

1 GEORGE S. CARDONA
 Acting United States Attorney
 2 CHRISTINE C. EWELL
 Assistant United States Attorney
 3 Chief, Criminal Division
 WESLEY L. HSU (Cal. Bar No. 188015)
 4 Assistant United States Attorneys
 Chief, Cyber and Intellectual
 5 Property Crimes Section
 1200 United States Courthouse
 6 312 North Spring Street
 Los Angeles, California 90012
 7 Telephone: (213) 894-3045
 Facsimile: (213) 894-8601
 8 e-mail: wesley.hsu@usdoj.gov

9 Attorneys for Plaintiff
 UNITED STATES OF AMERICA

10
 11 UNITED STATES DISTRICT COURT
 12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA,) No. CR 09-1215-R
 14)
 Plaintiff,) GOVERNMENT'S POSITION RE:
 15) SENTENCING; EXHIBITS
 v.)
 16) Sent. Date: March 8, 2010
 MICHAEL DAVID BARRETT,) Time: 1:30 p.m.
 17) aka "Mark Bennett,") Ctrm: 8
 aka "handsfouryou,")
 18) aka "GOBLAZERS1,") Hon. Manuel L. Real
)
 19 Defendant.)
 20 _____)

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I.

INTRODUCTION

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2
3 Between January and September 2008, defendant Michael David
4 Barrett ("defendant") stalked ESPN sideline reporter Erin Andrews
5 ("Victim Andrews") to at least three different hotel rooms in
6 three states. Defendant violated Victim Andrews' privacy by
7 removing the peephole device from her hotel room door without her
8 knowledge and watching her through the peephole while she was in
9 her room. Defendant used his cellphone to capture video of her
10 naked in her room. Defendant then, over the course of weeks in
11 2009, posted on the Internet ten videos of Victim Andrews naked,
12 both identifying Victim Andrews as the woman in the videos and
13 making them available for anyone with an Internet connection to
14 download for years to come. Victim Andrews suffered, and
15 continues to suffer, substantial emotional distress from
16 defendant's unlawful conduct.

17 As a public figure, Victim Andrews' distress was magnified
18 due to the fact that many thousands of persons are aware of the
19 videos, and unknown numbers have viewed them knowing who she is.
20 For many years, Victim Andrews is likely to come into contact
21 with sports fans and other members of the public who are among
22 those who have seen the videos or, at minimum, who are aware of
23 them.

24 Defendant's criminal conduct toward Victim Andrews warrants
25 significant punishment. The government respectfully requests
26 that the Court impose a sentence of 27 months imprisonment, three
27 years supervised release with terms and conditions as stipulated
28 to by the parties in the plea agreement, restitution in the

1 amount of \$334,808.27, and a special assessment of \$100. The
2 government also requests that the Court remand defendant to the
3 custody of the Bureau of Prisons ("BOP") at the conclusion of his
4 sentencing hearing.

5 **II.**

6 **ARGUMENT**

7 A. THE GOVERNMENT CONCURS IN THE ADVISORY GUIDELINES
8 CALCULATIONS SET FORTH IN DEFENDANT'S PSR

9 With respect to the presentence investigation report
10 ("PSR"), the government requests that the Court adopt its
11 advisory Sentencing Guidelines calculation. This calculation is
12 as follows: a base offense level of 18 (U.S.S.G. § 2A6.2(a)); +2
13 for a pattern of activity involving stalking, threatening,
14 harassing or assaulting the same victim (U.S.S.G.
15 § 2A6.2(b)(1)(D)); and -3 for acceptance of responsibility--for a
16 total adjusted offense level of 17. The parties stipulated to
17 this calculation in the plea agreement. (Plea Agt. ¶ 13.)

18 The government also respectfully submits that the PSR
19 correctly calculated defendant's criminal history to be Category
20 I and asks that the Court adopt that calculation. Thus, the
21 government requests that the Court adopt an advisory Guidelines
22 range of 24 to 30 months.

23 B. A SENTENCE OF 27 MONTHS IMPRISONMENT IS SUFFICIENT, BUT NOT
24 GREATER THAN NECESSARY, TO PUNISH DEFENDANT FOR HIS CONDUCT

25 In addition to the advisory Guidelines range, of course, the
26 Court must consider the factors set forth under 18 U.S.C.
27 § 3553(a). The government respectfully submits that application
28

1 of the facts of this case to the Section 3553(a) factors supports
2 a sentence of 27 months in prison in this case.

