

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DISIVISION**

| | | |
|----------------------------------|---|-------------------------------------|
| UNITED STATES OF AMERICA, |) | CRIMINAL NO. 07 CR 195 |
| |) | |
| Plaintiff, |) | JUDGE CHRISTOPHER BOYKO |
| |) | |
| vs. |) | <u>SENTENCING MEMORANDUM</u> |
| |) | |
| SCOTT HARVANEK, |) | |
| |) | |
| Defendant. |) | |

Defendant, Scott D. Harvanek, by and through undersigned counsel, Edwin J. Vargas respectfully submits the instant Sentencing Memorandum for use by the Court in anticipation of the sentencing hearing scheduled before this Court on August 5, 2008, at 2:00 p.m. Setting forth factors for this Court to take into consideration in determining the type of and length of sentence, to comply with the statutory directives set forth in 18 U.S.C. § 3553(a); and for a departure and/or variance (non-guideline sentence).

SENTENCING UNDER BOOKER:

On January 12, 2005, the Supreme Court ruled that its Sixth Amendment holding in Blakely v. Washington, 124 S. ct. 2531 (2004) and Apprendi v. New Jersey, 530 U.S. 466 (2000) applies to the Federal Sentencing Guidelines. In the subsequent United States Supreme Court Decision in United Sates v. Booker, 125 S. ct. 738, 756 (2005). Given the mandatory nature of the Sentencing guidelines, the Court found a relevant distinction between the sentence imposed pursuant to the Washington statutes in Blakely and the sentences imposed pursuant to the Federal Sentencing Guidelines in cases before the District Court *Id.* at 751. The Court further found those provisions of the Federal Sentencing Reform Act of 1984 that make the Guidelines

mandatory, 18 U.S.C. § 3553 (b)(1) or which rely upon the guidelines mandatory nature 18 U.S.C. § 374 (e), incompatible with its Sixth Amendment holding Booker, 125 S. ct. at 756. Accordingly, the Court served and exercised those provisions, making the guidelines effectively advisory. *Id.* at 757. Instead of being bound by the Sentencing Guidelines, the Sentencing Reform Act, as revised by Booker requires a Sentencing Court to tailor the sentence in light of other statutory concerns as well 18 U.S.C. § 3553 (a). Booker, 125 S.Ct. at 757. Thus under Booker, Sentencing Courts must treat the guidelines as just one of a number of sentencing factors set forth in 18 U.S.C. § 3553 (a).

The Primary Directive in 18 U.S.C. § 3553 (a) is for Sentencing Courts to impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph 2. Section 3553(a)(2) states that such purposes are:

- A. to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- B. to afford adequate deterrence to criminal conduct;
- C. to protect the public from further crimes of the defendant; and
- D. to provide the defendant with needed educational or vocational training, medical care, or the correctional treatment in the most effective manner;

In determining the minimally sufficient sentence 18 U.S.C. § 3553 (a) further directs Sentencing Courts to consider the following factors:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant 18 U.S.C. § 3553 (a)(1);
- (2) the kinds of sentences available 18 U.S.C. § 3553 (a)(3);
- (3) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct 18 U.S.C. § 3553 (a)(6), and

- (4) The need to produce restitution to any victims of the offense 18 U.S.C. § 3553 (a)(7).

OFFENSE CONDUCT:

From September 2004 to May 25, 2005, the Defendant participated, in the beginning, as a member of Elite Torrents (“ET”), an online piracy organization which used a computer program called BitTorrent, which allows peer-to-peer file sharing over the internet. The Bit Torrent technology allows users to copy and distribute pirated versions of copyrighted movies, video games, and software among members. The BitTorrent program was originally developed to allows software developers, working in different parts of the world, to share data as they worked on the same software package. However, the technology was quickly converted to many other legitimate and illegitimate uses.

The Elite Torrents network was a hierarchical organization. Within that hierarchy, the Defendant started off as member of the network. However, because network administrators quickly identified the Defendant’s internet connection as a fast connection he was recruited, by Daniel Dove, to serve as one of several “Uploaders”, who were responsible for initially distributing newly acquired pirated content others members of the group. Defendant would receive newly pirated movies from Elite Torrents’ “Uploader Administrator” which he would then upload to other Elite Torrents members using a very fast Internet connection.

The government was able to acquired the computer database that tracked all of Elite Torrents’ members’ uploads and downloads, as well as other data. The preliminary analysis of this database record showed that for a six month period between September 2004 and May 25, 2005, Defendant participated in distributing and copying pirated copyrighted movies, software programs, computer games and music with a total retail value in excess of \$10,000, but less than

\$30,000. The Defendant acknowledged that he participated in the group so that he could acquire free copies of movies, software and video games. (Please See Exhibit A).

