

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FILED
UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO

JUL 08 2019

MITCHELL R. ELFERS
CLERK

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DONALD TOLBERT,

Defendant.

Cr. No. 14-cr-3761 JCH

PLEA AGREEMENT

Pursuant to Rule 11(c)(1)(C), Fed. R. Crim. P., the parties notify the Court of the following agreement between the United States Attorney for the District of New Mexico, the Defendant, Donald Alvin Tolbert, and the Defendant's counsel, Todd B. Hotchkiss

REPRESENTATION BY COUNSEL

1. The Defendant understands the Defendant's right to be represented by an attorney and is so represented. The Defendant has thoroughly reviewed all aspects of this case with the Defendant's attorney and is fully satisfied with that attorney's legal representation.

RIGHTS OF THE DEFENDANT

2. The Defendant further understands the Defendant's rights:
- a. to plead not guilty, or having already so pleaded, to persist in that plea;
 - b. to have a trial by jury; and
 - c. at a trial:
 - 1) to confront and cross-examine adverse witnesses,
 - 2) to be protected from compelled self-incrimination,

- 3) to testify and present evidence on the Defendant's own behalf, and
- 4) to compel the attendance of witnesses for the defense.

WAIVER OF RIGHTS AND PLEA OF GUILTY

3. The Defendant agrees to waive these rights and to plead guilty to Counts 2 through 8 of the superseding indictment, charging violations of Title 18 United States Code Sections 2252(a)(2), 2252(b)(1), and 2256, that being Receipt of a Visual Depiction of Minors Engaged in Sexually Explicit Conduct; Counts 9 through 11 of the superseding indictment, charging violations of Title 18 United States Code Sections 2252(a)(2), 2252(b)(1), and 2256, that being Distribution of Visual Depictions of Minors Engaged in Sexually Explicit Conduct; and Counts 12 and 13 of the superseding indictment, charging violations of Title 18 United States Code Sections 2252(a)(4)(B), 2252(b)(2), and 2256, that being Possession of a Matter Containing Visual Depictions of Minors Engaged in Sexually Explicit Conduct.

SENTENCING

4. The Defendant understands that the minimum and maximum penalties provided by law for the offenses charged in Counts 2 through 11 of the superseding indictment is:
- a. imprisonment for a period of not less than 5 years and not more than 20 years of incarceration; if, pursuant to Title 18 United States Code Section 2252(b)(1), the defendant has one prior conviction under the laws of any state relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, imprisonment for a period not less than 15 years and not more than 40 years of incarceration;
 - b. a fine not to exceed the greater of \$250,000 or twice the pecuniary gain to the Defendant or pecuniary loss to the victim;

- c. a term of supervised release of any terms of years up to life to follow any term of imprisonment. (If the Defendant serves a term of imprisonment, is then released on supervised release, and violates the conditions of supervised release, the Defendant's supervised release could be revoked — even on the last day of the term — and the Defendant could then be returned to another period of incarceration and a new term of supervised release.);
- d. a mandatory special penalty assessment of \$100.00; and
- e. restitution as may be ordered by the Court.

5. The Defendant understands that the minimum and maximum penalties provided by law for the offenses charged in Counts 12 and 13 of the superseding indictment is:

- a. imprisonment for a period of not more than 10 years of incarceration; if, pursuant to Title 18 United States Code Section 2252(b)(2), any visual depiction involved in this offense involved a prepubescent minor or a minor who had not yet attained 12 years of age, imprisonment for a period of not more than 20 years of incarceration; if, pursuant to Title 18 United States Code Section 2252(b)(2), the defendant has one prior conviction under the laws of any state relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, imprisonment for a period not less than 10 years and not more than 20 years of incarceration;
- b. a fine not to exceed the greater of \$250,000 or twice the pecuniary gain to the Defendant or pecuniary loss to the victim;

- c. a term of supervised release of any terms of years up to life to follow any term of imprisonment. (If the Defendant serves a term of imprisonment, is then released on supervised release, and violates the conditions of supervised release, the Defendant's supervised release could be revoked — even on the last day of the term — and the Defendant could then be returned to another period of incarceration and a new term of supervised release.);
- d. a mandatory special penalty assessment of \$100.00; and
- e. restitution as may be ordered by the Court.

6. The parties recognize that the federal sentencing guidelines are advisory, and that the Court is required to consider them in determining the sentence it imposes.

7. The parties are aware that the Court will decide whether to accept or reject this plea agreement. The Court may defer its decision as to acceptance or rejection until there has been an opportunity to consider the presentence report. Pursuant to Federal Rule of Criminal Procedure 11(c)(5), if the Court rejects this plea agreement, the defendant shall have the right to withdraw the defendant's plea of guilty.

