 she would wear that, because it is a blockade for entry even
10:00:46 16 during summer months.

10:00:47 17 And third, perhaps most importantly about her
10:00:50 18 testimony and the credibility, is that the defendant is here on
10:00:53 19 child pornography charges, so the Court knows he has some sort
10:00:59 20 of penchant for child sex acts or crimes. It would be
10:01:02 21 different and none of this would be relevant if he was here on
10:01:07 22 a wire fraud count or a firearm charge. But her testimony is
10:01:10 23 actually validated by the charges we're here for.

10:01:13 24 **THE COURT:** I don't know that I agree with that. It's
10:01:15 25 relevant because the guidelines make it relevant.

10:01:18 1 **MR. GOLDBERG:** But it also bolsters her credibility
10:01:21 2 because it's the same type of crime just like we would do a 404
10:01:29 3 or 413 analysis. It is relevant.

10:01:31 4 **THE COURT:** Maybe so, maybe so. Let me ask you a
10:01:34 5 question about the onesie you just brought up. Didn't she say
10:01:38 6 in the trial that the incident on the couch she was in shorts?

10:01:39 7 **MR. GOLDBERG:** Yes, because I believe her testimony
10:01:44 8 was that wasn't sleepy time. That was -- with the incident on
10:01:47 9 the couch, she had just said goodbye to her mother who left for
10:01:51 10 the day. It wasn't nighttime.

10:01:54 11 **THE COURT:** I'll have to look back at that. All I'm
10:01:57 12 hearing about right now in this courtroom is onesies, but I do
10:02:02 13 recall in the transcript there was a reference to shorts.

10:02:05 14 **MR. GOLDBERG:** I believe that was daytime attire. I
10:02:05 15 believe -- and certainly I would rely on the Court's
10:02:08 16 recollection of the transcript. The pajamas, it was nighttime,
10:02:11 17 it was for sleepy time, because she was trying to protect
10:02:14 18 herself, which I guess was the testimony that you just heard
10:02:17 19 here today.

10:02:17 20 And I know the defense made some argument in its
10:02:20 21 filings about -- you know, we all agree that there was an
10:02:23 22 acquittal in 2004. That's why we have trials. That's why the
10:02:27 23 boxes on the verdict sheet say guilty or not guilty, they don't
10:02:32 24 say innocent.

10:02:33 25 This Court has to make an independent determination by

10:02:36 1 a preponderance of the evidence, just as it would if there was
10:02:38 2 a firearm enhancement or an intended or actual loss enhancement
10:02:41 3 under 2B1.1. The State of Connecticut may have decided in
10:02:45 4 cases like this not to have even gone forward, but her
10:02:49 5 testimony is still relevant for the pattern enhancement.

10:02:52 6 **THE COURT:** It's relevant, Mr. Goldberg, but you
10:02:55 7 wouldn't have brought this as an independent charge and tried
10:02:58 8 it to a jury with simply her testimony. That wouldn't happen.

10:03:05 9 **MR. GOLDBERG:** I apologize, but I respectfully
10:03:07 10 disagree. Sometimes those trials happen.

10:03:10 11 **THE COURT:** I have never -- I've been on this bench
10:03:12 12 for 18 years, and I don't think I've ever seen a one-witness
10:03:16 13 trial.

10:03:17 14 **MR. GOLDBERG:** Well, we don't have sexual assault
10:03:20 15 cases that are federal crimes often. And actually, I had a
10:03:23 16 case in front of Your Honor, and the minor victim was the
10:03:25 17 stepdaughter of the defendant. I actually believe Mr. Keith
10:03:29 18 was counsel, and it was on a military installation. And all
10:03:33 19 the government had was the credible testimony of the minor, and
10:03:36 20 he was --

10:03:36 21 **THE COURT:** It was a sentencing. That was a
10:03:38 22 sentencing, not a trial.

10:03:40 23 **MR. GOLDBERG:** Right, because he pled guilty.

10:03:42 24 **THE COURT:** Right, right, that's different. I'm
10:03:43 25 talking about a trial. Because you're talking about the State

10:03:46 1 of Connecticut -- you started off talking about the jury
10:03:48 2 verdict, the State of Connecticut, that trial. And so I'm just
10:03:52 3 saying here I do not believe you would have brought this as a
10:03:56 4 separate charge, taken it to trial, and argued to a jury based
10:04:01 5 on the testimony of one witness.

10:04:06 6 **MR. GOLDBERG:** We can -- I understand Your Honor's
10:04:08 7 position. As a former state prosecutor, I know that happens
10:04:11 8 all the time.

10:04:11 9 **THE COURT:** Not in this court.

10:04:13 10 **MR. GOLDBERG:** Yes, I concede it does not happen in
10:04:16 11 this court. But the issue for Your Honor is to determine
10:04:18 12 whether this witness testified today credibly and compare it to
10:04:21 13 her transcript when she --

10:04:22 14 **THE COURT:** 18 years later.

10:04:24 15 **MR. GOLDBERG:** Yes.

10:04:25 16 **THE COURT:** 18 years later.

10:04:27 17 **MR. GOLDBERG:** Yes. And she testified multiple times
10:04:29 18 that she has not reviewed her transcript because we did not
10:04:33 19 show it to her, and she is telling the same story, and it's the
10:04:36 20 same facts and it's what she remembers. And if Your Honor
10:04:38 21 decides by a preponderance of the evidence that she is not
10:04:41 22 credible, then the pattern won't apply. Your Honor has to make
10:04:44 23 that determination.

10:04:44 24 **THE COURT:** Not just credible; it's reliable. So
10:04:44 25 credible and reliable.

10:04:44 1 **MR. GOLDBERG:** Yes.

10:04:49 2 **THE COURT:** Again, it's 18 years later.

10:04:51 3 **MR. GOLDBERG:** Yes, and it is the same fact pattern.

10:04:54 4 **THE COURT:** Well, I can tell you I'm not going to
10:04:56 5 sentence Mr. Merry today, because I am going to now take this
10:04:59 6 testimony and I am going to compare it to the trial testimony.
10:05:01 7 I have no choice. That's the position you've put me in, so
10:05:04 8 that's what I need to do.

