

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

UNITED STATES OF AMERICA)	
)	
v.)	Criminal No. 06-40 E
)	
SCOTT R. McCAUSLAND)	

DEFENDANT'S POSITION WITH RESPECT TO SENTENCING FACTORS

AND NOW, comes the defendant, Scott R. McCausland, by his attorney, Thomas W. Patton, Assistant Federal Public Defender, and respectfully files his Position With Respect To Sentencing Factors. In support thereof, counsel states:

Mr. McCausland agrees with the presentence report that his advisory guideline imprisonment range is 10 to 16 months. Because this advisory range falls within Zone C of the Sentencing Table, this Court can impose a split sentence of 5 months of imprisonment followed by 5 months of home confinement as a condition of supervised release. Considering the factors set forth in 18 U.S.C. § 3553(a), Mr. McCausland respectfully submits that a term of probation with 10 months of home confinement is sufficient, but not greater than necessary, to achieve the goals of sentencing.

Mr. McCausland's sentence is no longer driven and controlled by the rigidity of the Sentencing Guidelines. Rather, this Court must impose a sentence **"sufficient, but not greater than necessary"** to comply with the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). 18 U.S.C. § 3553(a)(1). Section 3553(a)(2) directs the Court to consider the need for the sentence imposed:

- (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 other correctional treatment in the most effective manner.

The Court must also consider the nature and circumstances of the offense, and the history and characteristics of the defendant, the kinds of sentences available, the sentence recommended by the sentencing guidelines, the need to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct, and the need to provide restitution to victims of the offense. 18 U.S.C. § 3553(a)(1), (3), (4),(5),(6), and (7).

1. The Nature and Circumstances of the Offense.

Scott's offense involved uploading and downloading copyrighted materials to the internet. Scott received no money for committing the offense and the web site he was involved with didn't charge anyone to download the copyrighted material. The only benefit Scott received was access to copyrighted material, which would have been available to him on any number of other torrent sites had the Elite Torrent site not existed.

The PSR notes that Scott uploaded the movie *Star Wars III: Revenge of the Sith* prior to its theatrical release. While this is true, it is important for the Court to know that Scott obtained the copy of Star Wars III that he uploaded to the ET site from another torrent site that had already put the movie on the web. As Scott explained to the authorities on August 25, 2005, he obtained his copy of Star Wars from a torrent site called "The Pirate Bay." That website is still up and running today. Attached as Defendant's Exhibit A are six pages worth of content available on The Pirate Bay website for downloading under the search term "Star Wars iii." Scott is not denying that his

actions in uploading Star Wars, or any other copyrighted material, to the ET website were illegal. The information concerning the origin of Scott's version of Star Wars is important, however, in establishing that Scott is not a major player in the copyright infringement world with the ability to obtain copyrighted material from its original source.

The PSR accurately states that Scott held the position of an Administrator of the ET site. Scott was one of the Administrators of the ET site but what that really amounted to was that he was one of the people willing to spend time on the internet doing basic day to day maintenance to keep the site operating. The only real benefit Scott received from being an Administrator was that he could download content without being required to "seed" content. Ordinary members of the ET site had to have a 1:1 ratio of "seeding" to "leeching." Seeding means a user has a file on their computer that they are making available to others for downloading through the use of peer-to-peer software. Leeching is downloading a file from other people's computers using peer-to-peer software. The more people seeding a particular file, the faster that file can be downloaded. A regular member of the ET site had to seed as much content as they leeches. As an Administrator, Scott was not bound by the seeding to leeching ratio. The only other benefit Scott received for being an Administrator versus an ordinary member was that he could kick someone off the site if their behavior was unacceptable. Accordingly, while an "Administrator," Scott really wasn't much different than ordinary members.

The PSR explains that the combined value of the copyrighted works Scott downloaded from the Elite Torrents website was \$1,700. While any copyright infringement is serious, it is clear that Scott was not amassing huge quantities of copyrighted material for himself.

2. The History and Characteristics of Scott McCausland

Scott is a 24-year-old man putting himself through college. Scott is majoring in Biology with the hope of going to graduate school and pursuing a career in cancer research. While the PSR documents Scott's less than stellar performance in high school, his SAT score of 1480 and his college G.P.A. of roughly 3.2 show him to be a highly intelligent young man who didn't take high school very seriously.¹ The felony conviction Scott has suffered in this case is going to have a very negative impact on his ability to find work in his field. Scott will be feeling the impact of these convictions long after he finishes serving any sentence this Court imposes. The letters submitted to the Court by Scott's family highlight his true character and show beyond doubt that this offense does not define Scott.