8. Regardless of any other provision in this agreement, the United States reserves the right to provide to the United States Pretrial Services and Probation Office and to the Court any information the United States believes may be helpful to the Court, including but not limited to information about the recommendations contained in this agreement and any relevant conduct under U.S.S.G. § 1B1.3.

ELEMENTS OF THE OFFENSE

9. If this matter proceeded to trial, the Defendant understands that the United States would be required to prove, beyond a reasonable doubt, the following elements for violations of the charges listed below:

Counts 2—8: 18 U.S.C. §§ 2252(a)(2), 2252(b)(1), and 2256, that being, knowingly receiving any matter that contains a visual depiction of a minor engaging in sexually explicit conduct:

First: that the defendant knowingly received a matter that the defendant knew contained at least one visual depiction of at least one minor engaged in sexually explicit conduct;

Second: that the visual depiction

(a) had been mailed, or had been shipped or transported in or affecting interstate or foreign commerce, including by computer; or

(b) had been mailed, or had been shipped or transported using any means or facility of interstate or foreign commerce, including by computer; or

(c) was produced using materials that had been mailed, or had been shipped or transported in or affecting interstate or foreign commerce, including by computer; or

(d) was produced using materials that had been mailed, or had been shipped or transported using any means or facility of interstate or foreign commerce, including by computer;

Third: that the producing of the visual depiction involved the use of a minor engaging in sexually explicit conduct; and

Fourth: that the visual depiction is of a minor engaged in sexually explicit conduct.

Counts 9—11: 18 U.S.C. §§ 2252(a)(2), 2252(b)(1), and 2256, that being, knowingly distributing any matter that contains a visual depiction of a minor engaging in sexually explicit conduct:

First: that the defendant knowingly distributed a matter that the defendant knew contained at least one visual depiction of at least one minor engaged in sexually explicit conduct;

Second: that the visual depiction

- (a) had been mailed, or had been shipped or transported in or affecting interstate or foreign commerce, including by computer; or
- (b) had been mailed, or had been shipped or transported using any means or facility of interstate or foreign commerce, including by computer; or
- (c) was produced using materials that had been mailed, or had been shipped or transported in or affecting interstate or foreign commerce, including by computer; or
- (d) was produced using materials that had been mailed, or had been shipped or transported using any means or facility of interstate or foreign commerce, including by computer;

Third: that the producing of the visual depiction involved the use of a minor engaging in sexually explicit conduct; and

Fourth: that the visual depiction is of a minor engaged in sexually explicit conduct.

Count 12: 18 U.S.C. §§ 2252(a)(4)(B), 2252(b)(2), and 2256, that being, knowingly possessing any matter that contains a visual depiction of a minor engaging in sexually explicit conduct:

First: that the defendant knowingly possessed a matter that the defendant knew contained at least one visual depiction of at least one minor engaged in sexually explicit conduct;

Second: that the visual depiction

- (a) had been mailed, or had been shipped or transported in or affecting interstate or foreign commerce, including by computer; or
- (b) had been mailed, or had been shipped or transported using any means or facility of interstate or foreign commerce, including by computer; or
- (c) was produced using materials that had been mailed, or had been shipped or transported in or affecting interstate or foreign commerce, including by computer; or
- (d) was produced using materials that had been mailed, or had been shipped or transported using any means or facility of interstate or foreign commerce, including by computer;

Third: that the visual depiction is a visual depiction other than the visual depictions relied upon in Counts 2-11, and 13.

Fourth: that the producing of the visual depiction involved the use of a minor engaging in sexually explicit conduct; and

Fifth: that the visual depiction is of a minor engaged in sexually explicit conduct.

Count 13: 18 U.S.C. §§ 2252(a)(4)(B), 2252(b)(2), and 2256, that being, knowingly possessing any matter that contains a visual depiction of a minor engaging in sexually explicit conduct:

First: that the defendant knowingly possessed a matter that the defendant knew contained at least one visual depiction of at least one minor engaged in sexually explicit conduct;

Second: that the visual depiction

(a) had been mailed, or had been shipped or transported in or affecting interstate or foreign commerce, including by computer; or

(b) had been mailed, or had been shipped or transported using any means or facility of interstate or foreign commerce, including by computer; or

(c) was produced using materials that had been mailed, or had been shipped or transported in or affecting interstate or foreign commerce, including by computer; or

(d) was produced using materials that had been mailed, or had been shipped or transported using any means or facility of interstate or foreign commerce, including by computer;

Third: that the visual depiction is a visual depiction other than the visual depictions relied upon in Counts 2-11, and 12.