10:05:06 9 This is the trial transcript, at least what I was
10:05:11 10 provided, and it's quite lengthy, so I don't know it verbatim.
10:05:18 11 I've recalled a few facts from it, but I'll have to go back
10:05:23 12 through it.

10:05:23 13 **MR. GOLDBERG:** Certainly, Your Honor. That's all the
10:05:25 14 government is asking you to do is to determine her reliability
10:05:28 15 and credibility. That's the only reason we're here and the
10:05:32 16 only reason we're hearing her testimony is to --

10:05:34 17 **THE COURT:** And I will do it. I will do it. That's
10:05:36 18 my job. But I'll do it on a different day.

10:05:39 19 **MR. GOLDBERG:** -- right, to see if there is a pattern
10:05:41 20 of activity of two or more instances. And my suggestion to the
10:05:44 21 Court is that's how she testified when he was 10, and that's
10:05:47 22 how she is testifying when she's 27. Two or more instances, if
10:05:52 23 that's reliability or credible, by a preponderance of the
10:05:55 24 evidence, the issue is resolved.

10:05:56 25 **THE COURT:** Thank you.

10:05:57 1 Mr. Keith?

10:06:01 2 **MR. KEITH:** Well, Your Honor, I concur of course with
10:06:04 3 what your decision would be, not sentence him today and to
10:06:09 4 review that transcript. I reviewed it myself closely, made
10:06:12 5 some notes.

10:06:14 6 **THE COURT:** Well, because I have no other evidence
10:06:16 7 other than the testimony here today, I have to do that, I mean,
10:06:24 8 I have to compare it to decide whether the testimony today is
10:06:28 9 credible and reliable. That's the only thing I have to rely
10:06:31 10 on.

10:06:32 11 **MR. KEITH:** Well, I'll just point out some of the
10:06:34 12 things that I see in the transcript as the reasons why I
10:06:38 13 believe the jury returned the verdict of not guilty, there was
10:06:43 14 some inconsistencies in the testimony between witnesses. Of
10:06:49 15 course, the jury saw the witnesses, heard the witnesses, and
10:06:54 16 evaluated their credibility, and reached their verdict.

10:06:58 17 But to some of the things, that Ms. C.L. testified
10:07:06 18 that she reported the incidents -- I think there was three
10:07:11 19 incidents not including -- she testified about not including
10:07:16 20 the bathroom incident, we call it, that she told her mother
10:07:21 21 each time that that had occurred right away, that with the
10:07:28 22 stairs her mother was there, she reported it right away, the
10:07:31 23 mother helped clean up -- clean her up.

10:07:35 24 The testimony of the mother is different -- was
10:07:38 25 different in terms of what was reported or told to her. She

1 testified that there was -- her daughter reported something a
2 week before -- she finally went to the pastor, I mean, that was
3 a week before, and then she said something just the day before
4 that went to the pastor about something, it's not real clear.

5 But her testimony is not that she obviously knew about
6 this, it was being reported to her by her daughter, and that --
7 she did testify that, when she called the hotline, you know,
8 after the pastor -- it was discussed with the pastor, she
9 admitted that she said I only know about one reported incident,
10 you know, not more than one reported incident. That's what was
11 said when she made the call to the hotline.

12 Also, you know, they made a bit at the trial about the
13 nightmares, but the testimony was she had nightmares before and
14 after, and the nightmares were not related to Mr. Merry harming
15 her or anything like that, they were something else, you know,
16 about something else.

17 Bedwetting, wearing the pajamas -- the wintertime
18 pajamas. The other witnesses that she talked to, DCF,
19 Ms. Spoerl [*phonetic*], there is a woman from Yale that
20 testified, Janet Murphy, that did examination. They testified
21 that there was no reporting to them at all about any unusual
22 behavior like nightmares or bedwetting or the pajamas. There
23 was just no reporting about that whatsoever, and they said,
24 well, that might have been important, and they said that there
25 was nothing in their notes or records about that.

10:09:33 1 Also, I think it's important to note that in the
10:09:38 2 report of Ms. Murphy, I believe it is, about whether there was
10:09:47 3 any report of bleeding, she said her report was there is no
10:09:54 4 report -- I mean, it was a report of no bleeding given to her.
10:09:58 5 I mean, so not only did they not say anything about -- they
10:10:02 6 said no bleeding, there was no bleeding involved.

10:10:04 7 And of course, the examination of Ms. C.L. obviously
10:10:09 8 didn't show any signs of any damage or injury or anything like
10:10:17 9 that. It was a normal exam. And that was the testimony of
10:10:20 10 Ms. Murphy from Yale.

10:10:22 11 **THE COURT:** Does the record reflect how long it was
10:10:26 12 between the stair incident and her exam?

10:10:31 13 **MR. KEITH:** The problem is we're not sure when the
10:10:33 14 stair incident would have occurred exactly, I mean, somewhere
10:10:39 15 in this three-month period is -- it's all kind of vague about
10:10:41 16 when it occurred, what order it might have occurred allegedly.
10:10:44 17 And the examination was September 20th or something like that,
10:10:51 18 and September 1st was when it started to be investigated.

10:10:56 19 I mean, they did testify -- she did testify that, you
10:11:00 20 know, a lot of times there is no evidence of physical injury or
10:11:04 21 anything like that to show signs of that. But again, what was
10:11:09 22 told to them or reported to them was not what was being
10:11:14 23 testified to at the trial in terms of what I just said, you
10:11:17 24 know, about nightmares, bedwetting, things like that.

10:11:24 25 So I know if the Court reads through the transcript,

10:11:28 1 you'll also, you know, see, you know, what I see, you know, in
10:11:37 2 terms of overall the testimony and the argument. That's why I
10:11:42 3 ordered the closing argument, too, that's part of the record as
10:11:45 4 to what was argued by each side as to the evidence.

10:11:49 5 So overall, I submit that the verdict of not guilty
10:11:54 6 was appropriate and should be given weight in this Court's
10:12:01 7 decision also, the verdict of the jury. And of course, we'll
10:12:07 8 be objecting to that -- any finding that that did occur, you
10:12:12 9 know, that the pattern applies.

