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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,)	
)	
<i>Plaintiff,</i>)	NO. CR07-187MJP
)	
v.)	DEFENDANT'S SECOND
)	SUPPLEMENTAL SENTENCING
ROBERT ALAN SOLOWAY,)	MEMORANDUM
)	
<i>Defendant.</i>)	
_____)	

COMES NOW the defendant, ROBERT ALAN SOLOWAY, and submits this Second Supplemental Sentencing Memorandum to address the issues raised by the Court at the end of the day on July 14, 2008.

I. BULK COMMERCIAL E-MAIL IS REGULATED, NOT BANNED.

18 U.S.C. §1037 (the criminal provisions of the CAN-SPAM Act) does not criminalize the sending of bulk commercial email ("spam"), nor does it place any limits on the number of commercial emails that can be sent, so long as the five specific prohibitions set forth in the statute are not violated. Moreover, the Act does not apply at all to non-commercial email messages, regardless of the quantity, so there are no prohibitions, including the use of proxies or use of forged headers, in connection with non-commercial email. And so long as the quantity thresholds set forth in §1037(d)(3) are not

1 exceeded, even commercial email messages can be sent using proxies and forged headers
2 without violating the statute. Of course, Mr. Soloway admitted in his plea agreement that
3 he violated 18 U.S.C. §1037(a)(3) by using headers which contained the same email
4 address in both the "from" and the "to" fields in the headers in his own commercial email
5 messages (those sent by him to potential customers as opposed to the emails he sent out
6 on behalf of customers who had purchased his service). The government, however, has
7 not established that he violated 18 U.S.C. §1037 in connection with the product or service
8 that he sold.
9

10 II. THE NUMBER OF "VICTIMS."

11 The United States Sentencing Guidelines make clear that loss under §2B1.1(b)(1)
12 means pecuniary harm. U.S.S.G. §2B1.1, Application Note 3(A)(i). Pecuniary harm is
13 defined as follows:
14

15 (iii) Pecuniary Harm.-- "Pecuniary harm" means harm that
16 is monetary or that is otherwise readily measurable in
17 money. Accordingly, pecuniary harm does not include
18 emotional distress, harm to reputation, or other non-
economic harm.

19 U.S.S.G. §2B1.1, Application Note 3(A)(iii). Annoyance does not fall within this
20 definition.

21 It is also worth noting that in order for there to even be a violation of the CAN-
22 SPAM Act, the offense must involve the transmission of more than 100 such messages
23 during a 24 hour period, more than 1,000 during a 30 day period, or more than 10,000
24 in a one year period. 18 U.S.C. §1037(d)(3). And even with such numbers, absent some
25 other enhancement under the statute, the violation would be a misdemeanor. 18 U.S.C.
26 §1037(b)(3).
27

1 In order to constitute a felony violation (punishable by a maximum statutory
2 sentence of up to five years) the offense must involve the transmission of more than 2,500
3 such emails in a 24 hour period, 25,000 during a 30 day period, or 250,000 within a one
4 year period. If it takes at least 100 emails in a 24 hour period to constitute even a
5 misdemeanor under the statute, and if anyone who received a spam email was a victim,
6 then arguably there would have to be at least a four level victim enhancement (more than
7 50 victims) in every misdemeanor case. Similarly, and for the same reason, there would
8 have to be a six level victim enhancement in every felony case under that statute. Clearly,
9 that is not what the guidelines contemplate.
10
11

12 U.S.S.G. §2B1.1(b)(2) provides for a two level enhancement if the offense involved
13 10 or more victims, or was committed through mass-marketing. U.S.S.G. §2B1.1,
14 Application Note 4(A), provides that "mass-marketing" means "a plan, program
15 promotion, or campaign that is conducted through solicitation by telephone, mail, the
16 Internet, or other means . . ." U.S.S.G. §2B1.1, Application Note 4(B) provides that for
17 purposes of §2B1.1(b)(2), an offense under 18 U.S.C. §1037 shall be considered to have
18 been committed through mass-marketing, and at least a two level enhancement shall apply,
19 although a greater enhancement may apply if the government can establish the requisite
20 proof. If the government's theory that anyone who received a spam is a victim, then, as
21 stated above, the minimum enhancement under U.S.S.G. §2B1.1(B)(2) would be at least
22 four levels, not two, but that is clearly not the case.
23
24

25 Finally, although gathering information in other spam cases has been difficult
26 (mainly searching through PACER documents), we note that in at least two recent federal
27 cases involving similar violations of 18 U.S.C. §1037 (sending millions of commercial
28

1 emails with forged headers and using proxies), the court found, and the government
2 agreed, that the proper victim enhancement adjustment for the spam violations in each case
3 was two (2) levels pursuant to U.S.S.G. §2B1.1(b)(2)(A) (mass-marketing). See, *United*
4 *States v. Jeffrey Kilbride*, U.S.D.C. for District of Arizona, Case No. 05-870, and *United*
5 *States v. Adam Vitale*, U.S.D.C. for the Southern District of New York, No. 06-391.¹
6 A more detailed analysis of those cases is set forth, *infra*, Section V. Suffice it to say
7 here, if everyone who received a spam email in those cases was a victim, there would
8 have been over a million victims in each case, so those courts--and the government--clearly
9 rejected that approach in those cases.
10
11

12 Here, the government has not established that there are more than 50 victims who
13 suffered pecuniary losses as a result of the defendant's fraud.² Accordingly, the
14 appropriate victim enhancement in this case is two levels for mass-marketing pursuant to
15 U.S.S.G. §2B1.1(2)(A).
16

17 III. QUANTIFYING LOSS.

18 The burden of establishing a loss amount in this case is on the government. We
19 acknowledge that the law as applied to the facts of this case does not render that
20 determination easy, but that difficulty does relieve the government of its burden. For the
21 reasons set forth in our initial sentencing memorandum, we believe that the defendant's
22 "gain" is not an accurate measure of damages in this case.
23

24 ¹ The Guidelines calculations in *Kilbride* are set forth in an Order issued on September
25 24, 2007, which is reported at 2007 WL 2774487. The Guidelines calculations in *Vitale* are set
26 forth in the Plea Agreement, which is referenced at page 3 of the government's sentencing letter
in that case (July 9, 2008), a copy of which is attached hereto as Exhibit A.

27 ² Loss does not include "costs incurred by victims primarily to aid the government in
28 the prosecution and investigation of an offense." U.S.S.G. §2B1.1, Application Note 3(D)(2)(ii).

1 There are basically two distinct categories of losses in this case. The first is for
2 those people who did not purchase a product or service from Mr. Soloway, but who
3 nevertheless claim to have suffered a loss merely as a result of receiving his email
4 messages. The second category includes people who suffered losses as a result of
5 purchasing a product or service. We submit that there is no rational relationship between
6 gains Mr. Soloway made on the sale of his product and service, and losses claimed by
7 people who merely received his emails, without purchasing a product or service.
8

9 Consider the following example. Ten thousand people receive spam emails offering
10 a product for sale for \$10.00. Of those 10,000 people, one hundred purchase the product.
11 Consequently, there is a gross "gain" of \$1,000.00.³ Of the 10,000 people who received
12 an email but did not purchase a product, ten later complain that they incurred some sort
13 of financial loss as a result of receiving the email. The remaining 9,990 people do not
14 make any complaint or claim any loss. Of the one hundred people who purchased a
15 product, one claims that he suffered a loss as a result. What possible connection is there
16 between the \$1,000.00 gain realized on the one sale, and the loss, if any, to the 10,000
17 people who received the emails but did not purchase a product or service, 99% of whom
18 did not complain? And what if no one purchased the product, and there was no gain at
19 all? Would that mean that there were no losses? Not likely.
20

21 We believe that the court in *Kilbride, supra*, got it right when it found that gain
22 was not an accurate measure of loss in a spam case. *United States v. Kilbride, supra*,
23 2007 WL at page 4 (see discussion set forth in our initial Sentencing Memorandum, at pp.
24

25 _____
26
27 ³ Of course, that is a gross gain. Costs were incurred in selling and distributing the product, so
28 the actual net gain is likely no more than fifty (50%) percent of the price of the product or service.