Fourth: that the producing of the visual depiction involved the use of a minor engaging in sexually explicit conduct; and

Fifth: that the visual depiction is of a minor engaged in sexually explicit conduct.

DEFENDANT'S ADMISSION OF FACTS

10. By my signature on this plea agreement, I am acknowledging that I am pleading guilty because I am, in fact, guilty of the offense(s) to which I am pleading guilty. I recognize and accept responsibility for my criminal conduct. Moreover, in pleading guilty, I acknowledge that if I chose to go to trial instead of entering this plea, the United States could prove facts sufficient to establish my guilt of the offense(s) to which I am pleading guilty beyond a reasonable doubt, including any facts alleged in the superseding indictment that increase the statutory minimum or maximum penalties. I specifically admit the following facts related to the charges against me, and declare under penalty of perjury that all of these facts are true and correct:

Facts Relevant to Count 2:

11. On August 17, 2012, an individual controlling the account, downlow012@yahoo.com, sent an email containing visual depictions of minors engaging in sexually explicit conduct ("child pornography") to ddt123abc@aol.com, an account I controlled and created to receive and distribute child pornography. That email contained two videos titled, "-_(22).wmv" and "2010_Emma-Sis_Sara_7.wmv."

-_(22).wmv is a color video that is 1 minute and 24 seconds in length. This video depicts a blonde haired pre-pubescent female or girl wearing a pink shirt and kneeling in front of a naked adult male individual who is standing. The young girl has both her hands on the adult male's erect penis. While the young girl is looking at the camera she is licking the adult male's penis. Further on in the movie the young girl performs oral sex and masturbates the adult male's penis.

2010_Emma-Sis_Sara_7.wmv is a color video that is 1 minute and 5 seconds in length. This video depicts a brown haired pre-pubescent female or girl wearing a pink blind-fold mask and kneeling in front of an adult male who is standing, also wearing greenish colored pants. The adult male has his penis out through his zipper area and the young girl is performing oral sex on the adult male's penis.

12. On September 1, 2012, I forwarded the email I received from **downlow012@yahoo.com**, along with the two videos of child pornography, to another email account I controlled, **donnieisagod@aol.com**.

Facts Relevant to Count 3:

13. On August 20, 2012, an individual controlling the account, "gi gi" **69fakarava@gmail.com**, sent an email containing child pornography to **ddt123abc@aol.com**, an account I controlled and created to receive and distribute child pornography. That email contained three images titled, "**c1f912abfbcf64c3a7719040f163f65c.jpg**", "**c8fd84fa73d2a4e349c1617ad6078ec3.jpg**", and "**ea02dff7ada6a75e8501ee08fa7d732d.jpg**".

c1f912abfbcf64c3a7719040f163f65c.jpg is an image that depicts a dark haired prepubescent bent over on her knees and her left shoulder, while looking back at the camera. The young girl is wearing white colored lingerie and white thong-style underwear. In the bottom right corner of the image is the logo: "@www.vladmodels.ru". This image appears to be child erotica.

c8fd84fa73d2a4e349c1617ad6078ec3.jpg is an image that depicts a naked blonde haired pre-pubescent female or girl crouched or squatting down on her toes while on an unknown item, with wood paneled walls behind her. The young girl's long hair is

covering her breast area. The young girl's legs are spread apart and her vagina is exposed in a lewd or lascivious manner, with her arms resting on her legs.

ea02dff7ada6a75e8501ee08fa7d732d.jpg is an image that depicts a blonde haired pre-pubescent female or girl nude from the stomach down and wearing a blue t-shirt which is bearing the logo "Madagascar". The young girl is lying on her back on a bed and propped upward on her elbows. The young girl has her legs spread apart and with her vagina exposed in a lewd or lascivious manner, with her looking down towards her genitals.

14. On September 1, 2012, I forwarded the email I received from "gi gi" 69fakarava@gmail.com, along with the two images of child pornography and one image of child erotica, to another email account I controlled, donnieisagod@aol.com.