10:12:14 10 **THE COURT:** Right. Well, I know you said you wanted
10:12:17 11 to make a record as far as just -- the law is against you in
10:12:25 12 the Eleventh Circuit but you wanted to make a record.

10:12:27 13 **MR. KEITH:** Preserve it. And Justice Cavanaugh -- who
10:12:31 14 knows what they might pick up on later or something.

10:12:34 15 And the Court is aware also that on the restitution we
10:12:38 16 agreed to try to put that off. I haven't had a chance to
10:12:42 17 really look at that real close.

10:12:43 18 **THE COURT:** What is your response to Mr. Goldberg's
10:12:45 19 argument in regards to the charges here that Mr. Merry has pled
10:12:49 20 guilty to in relation to the credibility of the witness? It's
10:12:58 21 certainly related in terms of the type of conduct, the nature
10:13:02 22 of the conduct.

10:13:04 23 **MR. KEITH:** Well, I disagree with that argument. I
10:13:13 24 think it's strained, you know. I don't know that just because
10:13:15 25 someone has child pornography that that proves that they would

10:13:19 1 molest a child or anything like that. There is no real study
10:13:23 2 or proof that I'm aware of that you could say, okay, that is
10:13:26 3 true, that that's related, I mean, that that's evidence like
10:13:28 4 404(b) type evidence. I don't believe that's a valid argument
10:13:36 5 that it affects their credibility.

10:13:38 6 **THE COURT:** All right. Thank you.

10:13:40 7 Mr. Goldberg, do you have anything in reply?

10:13:45 8 **MR. GOLDBERG:** Only as a follow-up to the Court's
10:13:48 9 follow-up question about the nature of these charges. That is
10:13:53 10 what 404(b) is there for, absence of mistake, such as like his
10:13:58 11 finger didn't accidentally slip inside of her during a tickle
10:14:02 12 fight. She testified that it was inserted on more than one
10:14:05 13 occasion. That's all. That's why the charges are relevant.

10:14:07 14 The government is not saying there is causation, but
10:14:10 15 there is certainly correlation. It's not a wire fraud case
10:14:15 16 we're here for. It's related in nature, which makes it
10:14:18 17 relevant.

10:14:18 18 **THE COURT:** All right. Well, as indicated, I'm going
10:14:20 19 to need to review the transcript again in light of the
10:14:24 20 testimony that's been given here.

10:14:25 21 So, Mr. Merry, I'm not going to impose your sentence
10:14:28 22 today. You'll be brought back at some point in the future.
10:14:32 23 I'll get the case reset for sentencing. But I will need to
10:14:36 24 take the time to, like I said, review that prior -- well, her
10:14:42 25 testimony but also all of the testimony in the trial in light

10:14:49 1 of what the testimony was before me today.

10:14:51 2 So I have all the evidence, correct?

10:14:56 3 **MR. KEITH:** Yes, Your Honor.

10:14:57 4 **MR. GOLDBERG:** Yes, Your Honor.

10:14:58 5 **THE COURT:** All right. Then my office will reach out
10:15:02 6 to you, counsel, about getting the sentencing back on the
10:15:05 7 books.

10:15:05 8 And as far as restitution, Mr. Goldberg, I didn't hear
10:15:08 9 from you on that, but I assume -- I haven't actually imposed
10:15:13 10 sentence yet. I believe that I have 90 days from the time I
10:15:17 11 actually --

10:15:18 12 **MR. GOLDBERG:** That's accurate, Your Honor, so that
10:15:21 13 clock hasn't even begun to tick.

10:15:24 14 **THE COURT:** Very good. Thank you all.

15 *(Proceedings concluded at 10:15 a.m.)*

16 -----
17 *I certify that the foregoing is a correct transcript from the*
18 *record of proceedings in the above-entitled matter. Any*
19 *redaction of personal data identifiers pursuant to the Judicial*
20 *Conference Policy on Privacy are noted within the transcript.*

21 *s/Donna L. Boland*
22 *Donna L. Boland, RPR, FCRR*
23 *Official Court Reporter*

11-29-2021
Date

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USA

vs.

David Merry

Hearing Before:

JUDGE M. CASEY RODGERS

July 22, 2021

PHIPPS REPORTING

Raising the Bar!

Judge M. Casey Rodgers
July 22, 2021

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF FLORIDA
PENSACOLA DIVISION

CASE NO.: 3:19CR157 MCR

UNITED STATES,

Plaintiff,

vs.

DAVID MERRY,

Defendant.

_____ /

TRANSCRIPT OF PROCEEDINGS

Sentencing Hearing

DATE: Thursday, July 22nd, 2021

TIME: 11:00 a.m. - 11:40 a.m.

PLACE: U.S. District Court
Northern District of Florida
1 North Palafox Street Pensacola,
Florida 32502

BEFORE: Honorable Casey Rogers

Stenographically reported by:

PATRICIA C. STEPHENS

Job No.: 199281

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July 22, 2021

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1 Thereupon,
2 the following proceedings began at 11:00 a.m.

3 THE COURT: Good morning. Mr. David Merry
4 is before the Court for sentencing today. His
5 presentence investigation report has previously
6 been discussed with counsel at a prior sentencing
7 hearing. The Court continued that hearing in
8 order to decide the issue of the five-level
9 pattern adjustment. That ruling was entered, Mr.
10 Merry, denying the -- or overruling the
11 objection.

12 Mr. Merry is now before the Court on that
13 guideline calculation from the presentence
14 investigation report which places him at a 36-1,
15 which is an advisory guideline range of 188 to
16 235 months. Of course, there's the 60 month
17 mandatory minimum.

18 Mr. Keith, I need to hear from you under the
19 3553(a) factors. I don't believe we got there
20 last time.

21 MR. KEITH: Yes, Your Honor.

22 THE COURT: If we did, it's been so long
23 I'll hear from you again.

24 MR. KEITH: I don't think we did, Your
25 Honor.

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1 Of course, Your Honor, my position is that
2 the 3553(a) factors -- considering them and
3 balancing them and trying to determine a sentence
4 that's sufficient but not greater than necessary,
5 the advisory range in the presentence report of
6 the 188 to 235 months for Mr. Merry is far beyond
7 what would be a sufficient sentence for him
8 considering all the factors.