1 25-26). So too, here, gain is not a reasonable approximation of loss, and thus should not
2 be used in this case.

3
4 At the conclusion of the hearing on Monday, the Court suggested an analogy
5 between this case and pollution, which is also "spewed out." A more specific analogy
6 might be to noise pollution (rather than some hazardous material). Most people who are
7 the "victims" of noise pollution are merely annoyed, and want it to stop. However, in
8 egregious cases a few people may actually suffer from some hearing impairment, and
9 require medical attention, which results in costs to them. We believe that it would be fair
10 to say that the people who were merely annoyed by the noise did not suffer any economic
11 loss, but those who required medical treatment did. So too here, those people who were
12 merely annoyed by receiving Mr. Soloway's emails (a few each month) did not suffer any
13 real loss, but those who received a far greater number of emails, and actually had to take
14 some remedial steps that resulted in actual economic costs in order to prevent receiving
15 such emails, did suffer losses.

16
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18 Finally, we submit that the maximum value that can be placed on a person's time
19 in responding to spam is what a professional with the requisite expertise would charge for
20 the same service. For example, it would not make sense for the CEO of a major
21 corporation, who makes \$1,000,000.00 a year, to expect to receive his or her equivalent
22 "hourly wage" for the time it would take to change a light bulb. The reasonable value for
23 changing a light bulb would be what a typical maintenance person makes, not what the
24 CEO makes. This is simply a matter of mitigating damages. Thus, a reasonable estimate
25 of the value of dealing with spam might be what someone from the "Geek" squad would
26 charge for looking at a computer and installing the necessary software to combat spam.

1 This works in two ways. One, it sets a reasonable outside limit on the value of the time,
2 and two, it keeps the time down to the minimum necessary to achieve the desired result
3 because a professional knows what he is doing and is not wasting time on unproductive
4 solutions. But this would apply only to someone who had to do much more than simply
5 delete emails.
6

7 **IV. AVAILABILITY OF KLONOPIN IN A BOP FACILITY.**

8 Based upon the report received from BOP consultant Phillip S. Wise, attached
9 hereto as Exhibit B, it does not appear as though Mr. Soloway will be able to receive
10 Klonopin at any Bureau of Prisons facility, including a medical facility. If he is on
11 Klonopin when he enters a BOP facility, they will wean him off of it as quickly as
12 possible. We believe that Mr. Wise's suggestion is a good one, in that it would be
13 preferable to have Mr. Soloway establish a different regimen of medications prior to the
14 commencement of his sentence. We will immediately consult with his personal physician
15 to start that process, and we would request that he be given approximately 45 days to
16 complete that process before surrendering to the designated institution.
17
18

19 **V. OTHER RECENT SPAM CASES.**

20 On October 17, 2007, United States District Judge David G. Campbell sentenced
21 Jeffrey Kilbride to 78 months imprisonment. *United States v. Kilbride, supra*. Kilbride
22 was convicted of eight felony violations at the conclusion of a three week jury trial. These
23 violations included one count of Conspiracy to Commit Fraud in violation of 18 U.S.C.
24 §371; one count of Fraud in Connection with Electronic Mail in violation of 18 U.S.C.
25 §1037(b)(2) and (a)(3)[forged headers]; one count of Fraud in Connection with Electronic
26 Mail in violation of 18 U.S.C. §1037(b)(2) and (a)(4)[falsifying registrant information];
27

1 two counts of Importation or Transportation of Obscene Matters in violation of 18 U.S.C.
2 §1462; two counts of Transportation of Obscene Matters for Sale or Distribution in
3 violation of 18 U.S.C. §1465; and one count of money laundering in violation of 18
4 U.S.C. §1956.
5

6 According to a Department of Justice press release that was issued following the
7 sentencing hearing in that case, a copy of which is attached hereto as Exhibit C, Kilbride
8 and his associates

9 "sent millions of unsolicited messages which advertised
10 commercial Internet hard-core pornography websites. Kilbride and Schaffer [his co-defendant] earned a
11 commission for each person they caused to subscribe to one
12 of these Web sites. Hard-core pornographic images were
13 embedded in each email they sent and were visible to any
14 person who opened the email. . . By remotely logging in to
15 servers located in Amsterdam, the men were able to make it
16 appear that the messages they were sending originated
17 abroad, when they were actually being sent from Phoenix.

18 * * *

19 At Kilbride and Schaffer's trial, eight citizens
20 traveled from Massachusetts, Texas, Iowa, California and
21 Arizona to testify about the context in which their families,
22 including some children, received the pornographic spam
23 messages. In all, AOL and the FTC received over 1.5
24 million complaints from spam recipients, including some
25 who set parental controls to protect their children from
26 accessing graphic sexual content. The evidence at trial
27 established that the defendants falsified header information
28 and domain names of the messages they sent by creating a
fictitious employee at a shell corporation in the Republic of
Mauritius in order to hide their criminal conduct."

As can be seen, the millions of emails sent by Kilbride did not merely include a
link to a pornographic website. Rather, if the email was opened, the unsuspecting
recipient was automatically directed to a pornographic website on which graphic obscene

1 images were displayed. Some of the images were so obscene that the government sought
2 a four level enhancement pursuant to U.S.S.G. §2G3(b)(4) based on the sadistic and
3 masochistic nature of the material, although the court did not apply that enhancement.
4 Government's Sentencing Memorandum at page 7. Kilbride was also held responsible for
5 laundering over \$1.1 million, which was the proceeds of his spamming activity.
6

7 At sentencing, the court concluded that people who received Kilbride's emails were
8 not victims under the sentencing guidelines. Rather, the court found that the only victim
9 of Kilbride's crimes was AOL, and that the loss resulting from the defendants' conduct
10 was \$77,500.00, based on "credible evidence from AOL that investigator Eric Zeller
11 devoted 620 hours to investigating defendant's spam." See, Order, September 26, 2007
12 (Docket No. 358). Kilbride also received a two level upward adjustment for obstruction
13 of justice pursuant to U.S.S.G. §3C1.1, and, because he went to trial, he did not receive
14 any downward adjustment for acceptance of responsibility. His total offense level was 28,
15 with a guidelines range of 78-97 months. Kilbride was sentenced to the low end of the
16 range. His co-defendant, who had a total offense level of 26, with a guidelines range of
17 63-78 months, was sentenced to 63 months.
18
19

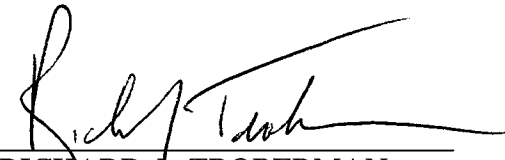
20 In an even more recent case, on July 15, 2008, Adam Vitale was sentenced to 30
21 months imprisonment. A copy of the DOJ Press Release in that case is attached hereto
22 as Exhibit D. Vitale pled guilty to three counts, including Conspiracy to Commit E-Mail
23 Fraud in violation of 18 U.S.C. §371, Fraud in Connection with Electronic Mail (open
24 proxies) in violation of 18 U.S.C. §1037(a)(2), and Fraud in Connection with Electronic
25 Mail (forged headers) in violation of 18 U.S.C. §1037(a)(3). Pursuant to a plea
26 agreement, the parties agreed that the amount of loss was more than \$120,000 but less
27
28