3 1. 18 U.S.C. § 3553(a) (1)

4 18 U.S.C. § 3553(a) (1) requires the Court to consider the
5 nature and circumstances of the offense and the history and
6 characteristics of defendant. The nature and circumstances of
7 the offense are, to borrow the words of the United States
8 Magistrate Judge in Chicago who initially set defendant's bail,
9 "very horrific." See

10 <http://sports.espn.go.com/espn/news/story?id=4534293> (true and
11 correct copy attached as Ex. 1.)

12 Over the course of nine months, the defendant tracked Victim
13 Andrews across the country on at least three separate occasions.
14 (PSR ¶¶ 11-18.) He called a number of different hotels to locate
15 where she would be staying. (PSR ¶¶ 11, 15.) He deliberately
16 requested a room next door to her. (PSR ¶ 17.) While she was in
17 the privacy of her hotel rooms preparing for work by showering,
18 blow-drying her hair, and getting dressed, defendant invaded
19 Victim Andrews' privacy in a serious manner, removing the
20 peephole device from her hotel room doors so that he could take
21 digital videos of her naked. (PSR ¶¶ 13, 16, 18.)

22 Then, over the course of weeks in 2009, he posted the videos
23 for the public to download, naming the first video "Erin Andrews
24 Naked Butt," and other videos "Sexy and Hot Blonde Sports
25 celebrity shows us her all," "Erin Andrews in a Pink Thong,"
26 "Erin go WOW!!," "Erin Andrews," "Erin Andrews Spectacular Butt,"
27 and "Erin Andrews Awesome." (Ex. 2 (list of videos posted and
28 named by defendant on DailyMotion.com between February 17 and

1 June 19, 2009); PSR ¶¶ 21-22.) Defendant had attempted to sell
2 the videos to TMZ.com¹ (PSR ¶ 19), so he knew there would be
3 significant public interest in downloading the videos. In July
4 2009, the videos reached the top of Google's "most searched
5 items" list, so it is reasonable to infer that the videos were
6 widely downloaded. See
7 <http://www.youtube.com/watch?v=ebwP5LTOe8o> (Good Morning America
8 news report noting that the videos rose to the "top" of Google's
9 search list) (a true and correct copy on CD-ROM attached as Ex.
10 3.) The videos simply cannot be removed from the Internet, so no
11 doubt downloads continue to this day.

12 The emotional distress caused to Victim Andrews is a
13 necessary part of the evaluation of the nature and circumstances
14 of defendant's offense. See, e.g., United States v. Moon, 513
15 F.3d 527, 534 (6th Cir. 2008) (affirming sentence where district
16 court permitted testimony of relatives of deceased patients as
17 relevant to nature and circumstances of the fraud offense).²
18 Defendant, of course, has admitted that he intended to cause
19 Victim Andrews substantial emotional distress and that he in fact
20 did cause her substantial emotional distress. Nevertheless, as
21 her statement to the Court at defendant's guilty plea and her
22 Victim Impact Statement both make clear, defendant's conduct has
23

24 ¹ TMZ.com is a website dedicated to celebrity news.

25 ² Some courts have considered harm to the victim under
26 Section 3553(a)(2) as well. See, e.g., United States v.
27 Gonzalez, 541 F.3d 1250, 1254 (11th Cir. 2008) (noting district
28 court's consideration of "desperation of the victims" when
considering the nature and circumstances of offense and harm to
victims when considering the need to reflect the seriousness of
the offense, to promote respect for the law, and to provide just
punishment).

1 had a devastating impact on Victim Andrews' emotional state, and
2 the emotional distress caused to her and her family cannot be
3 overstated. She has lived in fear for her physical safety.
4 (Victim Impact Statement at 1.) She has nightmares about
5 defendant. (Id.) She also wakes up at least once a night
6 fearing that defendant is breaking into her home. (Id.) Every
7 time she turns on a computer, Victim Andrews is reminded that the
8 videos cannot be removed from the Internet (id.), and she knows
9 that her future husband and her future children will have to
10 confront these videos (id. at 2). Whenever she goes to work, she
11 must deal both with worries that she is not being taken seriously
12 and with "fans" that say things about the videos to her. (Id. at
13 1.) Also disturbing is the fact that many people, including some
14 of Victim Andrews' peers in the media, wrongly believed that
15 Victim Andrews had something to do with these videos, i.e., that
16 she orchestrated them to boost her career. (Id. at 2.) Victim
17 Andrews' father has also suffered significant emotional distress,
18 with his daughter calling in tears and being "ravaged on the
19 Internet." (Id. at 3.) Taken together, the nature and
20 circumstances of defendant's conduct require significant
21 punishment.

