

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

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

**GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION
TO CLARIFY CONDITIONS OF SUPERVISED RELEASE**

AND NOW comes the United States of America, by and through its counsel, Mary Beth Buchanan, United States Attorney for the Western District of Pennsylvania, and Christian A. Trabold, Assistant United States Attorney for said district, and states as follows:

The defendant, Scott McCausland, was convicted on September 12, 2006, of one count of conspiracy to commit copyright infringement and one count of copyright infringement. The conviction stems from McCausland uploading pirated movies to the Internet prior to their theatrical release. McCausland perpetrated his criminal conduct as one of the main members of the Elite Torrents Network, a piracy organization whose members engaged in the illegal reproduction and distribution of copyrighted items -- movies and music -- over the Internet.

On December 19, 2006, this Court sentenced McCausland to five months incarceration at each count, to be served concurrently, followed by a two-year term of supervised release at each count, again to run concurrently. In addition to the standard conditions

of supervised release, this Court imposed additional conditions, two of which limit McCausland's computer use:

6. The defendant shall consent to the U.S. Probation Office conducting periodic unannounced examinations of his/her computer system(s), which may include retrieval and copying of all memory from hardware/software and/or removal of such system(s) for the purpose of conducting a more thorough inspection and will consent to having installed on his/her computer(s), at his/her expense, any hardware/software to monitor computer use or prevent access to particular materials. The defendant shall consent to periodic inspection of any such installed hardware/software to insure it is functioning properly.

7. The defendant shall provide the U.S. Probation Office with accurate information about his entire computer system (hardware/software); all passwords used by the defendant and his/her Internet Service Provider(s); and **will abide by all rules of the Computer Restriction and Monitoring Program.**

(Doc. 6, p. 4) (emphasis added).

After McCausland began his term of supervised release, he signed the Computer Restriction and Monitoring Program Participant Agreement ("Agreement"), with which the Court had ordered his compliance. Paragraph 3 of the Agreement provides:

I shall possess and/or access only computer hardware or software **approved by the U.S. Probation Office.** I shall obtain written permission from the U.S. Probation Office prior to obtaining or accessing any additional computer hardware/software or making any alterations to my system.

(Exhibit A) (emphasis added). Subsequently, U.S. Probation Officer

Matthew Rea, who is supervising McCausland, learned that McCausland was using the Ubuntu operating system on his computer. Mr. Rea informed McCausland that the probation office could not operate a monitoring program, authorized by paragraph 5 of the Agreement, on the Ubuntu operating system, and therefore McCausland would need to either use the Windows operating system or not use that computer. At no time did McCausland seek, nor did Mr. Rea give, oral or written permission for McCausland to use the Ubuntu operating system, as is required by paragraph 3 of the Agreement.

McCausland promptly contacted his attorney, Assistant Federal Public Defender Thomas Patton, to contest Mr. Rea's authority to restrict McCausland's computer usage. Mr. Rea explained to Attorney Patton that McCausland did not have permission to use Ubuntu, but Attorney Patton insisted that Mr. Rea did not have the authority to require McCausland to use the Windows operating system.

Because McCausland refused to comply with the rules set forth in the agreement as required by this Court's December 19, 2006 Judgment setting forth the Additional Supervised Release Terms (Doc. 6, p. 4), the Chief Probation Officer of the Court filed a Petition on Supervised Release on September 7, 2007, seeking to have McCausland show cause why his supervised release should not be revoked. In response, Attorney Patton filed a document entitled "Defendant's Motion to Clarify Conditions of Supervised Release",

which in effect is a brief in support of his defense against revocation. This Court has ordered the Government to respond and has scheduled a Show Cause Hearing for October 4, 2007.

Despite the obvious requirement in the Agreement that McCausland must obtain permission before using Ubuntu, or any other software, he nevertheless argues that (1) the probation office does not have the authority to tell him which software he may use (Def. Motn. p. 3-4); (2) his use of Ubuntu without permission is not in violation of his supervised released conditions (Def. Motn. p. 3-4); and (3) the condition that the software be approved is broader than the restriction imposed by this Court and involves a greater deprivation of liberty than is reasonably necessary to deter future criminal conduct, protect the public, and rehabilitate him (Def. Motn. p. 5). The defense position is fraught with patently incorrect statements and is completely without merit.

McCausland argues that the probation office does not have the authority to tell him which software he may run on his computer, other than monitoring software. Even though Mr. Rea explained to Attorney Patton and McCausland that paragraph 3 of the Agreement -- an agreement with which this Court ordered McCausland to comply and which McCausland signed without asking any questions -- requires that McCausland obtain permission to use Ubuntu, the defense balks at such an explanation claiming, "This is ridiculous." (Def. Motn. p. 4). The Government fails to see what

is ridiculous about the probation office requiring a convicted felon on supervised release to comply with this Court's judgment of sentence.