1 than \$200,000; that there should be a two level adjustment for mass-marketing; and a three
2 level downward adjustment for acceptance of responsibility. The parties further agreed
3 that Vitale, who had an extensive criminal history, had six criminal history points,
4 resulting in a Criminal History Category III, and that the guidelines range was 18-24
5 months.
6

7 At sentencing, the government recommended that Vitale be sentenced to at least 30
8 months, if not more, because "his long history of arrests, convictions, and violations of
9 probation suggest a strong likelihood of recidivism and because his conduct post-arrest in
10 this case, including the commission of additional crimes, warrants an enhanced penalty."
11 See Government's Sentencing Letter (Exhibit B), at pp. 5-12, and 13. Vitale was
12 sentenced to 30 months.
13

14 DATED this 20th day of July, 2008.

15 RICHARD J. TROBERMAN, P.S.

16
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18 By: 
19 RICHARD J. TROBERMAN
20 WSBA #6379
21 Attorney for Defendant
22 Robert Alan Soloway
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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2008, I electronically filed the foregoing "Defendant's Second Supplemental Sentencing Memorandum" with the Clerk of Court, using the CM/ECF system which will send notification of such filing to the attorneys of record in this case.

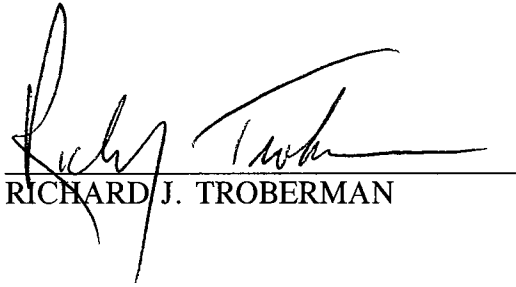

RICHARD J. TROBERMAN

EXHIBIT A



U.S. Department of Justice

*United States Attorney
Southern District of New York*

*The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007*

July 9, 2008

BY HAND DELIVERY

The Honorable Denny Chin
United States District Court
Southern District of New York
United States Courthouse
500 Pearl Street, Rm. 1020
New York, New York 10007

Re: United States v. Adam Vitale
06 Cr. 391 (DC)

Dear Judge Chin:

The Government respectfully submits this letter to inform the Court of the results of its investigation of Adam Vitale's post-arrest conduct, for which the Government sought an adjournment of the defendant's sentencing. In addition, for the reasons discussed below, the Government believes that, at a minimum, that the Court should sentence Vitale to 30 months, at the top of the Guidelines range agreed to by the parties in a plea agreement, as recommended by the Probation Office. The Government also contends, however, that the Vitale's continued criminal conduct warrants that he be stripped of acceptance points, and that he should be sentenced within the resulting Guidelines range of 33 to 41 months' incarceration.

BACKGROUND

A. Offense Conduct

On February 22, 2006, Vitale was arrested in Florida on a warrant issued pursuant to a criminal Complaint, 06 Mag. 0249 (attached hereto as Exhibit A), which charged him and his co-defendant, Todd Moeller, with two counts of e-mail fraud in violation of 18 U.S.C. §§ 1037(a)(2), (a)(3), (b)(2)(C), and 2, in connection with transmitting multiple commercial e-mail messages ("spam" e-mail) over the Internet. As detailed in the Complaint, a confidential informant ("CI") offered Vitale and

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Moeller the opportunity to send spam advertising a bogus computer security product.¹ Vitale and Moeller jumped at the chance after demanding a 50% share of the profits. (Complaint ¶ 20(b)). Accordingly, over a one-week period, Vitale and Moeller sent spam e-mail to approximately 1.2 million AOL subscribers. (Complaint ¶¶ 35(a)-(e)). Vitale told the CI that he and Moeller used proxies (third-party computers) and altered the spam e-mail's headers to hide the source of their spam and allow them to continue their criminal activity without fear of detection. (Complaint ¶¶ 18(b), 19). A forensic examination of a sample of the spam e-mail traced to Moeller and Vitale showed that, in fact, they had originated from multiple sources, indicating that Vitale and Moeller had indeed used "open proxies" or a botnet, and that the headers had also been altered, as Vitale had claimed. (Complaint ¶¶ 35(d), 36).

During recorded instant messaging chats with the CI, Vitale also boasted that he and Moeller were sending spam e-mail promoting stocks as part of a lucrative "pump and dump" scheme. (Complaint ¶¶ 11(a), 15(a), 23(a).) This illegal business apparently was so successful that Vitale offered to pay the CI at least \$10,000 to help him spam stocks. (Complaint ¶ 11(a)). Vitale's boasts about the pump-and-dump scheme were corroborated by files found on his computer following his arrest, including lists of stock ticker symbols and actual spam e-mail promoting stocks. See also PSR ¶¶ 11-52. In addition, bank records for an account used by Vitale reflected payments of approximately \$183,000 that appeared to come from financial brokers who had paid Vitale to spam stocks for them.

B. Indictment

On May 4, 2006, Indictment 06 Cr. 391 (DC) was filed in three counts. Count One charged Vitale and Moeller conspiring to commit e-mail fraud by transmitting spam e-mail over the Internet, in violation of 18 U.S.C. § 371. Count Two charged Vitale and Moeller with substantive e-mail fraud by using open proxies to relay and re-transmit spam e-mail with the intent to deceive as to the true origin of the spam e-mail, in violation of 18 U.S.C. §§ 1037(a)(2), (b)(2)(C) and 2. Count Three charged the defendants with substantive e-mail fraud by materially

¹ In recorded instant messaging chats with the CI, Vitale used nicknames such as "nlhustler4life," and "SpamsMVP."

falsifying the header information in spam e-mail and intentionally transmitting those spam e-mail over the Internet, in violation of 18 U.S.C. §§ 1037(a)(3), (b)(2)(C), and 2. (A copy of the Indictment is attached hereto as Exhibit B.)

C. Guilty Plea

On June 11, 2007, Vitale pleaded guilty to all three counts of the Indictment pursuant to a plea agreement with the Government ("Plea Agreement," a copy of which is attached hereto as Exhibit C). In the Plea Agreement, the parties stipulated that Vitale's base offense level is six, pursuant to U.S.S.G. § 2B1.1(a)(2). The parties also agreed that Vitale's offense level should be increased by 10 levels, pursuant to U.S.S.G. § 2B1.1(b)(1)(F), because the loss, including relevant conduct, is more than \$120,000 but less than \$200,000; that it should be further increased by two levels, pursuant to U.S.S.G. § 2B1.1(b)(2)(A)(ii) because the offense was committed through mass-marketing; and that it should be reduced by three levels, pursuant to U.S.S.G. §§ 3E1.1(a) and (b), for acceptance of responsibility. (Ex. C at 2). Accordingly, the parties agreed that Vitale's total adjusted offense level is 15. (Ex. C at 3).

In addition, the parties agreed that Vitale had a total of six criminal history points resulting in a Criminal History of III. In particular, the parties agreed that Vitale had three felony convictions for burglary, sexual assault/battery, and the attempted sale or purchase of marijuana, dating back as early as 1996, as well as at least 19 misdemeanor convictions for offenses ranging from leaving the scene of an accident, driving with a suspended licence, trespassing, misdemeanor battery, and criminal mischief, that covered a time period from 1999 to 2004. (Ex. C at 3-7). Moreover, Vitale agreed that he had two outstanding arrests in January 2006 for violating his probation and resisting an officer. (Ex. C at 7). Finally, Vitale stipulated that he committed the instant offense while on probation, warranting an additional two criminal history points. Notably, most of Vitale's prior felony and misdemeanor convictions did not result in any criminal history points because they were for offenses the defendant committed before the age of 18 and were outside the applicable time period, or because the defendant had accumulated a maximum of four criminal history points pursuant to U.S.S.G. § 4A1.1.(c).

