

1 (Whereupon, the Sentencing Hearing proceedings
2 commenced on March 8, 2017, at 9:00 a.m., on the record
3 in open court, as follows.)

4 THE COURT: Thank you.

5 Madam Clerk, if you would call the matter
6 scheduled for 9 o'clock, please.

7 THE CLERK: Yes, Your Honor.

8 Lexington Criminal Action Number 16-62,
9 United States of America versus Deric Lostutter, called
10 for sentencing.

11 THE COURT: Thank you.

12 If counsel could state their appearances,
13 please.

14 Mr. Gupta, we'll begin with you.

15 MR. GUPTA: Neeraj Gupta for the United States.
16 With me is Dan Kilbourne and Kevin Brady of the
17 FBI.

18 THE COURT: All right. Thank you.

19 MR. EKELAND: Good morning, Your Honor.

20 Tor Ekeland for Defendant Deric Lostutter, who
21 is present in the courtroom.

22 THE COURT: All right. Thank you.

23 This matter is scheduled for a sentencing
24 hearing this morning.

25 Before we proceed with the hearing, let me

1 first confirm that Mr. Lostutter has had the opportunity
2 to review his presentence report and also to discuss his
3 report with his attorney to his satisfaction.

4 Is that correct?

5 DEFENDANT LOSTUTTER: Yes, Your Honor.

6 THE COURT: Mr. Lostutter, your presentence
7 report will be filed in the record under seal. It is
8 available if you should need it for any reason, or if the
9 attorneys should need it, but it's not available for the
10 general public to review.

11 There is an objection that does affect the
12 guideline calculations in the case. We'll address that
13 matter first.

14 The objection relates to paragraph 29 of the
15 presentence report, in which there's a two-level
16 increase -- I'm sorry. There is a two-level increase
17 under that section under 2B1.1(b)(10)(C), but if the
18 resulting offense level is less than 12, then the Court
19 would increase the offense level to a level 12 as the
20 starting point for the analysis.

21 And in this case there is an objection,
22 although, the defendant recommended that particular
23 enhancement at the time that he entered his guilty
24 plea through the plea agreement, but I will give the
25 parties the opportunity to address that matter at this

1 time.

2 MR. EKELAND: Thank you, Your Honor.

3 Essentially, we're going to rest on the papers,
4 but essentially our point is that the technology in
5 question here, the VPN, is a readily available
6 commercial technology that most corporations and the
7 public use. It's very easy to use. It's not a
8 sophisticated means.

9 And we also maintain that simply just changing
10 the domain name server registration for foreign countries
11 is something that's very simple to do, and that anybody
12 with any kind of basic computer skills can do.

13 THE COURT: What about the fact that you
14 admitted to or recommended this particular increase in
15 the plea agreement that was entered in the matter?

16 MR. EKELAND: Your Honor, my understanding and
17 my reading of the plea agreement I do believe it
18 explicitly says we can object --

19 THE COURT: To other sections, to other
20 sections.

21 MR. EKELAND: -- to the guidelines
22 calculations.

23 THE COURT: No. No, that does not say that.
24 Let's go to the specific provision in the plea
25 agreement.

1 And you tell me if I'm reading this
2 incorrectly.

3 In paragraph 6, "Pursuant to Rule 11(c)(1)(B),
4 the United States and defendant recommend the following
5 sentencing guideline calculations, and they may object to
6 or argue in favor of other calculations," other than
7 those that are set forth in paragraph 6, which
8 specifically in sub-paragraph (c), includes six-level
9 increase based upon sophisticated means.

10 MR. EKELAND: Well, Your Honor, it was my
11 understanding when we entered into that agreement that we
12 would be able to argue this sophisticated means, but if
13 the Court believes otherwise, we will --

14 THE COURT: Well, what does the word "other"
15 mean?

16 MR. EKELAND: I'm sorry, what?

17 THE COURT: What does the word "other" mean to
18 you in that paragraph?

19 MR. EKELAND: Other calculations of the
20 United States Sentencing Guidelines in terms of --

21 THE COURT: Other than these calculations.

22 MR. EKELAND: That's not how I read it. We
23 read it as calculating the recommended guidelines in
24 another way. That was our understanding when we made the
25 agreement with the --

1 THE COURT: Paragraph 6 reads, "Pursuant to
2 Rule 11(c)(1)(B), the United States and defendant
3 recommend the following sentencing guidelines
4 calculations."

5 And what calculations are you referring to
6 when you say the following sentencing guideline
7 calculations?

8 MR. EKELAND: Your Honor, we're referring to
9 the calculations as they were put forth in --

10 THE COURT: Set forth in sub-paragraphs (a)
11 through (g); correct?

12 MR. EKELAND: Correct, Your Honor, but it's our
13 understanding we -- Your Honor, I think the Court
14 understands our point so we're just going to --

15 THE COURT: Well, I'm trying to figure out if
16 you're frivolously contesting a point.

17 MR. EKELAND: No, Your Honor. It was our
18 understanding that we could object to any of the
19 recommended guidelines calculations, is our
20 understanding.

21 THE COURT: Well, your understanding is
22 completely contrary to the clear and explicit language in
23 the plea agreement.

24 Let me see what the United States' position is
25 on this issue.

1 MR. GUPTA: We would just briefly create a
2 record on this.

3 THE COURT: Yes, sir.

4 MR. GUPTA: The objections -- the analytical
5 approach used in the defendant's objection is to look at
6 individual acts and assert that those individual acts in
7 isolation aren't sophisticated.

8 The analysis that the probation office uses,
9 the analysis that's in the plea agreement, and the
10 analysis that we'd ask the Court to use is whether the
11 scheme as a whole is sophisticated.

12 The individual acts that they cite to -- that
13 the defendant cites to is in isolation, not being
14 sophisticated, include guessing the password, which isn't
15 always going to be sophisticated individually; using a
16 VPN service, which back in 2009 the Sentencing Commission
17 actually proposed as sophisticated, but it wasn't
18 approved; and other acts such as changing the password to
19 lock the user out, and staging, filming, editing, and
20 uploading a video. They assert that these individual
21 acts aren't sophisticated.