Attorney Patton strains to interpret the Agreement in a way favorable to his client by claiming that because Ubuntu is not listed under "Hardware/Software Requiring Advanced Approval", (Exhibit B), the probation office is "exercising its authority arbitrarily to try to achieve a result that it does not have authority to impose." (Def. Motn. p. 4). Attorney Patton's interpretation is incorrect as paragraph 3 is not related to the "Hardware/Software Requiring Advanced Approval" list.

Pursuant to paragraph 3 of the Agreement, McCausland agreed that he would "possess and/or access only computer hardware or software approved by the U.S. Probation Office." (Exhibit A). Paragraph 3 is not contingent upon the list of items contained in the "Hardware/Software Requiring Advanced Approval". That is to say, a supervisee needs probation office approval to use any computer hardware/software, and not just those items contained on the list.

The "Hardware Software Requiring Advanced Approval" list, however, sets forth items that a supervisee may not possess or use "without **advanced written permission**". (Exhibit B). Each item on the short list relates to specific types of hardware/software - ones that enable a supervisee to use his computer in an anonymous

and/or destructive way, rather than items enabling the more innocuous and general use of a computer for word processing, spreadsheet creation, etc. To possess or use these items, a supervisee must obtain **advance written permission**, a more stringent requirement than paragraph 3, given the nature of the items on the list. Of course Ubuntu is not on the list, and neither is any other operating system or any other obscure hardware/software not used for anonymity and/or destructive purposes.

Conditions of supervised release do not have to set forth every possible permutation of prohibited conduct, but need only "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Balon, 384 F.3d at 43 (citations omitted). See also, United States v. Gallo, 20 F.3d 7, 12 (1st Cir. 1994) ("Conditions of probation do not have to be cast in letters six feet high, or to describe every possible permutation, or to spell out every last, self-evident detail. Conditions of probation may afford fair warning even if they are not precise to the point of pedantry. In short, conditions of probation can be written - and must be read - in a commonsense way.").

If McCausland's conditions of supervised release are read in a commonsense way, it is really quite simple. This Court ordered McCausland to comply with the Agreement. In order to comply with the Agreement, pursuant to paragraph 3 ("I shall

possess and/or access only computer hardware or software approved by the U.S. Probation Office"), McCausland must have his probation officer's permission to run Ubuntu on his computer. McCausland did not seek nor was he given permission by the probation office to run Ubuntu on his computer. In fact, when Mr. Rea learned that McCausland was running Ubuntu on his computer, he told McCausland that he could not do so, and that if he wished to use his computer, he would need to run Windows. McCausland refused, and continues to refuse, to comply with Mr. Rea's direction, which is in direct defiance of the Agreement, the Special Conditions of his Supervised Release, and this Court's Judgment of Sentence.

There is no question that McCausland's possession and use of Ubuntu, without probation office approval, is in violation of the conditions of his supervised release. For that reason, this Court should revoke the defendant's supervised release.

The defense also tries to argue that the condition that the software be approved is broader than the restriction imposed by this Court and involves a greater deprivation of liberty than is reasonably necessary to deter future criminal conduct, protect the public, and rehabilitate him (Def. Motn. p. 5). Obviously, the condition is not a broader restriction than that imposed by this Court since this Court is the one who required compliance with the Agreement. Nevertheless, the defense, recognizing that some monitoring is warranted, submits that unannounced inspections and

memory copying should be sufficient as opposed to the installation of monitoring software (Def. Motn. p. 5). In other words, McCausland does not object to some monitoring of his computer, as long as it is on his own terms rather than the Court's terms.

Since McCausland is challenging the validity of the condition of supervised release, the Court must look to 18 U.S.C. § 3583, which provides that a District Court "may order any appropriate condition to the extent it (1) is reasonably related to certain factors including (a) the nature and circumstances of the offense and the history and characteristics of the defendant, (b) deterring further criminal conduct by the defendant, or (c) protecting the public from further criminal conduct by the defendant; and (2) involves no greater deprivation of liberty than is reasonably necessary for the purposes of deterrence and protection of the public." United States v. Crandon, 173 F.3d 122, 127 (3d Cir. 1999).

Paragraph 3 of the Agreement is reasonably related to the nature and circumstances of McCausland's offense - copyright infringement - where McCausland used his computer to upload and distribute pirated movies prior to their theatrical release. A computer was the tool of his crime, and therefore it is not unreasonable to require probation office approval of any computer hardware or software to be possessed or used by McCausland while he is on supervised release.

This restriction is also reasonably related to the history and characteristics of McCausland. Obviously, McCausland is a sophisticated computer user. In order for the probation office to effectively supervise McCausland, it is necessary that it be aware of and approve of any computer hardware and software McCausland possesses and/or uses. It is also necessary that the probation office be able to monitor McCausland's computer in real-time, because the alternative of unannounced inspections and periodic memory copying affords McCausland, a sophisticated computer user, an opportunity to remove evidence of unauthorized and/or criminal conduct from his computer without his probation officer's knowledge.