Based on the foregoing, the parties stipulated that the

applicable Guidelines range is 24 to 30 months.

Finally, the parties agreed that a sentence within the stipulated Guidelines range was reasonable in light of the factors set forth in 18 U.S.C. § 3553(a), and that neither would seek a sentence outside that range. (Ex. C at 8). The parties reserved the right to make arguments regarding where within the stipulated Guidelines range Vitale should be sentenced, and Vitale agreed that the Government could seek a denial of acceptance of responsibility should it be determined that he committed another crime after signing the Plea Agreement. (Ex. C at 8-9). Vitale also waived his right to appeal or collaterally attack any sentence within or below the stipulated Guidelines range, (Ex. C at 10), agreed not to appeal any restitution order equal to or less than \$184,000 (*id.*).

D. Presentence Report

In advance of Vitale's sentencing, the Probation Office issued a Presentence Investigation Report ("PSR"). In the PSR, the Probation Office agreed with the offense level calculation in the Plea Agreement and concluded that Vitale's total adjusted offense level is 15. (PSR ¶¶ 64-76). The Probation Office also determined that, despite an extremely extensive history of repeated arrests and convictions starting when Vitale was 14 years old and continuing to the present, and the fact that Vitale committed the offense of conviction while on probation, Vitale had just six criminal history points, resulting in a Criminal History Category of III. (PSR ¶¶ 77-157).

Significantly, the Probation Office noted that Vitale continued to engage in illegal activity even after his arrest in the instant case. For example, Vitale "tested positive for drugs numerous times" and was required to enter a residential drug treatment facility. (PSR ¶ 7). Even after treatment, Vitale continued to test positive for drugs, and on two occasions attempted to evade urinalysis, once by providing urine he had stored in a latex glove and another time by trying to convince a Pretrial Services intern to substitute his urine for Vitale's. (PSR ¶¶ 8-9). The Probation Office also noted that a 17-year-old female filed a misdemeanor assault complaint against Vitale on August 18, 2007, after he allegedly dragged her from a vehicle, (PSR ¶¶ 156-57), and that the New Jersey State Police arrested Vitale on August 29, 2007, for drug possession after pulling him over for a traffic violation, detecting a strong odor of

marijuana, and finding what appeared to be a small amount of heroin in the trunk of his car, (PSR ¶¶ 9, 154).

Accordingly, the Probation Office determined that Vitale had an applicable Guidelines range of 24 to 30 months. Significantly, the Probation Office also recommended a sentence of 30 months, at the high end of that range, based on Vitale's extensive criminal past and continued criminal conduct. (PSR at 45-46).

E. The Government's Post-Guilty Plea Investigation

1. Diamond Blade Depot

As a condition of his bail, Vitale was ordered to refrain from using the Internet. In March 2007, prior to his guilty plea, the Court learned that Vitale had been operating an Internet-based business, Diamond Blade Depot, since August 2006 without first notifying the Court. The Government understands that Diamond Blade Depot was a drop-shipment company that sold industrial cutting tools, among other things. The Government further understands that Diamond Blade Depot relied on an Internet website to generate business and operated from a storefront in Brooklyn, New York. At a bail revocation hearing on March 7, 2007, the Court expressed skepticism of Vitale's claims that he was not using the Internet:

I don't know that [the Pretrial Services Officer] has any concrete proof that Mr. Vitale is using the Internet, unless there was some admission to the other officer, but it is an Internet-based business, and it would be surprising if [Mr. Vitale] were not using the Internet.

(Ex. D at 4). Defense counsel, however, represented that Vitale simply worked as a telemarketer for the company, and that two of his business partners and a clerk handled the Internet portion of the business.² (See March 7, 2007 Transcript at 3-4, attached

² Based on information gathered by the Government in its investigation, Vitale was the Chief Financial Officer of Diamond Blade Depot. His partner, Clinton Thomas III, was the CEO. As discussed below, 18 year-old Natasha Flores also worked for the

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July 9, 2008
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hereto as Exhibit D.) Defense counsel further explained that a miscommunication by Vitale's previous attorney was the reason why the Court was not informed of Vitale's new Internet-related business. (Ex. D at 9). The Court allowed Vitale to remain at liberty provided he attended a residential drug treatment program and exhibited "perfect" behavior.

2. Information Concerning Vitale's Continued Criminal Activity and His Arrest and Remand

In or about August 2007, the Government received information that Vitale was selling narcotics and operating a prostitution business out of the Diamond Blade Depot storefront in Brooklyn. In particular, the Government received information that Vitale advertised the services of prostitutes over a well-known Internet website, Craigslist.org. Before the Government could engage in a proactive investigation, however, Vitale was arrested on August 29, 2007 by the New Jersey State Police on narcotics charges, as noted above. Vitale was then immediately arrested on a warrant issued by the Court for violating his bail conditions. Prior to his appearance before the Court on or about August 30, 2007, Vitale tested positive for marijuana after unsuccessfully attempting to have a Pretrial Services intern switch urine samples with him, as discussed above. The Court immediately revoked Vitale's bail, and he has been detained at the Metropolitan Detention Center ("MDC") since that time.

3. Vitale's Involvement In Narcotics Post-Arrest

Vitale indicated his involvement in narcotics during a recorded telephone call that he placed from the MDC on August 31, 2007 at 7:56 p.m., shortly after his detention. During the call, Vitale spoke to an 18-year-old employee of Diamond Blade Depot, Natasha Flores ("Natasha"), as well as his brother, Joseph DiCarlos ("Joey"). (A transcript of this call is attached hereto as Exhibit E. A recording of this call and the other calls referenced in this letter are contained on the accompanying CD-ROM.) First, Natasha complained that since Vitale's arrest, his business partner, "Clint" [Clint Thomas III], had been withdrawing money from a Diamond Blade Depot bank account to purchase drugs for resale:

company.

ADAM: Well listen, yo. Um. What's going on with the company [Diamond Blade Depot]?

NATASHA: The company? Clint is taking out money to use the credit card at Major's Pub. Adam, I don't know what to do!

ADAM: Alright. Listen, this is what you need to do. You need to wire a check to "Q" [Souzi Semann, Vitale's girlfriend] and you need to clear everything out. How much did he take out?

NATASHA: He took out six hundred dollars. He said he is using them to buy pills so he could flip them. He took out... he... Adam.

(Ex. E at 2). Vitale, rather than appearing surprised at the news that his business partner was using money from the Diamond Blade Depot account to buy "pills" to "flip them," continued to instruct Natasha on how to clean out the bank account before Clint did. In a conversation with Joey later in the same call, Vitale admitted his continuing marijuana use and explained how he himself hid narcotic pills from the New Jersey State Police by giving them to his traveling companion to hide on her person:

I got, I got pulled over on the way to, to Florida in Jersey, right? They smelt weed in the car. I was smoking. You know I had pills, I had Oxy's [OxyContin, a Schedule II narcotic]. I had all that shit. I gave it to the girl, she stuck everything in her bra. The cop pulls me over. He's like, "Where is the weed, where is the rest of it? Blah, blah, blah." I'm like, "I don't know."

(Ex. E at 8). When Joey then admonished Vitale that the telephone call was "fuckin' being recorded," Vitale continued:

What's that? So what, I was smoking weed. I don't care. Whatever. I don't give a fuck.

I had [a] prescription for painkillers. I don't care if it's being recorded. But he went, he, he searched the whole car. He flipped everything. He looked through everything. And then all of sudden, um.

(Id.). As noted in the PSR, Vitale had a prescription for OxyContin for pain in his legs. (PSR ¶ 172). Assuming Vitale was traveling with a legitimate supply of painkillers, however, there would be no reason for him to hide the pills from law enforcement.