Facts Relevant to Count 4:

15. On August 25, 2012, an individual controlling the account, widd2703@web.de, sent an email containing child pornography to ddt123abc@aol.com, an account I controlled and created to receive and distribute child pornography. That email contained the following two videos and eight images; which were attached to this email and as are as follows: f44614960.avi, f37378000.avi, 74.jpg, &_(15).jpg, 36.jpg, 37.jpg, 72.jpg, 76.jpg, &_(7).jpg and 52.jpg.

f44614960.avi is a color video that is 42 seconds in length. This movie depicts a dark haired pre-pubescent female or girl wearing pink shorts and a white shirt that states "Atlanta" on it. The young girl is in a sitting position and holding her hands in a cupped fashion, while an adult male masturbates his penis while standing above the young girl. A couple of times in the movies the adult male moves the young girl's shorts aside and exposes the young girl's vagina. The adult male then ejaculates into the young girl's hands and clothes.

f37378000.avi is a color video that is 30 seconds in length. This movie depicts a naked pre-pubescent female or girl lying on her back and visible from the stomach down. The young girl has her legs spread apart and her vagina is visible. An adult male is standing in between the young girl's legs and is penetrating the young girl's vagina with his penis. The video pans upward where the adult male touched the young girl 's undeveloped breasts with his left hand and then pans downward again where the adult male is still having vaginal intercourse with the young girl.

74.JPG is an image that depicts a pre-pubescent female or girl standing up, naked and visible from the stomach down and with her vagina exposed. The young girl has white rope wrapped around her and wearing a purplish wrist-watch. An unknown adult person's left index finger is touching the inside of the young girl's vagina.

&_(15).JPG is an image that depicts a blonde haired, naked pre-pubescent female or girl lying on a young child 's bed, on her elbows and knees. The young girl's vagina and anus are exposed towards the camera and as the young girl is also looking back at the camera smiling. The focal point of the lewdly image is the young girl's genitals.

36.JPG is an image that depicts a blonde haired pre-pubescent female or girl lying on her stomach on a bed and with her eyes closed. The young girl is wearing a white shirt, yellow-checkered dress and wearing no underwear. The young girl's vagina and anus are exposed, with her legs slightly spread apart in a lewd, lascivious manner.

37.JPG is an image that depicts a blonde haired pre-pubescent female or girl lying on her back and on a bed. The young girl is wearing a white, yellow-checkered dress and wearing no underwear. The young girl has her legs spread wide apart and with her vagina

exposed in a lewd, lascivious manner. The young girl is looking at the camera and smiling.

72.JPG is an image that depicts a pre-pubescent female or girl visible and naked from the stomach down. The young girl's vagina is visible and lying on her back. In between the young girl's legs is an adult male naked from the waist down and with his penis exposed. The adult male's penis is up against the young girl's vagina, with a white creamy substance (possibly semen) on the adult male's penis and stomach.

76.JPG is an image that depicts a naked pre-pubescent female lying on her back and visible from the stomach down, with her vagina exposed. The young girl's legs are spread apart and a naked adult male is standing in between the young girl's legs. The adult male has his penis in his left hand and is placing his penis inside the young girl's vagina.

&_(7).jpg is an image that depicts a naked blond haired pre-pubescent female or girl, lying on her back on a bed and slight propped upward on her elbows. The young girl has her legs spread wide apart and with her vagina exposed in a lewd and lascivious manner. The young girl is smiling at the camera and the focal point of this image being the young girl's vagina.

52.JPG is an image that depicts a naked brown haired young girl on her hands and knees while on a white satin cloth. The young girl's vagina and anus are exposed, which the young girl has no pubic hair or the development of an underage female. The young girl has her legs apart slightly in a lewd and lascivious manner.

16. On September 1, 2012, I forwarded the email I received from widd2703@web.de, along with the two videos and eight images of child pornography, to another email account I controlled, donnieisagod@aol.com.

Facts Relevant to Count 5:

17. On September 8, 2012, an individual controlling the account, "IRIS Jasmine" jasmine.iris@yandex.com, sent an email containing child pornography to ddt666abc@gmail.com, another account I controlled and created to receive and distribute child pornography. That email contained one image titled, "23837218uNp.jpg".

23837218uNp.jpg is a color image that depicts a prepubescent girl laying on her stomach and facing away from the camera. She is nude from the waist down with her legs slightly spread and her vulva exposed in a lewd and lascivious manner.

18. On September 1, 2012, I forwarded the email I received from "IRIS Jasmine" jasmine.iris@yandex.com, along with the image of child pornography, to another email account I controlled, donnieisagod@aol.com.

Facts Relevant to Count 6:

19. On September 14, 2012, an individual controlling the account, "robert fitzhugh" yupikop@ymail.com, sent an email containing child pornography to ddt666abc@aol.com, an account I controlled and created to receive and distribute child pornography. That email contained two images titled, "1198371389715c.png" and "qwer.jpg".