22 The United States' position is that the scheme
23 as a whole is sophisticated, that this multi-step,
24 multi-day, coordinated multi-person computer hack was
25 sophisticated.

1 And then in the United States' sentencing memo,
2 we argue that the concealment of a hack after it took
3 place, also qualifies as -- for this sophisticated means
4 enhancement; the movement of the website to a host
5 offshore in a foreign country. And, again, the use of
6 virtual private network service. And that these are
7 analogous to examples of sophistication in the
8 application note.

9 THE COURT: What is your position on the clear
10 language of the plea agreement?

11 MR. GUPTA: We do agree that there was an
12 agreement at the time of the plea agreement that the
13 sophisticated means enhancement applies.

14 United States considered that a condition of
15 the plea. We would not have signed the plea had we not
16 understood that that enhancement -- that we were agreeing
17 to that enhancement.

18 THE COURT: Of course, it's a nonbinding
19 recommendation, but the parties' position was that they
20 were both recommending the sophisticated means
21 enhancement --

22 MR. GUPTA: That's right.

23 THE COURT: -- under this specific section.

24 MR. GUPTA: That's right.

25 THE COURT: There's another section that was

1 not incorporated that the parties had recommended.

2 You agree at this point that that would not
3 apply?

4 MR. GUPTA: I agree with what probation wrote
5 in that response is correct.

6 THE COURT: All right. All right. Thank you.

7 With regard to this objection, which is
8 outlined as objection number 3 in the appendix to the
9 presentence report, I will overrule the objection and
10 adopt the position that has been advocated by the
11 United States, and also has been set forth in writing by
12 the probation office, also find that the defendant's
13 position in filing the objection is clearly contrary to
14 the clear language of the plea agreement, which was only
15 a recommendation to the Court. It does not bind the
16 Court, and the Court does have to make an independent
17 analysis and evaluation as to whether the enhancement
18 should apply, but it clearly applies in this particular
19 case.

20 The response to the objection as set forth
21 in -- it's listed as objection number 3 in the response.
22 It sets forth the particular section in issue,
23 2B1.1(b)(10)(C).

24 "If the offense involves -- or otherwise
25 involves sophisticated means and the defendant

1 intentionally engaged in or caused the conduct
2 causing the sophisticated -- I'm sorry, constituting
3 sophisticated means, increase by two levels. If the
4 resulting offense level is less than 12, increase to
5 level 12."

6 Then application note 9(B) provides the
7 following information with respect to sophisticated
8 means.

9 "It means especially complex or especially
10 intricate offense conduct pertaining to the execution or
11 concealment of an offense."

12 And then it also references relevant conduct in
13 Section 1B1.3.

14 Probation officer then states in response to
15 the objection that it's the position of the probation
16 office, and this Court agrees, that Mr. Lostutter's
17 relevant conduct in the instant offense involves
18 sophisticated means with regard to his own individual
19 conduct and the conduct of the co-defendant, Mr. McHugh,
20 that they conspired to commit.

21 Lostutter recruited McHugh in the offense, and
22 they agreed to hack into the webmaster's fan site
23 rollredroll.com. Defendant sent McHugh messages
24 directing McHugh to gain access to the website with
25 Lostutter's knowledge. McHugh created an account on the

1 VPN service predator to anonymize Internet activity.
2 Both the defendants -- I'm sorry, both the defendant and
3 McHugh gained unauthorized access to the webmaster's
4 email account, and after gaining access, McHugh publicly
5 posted the webmaster's emails on the website with
6 Lostutter's knowledge.

7 And then with regard to the hacking of the
8 website, McHugh discovered the website was hosted by
9 Hostgator, and McHugh requested a password to reset --
10 that a password reset be sent to the webmaster's email
11 account so that -- that he'd taken over.

12 Lostutter then accessed this account without
13 authorization and changed the user name and password to
14 the webmaster's website, which McHugh provided -- I'm
15 sorry, which Lostutter provided to McHugh.

16 Then once McHugh received the password, he
17 logged into the cPanel for rollredroll.com and uploaded a
18 defacement message and video created by Lostutter. The
19 defacing page created by the defendant included the
20 video, written statement, and a link to download the
21 webmaster's private emails. During most of the hack
22 McHugh provided Lostutter with updates on how the hacking
23 was going.

24 McHugh also changed the contact information
25 inside the Hostgator cPanel as indicated to

1 justbatcat@gmail.com.

2 In addition, McHugh changed the DNS setting for
3 the rollredroll.com domain point to a Malaysian company
4 in order to maintain control of the domain.

5 Lostutter was also involved with redirecting
6 the website to a different Internet host.

7 The probation officer takes the position, and
8 the Court agrees, that the actual hack by McHugh and
9 directed by Lostutter in the redirection to a foreign
10 international -- I'm sorry, to a foreign Internet host by
11 the two standing alone supports the sophisticated means
12 enhancement.

13 During the hack the co-defendant devised a
14 method of first hacking the webmaster's email account to
15 gain access to the website. Once he had access, he was
16 able to request a password reset from the website's host,
17 Hostgator.

18 He and Lostutter then changed the DNS settings
19 for the account to a point to a Malaysian company to
20 maintain control of the domain.

21 And the probation officer indicates that the
22 conduct does fall within the purview of especially
23 complex or especially intricate offense conduct
24 pertaining to the execution or the concealment of the
25 offense, and it would be covered by this particular

1 section.

2 And clearly, when the Court takes into account
3 all of the activity and does not attempt to separate each
4 individual act, it clearly would support the enhancement;
5 and, therefore, the objection is overruled.

6 I will adopt the findings that are contained --
7 that is the only objection that does require ruling by
8 the Court, although, there are several other objections
9 that have been noted.

10 I will adopt the findings that are set forth
11 in the report, as well as in the addendum to the
12 reports -- to the report, as well as the guideline
13 calculations.

14 I will review those calculations with the
15 parties at this time.

16 The 2016 edition of the guideline manual has
17 been used, and as indicated the two counts of conviction,
18 Counts 1 and 4, are grouped under 3D1.2.