Even later in the same telephone call, Joey indicated that he was the owner of the money Clint took from the Diamond Blade Depot bank account:

ADAM: And yo, I didn't mean for... I knew Clint was gonna start taking money out.

JOEY: [UI] every week. I spoke to Clint. [UI] I told him [UI]. I was like, "Boy, that was my money. That shit better be back." I said, "We never had a problem." I said, "I don't wanna come down there." And he said by tomorrow he was going to put six hundred back in. [UI]. [Voice Muffled].

(Ex. E at 12).

4. The Secret Service Visits Diamond Blade Depot's Office and Interviews Natasha

On September 11, 2007, from approximately 3:00 p.m. to 5:00 p.m., United States Secret Service agents visited Diamond Blade Depot's offices in Brooklyn. There, they observed Natasha to be present along with three computers, at least one of which was switched on. No other individuals were present at the office. With Natasha's consent, the agents obtained a screenshot of what was displayed on the switched-on computer's monitor, looked up the IP address associated with that computer (24.45.28.80), and arranged to obtain copies of the hard drives of the three

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computers in the office. (A copy of the screenshot is attached as Exhibit F.)

The screenshot showed the 19 most recent postings on Craigslist.org by an account associated with the e-mail address "iloveacv@hushmail.com." Hushmail.com is a Canadian e-mail company that offers free encrypted e-mail accounts and is outside the jurisdiction of United States courts. "ACV" are the initials of the defendant's full name, "Adam Charles Vitale." Each of the 19 postings related to "erotic services" in New York City and each appeared to be an advertisement for prostitutes (e.g., "LET'S BUMP AND GRIND"). Subpoenaed subscriber information for each of the 19 posting ID's (attached as Exhibit G) indicates that all of the postings was associated with the same e-mail account, "iloveacv@hushmail.com," and all originated from the same IP address, 24.45.28.80, which was associated with the Diamond Blade Depot computer, as discussed above.

Despite the presence of the 19 Craigslist.org postings on the computer screen in her office, Natasha disclaimed all knowledge of them when interviewed by the Secret Service on September 11, 2007. Further attempts to obtain information from Natasha were unsuccessful.

The Government then subpoenaed subscriber information for all of the Craigslist.org postings originating from the 24.45.28.80 IP address. The resulting information showed that approximately 10,980 separate postings were made from that IP address through a variety of e-mail accounts, including "BIAtCH88@Hushmail.com," "sexysasha6969@hushmail.com," "sexyj69@hushmail.com," "wetandwild@hushmail.com," "imasexybitch@hushmail.com," "sohot6969@hushmail.com," "getcrazy@yadanet.com," "xoxoxoxoxo@hushmail.com," and, most recently, "iloveacv@hushmail.com." All of the postings related to "erotic services" in New York City and all appeared to involve advertisements for prostitutes (e.g., "COME over for a SINSational massage from TWO 18 yr old - w4m"). The postings began on June 10, 2007 and stopped on September 11, 2007, the date the Secret Service met with Natasha at Diamond Blade Depot's offices.

5. Natasha Talks to Adam About the Secret Service's Visit

At 5:39 p.m. on September 11, 2007, shortly after the Secret Service left Diamond Blade Depot's office at around 5:00 p.m., Natasha spoke to Vitale over the telephone. Natasha related the news that the Secret Service had taken the computers from Diamond Blade Depot's office to make copies of the hard drives, and that "someone is telling [the Secret Service] that there's something with prostitution and computers." (See the transcript of this conversation, attached as Exhibit H, at 2). Adam then disclaimed any knowledge about the computers, and Natasha, in contrast to what she had told the Secret Service agents, stated that she used the computers and was responsible for them:

ADAM: Listen, I don't know what's gonna go on with those computers, but, um, you know what I'm saying, I never touched those computers. Am I right?

NATASHA: I know, I told them. I said, that those computers I'm responsible for. For those computers I [UI].

ADAM: You and Clint did whatever y'all did and I had nothing to do with nothing. You know what I'm saying? I don't know nothing, I don't know if you guys know nothing, but, you know what I'm saying?

NATASHA: I know. Yes. I...you don't use those computers. They're mine.

ADAM: I don't, I don't go, I don't do nothing with them bitches.

NATASHA: I use them. I'm responsible for everything in the office. The computers, everything. Those are my I [UI] computers.

In the Vitale's next call, at 6:57 p.m., he informs Natasha that he had a "bad feeling" that she might get arrested the next day. (See the transcript of this conversation, attached as

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Exhibit I, at 2). Natasha does not express any surprise. Vitale then states that "they're gonna try to get us on a conspiracy charge. But I didn't do anything. You know what I'm saying?" He then spontaneously tells Natasha:

So, if you was advertising for people by yourself, you know, just accept responsibility for it. Even if they were to indict you on something, you're eighteen, you have no priors. The worst thing you can get is a year. No matter what they say.

(Ex. I at 3 (emphasis added)). Significantly, this is the first reference to "advertising" in any of Vitale's telephone conversations. Later in the same call, Vitale's girlfriend, Souzi Semaan ("Souzi"), got on the phone, and Vitale instructed her to tell Natasha that if she kept her mouth shut she could expect future loyalty from Vitale: "Just tell her those exact words: 'Be strong, stay real,' and you know what I'm saying? She got friends for life." (Ex. I at 5).

In Vitale's next call from the MDC at 8:04 p.m. on September 11, 2007, he speculated that he could get "like five to ten years" if convicted for the latest criminal conduct and emphasized to Natasha that she needed to avoid talking to law enforcement in the event she is arrested the next day: "Listen to me, do not make any statements, just get a lawyer. . . . Do not fucking talk." (See the transcript of this conversation, attached as Exhibit J, at 2).

During Vitale's next call from the MDC, at 12:00 noon the following day, he cryptically instructed Natasha to "clean up" certain items:

ADAM: Alright. Yo, remember that thing that, um, Jason and Zoey used to use? Well, um, that shit should be cleaned up, you know what I mean?

NATASHA: Yeah.

* * *

ADAM: Alright. Well, you gotta do that thing with Jason and Zoey. You

have to do that. You understand what I'm saying?

NATASHA: Yeah.

ADAM: Like now. Alright?

NATASHA: Alright.

ADAM: Alright. You know what I'm talking about, right?

NATASHA: Um. I'm kind of confused.

ADAM: You remember that thing with Jason and Zoey? What they used to use?

NATASHA: Yeah.

ADAM: Well, that things needs to be completely cleaned off and everything, you know? Like, for them. You know? You understand what I'm sayin' ?

NATASHA: Yeah.

(See transcript of this conversation, attached as Exhibit K, at 2, 3).

6. Forensic Analysis of Diamond Blade Depot Computer

For technical reasons, the forensic copies of the hard drives of the three computers in the Diamond Blade Depot office made on September 11, 2007 failed. As a result, the Secret Service again obtained copies of the same hard drives on January 11, 2008, with Natasha's consent. A preliminary forensic examination of two of those computers has been completed. A hard copy of the first 34 pages of that forensic examination are attached as Exhibit L (the remaining pages contain technical data regarding the hard drives and have been produced to defense counsel). The data obtained from the two hard drives clearly shows images of advertisements for "Anastasia" and "Jessie," which relate to prostitution and are of the type that could be included in Craglist.org postings. (Ex. L at 2-4). In

addition, temporary internet files and unallocated clusters for the computer hard drives reflect Craigslist.org "erotic services" postings like the kind observed on the computer screen on September 11, 2007 and obtained through subpoenas for subscriber information, as detailed above.

DISCUSSION

A. Vitale Should Be Sentenced to the Top of the Applicable Guidelines Range

The Government contends that, at a minimum, Vitale should receive a sentence at the top of the stipulated Guidelines range of 24 to 30 months. The Government further contends that Vitale should lose his acceptance points, which would result in an offense level of 18, and that he should be sentenced within the resulting Guidelines range of 33 to 41 months.