9 Just talking about the nature and
10 circumstances of the offense conduct as charged
11 in this case, and I realize this is an unusual
12 case because we have the past conduct that
13 factors into the offense level calculation that
14 the Court has found occurred in the -- 20 years
15 ago, if you look at his conduct is -- and I
16 pointed this out in my initial sentencing
17 memoranda -- a little unusual in Mr. Merry's case
18 that he didn't use any file-sharing program that
19 would have shared the child pornography. He went
20 online and went to Web sites, apparently, and
21 where ever, you know, they could be accessed with
22 the web. He would view, and he would download
23 the images, mainly images here. I don't think we
24 have a lot of videos in the analysis of the
25 devices with Mr. Merry.

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1 He obviously received them and he kept them,
2 and this occurred, you know, over a -- I think
3 there's evidence of 2016, 2017 and on into 2019,
4 when the search warrant was executed.

5 Clearly, he had issue with viewing and
6 obtaining child pornography. There's no question
7 about that, but he was not -- like I say,
8 sharing, distributing. He did not engage with
9 other people regarding child pornography, like in
10 the community, they call it.

11 And I know the sentencing commission in
12 their 2012 report and also in a more recent
13 update considering that report found to be a
14 factor that the Court should consider, an
15 important factor whether the offender was
16 involved with other offenders in like an Internet
17 community, online community. And Mr. Merry did
18 not do that.

19 So I would submit that his case, if you look
20 at the charged offense, is not as egregious as
21 other cases the Court has seen.

22 In this more updated report, the commission
23 went into 2019 statistics. And just in terms of
24 number of images, he had, as reported in the
25 presentence report, that they determined that the

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1 median number of images in cases in 2019 reported
2 was 4,265 images, is the median number. So in
3 terms of the number of images, I don't think Mr.
4 Merry's case is unusual. You know, it says some
5 offenders possess and distribute millions of
6 images and videos. So I don't think you can say
7 the number of images makes his offense conduct
8 unusual.

9 There's also -- they found that in the
10 enhancements for sadistic or masochistic conduct
11 for infant/toddler was in 84 percent of the cases
12 that's applied 600 or more images was applied 77
13 percent of the cases.

14 And I know the Court's aware that these
15 enhancements, the special specific offense
16 conduct enhancements are applied in many, many
17 cases. And that's why the commission has looked
18 at this and determined there's some other factors
19 that should be looked at in terms of the
20 offender's collection and nature of the
21 collecting behavior. I think sophistication,
22 whether they have these files categorized and,
23 you know, Mr. Merry did not do that.

24 And, of course, one of the important factors
25 I recognize is whether they ever engaged in some

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1 kind of sexually abusive or exploitive behavior
2 also in addition to the child pornography. Of
3 course, there could be different cases where it's
4 more -- happening at the same time, and
5 somebody's involved with the child pornography
6 receipt that they might be engaged in some kind
7 of sexually abusive behavior of some sort, but in
8 this case the Court's found it happened, you
9 know, 20 years ago for Mr. Merry.

10 So, overall, looking at the guidelines and
11 the offense conduct of Mr. Merry as he's charged
12 with the child pornography offense conduct, I
13 don't think Mr. Merry's case is, like I said, is
14 as egregious as many other cases. I know it
15 makes it a little more egregious, certainly, that
16 Mr. Merry did not stop, you know, when the search
17 warrant was executed in October 2019. His
18 devices were --

19 Can I get a tissue? I'm sorry. I've had a
20 cold.

21 THE COURT: Yes. Certainly.

22 MR. KEITH: I recognize that's an
23 aggravating factor, and that's affected his
24 acceptance of responsibility because I know the
25 government's not moving for the third point,

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1 not -- for reasons that are listed in the
2 guidelines in terms of Mr. Merry did plead
3 timely, didn't have to prepare for trial. That's
4 usually the third point being given, but I
5 think -- I recognize that there could be an
6 argument that maybe he shouldn't get acceptance,
7 but he has gotten the two levels instead of the
8 three in the presentence report, although he did
9 plead timely and accepts responsibility for the
10 offense conduct.

11 A lot of the -- like I say, images, as are
12 reflected in the report on the second phone after
13 the search warrant, and he wasn't charged at that
14 time, of course, but based on the same images
15 that were on the phone that were seized during
16 the search warrant, so there's the duplication
17 there.

18 History and characteristics, the Court's
19 aware Mr. Merry is about 60 -- close to 61 years
20 old. If you look at his background, of course,
21 you can't -- based on the Court's finding, you
22 have that Connecticut charge that he was
23 acquitted of and the Court's finding by
24 preponderance it occurred. That's the only
25 charge ever brought against him. No other prior

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1 criminal record. No other, you know, allegations
2 similar to the charge in Connecticut ever brought
3 against him. Came from a good family, served in
4 the Navy, served in the military, honorably
5 discharged, been employed, not really causing any
6 trouble.

7 I don't think his background has got
8 anything, you know, that the Court should look at
9 as an aggravating factor for the sentencing
10 purposes. His health, as the presentence report
11 reflects, is not good. He's been -- diabetes,
12 hypertension, various health issues that he
13 receives medication for at the jail. It's being
14 treated. He's doing okay. But he does have
15 these health issues.

16 As the presentence report reflects also, and
17 the letter from his sister reflects, he grew up
18 in the church, he attends church and has been
19 attending church throughout the time until he was
20 arrested in this case. So he's a church-going
21 person.

22 So if you take into account, you know, the
23 3553(a) factors and history and characteristics
24 of Mr. Merry, outside of the big elephant in the
25 room, so to speak, is the issue of the pattern,

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1 applying that enhancement for the conduct the
2 Court found occurred.

3 I don't think his history and
4 characteristics is aggravating circumstance for
5 sentencing. I don't think his offense conduct is
6 more aggravating than cases the Court sees and
7 may be less aggravating, as I've said.