22 Defendant's history and characteristics also support a
23 sentence of 27 months imprisonment. It is true that defendant's
24 criminal history does not result in any criminal history points.
25 (PSR ¶¶ 42-47.) It is also true that defendant has a history of
26 stable employment. (PSR ¶¶ 64-65.) However, defendant's conduct
27 toward Victim Andrews cannot be viewed as an "isolated" or
28 "aberrant" act in an otherwise law-abiding life.

1 To the contrary, Victim Andrews was only one of defendant's
2 many victims. After initially posting one of the videos of
3 Victim Andrews to Google on February 12, 2009, defendant posted
4 ten videos of Victim Andrews to DailyMotion.com under his
5 username "GOBLAZERS1" between February 16 and March 11, 2009.
6 (PSR ¶¶ 21-22.) Between February 16 and June 19, 2009, defendant
7 also used the GOBLAZERS1 account at DailyMotion.com to post 32
8 other "hotel peephole" videos. (See Ex. 2; Gov't Under Seal Ex.
9 A (CD with copies of all videos received by the government from
10 DailyMotion.com).)³ Review of these other videos demonstrates
11 that defendant victimized approximately 16 other women in almost
12 precisely the same way that he victimized Victim Andrews. (Gov't
13 Under Seal Ex. A). Thus, defendant's video scheme spanned at
14 least 18 months, and involved over a dozen victims. (PSR ¶ 10.)
15 Also, as he did with Victim Andrews (PSR ¶ 14), defendant ran
16 "People Searches" (a type of Internet background check that can
17 produce information such as date of birth and home address) on
18 more than 30 other women between November 25, 2006, and July 2,
19 2009. (See Gov't Under Seal Ex. B.)⁴ These women included other
20 female sports reporters, as well as other television
21 personalities. (See id. at 18, 51, 54-55.)⁵ Thus, defendant's
22 criminal conduct toward Victim Andrews was neither aberrant or
23

24 ³ The government is concurrently filing exhibits A and B
25 under seal.

26 ⁴ It is worth noting that, in contrast, the only man that
27 defendant ran a "People Search" on was himself.

28 ⁵ Based on the government's review of the videos, the
government does not believe that celebrities other than Victim
Andrews are portrayed in the other 32 videos posted by defendant.

1 isolated. Instead, it was a part of a long-term obsession and
2 scheme involving Victim Andrews, as well as a significant number
3 of other women.

4 For all of these foregoing reasons, this Section 3553(a)(1)
5 factor strongly supports the imposition of a sentence of 27
6 months imprisonment.

7 2. 18 U.S.C. § 3553(a)(2)

8 18 U.S.C. § 3553(a)(2) requires the Court to consider the
9 need for the sentence to reflect the seriousness of the offense,
10 promote respect for the law, provide just punishment for the
11 offense, afford adequate deterrence to criminal conduct, protect
12 the public from further crimes of defendant, and provide
13 defendant with needed educational or vocational training, medical
14 care, or other correctional treatment in the most effective
15 manner. This factor also supports the government's request for a
16 sentence of 27 months imprisonment because of the seriousness of
17 the offense, the need to deter further criminal conduct by the
18 defendant, and the need to promote respect for the law.

19 As discussed above, defendant's offense is serious.
20 Defendant's punishment in this case must not only serve as a
21 deterrent to him, but as a deterrent to other would-be video
22 voyeurs who would post their videos on the Internet. The
23 confluence of the widespread use of cellphone cameras, the
24 popularity of reality television, and the availability of the
25 Internet have combined to make video voyeurism a serious problem
26 today. "The problem of voyeurism has become even more
27 exacerbated since the introduction of cell phones equipped with
28 digital cameras These portable devices enable a Peeping

1 Tom to secretly snap photographs of anyone at any time without
2 notice, and easily upload these photographs to the Internet for
3 anyone to view." Josh Blackman, Note, Omniveillance, Google,
4 Privacy in Public, and the Right to Your Digital Identity: A Tort
5 For Recording and Disseminating an Individual's Image Over the
6 Internet, 49 Santa Clara L. Rev. 313, 360 (2009) (internal
7 citation omitted) (true and correct copy attached as Ex. 4.) The
8 combination of video voyeurism and the Internet poses an ever-
9 growing and substantial danger to the right to privacy.