3. The Seriousness of the Offense, Promoting Respect For The Law, and Providing Just Punishment.

Any federal crime is serious so what this factor requires is the Court to compare the seriousness of this federal offense to the seriousness of other federal offenses. Viewed in that context, Scott's offense falls at the lower end of the seriousness spectrum. This is not a violent offense nor a drug offense, undoubtedly the most serious federal offenses. Even within the realm of copyright offenses, Scott's offense falls on the low end of the seriousness scale. Scott was not copying copyrighted works and reselling them for profit. That form of copyright infringement is much more serious than Scott's offense for two reasons. First, selling illegally obtained copyrighted works shows a person who is attempting to make a living by engaging in illegal activity. Such a

¹Scott has asked Penn State-Berhend for his transcripts but because he is not currently enrolled in classes (due to this case) the University must order the transcripts and they have not yet been received. Scott will provide copies of his SAT scores to the Court prior to or at sentencing.

person is much more likely to commit crimes in the future and accordingly must be punished more harshly. Second, a person who sells illegally obtained copyrighted work is truly taking money away from the copyright holder. It may be assumed that a person who is willing to pay to purchase an illegally obtained copyrighted work would probably actually buy the copyrighted work if it were not available at a lower price from the copyright infringer. People who download copyrighted works from the internet at no cost, however, are much less likely to ever actually purchase the copyrighted work. Simply put, a person may well download a copyrighted work for free that they would never pay for simply because its available, albeit illegally, for free. Like it or not, the bulk of today's teenage and young adult population expect to be able to access media content for free on the web. Many media companies are beginning to realize this fact and are trying to take advantage of it. ABC, for example, now makes its hit television shows available for viewing on the web free of charge. This, of course, does not make Scott's conduct legal but it does help to put it in perspective.

Two federal felony convictions for committing a crime from which you received no pecuniary benefit followed by 10 months of home confinement promotes respect for the law and provides just punishment. The Courts and lawyers who deal with federal criminal offenses on a daily basis sometimes forget how serious the simple fact of a federal felony conviction is. It is a brand that stays with a defendant for ever. Every time Scott fills out a job application, he'll have to tell his prospective employer he is a felon. Indeed, Scott has already lost his job due to his felony conviction. And, 10 months of home confinement is no picnic. It's easy to view home confinement as not much of a penalty, but that is not true. Home confinement is just what its name says, confinement. A person on home confinement is not free to come and go as they please. Rather

their comings and goings are monitored and dictated by a federal probation officer and are limited to work, school, or necessary doctors appointments, etc. The stigma of two felony convictions and 10 months of confinement are more than sufficient to promote respect for the law and provide just punishment.

4. Providing Adequate Deterrence.

Since the search warrants were executed in this case, the Department of Justice and the Motion Picture Association of America (MPAA) have used this case to warn others of the criminal penalties for copyright infringement. Attached as Defendant's Exhibit B are press releases from MPAA, and the Department of Justice, and a download of the message posted by the Department of Justice on the Elite Torrents web site after it was shut down. Undoubtedly more press releases will be forthcoming after Scott's sentencing. If the threat of having federal agents knock on your door with a search warrant followed by a felony conviction for copyright violations does not deter an individual from illegally obtaining copyrighted material, putting Scott in jail for 5 months versus home confinement for 10 months isn't going to deter any potential copyright infringers.

5. Protecting the Public From Future Crimes of Scott McCausland.

There is absolutely no reason for the Court to believe that Scott is a danger to commit future crimes. Other than a few traffic violations, Scott has no prior convictions. This factor weighs heavily in favor of a lower sentence.

6. Providing Scott with Needed Educational or Vocational Training, Medical Care, or Other Correctional Treatment.

A sentence of imprisonment will not provide Scott with any educational, vocational, or medical treatment. Sending Scott to prison will actually interfere with his college education which

could be pursued if he were sentenced to probation with home confinement.

7. The Kinds of Sentences Available.

Probation with home confinement is available to the Court and can easily be arranged.

8. The Advisory Guideline Range and Pertinent Policy Statements.

The guidelines recommend a sentence of 10 to 16 months of imprisonment, although a split sentence of 5 months in prison and 5 months of home confinement is also authorized. A sentence of probation with 10 months of home confinement is a slightly lower sentence than called for under the guidelines but appropriate under the circumstances of this case.

9. The Need to Avoid Unwarranted Sentence Disparities.

A sentence of probation with 10 months of home confinement is very close to the sentence called for by the sentencing guidelines which are designed to avoid unwarranted sentence disparities. Accordingly, a sentence of probation with 10 months of home confinement will not result in any great disparity with any other similarly situated defendant.

10. The Need to Provide Restitution.

The PSR notes that the government will be asking the Court to waive an order of restitution due to the difficulty in attempting to craft such an order. Accordingly, this factor is not in play here.

CONCLUSION

Scott McCausland is a 24-year-old young man with no prior convictions who committed a crime for no monetary gain. Scott will carry these felony convictions with him for the rest of his life. A sentence of probation with 10 months of home confinement is sufficient, but not greater than necessary, to punish Scott, promote respect for the law, and deter others from committing similar offenses.

Respectfully submitted,

/s/ Thomas W. Patton

Thomas W. Patton

Assistant Federal Public Defender

PA I.D. No. 88653