8 So what's the sufficient sentence? What's
9 the sentence -- Mr. Merry's going to have a
10 difficult time serving a sentence with his health
11 issues, his age. Hopefully he'll do all right
12 and make it through any sentence the Court
13 imposes.

14 I don't see Mr. Merry -- I mean, as I said
15 in the memorandum, the latest one, he's not going
16 to be in any circumstance that was like he was in
17 in 2002, where he would be living with a minor;
18 that will never, ever happen again. I don't see
19 Mr. Merry, considering no other allegations of
20 any improper conduct with minors, that he should
21 be considered any danger or threat to a minor
22 once he's released on supervision with the
23 conditions he'll be under. And I think the only
24 thing that the Court should be concerned about is
25 would Mr. Merry ever receive child pornography

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1 again. And that could be monitored. He would
2 not want to -- he's not intending to. And with
3 the restrictions on supervision with the Internet
4 access and monitoring, certainly, I don't see him
5 re-offending.

6 I would point out to the Court that in one
7 of the latest reports they talk about recidivism
8 rates of persons charged like Mr. Merry, and
9 only -- they found out of 1,093 offenders, 4.3
10 percent were re-arrested with a sex offense
11 within three years. So it's a very low
12 recidivist rate for persons like Mr. Merry and
13 charged like Mr. Merry in this case.

14 So I don't see Mr. Merry as a threat or
15 danger to the public where the Court has to
16 impose a sentence to incapacitate him, keep him
17 in prison just for the protection of the public.
18 He knows he's going to have to serve a sentence
19 of some length, but, certainly, I think in
20 deterrence of him, he's certainly been deterred.
21 He's been in county jail now for a year and a
22 half or more and serving an additional time the
23 Court will impose is certainly sufficient to
24 deter him from any future criminal conduct like
25 he's charged with in this case.

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1 It will deter others too, you know, in terms
2 of the Court's sentence. I know if it's even
3 well below the advisory guideline range, it would
4 be sufficient to deter others from engaging in
5 this similar conduct.

6 The Court has to consider, of course,
7 disparities, what you've sentenced in other
8 cases; the Court's aware of that. Every case is
9 unique, and Mr. Merry's is unique too in some
10 ways. Some ways mitigating and some ways
11 aggravating, but I think you have to look at
12 maybe the guideline range that should apply if
13 Mr. Merry didn't have this pattern adding to his
14 offense level and then consider it would have
15 been 108 to 135 without the pattern. And that
16 would be too high, I would say. And that would
17 be in light of the flaws in the guidelines and
18 disparities, I think the Court would have
19 sentenced -- or should have sentenced, I would
20 argue, below the 108 to 135 range.

21 And then the Court has to consider how much
22 additional time should Mr. Merry serve as a
23 result of the Court's finding as to the acquitted
24 conduct in Connecticut in 2002.

25 I recognize that that's allowed. It's legal

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1 for the Court to consider that, and but I would
2 ask the Court not to sentence him, really, for
3 that conduct to an extreme extent. Like I said,
4 the guideline range at the bottom increases 80
5 months based on the Court's finding of that. And
6 I think that's too severe for overall
7 circumstances of that.

8 So, Your Honor, I just -- I'm not asking
9 specifically for a sentence, but I would ask for
10 a substantial variance below the guideline range
11 stated in the presentence report.

12 I will add that as to restitution, I still
13 haven't reached an agreement. I would ask for
14 additional time to do that. I wanted to see what
15 sentence the Court would impose so I could --
16 they would know that, the attorneys for the
17 victims. I think we can work it out and agree to
18 it and submit something to the Court later on
19 that.

20 THE COURT: All right.

21 MR. KEITH: That's all, Your Honor.

22 THE COURT: All right. Thank you.

23 Mr. Merry, is there anything you would like
24 to say today? And if so, you're fine where you
25 are. As long as I can hear you, and it looks

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1 like you have some paperwork in front of the
2 microphone, so I'll ask you or Mr. Keith to move
3 that over.

4 Thank you. And then you're not required to
5 speak, but you do have the right, and if you
6 would like to, now would be the time.

7 THE DEFENDANT: Yes. I don't feel like I've
8 been represented for that five point difference
9 as a -- as properly as I should have been. I
10 don't think I had the opportunity to defend it
11 properly.

12 THE COURT: I'm not sure what you're
13 referring to, to defend it properly?

14 THE DEFENDANT: Well, I didn't have anybody
15 here to defend it. Up there in -- for the trial
16 I had, what, six -- we had six witnesses that all
17 contradicted her. And -- and I wasn't even able
18 to say anything myself to contradict what she
19 said.

20 THE COURT: Well, you weren't prevented from
21 testifying.

22 THE DEFENDANT: I wasn't asked to neither.
23 I didn't know if I could or not.

24 THE COURT: Well, this is not the time for
25 those arguments, Mr. Merry. This is the time for

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1 you to speak in mitigation of your sentence. I'm
2 not going to consider your representation at that
3 hearing in terms of your sentence today.

4 THE DEFENDANT: All right.

5 THE COURT: That may be a matter you want to
6 raise later, but for now that decision has been
7 made. And Mr. Keith asked me to reconsider it,
8 and I denied that. So we -- that issue is
9 settled for purposes of your sentencing today.

10 THE DEFENDANT: All right.

11 THE COURT: It's preserved. You certainly
12 can raise it on appeal.

13 THE DEFENDANT: Okay. I realize what I was
14 doing was wrong. I repeated it because I think I
15 was addicted to it, sort of, at the time. So I
16 mean, it was not something I'm going to look to
17 be doing again, as far as downloading the videos
18 or video pictures. So I'm sorry about that. And
19 I just ask that you look favorably upon me.
20 Thank you.

21 THE COURT: All right. Thank you.

22 All right. Mr. Goldberg.

23 MR. GOLDBERG: Your Honor, it's the
24 government's position that the guidelines are
25 properly calculated. As this Court is aware, the

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1 defendant's predatory behavior essentially went
2 unchecked for many years, from Connecticut all
3 the way down to Florida, which makes him
4 distinguishable from other child pornography
5 cases.