19 Starting with an offense level -- the base
20 offense level in the case, as reflected in paragraph 29,
21 does become 14 for the reasons that have been just
22 explained.

23 There's also a two-level increase based upon
24 the defendant's position as an organizer, leader,
25 manager, or supervisor, and the Court does find that that

1 two-level increase is applicable based upon
2 Mr. Lostutter's management and supervisory position over
3 the co-defendant in this case, Mr. McHugh.

4 There's a two-level increase for obstruction of
5 justice that results in an offense level of 18 for
6 Count 1.

7 Count 4 has calculations that would result in a
8 lower offense level, but the Court then applies the
9 higher for Count 1 calculations.

10 There's a three-level reduction indicated for
11 acceptance of responsibility. Before the Court can apply
12 the third level for acceptance of credit, it does require
13 a motion from the United States under Section 3E1.1(b).

14 MR. GUPTA: We make that motion.

15 THE COURT: All right. That motion will be
16 sustained.

17 Upon the three-level reduction for acceptance
18 of responsibility, that reduces the total offense level
19 to a level 15.

20 The defendant has the conviction -- prior
21 conviction noted in paragraph 46. That does not result
22 in criminal history points being assessed.

23 And, therefore, he's in Criminal History
24 Category I as reflected in paragraph 51, and that has the
25 affect of creating a guideline range of imprisonment in

1 the case of 18 to 24 months.

2 The range for supervision in this matter is a
3 range of one to three years as reflected in
4 paragraph 84.

5 And the fine range in the case based upon those
6 calculations is a range of 4,000 to \$40,000.

7 Again, those are the guideline calculations
8 that have been adopted by the Court.

9 I will call the parties' attention to
10 paragraph 97 of the report, which indicates that there
11 may be a basis for departure under 5K2.0(a)(1).

12 And the probation office specifically
13 references that there may be aggravating or mitigating
14 circumstances in the case that would allow the Court to
15 depart from the guideline range.

16 Also, I have received victim impact statements
17 that have been filed by the United States, together with
18 correspondence that it believes would be relevant.

19 I have also received sentencing memorandum
20 filed by the United States, and also a lengthy
21 memorandum filed on behalf of the defendant, which has
22 attached to it a number of materials, including 12 or 13
23 letters.

24 I have received additional correspondence
25 other than the letters that have been filed by the

1 parties.

2 And as a matter of fact, I've received so much
3 correspondence in this case that I have changed the
4 practice that I have typically followed in filing matters
5 in the record at this point.

6 When I receive correspondence, those items of
7 correspondence are being forwarded to the parties so that
8 they can make a determination as to whether they should
9 be filed in the record.

10 I will note that if you want specific ruling
11 with respect to any of those correspondence, you will
12 need to alert me to the specific item and address the
13 matter that you believe would be relevant.

14 Let's see, I believe we may have some counts to
15 be dismissed; is that correct?

16 MR. GUPTA: Yes, Your Honor. The United States
17 moves to dismiss Counts 2 and 3 as it reads in the plea
18 agreement.

19 THE COURT: All right. That motion will be
20 sustained. Those counts will be dismissed, effective
21 upon entry of the judgment in the case.

22 All right. If there are no other motions, we
23 will proceed with allocution in this matter.

24 I'll hear first from Mr. Ekeland and also from
25 Mr. Lostutter if he would like to address the Court.

1 MR. EKELAND: Thank you, Your Honor.

2 I just rest on my papers, but I believe
3 Mr. Lostutter has a brief statement he would like to
4 make.

5 THE COURT: All right. Very well.

6 DEFENDANT LOSTUTTER: Thank you, Your Honor.

7 I had a giant three-page long statement I wrote
8 to give you, and I'm not going to waste your time with
9 that, just like I wasn't going to waste time with trial,
10 and I admit responsibility for my actions. I've always
11 admitted responsibility for my actions.

12 I issued an apology to the webmaster in my very
13 first interview I gave whenever I came out to who I was
14 and proffer interview with Agent Chin, and I publicly
15 announced any sort of defamatory content to him.

16 I have tried to put this behind me for the past
17 three years, and I left the state to do so.

18 And to be honest I'm totally terrified of you
19 so I definitely don't want to be back here.

20 But, yeah, so I try to lead a law-abiding life,
21 and I try to help a victim in the matter and, you know,
22 the cover-up narrative that I was telling the media I
23 feel vindicated by -- that that was true with the grand
24 jury impaneled in April of 2013 and the indictment of
25 four and conviction on two, while tampering with evidence

1 and contributing to minors. And that was my main goal
2 was to make sure everything was thoroughly investigated,
3 and I should have left that up to the officials in
4 retrospect.

5 And so I do apologize for wasting this Court's
6 time, and I apologize publicly to the webmaster again,
7 and everyone here.

8 Thank you.

9 THE COURT: All right. Thank you.

10 Mr. Gupta?

11 MR. GUPTA: Well, the United States filed a
12 sentencing memorandum that discusses the 3553(a) factors,
13 but I'll respond briefly to that statement and to the
14 arguments that are in the defendant's sentencing
15 memoranda.

16 The defendant says that he takes
17 responsibility, that he's always accepted responsibility.
18 That's not true. He's always claimed responsibility, and
19 as part of his plea agreement he accepted legal
20 responsibility. He's never accepted moral
21 responsibility.

22 He continues to, in his sentencing memorandum,
23 perpetuate this false narrative that he solved the rape,
24 that he exposed a government corrupt cover up, that he
25 prevented media silence.

1 This -- the sentencing memorandum filed by the
2 government actually cites the articles that -- that
3 contain the false narrative that he created. It is very
4 self-serving for him to continue this claim that he was a
5 white knight, that he was somehow needed to intervene,
6 and that it just happened to be against the law, and
7 therefore he should get leniency.

8 The sentencing memorandum by the United States
9 lays this out, and I think more effectively the victim
10 impact statement by Jane Hanlin that was filed publicly.