Similarly, being required to have probation office approval for any computer hardware or software and being subject to real-time monitoring of his computer activity is reasonably related to deterring McCausland from future criminal conduct. These restrictions make it more difficult for McCausland to engage in criminal activity using his computer. And, although a sophisticated computer user, such as McCausland, may find or know ways to circumvent these restrictions, the fact that these restrictions are in place subjects McCausland to possible revocation of his supervised release should he attempt to do so. For these reasons, the restrictions are reasonably related to deterring future criminal conduct by McCausland.

Finally, these restrictions impose no greater deprivation of liberty than is reasonably necessary for the purposes of deterrence and protection of the public. The restrictions do not ban all computer use by McCausland, but limit his computer use to acceptable forms which allow effective monitoring by the probation office.

While Attorney Patton cites to the Third Circuit's decision in United States v. Freeman, 316 F.3d 386 (3d Cir. 1999) in support of his contention that unannounced inspections and memory copying should be sufficient, Freeman does not stand for the proposition that a district court is constrained to imposing the restrictions outlined by Attorney Patton. To the contrary, the Third Circuit was careful to note that it had previously approved restricting all Internet access and that it was not in any way limiting its ability to do so in the future in appropriate cases. Freeman, 316 F.3d at 392 (citing to United States v. Crandon, 173 F.3d 122, 125 93d Cir. 1999); United States v. Lee, 315 F.3d 206, 210 fn.1 (3d Cir. 2002)). And, in any event, the Third Circuit has more recently stated that it approves of the use of filtering or monitoring software as well. United States v. Voelker, 489 F.3d 139, 150 (3d Cir. 2007). Therefore, Attorney Patton's argument is not supported by Third Circuit case law.

The Third Circuit also stated in Freeman that if the defendant "does not abide by more limited conditions of release

permitting benign [I]nternet use, it might be appropriate to ban **all** use." Freeman, 316 F.3d at 392 (emphasis added). In this case, McCausland has already willfully failed to abide by the limited conditions of his supervised release.

Since the conditions of supervised release imposed upon McCausland are valid and there is no doubt that he is violating at least one of those conditions, the Court has the discretion to revoke his supervised release. The Government submits that revocation is appropriate because McCausland's violation of his conditions of supervised release does not stem from confusion, but rather is a deliberate, willful act by the defendant to flout this Court's judgment of sentence.

In the alternative, the Government submits that this Court has the authority to amend the conditions of supervised release to prohibit all use of his computer since he has refused to abide by more limited conditions of release permitting benign use. See Freeman, 316 F.3d at 392 (Third Circuit stated that although total ban on Internet use was initially invalid, if the defendant did not abide by more limited conditions of release permitting benign Internet use, it might be appropriate to ban all use in the future).

The defendant raises another issue, unrelated to the rule to show cause hearing, in his Motion to Clarify Conditions of Supervised Release. McCausland asserts that paragraph 11 of the

agreement is unreasonable. Paragraph 11 of the Agreement provides:

I will provide copies of credit card billing records or other financial records monthly and will not open any new lines of credit without authorization of my supervising officer. I understand that my supervising officer has the authority to request my credit history information to confirm my compliance with the conditions of release and these program rules. My signature on this document signifies my consent for the release of the credit history information.

(Exhibit A). Although McCausland's objection has nothing to do with his revocation, nor is he seeking clarification of the condition as his motion purports to do, the Government responds to his objection as follows.

McCausland asserts that "[t]his condition has nothing to do with computer use." (Def. Motn. p. 6). To the contrary, this condition provides another means for the probation office to monitor McCausland's computer use to ensure he is complying with the conditions of his supervised release. While McCausland acknowledges that credit card statements could reveal whether a supervisee has joined a web site, he claims that such supervision is not necessary nor reasonable in his case because his offense involved the use of free web sites. This argument assumes that the probation office is limited in its supervision of McCausland to making sure that he does not recommit the precise crime for which he was convicted. No such limitation exists as McCausland, as is every citizen, is required to abide by all of the laws, and not

just the one he has previously violated. Just because McCausland's prior crime involved him accessing free web sites does not mean that other valuable monitoring information cannot be obtained from his credit card and financial records.

For instance, monthly credit card and financial records will show if McCausland is purchasing any computer hardware/software without permission, if he is purchasing hardware/software designed to avoid monitoring programs installed on his computer, and if he is purchasing any hardware/software or other services as tools of criminal conduct or as contraband. In short, this condition satisfies the requirements of 18 U.S.C. § 3583 and is not unreasonable.

WHEREFORE, the Government submits that the defendant has failed to show cause why his supervised release should not be revoked.

Respectfully submitted,

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