6 THE COURT: Well, Mr. Goldberg, there's
7 nothing in between. There's no evidence of any
8 improper conduct of this nature in between 2002
9 and 2020.

10 MR. GOLDBERG: Well, Your Honor, actually,
11 if you look at the PSR, paragraphs 19 through 23,
12 he popped up on the radar of the Pensacola Police
13 Department.

14 THE COURT: Okay. I'm sorry. You're right,
15 a couple of years before 2020, but --

16 MR. GOLDBERG: That's all I'm suggesting.

17 THE COURT: -- not from 2002 up to the
18 incident at the genealogy library.

19 MR. GOLDBERG: Yes. That's all I was
20 suggesting. It's in the PSR I objected to
21 regarding those incidents prior to his 2020
22 arrest, which does, particularly the Connecticut
23 incident or incidents, make him distinguishable
24 from other child pornography offenders.

25 The incident offense happens, he's arrested,

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1 and he violates his pretrial release with more
2 child exploitation crimes, and that makes it
3 distinguishable from other cases.

4 And to the government on the grand spectrum
5 of child exploitation offenses, that makes it
6 disconcerting, that it's distinguishable because
7 we have a hands-on offender and someone who
8 violated release while out, which means we know
9 he's a recidivator at this point.

10 So all the government is requesting of the
11 Court is to protect the public from the
12 defendant, who won't respect the law for someone
13 who this Court has found has engaged in a
14 hands-on offense, for a defendant who we know
15 recidivates and for a defendant who was engaged
16 in conduct regarding child exploitation for many
17 years.

18 It would be the government's position there
19 is no reason to deviate from the guidelines in
20 3553(a), as well as 3661. After the Court
21 adjudicates the defendant, the government would
22 ask that the Court dismiss the remaining two
23 counts, which would be counts 2 and 4, and if I
24 may approach, this has been served on the defense
25 already, a motion for final forfeiture and

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1 purposed final order of forfeiture.

2 THE COURT: All right. Are you in agreement
3 with the restitution request?

4 MR. GOLDBERG: Yes, Your Honor. I believe
5 Mr. Keith and I would agree to a 90-day
6 continuance, and if it's before that, it's
7 something that will be filed with the Court.

8 THE COURT: Okay. The guidelines are
9 properly calculated as indicated as 188 to 235
10 months. There is the mandatory minimum of five
11 years. If the pattern enhancement had not been
12 applied, Mr. Keith is right, the guideline range
13 would have been 108 to 135 months. All things
14 considered, setting aside that pattern
15 enhancement, the sentence the Court would have
16 imposed would not have been a five-year sentence,
17 given the more aggravating circumstances in this
18 case that Mr. Goldberg just referenced, namely
19 the -- I don't know if you referenced the number
20 of images, but I do find the number of images
21 concerning. 5,000 plus images in total, I
22 believe.

23 The fact that the conduct continued --
24 excuse me -- occurred even earlier than what was
25 charged, and then the fact that it continued even

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1 after the federal search warrant on Mr. Merry's
2 residence. So the length of time that Mr. Merry
3 has been engaged in this conduct, the offense
4 conduct here, the number of images, the issue
5 with the new phone, telling probation
6 that he hadn't accessed or had any child
7 pornography on that Samsung phone, which was
8 entirely false, those are all aggravating factors
9 in my mind and would support a greater than
10 mandatory minimum sentence.

11 I would also take into account, however,
12 mitigating circumstances, his age, Mr. Merry's
13 health. There was no distribution, and that is
14 taken into account somewhat in the guideline
15 calculation.

16 The fact that there is no evidence of any
17 further instances between 2002 and I believe it
18 might have been '19 -- or 2019, but it's
19 reflected in the PSR, no criminal history
20 documented and honorable military service. So
21 all of those things considered, I would impose a
22 sentence absent the pattern of 90 months, which
23 would be a seven-and-a-half-year sentence.

24 With the five-level pattern, certainly I
25 will take that into account, the sentence that

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1 I'm going to impose is 132-month sentence. So it
2 is well below the advisory guideline range, Mr.
3 Merry, but I do think it takes into account the
4 factors that I need to consider, including your
5 personal history and characteristics, age and
6 health, as I've mentioned.

7 So that's the sentence I'm going to impose
8 today. If my ruling that is document 61 on
9 appeal regarding the five-level enhancement is
10 rejected or overruled, and the appellate court
11 finds that I have made an error in that ruling,
12 then as I said, the sentence that I would impose
13 would be a 90-month sentence.

14 Given that pattern enhancement and the
15 findings that I have made, I am going to impose a
16 life term of supervision. Again, if that
17 sentence -- or excuse me -- that decision is
18 overturned, then that decision would change to a
19 ten-year term of supervision.

20 All right. Mr. Merry, are you able to rise?

21 THE DEFENDANT: Yes.

22 THE COURT: Sir, if you would, please, rise
23 so I can formally pronounce your sentence.

24 THE DEFENDANT: Okay.

25 THE COURT: All right. Thank you. Mr.

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1 Merry, you are at this time formally adjudicated
2 guilty of counts 1 and 3 of the superseding
3 indictment; counts 2 and 4 are hereby dismissed.
4 I do find your presentence investigation report
5 accurate. I order the findings of the report
6 incorporated in the following sentence: Pursuant
7 to the Sentencing Reform Act of 1984 and all
8 amendments to that law, it is the judgment of
9 this Court that the Defendant David E. Merry is
10 hereby committed to the custody of the Bureau of
11 Prisons to be imprisoned for a total term of 132
12 months, as to both counts, with those terms to
13 run concurrent, one with the other. Also, you
14 will receive credit for all time served in this
15 case.

16 I've stated the basis for my sentence. I do
17 find that it is sufficient but not greater than
18 necessary to comply with the statutorily defined
19 purposes of sentencing in 18 USC 3553(a).