11 THE COURT: Ms. Hanlin testified with the --
12 back to the -- keep referring to the co-defendant,
13 Mr. McHugh.

14 MR. GUPTA: That's correct.

15 THE COURT: She testified in that particular
16 matter, and her testimony is essentially summarized in
17 the letter that's been filed as a victim impact
18 statement, and essentially she outlines the prosecution
19 that was taking place beginning in August and then
20 continuing through October and how that was proceeding
21 with the Ohio Attorney General, special prosecutor that
22 had been appointed in the case.

23 And then suddenly Mr. Lostutter and his cohorts
24 become involved in the matter around December 23rd of
25 2012, and it really just complicates things and make

1 matters go much worse at that point based upon his
2 interference with the prosecution.

3 Is that a fair summary of her statement?

4 MR. GUPTA: That's right.

5 THE COURT: And then she goes beyond that to
6 indicate the pain and injury that was inflicted upon her
7 and on her family by the defendant and his followers,
8 that she -- you know, she had nothing to do with the
9 prosecution following her recusal from the case, but he
10 continued to harass and to attempt to intimidate and
11 injure her and her family, including her son well after
12 the fact.

13 MR. GUPTA: That's right.

14 And for years after that, including throughout
15 this indictment, after the indictment, and throughout
16 this prosecution, he continues to claim -- he continues
17 to make the claims that she describes in her letter, the
18 claims that not only defame the owner of the website but
19 defame an entire town as being complicit in a cover up of
20 the rape of a child. And it's just false.

21 The reason I'm emphasizing that is because
22 it's a factor under 3553(a). There needs to be a
23 punishment that's consistent with the seriousness of
24 this crime.

25 This was a hack of a human person, a person who

1 ran a fan website, and that person for no reason at all
2 was defamed and humiliated. And their private
3 correspondence, including with third parties, was
4 publicly posted. That's -- that's a real crime and a
5 real -- has real consequences to a real person.

6 And I'm glad that Mr. Lostutter finally
7 acknowledged that today, but previously he hasn't, and he
8 doesn't in his sentencing memorandum. Instead, he
9 continues to claim that this was somehow necessary to
10 uncover a rape. And, of course, that's just not true.

11 Not only was there not a cover-up, it's
12 logically impossible to describe solving a crime that had
13 been solved four months earlier, or preventing a cover-up
14 when there's national news coverage. That's impossible.
15 But they didn't help this investigation at all.

16 I think Mr. Lostutter also made a comment today
17 about trying to lead a law-abiding life. We believe that
18 a punishment at the top of the guidelines range is
19 important to emphasize respect for the law.

20 Here the -- Mr. Lostutter seems to think that
21 the 1030(a) -- the 1030 statute is simply a technicality
22 that be evaded whenever he thinks there's a -- some sort
23 of a -- that the ends could justify the means, and that
24 he can just violate this law.

25 And he continued that lack of respect for the

1 law when he lied to the FBI agents during the
2 investigation, and when he committed what the
3 United States considers to be perjury at a pretrial
4 hearing.

5 In Exhibit 3 of the United States sentencing
6 memorandum we attached four Twitter posts or Twitter
7 direct messages. They weren't posts, they were direct
8 messages. And that's from the discovery from
9 Deric Lostutter's email account where we were able to
10 pull these direct messages that were sent from the
11 Twitter service to his email. It's Exhibit 3 of the
12 sentencing memo by the United States.

13 And there's only one-half of the conversation
14 because we don't have Mr. Lostutter's responses, but it
15 shows that during their hack and immediately after their
16 hack these -- these self-proclaimed members of Anonymous
17 didn't think that this was a crime that could have any
18 consequences for them, that they could hide behind their
19 mask, hide behind their screen, hide behind their virtual
20 private network service and cause chaos and havoc in
21 other people's life, but that they themselves would never
22 be punished.

23 So we believe that a sentence at the top of the
24 guidelines range is important to send a general message
25 of deterrence to other computer hackers that this is a

1 real crime with real consequences, including real, real
2 consequences for them.

3 And then finally as to specific deterrence and
4 incapacitation, well, we think the record also supports a
5 sentence at the top of the guidelines range.

6 Mr. Lostutter has not led a law-abiding life.
7 He was indicted, he came to this court, he was told
8 to make -- to keep certain conditions, to keep certain
9 rules as a condition of his release, and he immediately
10 broke them by harassing people that he considered -- some
11 woman he considered to be a witness in this trial, online
12 harassing her.

13 There's a letter that was filed under seal at
14 docket entry 104 that describes a woman -- this is from a
15 woman who he's been harassing and bullying as part of
16 what he considers to be an investigation business or a
17 security business, that as a result of getting fame from
18 this 2012 computer hack, he's now marketed himself as
19 somebody who will cyber bully or shakedown people online
20 for money.

21 And we think that the only way to stop
22 Mr. Lostutter from continued computer bullying and
23 harassment is incapacitation under the guidelines
24 range.

25 And I'll finally address one more thing, which

1 was in the defendant's sentencing memorandum. And it was
2 the final, I think, six pages of their memorandum, and it
3 describes six cases from the past five or six years, or
4 cherry picked these cases from the last five or six
5 years, when the Court imposed a sentence less than
6 24 months.

7 And it argue -- the inference or the argument
8 is that a sentence within the guidelines range or at the
9 top of the guidelines range would be an unwarranted
10 sentencing disparity.

11 United States responds in two ways. One, we
12 put a footnote in our own sentencing memorandum that
13 cherry picks six other cases from the last six or seven
14 months where the Court imposed a guideline -- a sentence
15 of imprisonment for just 1030, nothing else. Here we
16 have, of course, two crimes. But for just 1030 they
17 imposed a sentence of imprisonment for 24 months or
18 more.

19 We'll also just point out what 3553(a)(6)
20 actually is. It's about unwarranted sentencing
21 disparities nationwide, and pointing to a single
22 defendant in a different court that was given a downward
23 variance doesn't risk an unwarranted sentencing
24 disparity. There are too many factors in the sentencing
25 guidelines to make it effective to compare any one

1 defendant with every other defendant that has been
2 convicted of that crime.

3 The only way to promote uniformity nationwide
4 is to calculate and give appropriate weight to the
5 sentencing guidelines.

6 And we think that's what the Court should do
7 here, and we recommend a sentence at the top of the
8 sentencing guidelines.