Vitale merits an enhanced sentence in this case because his his long history of arrests, convictions, and violations of probation suggest a strong likelihood of recidivism and because his conduct post-arrest in this case, including the commission of additional crimes, warrants an increased penalty. In particular, the evidence gathered from the Diamond Blade Depot computers in an office where Vitale worked, shows that they were used since at least June 2007 to advertise prostitutes on the Internet. Vitale's telephone calls with Natasha after he learns of the Secret Service's visit on September 11, 2007, indicates that he had at least a knowledge of, if not an involvement in, that criminal activity. For example, he revealed an independent knowledge of Natasha's "advertising" something that would cause her to be arrested. His repeated denials of knowledge, coupled with his frequent assertions of "You know what I mean?" ring hollow. After realizing that he could be liable for an enhanced sentence based on a charge of conspiring with Natasha, he instructs her to "stay strong, be real" and say nothing to law enforcement. Knowing that his telephone calls are being monitored, he also attempts to instruct Natasha to "clean up" incriminating evidence.

An enhanced sentence would be reasonable under the sentencing factors outlined in 18 U.S.C. § 3553(a). The nature and circumstances of Vitale's offense of conviction, as well as his history of recidivism, coupled with continued criminal

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activity, including drug trafficking, assault, and prostitution,
warrant an increased penalty.

CONCLUSION

For the foregoing reasons, the Government respectfully submits that Vitale warrants, at a minimum a sentence at the top of the stipulated Guidelines range of 24 to 30 months. The Government further submits that Vitale should not be awarded acceptance points and that he should be sentenced within the resulting enhanced Guidelines range of 33 to 41 months.

Respectfully submitted,

MICHAEL J. GARCIA
United States Attorney

By: Thomas G. A. Brown
Thomas G. A. Brown
Assistant United States Attorney
(212) 637-2194

cc: David Touger, Esq. (via FedEx)

EXHIBIT B

PHILLIP S. WISE, CONSULTANT
ASSISTANT DIRECTOR (RETIRED)
UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS

140 PARHAM RD. N.W., MILLEDGEVILLE, GEORGIA 31061
TELEPHONE: 478-968-7907 FAX: 478-968-0493 EMAIL: PSWISE@MSN.COM

July 18, 2008

Honorable Marsha J. Pechman
U.S. District Judge
Western District of Washington
Seattle, Washington 98101

Re: U.S. v. Robert Alan Soloway
Docket Number CR07-00187MJP-001

Dear Judge Pechman,

I have been contacted through the Law Offices of Alan Ellis by Richard J. Troberman, attorney for Mr. Alan Soloway regarding the above cited case. Specifically, I was asked to review relevant medical and other records to form an opinion whether Mr. Soloway would likely have access to Klonopin for the treatment of his Tourette's Syndrome if incarcerated in a Bureau of Prisons facility, and whether he appears to be eligible for placement in a minimum security camp setting if sentenced to a period of incarceration.

My ability to form such an opinion stems from having worked in the Bureau of Prisons for 25 years, from 1977 through February 2002, when I retired as Assistant Director of that agency with responsibility for health care. Subsequent to my retirement from that agency, I worked as Vice President for a national firm that provides specialty health care for federal and state inmates. A copy of my resume is attached for your review.

As you are aware, the Bureau of Prisons (BOP) maintains a National Formulary of approved medications, and vigorously enforces the requirements of that formulary. Requests for non-formulary prescription may be submitted, along with the reasons for the request to the agency headquarters for review by the Chief Pharmacist and Chief Physician for approval or denial. Klonopin (clonazepam) is a benzodiazepine derivative with substantial potential for abuse and dependency development. It is FDA approved for the treatment of some seizure disorders and panic attacks. Its use for treatment of Tourette's Syndrome may be considered "off label" meaning that while it may prove useful in some cases, it is not specifically FDA approved for that use, nor is its off label use for that purpose prohibited.

Based on the medical information for Mr. Soloway provided to me, the policies and procedures of the BOP, including the National Formulary, and information from the FDA website, it is my opinion that Mr. Soloway is unlikely to receive Klonopin while

incarcerated in the Bureau of Prisons. While I am not a physician and thus cannot make a clinical judgment regarding whether Klonopin is clinically indicated and appropriate, two conditions exist that make it highly unlikely that it will be provided in a BOP facility. First, as a benzodiazepine derivative, in the same family as Valium, it presents the potential for abuse and dependence. Because of the many drug seeking individuals in virtually any correctional setting, such medications are used very conservatively to minimize its availability to "recreational" users within the inmate population and to prevent pressure from such users on those inmates who receive it through authorized means. These kinds of medications can be dangerous in a correctional environment and their liberal use can lead to illicit drug use and distribution within any facility, whether a medical facility or not.

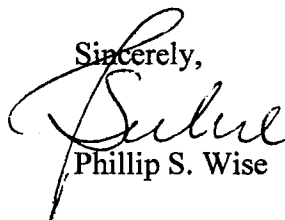
Secondly, it appears that Klonopin has not been empirically demonstrated to be efficient in the treatment of Tourette's Syndrome, even though it may, in Mr. Soloway's case result in alleviation of symptoms. Medical treatment in the BOP is generally science based and data driven, particularly with regard to the selection of medications for the National Formulary and their prescription. Because of undocumented efficacy in the treatment of Tourette's Syndrome, increased liability for using medications off label, and legitimate concern for remaining within generally accepted practices in the medical treatment of inmates, it is unlikely that an off label prescription will be approved, whether in a BOP medical facility or any other BOP facility. Any facility to which Mr. Soloway may be designated will likely have a Psychiatrist available by contract that can review the BOP National Formulary to determine if an alternative medication from the BOP formulary is available that may help with control of Mr. Soloway's Tourette's symptoms.

Based on the information provided to me, including the Pre-Sentence Investigation Report, there do not appear to be any factors, including his Tourette's Syndrome that would preclude his placement in a minimum security camp setting.

Given the probability that Klonopin will not be available to him in a correctional setting along with the likelihood that he will experience some symptoms of withdrawal, I would recommend that his treating physician review the BOP national formulary (which is available online) and consider "weaning" him from Klonopin and establishing him on a medication more likely to be available prior to any period of incarceration. However, whether that course of action is medically advisable or appropriate would have to be determined and managed by a qualified physician. Should the treating physician determine that such a course of action is medically appropriate, I believe it would be in the best interests of both Mr. Soloway and the Bureau of Prisons to make that option available.

If I can provide any further information, please let me know.

Sincerely,



Phillip S. Wise

Resume for

Phillip Steven Wise
140 Parham Rd. N.W.
Milledgeville, Georgia 31061
Phone: 478-968-7907
Cellphone: 478-456-4904
Email: pswise@msn.com

PERSONAL INFORMATION

Date and place of birth: December 2, 1951, Atlanta, Georgia
Family: Married to Dianne Wise since December 28, 1974
One son, Joshua, former Petty Officer aboard the USS Avenger, MCM-1,
Hobbies/interests: Running, bicycling, cooking, traveling, gardening

EDUCATION

High School:

Danbury High School
Danbury, Connecticut
Graduated June 1969

Undergraduate Studies:

Emory University
Atlanta, Georgia
Enrolled September 1969
Awarded BA (major in Psychology) August 1972
Awards: Phi Beta Kappa

Graduate School

University of Minnesota
Center for Research in Human Learning
September 1972 through May 1973

Georgia State University
School of Education
Enrolled 1975

Awarded M.Ed. (Counseling and Psychological Services) March 1977

RELEVANT EMPLOYMENT

Bureau of Prisons

Psychology Technician

U.S. Penitentiary
Atlanta, Georgia
March 1977-September 1978

Major Duties: Administration of psychological assessment instruments; collection, analysis and organization of material for completion of forensic evaluations; group and individual therapy; development and delivery of counselor training; general correctional duties.