20 I do recommend to the BOP that Mr. Merry
21 participate in the sex offender treatment program
22 prior to his release. I will not be imposing a
23 fine, Mr. Merry. I suspect there may very well
24 be restitution that is ordered. I also will not
25 be imposing the JBTA special assessment. Those

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1 obligations are waived; however, pursuant to law
2 there is a special monetary assessment. The
3 total amount is \$200. It's nonwaivable. It's
4 due and payable immediately. And that actually
5 is 100 for the two felony counts of conviction.
6 The total is 200.

7 Also, and it is nonwaivable, there's another
8 mandatory assessment, and that is under 18 USC
9 2259(a) that applies in child pornography cases.
10 The assessment is mandatory up to \$35,000. I
11 will impose an assessment of \$500, and that is
12 also due and payable immediately.

13 Restitution will be determined at a later
14 time. I'll defer that decision for 90 days. All
15 right. You may be seated.

16 And I would recommend Mr. Merry be
17 designated to serve this sentence to a facility
18 as near to Escambia County, Florida as the Bureau
19 of Prisons can accommodate.

20 As indicated, upon your release from
21 custody, Mr. Merry, you will be placed on a
22 period of supervision of life. That is as to
23 both of the two counts with those terms to run
24 concurrently, one with the other. Supervision
25 will be under the mandatory and standard

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1 conditions adopted in this district together with
2 the special conditions that are outlined in your
3 presentence report, at paragraphs 115 through
4 131.

5 Mr. Keith, have you been over those with Mr.
6 Merry?

7 MR. KEITH: Well, he has a copy of the
8 presentence report, and --

9 THE COURT: Mr. Merry, do you have any
10 questions about those conditions?

11 THE DEFENDANT: No.

12 MR. KEITH: Your Honor, there was one thing
13 that I saw that I didn't know if the wording of
14 it was --

15 THE COURT: Well, there is a financial
16 condition that's based upon the anticipated
17 restitution, and I am required to set a monthly
18 installment amount, but I haven't ordered the
19 restitution so I will do that at the time. If I
20 amend the judgment if there is a restitution
21 award, if there is not a restitution award, these
22 financial conditions would be removed.

23 But was there something else, Mr. Keith?

24 MR. KEITH: No. I just saw -- it's not
25 going to be an issue, really, I don't think, but

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1 it says that you have no contact with minors --
2 I'm sure he didn't want to -- but that could be
3 inadvertent contact. I think it should be like
4 intentional contact with minors without any
5 supervision, you know, without approval, you
6 know, or something -- something more, I think, is
7 usually the language in that condition than
8 just --

9 THE COURT: I can add you must not have any
10 unsupervised contact with any minor. The
11 language I'm familiar with actually says directly
12 or indirectly, but I don't mind adding
13 unsupervised.

14 MR. KEITH: Yeah.

15 THE COURT: This is not intended to apply to
16 Mr. Merry going into a fast-food restaurant and
17 ordering a meal from a 15 year old. That's not
18 what it's intended to apply to.

19 MR. KEITH: Right.

20 THE COURT: All right. Total sentence --
21 excuse me -- there is also the matter of the
22 final order of forfeiture, which I just signed
23 that order, and as part of the judgment, those
24 items of property and Mr. Merry's interest in
25 them; A, B, C, D and E, also reflected in my

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1 preliminary order of forfeiture, document 47, Mr.
2 Merry's interest in those property items are
3 hereby -- is hereby forfeited to the United
4 States.

5 Mr. Merry, do you know what those items of
6 property are?

7 THE DEFENDANT: (Indicating).

8 THE COURT: You do. Okay. Very good.
9 Those will be forfeited as part of the judgment
10 in this case.

11 Mr. Keith, anything else? And all your
12 objections are preserved, obviously. Is there
13 anything else?

14 MR. KEITH: Your Honor, as to the
15 recommended designation, I talked to Mr. Merry,
16 and he's asked me, I believe, to ask, instead of
17 being as close to Pensacola, his sister lives in
18 Northern Virginia. He has some friend up in
19 Connecticut. Could we say the closest facility
20 to Connecticut?

21 THE COURT: Is that your request, Mr. Merry?
22 Is that where you would like to be?

23 THE DEFENDANT: Yeah, maybe somewhere
24 between Connecticut and Virginia somewhere, you
25 know, or in Connecticut or in Northern Virginia.

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1 THE COURT: We can -- certainly I can word
2 the recommendation in that fashion as opposed to
3 Northwest Florida to recommend --

4 THE DEFENDANT: I got nobody down here, no
5 family, no nothing. So --

6 THE COURT: So that makes no sense. So I
7 will make the recommendation for a designation to
8 the facility in proximity to -- as close as the
9 BOP can accommodate to Northern Virginia,
10 Connecticut, the northeast.

11 THE DEFENDANT: I'm sure there's somewhere
12 around New York City.

13 THE COURT: We'll word it to that effect.

14 MR. KEITH: Maybe if you could add that his
15 sister lives in Northern Virginia, and that would
16 be the reason he would want that.

17 THE COURT: Yes. We will do that.

18 MR. KEITH: And otherwise, Your Honor, I
19 know all my objections are preserved, and I would
20 state that we believe the sentence is greater
21 than necessary considering all 3553(a) factors of
22 imprisonment, and also the lifetime supervision
23 is greater than necessary in light of his age and
24 the unique circumstances of what happened when
25 the courts found 20 years ago and that he, my

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1 argument, he doesn't pose any danger or threat to
2 a minor upon his release.

3 THE COURT: I understand, Mr. Keith, but
4 with that finding made of contact, whether it was
5 20 years ago or 30 years ago, you know, my
6 decision is the same. Lifetime supervision is
7 appropriate and necessary.

8 If that decision gets overturned, and I've
9 considered that improperly, then I've told you
10 what my decision would be otherwise.

11 All right. Mr. Goldberg from the
12 government, is there anything you would like to
13 place on the record at this time?

14 MR. GOLDBERG: Your Honor, I apologize if I
15 missed it. Did the Court grant our motion to
16 dismiss the remaining counts?