1198371389715c.png is a color image that depicts a close-up picture of a prepubescent girl's vulva and vagina exposed in a lewd and lascivious manner toward the camera.

qwer.jpg is a color image that depicts a brown haired prepubescent girl completely nude laying on her back on leopard print furniture. The girl's legs are spread wide apart with her vulva exposed in a lewd and lascivious manner. The fingers of her right hand are spreading the lips of her vulva to expose her vagina.

20. On September 14, 2012, I forwarded the email I received from “robert fitzhugh” yupikop@ymail.com, along with the two images of child pornography, to another email account I controlled, donnieisagod@aol.com.

Facts Relevant to Count 7:

21. On September 15, 2012, an individual controlling the account, “robert fitzhugh” yupikop@ymail.com, sent an email containing child pornography to ddt666abc@aol.com, an account I controlled and created to receive and distribute child pornography. That email contained one video titled, “a-maste%201.mp4”.

a-maste%201.mp4 is a color video that is approximately 49 seconds long. The video depicts a blonde haired prepubescent girl completely nude laying on her back amid several bags. The girl’s legs are spread wide apart with her vulva exposed in a lewd and lascivious manner. The fingers of her right hand are spreading the lips of her vulva to expose her vagina.

22. On September 16, 2012, I forwarded the email I received from “robert fitzhugh” yupikop@ymail.com, along with the images of child pornography, to another email account I controlled, donnieisagod@aol.com.

Facts Relevant to Count 8:

23. On September 15, 2012, an individual controlling the account, “robert fitzhugh” yupikop@ymail.com, sent an email containing child pornography to ddt666abc@aol.com, an account I controlled and created to receive and distribute child pornography. That email contained one video titled, “VD4lapAAA.MP4”.

VD4lapAAA.mp4 is a color video that is approximately 1 minute and 13 seconds long. The video depicts a blonde haired prepubescent girl completely nude. The video also

features the penis, legs, and a hand of an adult male. At approximately 12 seconds, the adult male uses his hand to demonstrate a stroking movement on his penis, which the girl imitates with her own hand. At approximately 17 seconds, the girl attempts to place the penis in her vagina. At approximately 33 seconds through the end of the video, the girl alternates between kissing and sucking on the penis.

24. On September 16, 2012, I sent an email to shaneyone84@yahoo.com, along with the two images of child pornography and one image of child erotica, to another email account I controlled, donnieisagod@aol.com.

Facts Relevant to Count 9:

25. On July 17, 2012, I sent an email to shaneyoung84@yahoo.com and attached child pornography from dat666abc@aol.com, an account I controlled and created to receive and distribute child pornography. That email contained two videos titled, “-_chinas.wmv” and “-_22_soy (1).wmv”.

-_chinas.wmv is a color video that is approximately 38 seconds long. The video depicts three black haired prepubescent girls, all completely nude. The video also features the full naked body and penis of an adult male. One of the girls is performing the fellatio on the adult male’s penis, a second is sitting on the face of the adult male with her legs on either side of his face and her vulva sitting on the adult male’s face. The third girl is sitting next to the adult male.

-_22_soy (1).wmv is the same video described above as “-_(22).wmv”.

Facts Relevant to Count 10:

26. On August 7, 2012, I sent an email to laminat66@wp.edu and attached child pornography from abc123ddt, another account I controlled and created to receive and distribute

child pornography. That email contained two videos titled, “-_22_soy (1).wmv, which is described above as “-_ (22).wmv”.

Facts Relevant to Count 11:

27. On July 17, 2012, I sent an email to shaneyoung84@yahoo.com and attached child pornography from dat666abc@aol.com, an account I controlled and created to receive and distribute child pornography. That email contained two videos titled, “-_ (22).wmv”, “2010_Emma-Sis_Sara_7.wmv”, c8fd84fa73d2a4e349c1617ad6078ec3.jpg, and ea02dff7ada6a75e8501ee08fa7d732d.jpg, all of which are described above.

Facts Relevant to Count 12 and 13:

28. On September 20, 2012, I possessed a black tower eMachine computer, model E11360g, serial number PTNDSP20011500268F3000, that contained numerous images of child pornography and at least one video. Among those was the following video titled “Kait_47.avi.”

Kait_4y.avi is a color video that is approximately 1 minute and 10 seconds long. The video depicts a blonde haired prepubescent girl wearing a white onesie bearing a small rainbow. The video also features the penis, legs and a hand of an adult male. During the first approximately 53 seconds, the girl is seated between the naked legs of the adult male and performing fellatio on his penis. During the approximately 17 remaining seconds, the video depicts the same girl from the waist up, now naked, facing upward at an adult male penis being stroked by what appears to be the adult male’s hand. The adult male ejaculates on the girls’ face as she pulls away.