DEFENDANT'S BACKGROUND:

The Defendant was born on July 29, 1985 and raised in Berea, Ohio. While growing up in Berea the Defendant was industrious and made good use of his time working as a T-Ball umpire, completing remodeling projects, mowing lawns and working on cars for either family or neighbors. (Please See Exhibit B-1, 2)

The Defendant, Scott, had a happy childhood and showed early on a keen intellect and a desire to learn. Scott was a good student and graduated from Berea High school. While at Berea High the Defendant was active in extracurricular activities including marching bands where he met his future and current wife Erin. (Please see Exhibits B, C & D). The Defendant graduated from Berea High School in 2003 and shortly thereafter formed Fused Network which was a business operated by himself and a business partner that resold internet web servers hosted in a Chicago data center on a fast internet node.

After the Defendant's wife, Erin-Marie Chadowski, graduated from Berea high school she joined the Air Force. They were briefly separated in 2004 and 2005 while she completed training but eventually married in Mobile Alabama on February 11, 2005. Erin would later be assigned to their current home at the Davis-Monthan Air Force Base in Tucson Arizona and where Scott later moved to start a life with Erin. The Defendant's move happened just weeks before the search warrant was served on his parent's house where he lived prior to his marriage. Once the defendant was made aware of the search warrant he fully cooperated with the government turning over computers, giving user names and passwords and directing the government to file locations on his computer where they could find logs.

POST OFFENSE CONDUCT:

After realizing the seriousness of his offense the defendant provided help to the government in a proffer that was conducted in Phoenix Arizona. He cooperated with the government even though his original plea agreement did not contemplate this level of involvement.

The Defendant immediately set about making himself into a better citizen and person. First, he dedicated himself to supporting his wife, who was a contributing member of the armed services. She has served this country by providing mission sensitive weather forecasts. Her service has taken her to “in theater” bases in Columbia, South America. (Please See Exhibit D-1 & 2). The Defendant and his wife have and will be separated for long periods of time as she is currently set to deploy to South Korea for a period of one (1) year. (Please see Exhibit D-1). The Defendant supports his wife’s mission and has helped with numerous fund-raising efforts held at the University of Arizona football games. (Please see Exhibit D-1). The funds raised will help families of Airmen station over-seas.

While in Tucson the Defendant has made good use of his time, efforts and expertise and in October of 2005 obtained a position as a Network Engineer for Login Inc. Login Inc is small company of 6 fulltime employees. However, it runs the largest independent Internet Service Provider in southern Arizona. The Defendant hopes to continue his work in providing the best and most reliable connectivity to their customers. Furthermore, Login, with the efforts of the Defendant, has become widely known as the most competent and stable internet company in the area.

The Defendant is also co-owner SPEAKservers LLC, a company, which he and a friend started in early 2007. The Defendant’s new company provides voice of an internet protocol

network (VoIP) for computer gamers. The service is run in conjunction with games played on Sony Playstaions, XBox 360's and other gaming platforms. SPEAKservers customers use the service to communicate via voice while playing in on-line gaming networks. The future of SPEAKservers looks extremely profitable given the growing popularity of on line gaming. The Defendant has assisted in starting the company from the ground up and the company is now in a cash flow positive position and has a bright future. The Defendant takes pride in the fact that he is only 23 years old, has a good career path and co-owns his own business. Furthermore, the Defendant achieved all this in the face of being criminally prosecuted for conduct that occurred when he was 19 years old.

The Defendant has also gone back to school and is currently enrolled at Pima Community College in Tucson. (Please see Exhibit D-1). The Defendant is pursuing an associate's degree in Applied Science in Systems Administration/Networking and is currently carrying a GPA of 3.45. The Defendant is scheduled to have his associate's degree by spring of '09 and plans to continue his education after that towards a bachelor's degree. The Defendant is scheduled to take a full load of classes this fall and is currently scheduled for 14 credit hours across three classes. (Please See Exhibit J).

As for his future the Defendant his wife are scheduled to move to Colorado Springs, CO in 2010 where they we hope to start a family because they we will be stationed there until at least 2014. The Defendant is willing to move jobs so his Wife can pursue her bright United States Air Force career as a weather forecaster. The Defendant credits his wife as being of great support in achieving his goals and those of his future.