9 THE COURT: All right. Thank you.

10 I will address many of the arguments that have
11 been made by the parties.

12 Counsel for the defendant has chosen to stand
13 on his materials, and, of course, it's difficult for the
14 Court to go through all of these materials, and I
15 specifically ask the parties to identify any letters
16 that they would like for me to address. There have
17 been a couple that the government has pointed out
18 through the victim impact statements, and I will address
19 those.

20 But I have considered all of these other
21 letters that have been submitted, and I have considered
22 the sentencing memorandum filed by the defendant as well,
23 as well as his statements here today.

24 I do begin the analysis of an appropriate
25 sentence from the properly calculated but nonbinding

1 guideline range, and in this particular case when we talk
2 about a term of incarceration, the guideline range is a
3 range of 18 to 24 months.

4 I then take into account all of the relevant
5 factors of Title 18, Section 3553.

6 Let me start from the last argument made by the
7 United States in terms of 3553(a)(6), unwarranted
8 sentencing disparities. I do want to cite for the
9 parties' benefit a couple of cases that have been decided
10 in this circuit that go to this -- to this very issue,
11 and it's the issue that I often refer to as lowest common
12 denominator.

13 And it's not unusual for a particular defendant
14 to find a case somewhere in the United States, which he
15 or she claims is similar in some nature and some respect
16 to his particular case and then argue that because that
17 defendant received a very low sentence that he should
18 receive that sentence as well.

19 It does not represent a clear cross-section of
20 cases. It's not statistically significant. It
21 essentially just means that one judge in some other
22 district in some location, or two or perhaps five, have
23 found for whatever reason to impose a below guideline
24 sentence. That does not mean that it's in any way
25 relevant to the facts that are presented in the case

1 that's before this Court obviously.

2 And it is impossible, unless this Court has the
3 sentencing memorandum filed in those matters and also has
4 the presentence reports, has the benefit of arguments by
5 the parties and statements in those cases for the Court
6 then to draw proper analogies.

7 And the Sixth Circuit has pointed out the
8 danger in cherry picking cases, which is essentially what
9 the government has asserted has occurred in this
10 particular matter.

11 And we start with the Simmons case, which is
12 often cited. It's 501 Fed 3d, 620. I think it's a
13 2007 case from the Sixth Circuit. I believe that
14 Judge Cornelia Kennedy had written prior to her passing.

15 She points out that, "Section 3553(a)(6) is
16 concerned with national disparities among defendants with
17 similar backgrounds convicted of similar conduct. It's
18 not a concern with disparities between one individual's
19 sentence and another individual's sentence despite the
20 fact that two may even be co-defendants in a particular
21 case."

22 And she cites a number of jurisdictions that do
23 emphasize the fact that the issue is nationwide
24 sentencing disparities.

25 As a matter of fact, I believe there are only

1 two jurisdictions at this point, perhaps three circuits,
2 two or three circuits, that have not followed that
3 specific guidance that 3553(a)(6) concerns itself with,
4 nationwide sentencing disparities.

5 That point is also emphasized in other cases.
6 As a matter of fact, in the Saez case, United States
7 versus Saez, which was is 2006 case, 444 Fed 3d, 15, the
8 Court notes that, "Usually little is to be learned about
9 national uniformity by pointing to the sentence of one
10 other defendant. Of course, if the same judge sentences
11 two identically situated defendants to substantially
12 different terms, some explanation may be required;
13 uniformity aside, the basic requirement of rationality
14 remains. But with different judges sentencing two
15 defendants quite differently, there's no reason to think
16 that the first one was right than the second one."

17 And there's also the situation that's even more
18 analogous here where parties had pulled five cases, drug
19 case, and the Court in Thomas, United States versus
20 Thomas, which is a 2010 case, it's unreported, but it
21 appears at 395 Federal Appendix 168.

22 Thomas's -- and the Court states, Thomas's
23 comparison -- it's a case opinion by Judge McKeague.
24 "Thomas's comparison of sentences to those given five
25 random defendants scattered throughout the United States

1 is only marginally relevant; he cannot demonstrate the
2 existence of a national sentencing disparity for
3 street-level dealers sentenced as career offenders by
4 citing five individual district court cases. In Simmons,
5 we approvingly cited a First Circuit case criticizing
6 exactly this sort of argument. A single example is about
7 the weakest sort of proof of national practice that can
8 be imagined. We observed, warning against a sentence in
9 which, quote, weight is given to such singular examples."
10 It cites Simmons and also the Saez case.

11 "As the First Circuit has noted, such
12 comparison between different singular sentences given
13 by different judges opens the door to endless rummaging
14 by lawyers through sentencing in other cases. Each side
15 finds -- or finding random examples to support higher
16 or lower sentences, as their clients' interests
17 dictate."

18 So the Court does reject the argument that
19 because the defendant has been able to find other cases
20 from other jurisdictions in which a person has been
21 convicted under one of the two counts of conviction in
22 this case that the Court should somehow lower or
23 consider those to be a national average and should
24 somehow adjust the sentence in this particular case,
25 and the Court specifically rejects that approach in

1 light of the individual characteristics that should be
2 considered.

3 The Court should consider the need to avoid
4 unwarranted sentencing disparities but is not required to
5 do so by cherry picking those individual cases and giving
6 them undo weight.

7 Likewise, the Court does consider all of the
8 other information contained in the presentence report.
9 It does reflect upon the defendant's history and his
10 characteristics.

11 And in addressing this particular issue, as
12 well as the nature and the circumstances of the offense
13 and the seriousness of the offense, which are matters
14 that are set forth in the sentencing memorandum, I will
15 again refer back to the consequences of the defendant's
16 actions, which really go to his intent and the arguments
17 that have been made here in terms of his acting as a
18 white knight and somehow his actions being noble and
19 necessary in order to uncover some type of a cover up of
20 a matter that would not otherwise be prosecuted.

21 And it would appear based upon all of the
22 information provided that that's not the case, that this
23 defendant it was not necessary that he intervene in this
24 matter for any legitimate reason.