29. On September 20, 2012, I possessed a Silver tower Dell computer, model E520, serial number Dm51nc1, that contained numerous images and at least one video of child pornography. Among those was the following video titled “d3463b009c2e223a.bmp”.

d3463b009c2e223a.bmp is a color image that depicts a brown haired prepubescent girl laying on her back on a bed, completely nude and looking at the camera. There are also parts of a hand, arm, and leg of another individual who also appears to be a minor. The girl's legs are spread wide apart with her vulva exposed in a lewd and lascivious manner. The other individual's index finger is between the lips of the girls' vulva.

30. I now know that the images and videos of child pornography described above had been mailed, or had been shipped or transported in or affecting interstate or foreign commerce, including by computer; or had been mailed, or had been shipped or transported using any means or facility of interstate or foreign commerce, including by computer; or were produced using materials that had been mailed, or had been shipped or transported in or affecting interstate or foreign commerce, including by computer; or were produced using materials that had been mailed, or had been shipped or transported using any means or facility of interstate or foreign commerce, including by computer. In fact, each email was transported in and affecting interstate commerce because no relevant server was located in the state of New Mexico. I also agree that all of the child pornography depicts real children under the age of 16, and that the production of those images and videos of child pornography involved the use of a minor engaging in sexually explicit conduct.

31. By signing this agreement, the Defendant admits that there is a factual basis for each element of the crime(s) to which the Defendant is pleading guilty. The Defendant agrees that the Court may rely on any of these facts, as well as facts in the presentence report, to determine the Defendant's sentence, including, but not limited to, the advisory guideline offense level.

RECOMMENDATIONS

32. The United States and the Defendant recommend as follows:

- a. The Defendant and the United States have made an AGREEMENT pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), that a specific sentencing range of 360 to 420 months imprisonment is the appropriate disposition in this case. This sentencing range is meant to apply whether by operation of the prior conviction for Counts 2-11, or by running separate counts of conviction consecutive to each other. In either case, the parties agree that a specific sentencing range of 360 to 420 months imprisonment is the appropriate disposition in this case. This agreement takes into account the Defendant's acceptance of responsibility, with no further reduction to occur. The remaining components of the Defendant's sentence, including but not limited to any fine or restitution and the length and conditions of supervised release, shall be imposed by the Court after the presentation of evidence and/or argument by the parties.
- b. If the Court accepts the plea agreement, it must inform the Defendant that the agreed upon disposition will be included in the judgment, and the Court is bound by the terms of the plea agreement once the Court accepts the plea agreement.

DEFENDANT'S ADDITIONAL AGREEMENT

33. The Defendant understands the Defendant's obligation to provide the United States Pretrial Services and Probation Office with truthful, accurate, and complete information.

The Defendant represents that the Defendant has complied with and will continue to comply with this obligation.

34. Except under circumstances where the Court, acting on its own, rejects this plea agreement, the Defendant agrees that, upon the Defendant's signing of this plea agreement, the facts that the Defendant has admitted under this plea agreement as set forth above, as well as any facts to which the Defendant admits in open court at the Defendant's plea hearing, shall be admissible against the Defendant under Federal Rule of Evidence 801(d)(2)(A) in any subsequent proceeding, including a criminal trial, and the Defendant expressly waives the Defendant's rights under Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410 with regard to the facts the Defendant admits in conjunction with this plea agreement.

35. By signing this plea agreement, the defendant waives the right to withdraw the defendant's plea of guilty pursuant to Federal Rule of Criminal Procedure 11(d) unless (1) the court rejects the plea agreement pursuant to Federal Rule of Criminal Procedure 11(c)(5) or (2) the defendant can show a fair and just reason as those terms are used in Rule 11(d)(2)(B) for requesting the withdrawal. Furthermore, defendant understands that if the court rejects the plea agreement, whether or not defendant withdraws the guilty plea, the United States is relieved of any obligation it had under the agreement and defendant shall be subject to prosecution for any federal, state, or local crime(s) which this agreement otherwise anticipated would be dismissed or not prosecuted.

36. The Defendant recognizes that this plea agreement has already conferred a benefit on the Defendant. Consequently, in return for the benefit conferred on the Defendant by entering into this agreement, the Defendant agrees not to seek a downward departure or variance from the specific sentencing range of 360 to 420 months incarceration, as agreed to by the parties

pursuant to Rule 11(c)(1)(C) of the Federal rules of Criminal Procedure. If the Defendant, in violation of this paragraph, should nevertheless seek a downward departure or variance, including a departure or variance from the guideline Criminal History Category, the United States shall have the right to treat this plea agreement as null and void and to proceed to trial on all charges before the Court.