THE PLEA AGREEMENT GUIDELINE CALCULATIONS:

Under the plea agreement the Defendant and the Government have come to an agreement

on certain factors that relate to the overall calculations in this matter. These important calculations are set forth as follows:

| Offense Levels and Characteristics | Offense Level | Guideline § |
|------------------------------------|---------------|------------------------|
| Base Offense Level | 8 | § 2B5.3 |
| Loss Amount > \$10,000.00 | 4 | § 2B1.1(b)(1)(C) |
| Uploading | 2 | § 2B5.3 (b)(2) |
| Acceptance | -2 | § 3E1.1 |
| Substantial Assistance | -3 | § 5K1.1 |
| Subtotal | 9 | Adjusted Offence Level |

THE PSR GUIDELINE CALCULATIONS:

| Offense Levels and Characteristics | Offense Level | Guideline § |
|------------------------------------|---------------|------------------------|
| Base Offense Level | 8 | § 2B5.3 |
| Loss Amount < \$40,000.00 > 1mil. | 8 | § 2B1.1(b)(1)(C) |
| Uploading | 2 | § 2B5.3 (b)(2) |
| Acceptance | -2 | § 3E1.1 |
| Substantial Assistance | -3 | § 5K1.1 |
| Subtotal | 13 | Adjusted Offence Level |

The disparity of the Plea Agreement Guideline Calculations and the PSR Calculations is based upon the USSG § 2B5.3. The PSR writer's calculation of the amount of loss in this matter is grossly overstated and was the basis of the one of the defendant's objections to the PSR. The Government concisely sets forth the correct valuation of the amount of loss attributed to the Defendant in its Sentencing Memorandum as follows:

Following the method described above, total value of infringing items uploaded by the nine targeted co-conspirators involved in the Elite Torrents organization is approximately \$16,500. In addition, Defendant downloaded pirated works with a total value of \$5,047. Accordingly, the government estimated that Defendant was responsible for copying or participating in a conspiracy to distribute pirated works with retail values totaling approximately \$21,550.

Thus, the government submits that, considering the status of the government's investigation at the time of plea negotiation, it is appropriate to value the loss attributable to Defendant conservatively at a range between \$10,000 and \$30,000.

Therefore, based upon the governments own investigation the proper amount of loss for this court to consider pursuant to USSG § 2B5.3(b)(1)(B) and § 2B1.1 is the amount greater than

\$10,000, but less than \$30,000, with the commensurate four-level upward adjustment.

CRIMINAL HISTORY:

The defendant has no criminal history points.

U.S.S.G. 5K1.1:

As the Government as set forth in its sentencing memorandum the Defendant cooperated extensively in the Government's investigation and successful prosecution of a top administrator in the Elite Torrents organization in the Western District of Virginia in *United States v. Daniel Dove*. The Defendant assisted the Government by providing testimony before the Grand Jury and by testifying truthfully at the trial of Daniel Dove. In both instance the Defendant travel to the Western District of Virginia to provide this testimony on behalf of the Governments case.

The Defendant further assisted the government by identifying documents and email communications that allowed the government to prove Dove's operation of a high-speed computer resold by Defendant's company. Furthermore, the Defendant identified records providing both physical address information and Internet Protocol addresses that corroborated other evidence proving Dove's identity. These records, and other information provided by Defendant, also corroborated evidence that Dove used the server he leased in furtherance of his administrative role in the group.

Based upon the foregoing the Government has moved this court pursuant to USSG § 5K1.1 for a downward departure of three levels to a total offense level of 9. The defendant is grateful for the governments motion.

However, the Sentencing Commission has not placed absolute limits on the extent to which a district court may depart under USSG 5K1.1. Absent a statutory mandatory minimum sentence, a situation not present in this case, a district court may depart all the way down to a sentence of no imprisonment under USSG 5K1.1 so long as that departure is "reasonable" in

light of the defendant's assistance. See *United States v. Snelling*, 961 F.2d 93, 96-97 (6th Cir. 1991); *United States v. Pippin*, 903 F.2d 1478, 1485 (11th Cir. 1990); *United States v. Wilson*, 896 F.2d 856, 859-60 (4th Cir. 1990); *United States v. Emanuel*, 734 F. Supp. 877, 878-79 (S.D. Iowa 1990). The availability of an unlimited departure proves that USSG § 5K1.1, if it recognizes a defendant's assistance at all, cannot recognize it inadequately.

DEPARTURE FOR EXTRAORDINARY POST OFFENSE REHABILITATION:

In *United States v. Hairston*, 502 F.3d 378 (6th 2007) the Sixth Circuit Court of Appeal recognized that a district court may depart downward or grant a variance because of a Defendant's extraordinary post offense rehabilitation.