10 This danger has been noticed by legislatures across the
11 country. In passing the Video Voyeurism Prevention Act of 2004,
12 18 U.S.C. § 1801, Congress recognized the substantial harm of
13 video voyeurism combined with the Internet:

14 In passing the Video Voyeurism Prevention Act of 2004,
15 Congress addressed its concern with the Internet's
16 ability to easily and instantly disseminate voyeuristic
17 photographs to a global audience. The House Reports
18 noted that violations of privacy are "compounded when
19 the photographs find their way to the Internet . . .
20 [and] the instantaneous distribution capabilities of
21 the Internet, have combined to create a threat to . . .
22 privacy." The Congressional Record reported that "the
23 impact of video voyeurism on its victims is greatly
24 exacerbated by the Internet. As a result of Internet
25 technology, the photographs that a voyeur captures can
26 be disseminated to a worldwide audience in a matter of
27 seconds." Representative Jerse even commented that a
28 victim's "privacy could be violated millions of times"
if the image is posted on the Internet.

23 Blackman, supra, at 366-67. In addition to the federal
24 government, nearly all of the states have passed laws prohibiting
25 video voyeurism and/or the dissemination of such videos. See,
26 e.g., Tenn. Code Ann. § 39-13-605 (prohibiting video voyeurism
27 and dissemination); Ohio Rev. Code Ann. § 2907.08 (Voyeurism);
28 Wis. Stat. § 942.08 (Invasion of Privacy); S.C. Code Ann. § 16-

1 17-470 (prohibiting recording and distribution); 720 Ill. Comp.
2 Stat. 5/26-4 (same). Defendant's sentence should reflect the
3 need to curb this significant problem.

4 In this time of diminishing personal privacy, a line must be
5 drawn. Travelers must feel safe in the privacy of their hotel
6 rooms, secure that they will not have embarrassing videos taken
7 of them while showering or dressing and placed on the Internet
8 for unlimited distribution forever. A 27-month sentence in this
9 case would promote respect for the law and deter further criminal
10 conduct by defendant and others.

11 3. THE REMAINING 3553(a) FACTORS ALSO SUPPORT THE SENTENCE
12 REQUESTED BY THE GOVERNMENT

13 18 U.S.C. § 3553(a) (3) requires the Court to consider the
14 kinds of sentences available. There is no doubt that
15 incarceration is appropriate given the nature of defendant's
16 offense.

17 18 U.S.C. § 3553(a) (4) and (5) now require the Court to
18 consider the Sentencing Guidelines in determining the particular
19 sentence to be imposed. As noted above, the advisory Guidelines
20 recommend a sentence in the range of 24 to 30 months, which the
21 government requests here.

22 18 U.S.C. § 3553(a) (6) requires the Court to minimize
23 sentencing disparity among similarly situated defendants.
24 Sentencing within the Guideline range of 24 to 30 months is
25 sufficient to ensure that the sentence does not create an
26 unwarranted disparity with other defendants. See United States
27 v. Treadwell, ___ F.3d ___, 2010 WL 309027, at *18 (9th Cir. Jan.
28 28, 2010) ("Because the Guidelines range was correctly

1 calculated, the district court was entitled to rely on the
2 Guidelines range in determining that there was no 'unwarranted
3 disparity' between Treadwell and other offenders convicted of
4 similar frauds."). The government is unaware of any "similarly
5 situated" defendants.

6 Finally, 18 U.S.C. § 3553(a)(7) requires the Court to
7 consider restitution. Restitution can include an order requiring
8 defendant to liquidate retirement assets, to the extent that
9 defendant is permitted under his plan, in order to meet
10 restitution obligations. United States v. Novak, 476 F.3d 1041,
11 1053 (9th Cir. 2007) (en banc); (see PSR ¶ 67 (defendant
12 possesses retirement assets).) Two separate restitution
13 provisions apply here. Title 18, United States Code, Section
14 2264 mandates that the Court order "the full amount of the
15 victim's losses." 18 U.S.C. § 2264(b)(1), (4). This is defined
16 as including the following:

- 17 (A) medical services relating to physical,
18 psychiatric, or psychological care;
- 19 (B) physical and occupational therapy or
20 rehabilitation;
- 21 (C) necessary transportation, temporary housing, and
22 child care expenses;
- 23 (D) lost income;
- 24 (E) attorneys' fees, plus any costs incurred in
25 obtaining a civil protection order; and
- 26 (F) any other losses suffered by the victim as a
27 proximate result of the offense.