25 Instead, it appears to the Court that he has

1 acted as some type of shakedown artist or some type of a
2 cyber bully. He feels like that that has become his
3 profession perhaps, that he can gain fame or fortune in
4 that way. But he certainly was not a white knight in
5 this particular matter, and again I turn to the victim
6 impact statement that was filed by the former
7 prosecutor, Jane Hanlin, which appears at docket entry
8 102 in the case, and it describes the type of
9 consequences that occurred as a result of the
10 defendant's actions here.

11 Earlier I had summarized in terms of a timeline
12 the prosecution in the case that clearly indicates that
13 the underlying rape matter was being investigated,
14 prosecuted, and the convictions were moving forward
15 before the defendant either was aware of this or became
16 involved.

17 But once again, he made matters much worse.
18 And turning to page 3 of the victim impact statement, I'm
19 going to read a portion of this because I believe it's
20 clearly relevant to this case, and it clearly
21 demonstrates the type of damage that this defendant has
22 done.

23 Ms. Hanlin states, "It would be impossible to
24 describe the terror experienced by the citizens of
25 Steubenville as the videos began to infiltrate homes of

1 hundreds, if not thousands, of people. The threat that
2 people's children would be harmed and that their most
3 personal information would be divulged and that something
4 heretofore unknown in Steubenville, the Hive of
5 Anonymous, would be invading our town.

6 "To say that the actions of Mr. Lostutter were
7 unnecessary would be a gross understatement. Absolutely
8 everything that could be done to solve the crime had been
9 done in August 2012. The matter had been fully
10 investigated, appropriately -- appropriate charges had
11 been filed, and the Attorney General of the State of Ohio
12 publicly stated that there was no cover up of any sort.
13 The case was receiving more than adequate coverage in the
14 press. And yet, Mr. Lostutter took it upon himself to
15 invade our town, threaten our young people, and ignite an
16 international firestorm.

17 "What happened in the City of Steubenville
18 after Mr. Lostutter began his criminal activity is hard
19 to describe to anyone who is not on the ground to witness
20 it. His actions ignited protests, hundreds of unknown
21 masked individuals parading through our town, thousands
22 and thousands of death threats were issued via e-mail and
23 telephone message, facsimile, anonymous letters,
24 virtually every form of communication was used to
25 threaten and terrify the people of Steubenville.

1 "One of the most damaging effects of
2 Mr. Lostutter's actions is that the narrative that he
3 pushed through local and national and international media
4 was entirely false. The narrative promulgated by
5 Mr. Lostutter involved a false story that multiple star
6 football players repeatedly raped a girl in Steubenville
7 at multiple parties, that the victim was transported from
8 party to party in the trunk of a car, while dozens of
9 onlookers watched and did nothing. The problem with that
10 narrative is that it is false."

11 She goes on to describe what actually happened.

12 And then she states that, "One of the other
13 unfortunate effects of Mr. Lostutter's involvement was
14 the fear and hate that he was spreading throughout -- or
15 through these false theories resulting in witnesses being
16 frightened, intimidated, and afraid to cooperate with
17 local law enforcement officials. Up until the point that
18 Lostutter arrived, local law enforcement had received
19 near complete cooperation from witnesses. After
20 Lostutter incited so much hate and fear, families were
21 afraid to allow their children to cooperate. Thus,
22 Lostutter did not help the matter, he actually hurt the
23 prosecution's efforts."

24 Then she goes on to describe how this affected
25 her family. She states that, "My family and I were

1 personally and relentlessly attacked and targeted for
2 violence."

3 She explains how her son had been accepted
4 into -- as a student athlete at Kent State University and
5 how he was viciously attacked by others online and
6 through various forms of media. Anonymous attackers
7 cheered for her son to be burned alive, and she goes on
8 to describe some of the other threats and statements that
9 were made, which she attributes to Mr. Lostutter and the
10 Internet vigilantes that he had assembled.

11 She goes on for several pages, but she
12 indicates at page 5, and I agree with this summary.
13 "I'm quite certain that Mr. Lostutter's actions were
14 based upon greed, an undying need for attention, and
15 his willingness to harm anybody who attempted to point
16 out the truth of what had actually occurred in the
17 city."

18 I've reviewed this letter in some detail
19 because I do believe that it correctly indicates that the
20 prosecution was, in fact, occurring, that Mr. Lostutter's
21 actions were not necessary. They made matters worse, and
22 they harmed a number of other individuals.

23 He indicates that in his statement to the Court
24 just a few moments ago that he had actually left this
25 area, and he was leading a law-abiding life, but then

1 when we look at some of the other letters that were
2 filed, victim impact letters, one that was filed under
3 seal that was referenced by the United States, it appears
4 that he continues to engage in this type of Internet
5 battle pretty much anywhere he goes.

6 And, again, that reinforces my conclusion that
7 really he's attempting to become known as a -- as a
8 shakedown artist, as a cyber bully, and his actions in
9 this particular case and then his actions thereafter
10 would support that particular determination.

11 When I look at the factors of 3553, I mentioned
12 several of them. I've mentioned the defendant's history
13 and characteristics. Some of those characteristics are
14 outlined in the sentencing memorandum that has been filed
15 in this matter, beginning at page 3 going through page 7
16 or 8.

17 History and characteristics of the defendant
18 and those matters that occurred during his childhood and
19 adolescence have little or no bearing on the matter
20 that's -- for which he stands convicted in this
21 particular court.

22 I will note though that one of the matters that
23 troubles me somewhat in the memorandum and then in the
24 position that he's taken is that somehow he's a victim of
25 PTSD as a result of the warrants and the arrests that

1 occurred in this particular case because of his
2 interaction with the agents of the Federal Bureau of
3 Investigation.

4 He's attempting to become a victim once again
5 when, in fact, the officers were conducting an
6 appropriate search. There's nothing improper about the
7 search that was performed. And for this defendant to
8 then attempt to turn around and say that he's a victim
9 and is now suffering from this -- from this illness is --
10 is -- is not well-founded.

11 When we look at the seriousness of the offense,
12 I've attempted to highlight some of that by reading this
13 letter from the prosecutor in Ohio. I do believe that
14 it's serious. It's more serious than the defendant
15 credits it.