Case Manager

U.S. Penitentiary
Atlanta, Georgia
September 1978-February 1981

Major Duties: Overall management of the cases of 250 federal convicted felons, to include reception; coordination with courts and pre-trial services; sentence monitoring; development of individual program plans; release planning; coordination with post release services.

Case management Coordinator

Federal Correctional Institution
El Reno, Oklahoma
February 1981- February 1983

Major Duties: Coordination of activities of 8 casemangers, development and implementation of local policy regarding inmate management; advise Warden about case management policy; coordinate institution activities with U.S. Parole Commission; coordinate activities related to Interstate Agreement on Detainers, International transfer of inmates, and extradition issues.

Drug Abuse Treatment Unit Manager

Federal Correctional Institution
Fort Worth, Texas
February 1983-October 1983

Major duties: Management of a comprehensive, residential drug treatment unit for 200 convicted federal felons; supervision of clinical psychologist, casemanagers, counselors, correctional officers and support staff; general correctional responsibilities.

Instructor

Bureau of Prisons Staff Training Academy
Federal Law Enforcement Training Center (FLETC)
Brunswick, Georgia
October 1983-April 1985

Major duties: Instructing new Bureau of Prisons employees in firearms, self-defense, and policy; development and implementation of practical exercises for new employees; development of computer based instruction programs; firearms instruction for staff from other federal law enforcement agencies.

Assistant Regional Administrator for Correctional Programs

North Central Regional Office
Bureau of Prisons
Kansas City, Missouri
April 1985 – October 1986

Major Duties: Assisted the Regional Administrator in the evaluation of correctional programs in the 15 correctional facilities located within the North Central Region; management of inmate pay programs within the region; coordination of activities of the U.S. Parole Commission within the region.

Regional Administrator, Correctional Programs

North Central Regional Office
Bureau of Prisons
Kansas City, Missouri
October 1986 – April 1988

Major Duties: Provided oversight of correctional programs (including unit management, case management, inmate performance pay, monitoring of disruptive groups, placement of newly sentenced

inmates, separation of gang members, placement of federal inmates in state systems and receipt of state inmates in federal facilities), coordination of parole hearings and releases, coordination of release planning and coordination with offices of U.S. Probation, monitoring of interstate agreement on detainees, and coordination of movement of inmates.

Executive Assistant, Correctional Programs Division

Central Office (Headquarters)

Bureau of Prisons

Washington, D.C.

April 1988 – May 1989

Major Duties: Provided administrative assistance to the Assistant Director of the Bureau of Prisons who was responsible for all correctional programs, including community corrections, case management, unit management, chaplaincy programs, psychology services, and custody and security. Managed transfer of inmates to and from other countries, working with the Department of State to administer international treaties, managed covert operations in conjunction with the Office of Enforcement Operations, Department of Justice.

National Administrator, Correctional Programs Branch

Central Office (Headquarters)

Bureau of Prisons

Washington, D.C.

May 1989 – June 1990

Major Duties: Responsible for development of agency wide policy governing correctional programs, including case management, unit management, and management of disruptive groups. Oversight of programs agency wide in those areas, including a program of regular institution audits. Management of national program for the placement of Mariel Cubans and repatriation of those eligible, in conjunction with the Department of Justice, Department of State, Immigration and Naturalization Service and St. Elizabeth's Hospital. Participation in the development of administration social policy, including sentencing, legislative initiatives, and probation and parole policies.

Executive Associate Warden

Federal Correctional Institution

Lexington, Kentucky

June 1990 – July 1991

Major Duties: Responsible for all operational areas of a major correctional facility with both male and female populations and a significant medical mission. Included direct responsibility for budget development and execution, facilities management, food service, health services, personnel, and training.

Deputy Assistant Director

Bureau of Prisons

Central Office (Headquarters)

Washington, D.C.

July 1991 – June 1994

Major Duties: Responsible for policy development and oversight of agency activities in information management and technology, research and evaluation, security technology, and international affairs. Oversaw operations of agency information management development, including expansion of legacy system and development of agency wide local and wide area networks, the migration to distributed data bases, and integration of systems with other components of the criminal justice system. Worked collaboratively with U.S. Marshal's Service and Immigration and Naturalization Service to implement a joint automated booking system as a demonstration project in the Vice President's initiative to reinvent government. Participated regularly with Department of Justice and other agency officials in the

development of administration policies for the Department and White House regarding criminal justice issues, including sentencing and alternatives to incarceration, probation and parole policies, legislative initiatives and assessment of impact of legislative proposals. Participated in briefings of members of Congress, federal judges, and administration officials. Coordinated international assistance in corrections with Department of State and Department of Justice.

Warden

Federal Prison Camp
Alderson, West Virginia
June 1994 – September 1996

Major Duties: Responsible for the overall administration of a major prison camp for federal female offenders, including all operational areas such as custody, financial management with a budget of \$20 million, facilities management, personnel and food service, as well as program areas such as unit management, case management, chaplaincy and psychology services, education, drug abuse treatment and vocational training programs. Of particular note were programs specifically designed for pregnancy, childbirth, and parenting.

Warden

Federal Medical Center for Prisoners
Rochester, Minnesota
September 1996 – March 1999

Major Duties: Responsible for the overall administration of a complex medical facility for federal prisoners, including the highest levels of inmate custody, all operational areas and program areas, an annual budget of \$45 million, and management of contractual relationship with the Mayo Clinic. Management of medical and surgical inpatient and outpatient programs and populations, and in-patient, outpatient and forensic mental health programs and populations. Responsible for ensuring compliance with all federal health care laws and regulations, ethical medical decision making, and accreditation by external health care review organizations. Responsible for coordination of activities with other components of state and federal criminal justice components, including courts, probation and parole agencies, local, state and federal law enforcement organizations and other Department of Justice components. Participated in the development of health care policies for the Bureau of Prisons. Member of the U.S. Senior Executive Service.

Assistant Director of the Federal Bureau of Prisons with responsibility for Health Services Division

Federal Bureau of Prisons
Central Office (Headquarters)
Washington, D.C.
March 1999 – February 2, 2002

Major Duties: Responsible for agency wide programs in health services, food service, and safety, including policy development, integration of services across 93 institutions and 7 major medical referral centers, and oversight of those programs in each facility. Management and oversight of \$500 million annual health services/food service budget. Participate as one of 15 members of the agency Executive Staff that makes major agency policy and personnel decisions and collectively directs operations of the agency components. Provide briefings to members of Congress and testimony at relevant Congressional hearings, provide briefings to senior administration officials and participate in the development of national social policies related to corrections, correctional health care, public health, post release services, and legislative initiatives. Member of the U.S. Senior Executive Service.

Medical Development International

**822 Highway A1A North, Suite 310
Ponte Vedra Beach, Florida 32082**

Vice President, Client Services

December 1, 2003 to September 30, 2005

Medical Development International (MDI) is a medical service organization that arranges for specialty health care for inmates in federal, state, local, and private correctional facilities. Through contractual arrangements with providers and correctional facilities, MDI assembles provider networks, schedules appointments, adjudicates bills and provides fund control assistance. Major duties include participating in development of company policies and strategies, oversight of operations, and intervention on behalf of clients in contract management.