In *Hairston* the defendant was convicted of distributing more than five grams of cocaine base in violation of USC § 841(a)(1) and (b)(1)(B)(iii). *Id.* at 378. Hairston remained free on bond pending sentencing and during that time secure full-time employment working between 40-80 hours per week, submitted 24 consecutive negative urine sample and support his 5 children and his girlfriend. *Id.* at 379. Hairston moved the District Court for downward departure based upon his "extraordinary post-offense rehabilitation" and was granted a departure from 121-151 month to a sentence of 60 months. *Id.* at 382. This represented a 51% departure from the bottom end of the 121 guideline range. *Id.* at 382.

The Government appealed the reasonableness of the District Court departure. However, the Sixth Circuit Court of Appeals affirmed the departure stating that the District court had given proper justification based on the defendant's post offense activity to uphold the departure. *Id.* at 378. While it is true that the defendant in *Hairston* certainly had to come from farther down than the instant defendant, it certainly cannot be argued that the this defendant did not aim higher, reach higher and attain greater success.

While Hairston did certainly pull himself and his family out of a life of crime, the fact that he had father to go, should not minimize the instant defendant's efforts toward putting his life together. Here the Defendant has obtained that same fulltime, 40 + hours a week, employment and excelled in his position with Login Inc., successfully being promoted and received greater responsibility. As this court is aware the Defendant moved for and was granted permission to travel for a Las Vegas trip, which was a reward for outstanding job performance. This Defendant has also successfully stated an internet service company, maintained a GPA of 3.45 while attending college and has volunteered his time to raise money for Airmen's families.

Certainly this Defendant's actions are of the type that the court granted a downward variance for Hairston. Therefore, it is respectfully suggested that this court grant a downward departure based upon the Defendant's "extraordinary post-offense rehabilitation." *Id.* at 378.

AVOIDANCE OF SENTENCING DISPARITIES:

In order for this court to set forth a reasonable sentence that is sufficient and fair this Defendant's sentence must not be disparate from his co-defendants. See, 18 U.S.C. § 3553

(a)(6). The Defendant submits that based upon information gathered in this case the following sentences have been given to co-defendant's in this case.

1) Nick Caldwell (Uploader): Sentenced on 9/4/07 in the D. Ariz. to 5 months incarceration, 5 months home detention, 3 years of supervised release, \$3,000 fine, and \$200 special assessment. ***Caldwell did not provide substantial assistance to the Government.***

2) Sam Kuonen (Uploader): Sentenced on 7/16/07 in the D. Kans. to 5 months incarceration, 5 months home detention, 2 years of supervised release, and a \$200 special assessment. Fine was waived provided defendant pays costs of home detention monitoring and pays off outstanding student loan balance. ***Kuonen did not provide substantial assistance to the Government.*** Also, Kuonen used U.S. Department of Defense computer equipment in furtherance of this participation in the group.

3) Scott McCausland, (Administrator and Uploader): Sentenced on 12/19/06 in the W.D. Penn. to 5 months imprisonment, 5 months of home detention and 2 years supervised

release. McCausland was one of the group's top administrators. ***McCausland did not provide substantial assistance to the Government.***

4) Mark Repp (Uploader): Sentenced on 12/7/06 in the E.D. Wis. to 3 years probation, a \$200 special assessment and fine of \$2,600.00. Repp was 20 years old at the time of the offense and was under treatment for an anxiety disorder. ***Repp did not provide substantial assistance to the Government.***

5) Grant Stanley (Moderator): Sentenced on 10/17/06 in the W.D. Va. to 5 months incarceration, 5 months home detention, 3 years of supervised release, \$3,000 fine, and \$200 special assessment. ***Stanley subsequently provided substantial assistance, and the Government will be making at Rule 35 motion.***

Here as in all case the court must avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct 18 U.S.C. § 3553 (a)(6). Therefore, based upon the information of the other similarly situated defendants this court should consider a sentencing range that would include only a term of probation.

CONCLUSION

The Defendant request that this Honorable Court consider ordering a non-guideline sentence or variance pursuant to 18 U.S.C. § 3553(a), which would clearly be sufficient but not greater than necessary given the facts of this case. The Defendant request that this Honorable Court consider sentencing him to a term of probation.

Respectfully submitted,

THE VARGAS LAW FIRM

/s/ Edwin J. Vargas

EDWIN J. VARGAS (#0062913)
The Illuminating Building, Suite 2000
55 Public Square
Cleveland, Ohio 44113
(216) 539-1236 (Phone)
(216) 803-9919 (Fax)

CERTIFICATE OF SERVICE

I herby certify that on this 30th day of August, 2008, a copy of the foregoing Defendant's Sentencing Memorandum was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's system.

/s/ Edwin J. Vargas
Edwin J. Vargas (0062913)