16 He references the fact that he is sorry he has
17 taken the Court's time, but that's what this Court is
18 here for. This Court is here to address serious
19 violations of the criminal laws of the United States, and
20 there are two here.

21 The memorandum focuses primarily on Count 1 and
22 does not give much thought to Count 4, but that's also a
23 very serious count of conviction, which does certainly
24 deserve punishment.

25 It is in the Court's opinion necessary to

1 impose a term of incarceration in order to provide not
2 only specific deterrence for this defendant but other --
3 but deterrence for other individuals that might be
4 inclined to commit a similar offense.

5 An argument could be made that perhaps in these
6 other cases that have been cited had the Court taken a
7 stronger position in imposing a term of incarceration
8 that other individuals such as Mr. Lostutter would not
9 ignore the law and be willing to engage in criminal
10 activity.

11 I don't make any conclusions in that regard but
12 do point out that that is an argument that certainly can
13 be made in support of specific deterrence in this
14 particular matter.

15 But notwithstanding these other cases, the
16 Court believes that a term of incarceration along the
17 lines that has been suggested by the United States would
18 be appropriate and necessary in this particular case, not
19 only to provide specific deterrence but also general
20 deterrence and to protect the public.

21 I'm not unmindful of the fact that there's also
22 rehabilitative aspect of sentencing. 3553(a)(2)(D) does
23 indicate that the Court should provide the defendant with
24 needed educational or vocational training, medical care
25 or other corrective treatment.

1 Because I believe that it is necessary to
2 impose limitations on the defendant's Internet and
3 computer activities as a condition of supervision, I am
4 going to recommend that he receive vocational training
5 during the period of incarceration that will be imposed
6 in this case.

7 Also, there is an indication of some substance
8 abuse in his past, particularly with alcohol, and I will
9 be including some conditions for substance abuse
10 treatment, and also require that he abstain from the use
11 of alcohol as a condition of his supervision.

12 Again, I have considered the issue of
13 unwarranted sentencing disparities and do not believe
14 that a sentence within the guidelines in this particular
15 matter would be an unwarranted sentencing disparity.

16 Instead, I do conclude that when I consider all
17 of the factors of 3553, as well as the information that
18 has been provided to the Court in writing, as well as --
19 that has been argued here today, that a term of
20 incarceration at the top of the guidelines is absolutely
21 necessary in this particular matter.

22 And I will announce the sentence at this time.

23 And it will be the sentence of this Court,
24 pursuant to the Sentencing Reform Act of 1984, as
25 modified by the decisions in Booker and Fanfan, and I do

1 find that the following sentence would be sufficient but
2 not greater than necessary to meet the purposes of
3 Title 18, Section 3553(a).

4 And, therefore, it will be the judgment of the
5 Court that the defendant Deric Lostutter will be
6 committed to the custody of the Bureau of Prisons for a
7 term of 24 months on each Count 1 and 4, to run
8 concurrently, to produce a total term of incarceration of
9 24 months.

10 As I just indicated, I will recommend to the
11 Bureau of Prisons that he participate in a job skills and
12 vocational training program.

13 I'll recommend that he participate in the
14 Substance Abuse Treatment Program and also that he
15 participate in a program for mental health treatment
16 during the period of incarceration.

17 Upon release, he'll be placed upon supervised
18 release for a term of three years on each count, to run
19 concurrently, to produce a total term of supervision of
20 three years.

21 And within 72 hours of release from the custody
22 of the Bureau of Prisons he shall report in person to
23 the probation office in the district in which he is
24 released.

25 While on supervised release, the defendant may

1 not commit another federal, state, or local crime.

2 He must comply with the mandatory and standard
3 conditions that will be set forth in the judgment and
4 commitment order that have been adopted by the Court,
5 and he must comply with the following additional
6 conditions.

7 And they include that he not possess a firearm,
8 destructive device, ammunition, or a dangerous weapon.

9 He must refrain from any unlawful use of a
10 controlled substance and submit to one drug test within
11 15 days of release, and at least two periodic drug tests
12 thereafter.

13 I'll also include the following special
14 conditions, and they include that he abstain from the use
15 of alcohol, that he participate in a Substance Abuse
16 Treatment Program, and submit to periodic drug and
17 alcohol testing at the direction and discretion of the
18 probation office during the term of supervision.

19 Now, that program may include one or more
20 cognitive behavioral approaches to address criminal
21 thinking patterns and antisocial behaviors.

22 He will be required to pay the cost of
23 treatment services to the extent that he's able to do so
24 as determined by the probation office.

25 He will be required to refrain from engaging in

1 employment in the information technology field during the
2 term of supervision, pursuant to Section 5F1.5 of the
3 sentencing guidelines, again, for the reasons that have
4 been outlined as I've explained the rationale for the
5 sentence that is being imposed in the case.

6 He must refrain from obstructing or attempting
7 to obstruct or tamper in any fashion with the efficiency
8 and accuracy of any prohibited substance testing, which
9 is required as a condition of release.

10 He must attend and successfully complete any
11 mental health diagnostic evaluations and treatment or
12 counseling programs as directed by the probation office.

13 Again, he'll be required to pay the cost of
14 those treatment services but only to the extent that he's
15 able to do so as determined by the probation office.

16 And I will be imposing a fine in this case, and
17 so, therefore, I will include some conditions with
18 respect to some financial conditions with respect to
19 the -- with this matter.

20 Now, the defendant may not incur any new credit
21 charges or open additional lines of credit without the
22 approval of the probation office unless he's in
23 compliance with an installment payment schedule.

24 He will be required to provide the probation
25 office with access to any requested financial

1 information.

2 He may not purchase, use, distribute, or
3 administer any controlled substance or paraphernalia
4 related to controlled substances, except as prescribed by
5 a physician, and may not frequent places where controlled
6 substances are illegally sold, used, distributed, or
7 administered.

8 He may not possess or use a computer or any
9 device with access to any online computer service at any
10 location, including place of employment, without the
11 prior approval of the probation office. This includes
12 any Internet service provider, bulletin board system, or
13 any other public or private network, or email system.