17 THE COURT: I did.

18 MR. GOLDBERG: Thank you.

19 THE COURT: I dismissed those. Okay. Thank
20 you.

21 Mr. Merry, you do have the right to appeal
22 from this decision. If you choose to do so, your
23 notice of appeal must be filed within 14 days of
24 the date of the Court's written judgment. That
25 date does not run from today's date. It runs

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1 from the date that the sentence that I pronounced
2 here orally in court is put into a written
3 judgment and filed in our electronic court
4 docket. That's the date your appeal time begins
5 to run.

6 If you can't afford the cost of an appeal,
7 you may file for leave to appeal at no cost to
8 you. Mr. Keith will talk to you further about
9 your appeal rights. Just keep in mind the 14-day
10 window is strictly enforced, and if you intend to
11 challenge the decision -- the sentencing decision
12 on appeal, you should do so within that time
13 frame.

14 All right. The court will be in recess.

15 (Thereupon, the proceedings concluded at
16 11:40 a.m.)

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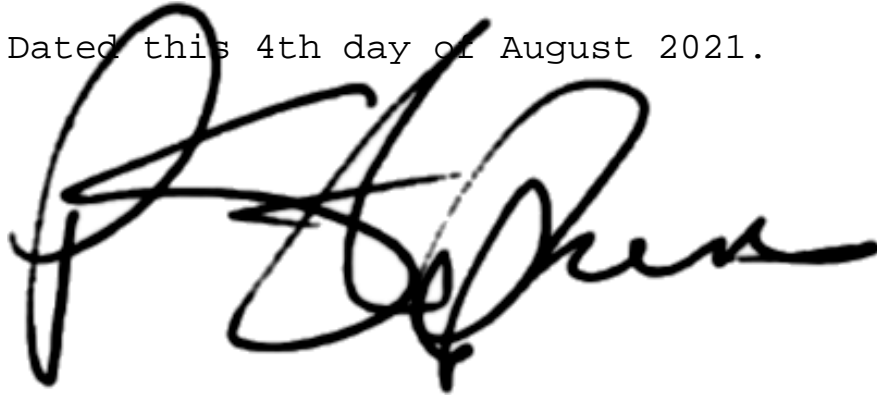
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COURT CERTIFICATE

STATE OF FLORIDA)
COUNTY OF SANTA ROSA)

I, Patricia C. Stephens, certify that
I was authorized to and did stenographically
report the foregoing proceedings, and that the
transcript is a true and complete record of my
stenographic notes.

Dated this 4th day of August 2021.



Patricia C. Stephens

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<p>_____</p> <p style="text-align: center;">\$</p> <p>_____</p> <p>\$200 23:3</p> <p>\$35,000 23:10</p> <p>\$500 23:11</p> <p>_____</p> <p style="text-align: center;">1</p> <p>_____</p> <p>1 22:2</p> <p>1,093 12:9</p> <p>100 23:5</p> <p>108 13:15,20 19:13</p> <p>115 24:3</p> <p>11:00 4:2</p> <p>11:40 29:16</p> <p>131 24:4</p> <p>132 22:11</p> <p>132-month 21:1</p> <p>135 13:15,20 19:13</p> <p>14 28:23</p> <p>14-day 29:9</p> <p>15</p>	<p>25:17</p> <p>18 22:19 23:8</p> <p>188 4:15 5:6 19:9</p> <p>19 17:11 20:18</p> <p>1984 22:7</p> <p>_____</p> <p style="text-align: center;">2</p> <p>_____</p> <p>2 18:23 22:3</p> <p>20 5:14 8:9 27:25 28:5</p> <p>200 23:6</p> <p>2002 11:17 13:24 17:8,17 20:17</p> <p>2012 6:12</p> <p>2016 6:3</p> <p>2017 6:3</p> <p>2019 6:3,23 7:1 8:17 20:18</p> <p>2020 17:9,15,21</p> <p>2259(a) 23:9</p> <p>23 17:11</p> <p>235 4:16 5:6</p>	<p>19:9</p> <p>_____</p> <p style="text-align: center;">3</p> <p>_____</p> <p>3 22:2</p> <p>30 28:5</p> <p>3553(a) 4:19 5:2 10:23 18:20 22:19 27:21</p> <p>36-1 4:14</p> <p>3661 18:20</p> <p>_____</p> <p style="text-align: center;">4</p> <p>_____</p> <p>4 18:23 22:3</p> <p>4,265 7:2</p> <p>4.3 12:9</p> <p>47 26:1</p> <p>_____</p> <p style="text-align: center;">5</p> <p>_____</p> <p>5,000 19:21</p> <p>_____</p> <p style="text-align: center;">6</p> <p>_____</p> <p>60 4:16 9:19</p> <p>600 7:12</p> <p>61 9:19 21:8</p>	<p>_____</p> <p style="text-align: center;">7</p> <p>_____</p> <p>77 7:12</p> <p>_____</p> <p style="text-align: center;">8</p> <p>_____</p> <p>80 14:4</p> <p>84 7:11</p> <p>_____</p> <p style="text-align: center;">9</p> <p>_____</p> <p>90 20:22 23:14</p> <p>90-day 19:5</p> <p>90-month 21:13</p> <p>_____</p> <p style="text-align: center;">A</p> <p>_____</p> <p>a.m. 4:2 29:16</p> <p>able 15:17 21:20</p> <p>absent 20:22</p> <p>abusive 8:1,7</p> <p>acceptance 8:24 9:6</p> <p>accepts 9:9</p> <p>access 12:4</p> <p>accessed 5:21 20:6</p> <p>accommodate 23:19 27:9</p>	<p>account 10:22 20:11,14,25 21:3</p> <p>accurate 22:5</p> <p>acquitted 9:23 13:23</p> <p>addicted 16:15</p> <p>addition 8:2</p> <p>additional 12:22 13:22 14:14</p> <p>adjudicated 22:1</p> <p>adjudicates 18:21</p> <p>adjustment 4:9</p> <p>adopted 24:1</p> <p>advisory 4:15 5:5 13:3 21:2</p> <p>afford 29:6</p> <p>age 11:11 20:12 21:5 27:23</p> <p>aggravating 8:23 10:9 11:4,6,7 13:11 19:17 20:8</p> <p>agreement 14:13 19:2</p> <p>allegations 10:1 11:19</p>
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