37. The Defendant agrees that the Defendant is the same person who was previously convicted of the following offenses, each of which was at the time of conviction punishable by imprisonment for a term exceeding one year:

- a. *State of New Mexico v. Donald Tolbert*, D-202-CR-2004-03555, for two counts of criminal sexual contact of a minor in the third degree (child under 13) in violation of § 30-9-13(A), NMSA 1978, one count of bribery of a witness (threats or bribes—reporting) in violation of § 30-24-3(A)(3), NMSA 1978, and one count of kidnapping (victim freed in safe place and no great bodily harm inflicted) in violation of § 30-4-1, NMSA 1978, in the Second Judicial District Court, County of Bernalillo, State of New Mexico on or about August 25, 2006.

RESTITUTION

38. The parties agree that, as part of the Defendant's sentence, the Court will enter an order of restitution pursuant to the Mandatory Victim's Restitution Act, 18 U.S.C. § 3663A.

FORFEITURE

39. The Defendant agrees to forfeit, and hereby forfeits, whatever interest the Defendant may have in any asset derived from or used in the commission of the offense(s) in this case. The Defendant agrees to cooperate fully in helping the United States (a) to locate and

identify any such assets and (b) to the extent possible, to obtain possession and/or ownership of all or part of any such assets. The Defendant further agrees to cooperate fully in helping the United States locate, identify, and obtain possession and/or ownership of any other assets about which the Defendant may have knowledge that were derived from or used in the commission of offenses committed by other persons.

40. The Defendant voluntarily and immediately agrees to the administrative, civil, or criminal forfeiture to the United States all of the Defendant's right, title, and interest in the following assets and properties:

- a. Black tower eMachine computer, model E11360g, serial number PTNDSP20011500268F3000;
- b. Silver tower Dell computer, model E520, serial number Dm51nc1; and
- c. Any other seized electronic media that contains evidence or was an instrumentality of a violation of the offenses alleged in Counts 1—13 of the superseding indictment.

41. The Defendant agrees to fully assist the United States in the forfeiture of the above-described property and to take whatever steps are necessary to pass clear title to the United States, including but not limited to execution of any documents necessary to transfer the Defendant's interest in the above-described property to the United States.

42. The Defendant agrees to waive the right to notice of any forfeiture proceeding involving the above-described property.

43. The Defendant knowingly and voluntarily waives the right to a jury trial on the forfeiture of the above-described property. The Defendant knowingly and voluntarily waives all constitutional, legal, and equitable defenses to the forfeiture of said property in any proceeding.

The Defendant agrees to waive any jeopardy defense or claim of double jeopardy, whether constitutional or statutory, and agrees to waive any claim or defense under the Eighth Amendment to the United States Constitution, including any claim of excessive fine, to the forfeiture of said property by the United States or any State or its subdivisions.

SEX OFFENDER REGISTRATION AND NOTIFICATION

44. The Defendant understands that by pleading guilty, the Defendant will be required to register as a sex offender upon the Defendant's release from prison as a condition of supervised release pursuant to 18 U.S.C. § 3583(d). The Defendant also understands that independent of supervised release, the Defendant will be subject to federal and state sex offender registration requirements, and that those requirements may apply throughout the Defendant's life. The Defendant understands that the Defendant shall keep the Defendant's registration current, shall notify the state sex offender registration agency or agencies of any changes to the Defendant's name, place of residence, employment, or student status, or other relevant information within three business days after such change. The Defendant shall comply with requirements to periodically verify in person the Defendant's sex offender registration information. The Defendant understands that the Defendant will be subject to possible federal and state penalties for failure to comply with any such sex offender registration requirements. If the Defendant resides in New Mexico following release from prison, the Defendant will be subject to the registration requirements of § 29-11A-4, NMSA 1978. The Defendant further understands that, under 18 U.S.C. § 4042(c), notice will be provided to certain law enforcement agencies upon the Defendant's release from confinement following conviction.

45. As a condition of supervised release, the Defendant shall initially register with the state sex offender registration in the State of New Mexico, and shall also register with the state

sex offender registration agency in any state where the Defendant resides, is employed, works, or is a student, as directed by the Probation Officer. The Defendant shall comply with all requirements of federal and state sex offender registration laws, including the requirements to update the Defendant's registration information. The Defendant shall provide proof of registration to the Probation Officer within 72 hours of release from imprisonment.