14 He must consent to the probation office
15 conducting unannounced examinations of his computer
16 system and any internal or external storage devices,
17 which may include retrieval and copying of all memory
18 from the hardware and software and/or the removal of such
19 systems for the purpose of conducting a more thorough
20 inspection.

21 And he must consent to having installed on his
22 computer any hardware or software to monitor his computer
23 use or to prevent access to particular materials, and to
24 consent to periodic inspections of such installed
25 hardware and software to ensure it is functioning

1 properly.

2 He will also be required to provide the
3 probation office with accurate information about his
4 entire computer system, and that would include the
5 hardware and software, any internal or external storage
6 devices and must provide all passwords used by him.

7 And he must abide by all rules of the computer
8 restriction and monitoring programming.

9 There's another provision that I will include
10 that was outlined in the second addendum to the
11 presentence report.

12 The defendant shall not communicate or attempt
13 to communicate, either directly or indirectly, in any
14 form, to include through Internet websites or services,
15 any message, content, information, or other communication
16 that has the purpose or intent to be threatening,
17 harassing, or intimidating to another individual. I will
18 include the individual's family, or corporation, or
19 organization.

20 Threatening, harassing, or intimidating
21 communications include any communication that has the
22 intent to inflict punishment, loss, pain, or damage to
23 another individual, the individual's family, corporation,
24 or organization; or the individuals, the individuals'
25 family, or the corporation, or organization's property

1 that is meant to cause distress or alarm to an
2 individual, an individual's family, corporation, or
3 organization; or is meant to coerce into action or place
4 under duress, whether it be emotionally, physically, or
5 financially any individual, any individual's family, or
6 corporation, or organization.

7 Now, based upon the defendant's current
8 financial situation, I will impose a fine at the bottom
9 of the fine range of \$5,000.

10 And he will be ordered to pay a special
11 assessment of \$200, which is \$100 per count of
12 conviction.

13 In determining the fine in the case and, quite
14 frankly, also in determining the sentence, I have
15 considered the impact of a fine and the sentence upon the
16 defendant's family. I do not believe that family ties or
17 circumstances under the guidelines would be a reason to
18 depart from the range as indicated, but I have considered
19 that issue.

20 But I have determined that to impose a higher
21 fine amount in the case, higher than \$4,000, would create
22 an undo hardship on the family and, therefore, I've
23 limited the fine to the bottom of the range.

24 The defendant will also be required to forfeit
25 to the United States all interest in property used or

1 intended to be used to commit and facilitate the
2 commission of the offense as charged in the indictment,
3 and that forfeiture will be pursuant to Title 18 of the
4 United States Code, Section 1030(i)(1)(A).

5 I will allow the defendant to report,
6 self-report, to the institution designated by the Bureau
7 of Prisons, but the report date will be not later than
8 2:00 p.m. on May 8th, 2017.

9 And that will be the judgment of the Court.

10 In just a moment I will ask -- well, I
11 believe -- I was going to say I will ask the clerk to
12 advise the defendant of his right of appeal, but my
13 recollection is that there's a limited waiver that was
14 agreed upon in this particular case, and the defendant
15 agreed that unless he was -- a sentence was imposed in
16 excess of the guideline range, the properly calculated
17 guideline range as determined by the Court at the time of
18 sentencing, that he would waive his right to appeal the
19 sentence imposed in the case.

20 That's correct, paragraph 9. So I'm not going
21 to ask the clerk to advise the defendant of any rights of
22 appeal.

23 But I will note for the record that in the
24 event that either party believes that this Court has
25 committed any error that would not be subject to the

1 waiver and would be subject to appeal, that any notice of
2 appeal would have to be filed within 14 days of entry of
3 the judgment to be timely filed.

4 Also, in the event the defendant believes that
5 there were issues that were not subject to the waiver and
6 would be subject to proper appeal, he could seek to
7 appeal in forma pauperis, which means he could seek to
8 appeal without payment or cost, and could also seek to
9 have counsel appointed to represent him without payment
10 or cost if he were able to establish that he could not
11 afford to pay the cost of an appeal or of an attorney.

12 Now, at this time I'll entertain any objections
13 that the parties have. There are three questions I will
14 present to the parties.

15 First would be any objections to the sentence,
16 or any conditions of supervision that have been
17 announced.

18 Next would be any objections under
19 United States versus Bostic. Under that decision from
20 the Sixth Circuit any objections not previously raised
21 would need to be raised at this time so that they may be
22 addressed by the Court to be properly preserved for
23 review on appeal.

24 And then, finally, if the parties would like
25 the Court to make additional findings to support the

1 sentence that has been announced, I will be happy to make
2 additional findings.

3 Mr. Gupta, I'll begin with the United States.

4 MR. GUPTA: Nothing to add, no objections.

5 THE COURT: All right. Thank you.

6 Mr. Ekeland.

7 MR. EKELAND: No objections, Your Honor. We
8 just would ask the Court, if it so pleases the Court, to
9 recommend to the Bureau of Prisons that Mr. Lostutter be
10 designated to the facility in Butner, which is in Durham,
11 North Carolina, so he can be near his family.

12 THE COURT: All right. I will include a
13 recommendation that the defendant serve a period of
14 incarceration at the location closest to Durham,
15 North Carolina, for which he would qualify.

16 MR. EKELAND: Thank you, Your Honor.

17 THE COURT: All right. Thank you.

18 Are there any other issues that need to be
19 taken up in the case?

20 Anything by the government?

21 MR. GUPTA: Nothing. Thank you.

22 THE COURT: Anything on behalf of the
23 defendant?

24 MR. EKELAND: No, Your Honor.

25 THE COURT: All right. Thank you.

1 If not, we'll take about a two-minute recess
2 before the next matter is called.

3 (Whereupon, the Sentencing Hearing proceedings
4 concluded at 10:00 a.m.)

5 C E R T I F I C A T E

6 I, Peggy W. Weber, certify that the foregoing is a
7 correct transcript from the record of proceedings in the
8 above-entitled matter.

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March 31, 2017

DATE

s/Peggy W. Weber

PEGGY W. WEBER, RPR