28 18 U.S.C. § 2264(b)(3). Under Section 2264, "victim" is defined
in relevant part as the individual harmed as a result of a
commission of a crime under Section 2261A. 18 U.S.C. § 2264(c).

1 Under the Mandatory Victims Restitution Act ("MVRA"),
2 restitution is mandatory where "an identifiable victim or victims
3 has suffered . . . pecuniary loss." 18 U.S.C. § 3663A(c)(1)(B).

4 For the purposes of this section, the term "victim"
5 means a person directly and proximately harmed as a
6 result of the commission of an offense for which
7 restitution may be ordered including, in the case of an
8 offense that involves as an element a scheme,
9 conspiracy, or pattern of criminal activity, any person
10 directly harmed by the defendant's criminal conduct in
11 the course of the scheme, conspiracy, or pattern.

12 18 U.S.C. § 3663A(a)(2). The MVRA requires that restitution
13 "reimburse the victim for lost income and necessary child care,
14 transportation, and other expenses incurred during participation
15 in the investigation or prosecution of the offense or attendance
16 at proceedings related to the offense." 18 U.S.C. § 3663A(b)(4)
17 (emphasis added). Investigation costs in aid of the criminal
18 proceedings, including attorneys' fees, are recoverable. United
19 States v. Gordon, 393 F.3d 1044, 1057 (9th Cir. 2004); see also
20 United States v. Battista, 575 F.3d 226, 233-34 (2d Cir. 2009)
21 (decided under "almost verbatim" language of the Victim Witness
22 Protection Act ("VWPA")).

23 As set forth in the PSR and in her Victim Impact Statement,
24 Victim Andrews seeks \$335,508.27 in restitution. The government
25 respectfully submits that nearly all of the losses requested by
26 Victim Andrews are recoverable under either Section 2664 or the
27 MVRA. Certainly, all of the losses directly incurred by Victim
28 Andrews are recoverable under Section 2664. ESPN's losses in
assisting with the investigation are also recoverable because
ESPN qualifies as a "victim" under the MVRA as Victim Andrews'
employer and given that she was traveling for work when

1 victimized. See Battista, 575 F.3d at 231 (“Although [the
2 defendant] did not defraud the NBA directly, we conclude that the
3 district court properly characterized the NBA as a ‘victim’ under
4 the VWPA because the NBA was harmed by the conduct committed
5 during the course of the conspiracy to transmit wagering
6 information”). The losses incurred to Victim Andrews’
7 father for traveling with her to Los Angeles to provide support
8 during the investigation and prosecution of this case are
9 recoverable as her father also qualifies as a victim under the
10 MVRA. Only the \$700 airfare for Victim Andrews’ mother, which
11 was neither incurred by Victim Andrews nor directly related to
12 the investigation or prosecution of defendant, seems to fall
13 outside the scope of both Section 2264 and the MVRA. Thus, the
14 government conservatively requests a restitution order of
15 \$334,808.27 (Victim Andrews’ requested amount less \$700).

16 **III.**

17 **CONCLUSION**

18 Defendant’s criminal conduct against Victim Andrews cannot
19 be sanctioned. A 27-month sentence is necessary to punish
20 defendant for his violations of Victim Andrews’ privacy and the
21 resulting substantial emotional distress. The government also
22 requests that the Court impose a three-year period of supervised
23 release, restitution in the amount of \$334,808.27, and a special
24 assessment of \$100. Finally, the government requests that
25 defendant be remanded to the custody of the BOP at the conclusion
26 of the sentencing hearing in this matter. See 18 U.S.C.
27 § 3143(b)(2) (“The judicial officer shall order that a person who
28 has been found guilty of an offense . . . and is awaiting

1 imposition or execution of sentence be detained unless . . . the
2 judicial officer finds there is a substantial likelihood that a
3 motion for acquittal or new trial will be granted . . . and the
4 judicial officer finds by clear and convincing evidence that the
5 person is not likely to flee or pose a danger to any other person
6 of the community.”) (emphasis added).

7
8 DATE: February 8, 2010

Respectfully submitted,

9 GEORGE S. CARDONA
Acting United States Attorney

10 CHRISTINE C. EWELL
11 Assistant United States Attorney
12 Chief, Criminal Division

13 _____
/s/
14 WESLEY L. HSU
15 Assistant United States Attorney
Chief, Cyber and Intellectual
Property Crimes Section

16 Attorneys for Plaintiff
17 UNITED STATES OF AMERICA
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