WAIVER OF APPEAL RIGHTS

46. The Defendant is aware that 28 U.S.C. § 1291 and 18 U.S.C. § 3742 afford a defendant the right to appeal a conviction and the sentence imposed. Acknowledging that, the Defendant knowingly waives the right to appeal the Defendant's conviction(s) and any sentence, including any fine, imposed in conformity with this Fed. R. Crim. P. 11(c)(1)(C) plea agreement, as well as any order of restitution entered by the Court. The Defendant also waives the right to appeal any sentence imposed below or within the Guideline range upon a revocation of supervised release in this cause number. In addition, the Defendant agrees to waive any collateral attack to the Defendant's conviction(s) and any sentence, including any fine, pursuant to 28 U.S.C. §§ 2241 or 2255, or any other extraordinary writ, except on the issue of defense counsel's ineffective assistance.

47. Notwithstanding this waiver of appeal rights as to his conviction and sentence and qualified waiver of appeal rights as to collateral attack, the Defendant, under Federal Rule of Criminal Procedure 11(a)(2), specifically reserves his right to appeal only the District Court's denial of the Defendant's motion to suppress (doc. 127) and denial of the Defendant's motion to reconsider that order (doc. 211). The United States expressly reserves its right to contest on any grounds any appeal.

GOVERNMENT'S ADDITIONAL AGREEMENT

48. Provided that the Defendant fulfills the Defendant's obligations as set out above, the United States agrees that:

- a. Following sentencing, the United States will move to dismiss Counts 1 and 14 of the superseding indictment.
- b. The United States will not bring additional criminal charges against the Defendant arising out of the facts forming the basis of the present superseding indictment.

49. This agreement is limited to the United States Attorney's Office for the District of New Mexico and does not bind any other federal, state, or local agencies or prosecuting authorities.

VOLUNTARY PLEA

50. The Defendant agrees and represents that this plea of guilty is freely and voluntarily made and is not the result of force, threats, or promises (other than the promises set forth in this agreement and any addenda). The Defendant also represents that the Defendant is pleading guilty because the Defendant is in fact guilty. Despite the District Court making space and time available on the morning of the Defendant's trial to allow for plea negotiations, the Defendant did not feel pressured in any way to accept a plea agreement. The Defendant understands that he could have elected to go to trial without illegal repercussions.

VIOLATION OF PLEA AGREEMENT

51. The Defendant agrees that if the Defendant violates any provision of this agreement, the United States may declare this agreement null and void, and the Defendant will thereafter be subject to prosecution for any criminal violation, including but not limited to any

crime(s) or offense(s) contained in or related to the charges in this case, as well as perjury, false statement, obstruction of justice, and any other crime committed by the Defendant during this prosecution.

SPECIAL ASSESSMENT

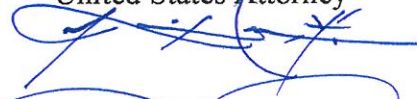
52. At the time of sentencing, the Defendant will tender to the United States District Court, District of New Mexico, 333 Lomas Blvd. NW, Suite 270, Albuquerque, New Mexico 87102, a money order or certified check payable to the order of the **United States District Court** in the amount of \$1,200 in payment of the special penalty assessment described above.

ENTIRETY OF AGREEMENT

53. This document and any addenda are a complete statement of the agreement in this case and may not be altered unless done so in writing and signed by all parties. This agreement is effective upon signature by the Defendant and an Assistant United States Attorney.

AGREED TO AND SIGNED this 8th day of July, 2019.

JOHN C. ANDERSON
United States Attorney



KRISTOPHER N. HOUGHTON
ALEXANDER M.M. UBALLEZ
Assistant United States Attorneys
Post Office Box 607
Albuquerque, New Mexico 87102
(505) 346-7274

I have carefully discussed every part of this agreement with my client. Further, I have fully advised my client of my client's rights, of possible defenses, of the sentencing factors set forth in 18 U.S.C. § 3553(a), of the relevant Sentencing Guidelines provisions, and of the consequences of entering into this agreement. In addition, I have explained to my client the elements to each offense to which she/he is pleading guilty. To my knowledge, my client's decision to enter into this agreement is an informed and voluntary one.



TODD B. HOTCHKISS
Attorney for the Defendant

I have carefully discussed every part of this agreement with my attorney. I understand the terms of this agreement, and I voluntarily agree to those terms. My attorney has advised me of my rights, of possible defenses, of the sentencing factors set forth in 18 U.S.C. § 3553(a), of the relevant Sentencing Guidelines provisions, and of the consequences of entering into this agreement.



DONALD ALVIN TOLBERT
Defendant