Consultant

**140 Parham Rd. N.W.
Milledgeville, Georgia 31061
478-968-7907**

September 30, 2005 to Present

Currently serve as consultant regarding prison health care with focus on Federal Bureau of Prisons. I have provided declarations, affidavits and/or testified in over 30 cases, generally during the sentencing phase, in the following Federal Judicial Districts: Central District of California, Eastern District of California, Southern District of New York, Maryland, Southern District of Florida, Colorado, Eastern District of Kentucky, District of Puerto Rico, Eastern District of Pennsylvania, Western District of Arkansas, Northern District of Ohio, and Middle District of Tennessee.

EXHIBIT C



Department of Justice

FOR IMMEDIATE RELEASE
FRIDAY, OCTOBER 12, 2007
WWW.USDOJ.GOV

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(202) 514-2007
TDD (202) 514-1888

Two Men Sentenced for Running International Pornographic Spamming Business

WASHINGTON – Two men have been sentenced to more than five years in prison for organizing and running an international pornographic spamming business that grossed over \$1 million, Assistant Attorney General Alice S. Fisher of the Criminal Division and Interim U.S. Attorney Dan G. Knauss of the District of Arizona announced today.

Jeffrey A. Kilbride, 41, of Venice, Calif., and James R. Schaffer, 41, of Paradise Valley, Ariz., were sentenced by U.S. District Judge David G. Campbell of the District of Arizona in a hearing that began on Sept. 24, 2007, and concluded yesterday. Kilbride was sentenced to 72 months in prison and Schaffer was sentenced to 63 months in prison. Kilbride received a higher sentence based on the court's finding that he had obstructed justice by attempting to prevent a government witness from testifying at trial. Kilbride and Schaffer were fined \$100,000 and ordered to pay \$77,500 in restitution to AOL Inc. Judge Campbell also ordered the defendants to jointly forfeit more than \$1.1 million, the amount of illegal proceeds from their spamming operation.

On June 25, 2007, a federal jury in Phoenix convicted Kilbride and Schaffer on eight counts including: violating the Controlling the Assault of Non-solicited Pornography and Marketing (CAN-SPAM) Act of 2003 by sending spam messages using falsified headers and domain names, conspiracy, fraud, money laundering, and various obscenity charges. The three-week trial was the first to include charges under the CAN-SPAM Act of 2003, a law designed to crack down on the transmission of pornography in commercial bulk unsolicited electronic mail messages.

Beginning in 2003, Kilbride and Schaffer established a spamming operation in the United States. Their business model consisted of sending millions of unsolicited email messages which advertised commercial Internet hard-core pornography Web sites. Kilbride and Schaffer earned a commission for each person they caused to subscribe to one of these Web sites. Hard-core pornographic images were embedded in each email they sent and were visible to any person who opened the email. In late 2003, after the CAN-SPAM Act was passed, Kilbride and Schaffer took steps to relocate their criminal enterprise abroad in an attempt to evade prosecution. By remotely logging in to servers located in Amsterdam, the men were able to make it appear that the messages they were sending originated abroad, when they were actually being sent from Phoenix.

At Kilbride and Schaffer's trial, eight citizens traveled from Massachusetts, Texas, Iowa, California and Arizona to testify about the context in which their families, including some children, received the pornographic spam messages. In all, AOL and the FTC received over 1.5 million complaints from spam recipients, including some who had set parental controls to protect their children from accessing graphic sexual content. The evidence at trial established that the defendants falsified header information and domain names of the messages they sent by creating a fictitious employee at a shell corporation in the Republic of Mauritius, in order to hide their criminal conduct. Further, Kilbride and Schaffer used bank accounts in the Republic of Mauritius and the Isle of Man to receive and funnel the proceeds from the operation and to further insulate themselves from detection by U.S. law enforcement.

Kilbride and Schaffer engaged in this criminal conspiracy for more than a year with three co-conspirators: Jennifer Clason, 32, of Tempe, Ariz.; Andrew Ellifson, 31, of Scottsdale, Ariz.; and Kirk Rogers, 43, of Manhattan Beach, Calif. Clason, Ellifson, and Rogers have pleaded guilty for their roles in the scheme and testified against Kilbride and Schaffer.

The case was prosecuted by Trial Attorneys Jill Trumbull-Harris and Bonnie Kane of the Child Exploitation and Obscenity Section (CEOS) of the Criminal Division, with assistance and support provided by Assistant U.S. Attorney

John R. Lopez IV of the District of Arizona. Former CEOS Trial Attorney Kayla Bakshi also participated in the trial of the case. The investigation was conducted by the Federal Bureau of Investigation and CEOS' High Tech Investigative Unit.

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EXHIBIT D



*United States Attorney
Southern District of New York*

FOR IMMEDIATE RELEASE
July 15, 2008

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**BROOKLYN MAN SENTENCED TO 30 MONTHS IN PRISON IN
MASSIVE AOL SPAM SCHEME**

MICHAEL J. GARCIA, the United States Attorney for the Southern District of New York, announced that ADAM VITALE was sentenced today to 30 months' imprisonment for his role in a conspiracy to send unsolicited commercial e-mails (also known as "spam" or "junk" e-mails) over the Internet to approximately 1.2 million subscribers of America Online, Inc. ("AOL"), and to hide the source of those e-mails. VITALE, 28, of Brooklyn, New York, was sentenced by United States District Judge DENNY CHIN of Manhattan federal court, before whom VITALE had pleaded guilty in June 2007. According to the Complaint, the Indictment, and statements made during VITALE'S sentencing:

Between April and August 2005, VITALE and TODD MOELLER communicated via online instant messaging with a confidential informant ("CI"). During these instant messaging chats, VITALE and MOELLER boasted of their ability to send large numbers of spam e-mails in a manner that would make it nearly impossible for the recipients to trace the spam e-mails to VITALE and MOELLER. VITALE and MOELLER boasted that they had made tens of thousands of dollars in profits through illegal spamming.

In or about August 2005, MOELLER agreed to transmit spam e-mails that advertised a commercial product that the CI purportedly wanted to sell, in exchange for a 50% share of the profits. Between August 17 and August 23, 2005, VITALE and MOELLER proceeded to transmit spam e-mails on behalf of the CI to approximately 1.2 million AOL subscribers. To hide the origin of the spam, prevent the recipients from tracing and stopping it, and allow them to continue their illegal activity, VITALE and MOELLER relayed the spam e-mail over third-party computers and altered the spam e-mails' header information.

VITALE pleaded guilty on June 11, 2007 to a three-count Indictment charging: (1) conspiracy to commit illegal spamming, (2) illegal spamming by using third-party computers to relay or retransmit spam e-mails with the intent to deceive as to the source of the spam e-mails, and (3) illegal spamming by altering the header information in spam e-mails with the intent to disguise the spam e-mails' true origins.

In addition to the term of imprisonment, Judge CHIN ordered VITALE to serve 3 years' supervised release and to forfeit \$183,304 as proceeds of his criminal activity.

On November 2, 2007, Judge CHIN sentenced VITALE's co-defendant, TODD MOELLER, principally to 27 months' imprisonment for his participation in the spam conspiracy. MOELLER pleaded guilty on June 19, 2007, to the same three illegal spamming counts as VITALE.

Until VITALE was arrested in this case, he was listed on the Register of Known Spam Operations (the "ROKSO List") maintained by Spamhaus.org, an anti-spamming website. According to Spamhaus.org, the ROKSO List is a register of individuals or operations that have been thrown off of at least three internet service providers for spamming. According to Spamhaus.org, individuals or operations on the ROKSO List are professional spammers and are believed to be responsible for 80% of the spam on the Internet.

Mr. GARCIA praised the investigative efforts of the United States Secret Service, and thanked AOL for its assistance and cooperation in this investigation.

The case is being prosecuted by the Computer Hacking/Intellectual Property ("CHIPS") group of the Office's Major Crimes Unit. Assistant United States Attorney THOMAS G. A. BROWN is in charge of the prosecution.

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