UNITED STATES DISTRICT COURT DISTRICT OF MINNESOTA Criminal No. 10-159 (DWF/FLN)

UNITE	D STATES	OF AMERICA,	)				
			)				
		Plaintiff,	)	GOVERNMEN	T'S PO	OSITION	WITH
			)	RESPECT T	O SENT	TENCING	
	v.		)				
			)				
BARRY	VINCENT	ARDOLF,	)				
			)				
		Defendant.	)				

The United States of America, by and through its attorneys B. Todd Jones, United States Attorney for the District of Minnesota, and Assistant United States Attorneys Timothy C. Rank and Laura M. Provinzino, hereby submits this memorandum setting forth its position with respect to sentencing factors in this matter.

The United States asks this Court to sentence defendant Barry Ardolf to a term of imprisonment of 293 months. Barry Ardolf has demonstrated by his conduct that he is a dangerous man. When he became angry at his neighbors, he vented his anger in a bizarre and calculated campaign of terror against them. And he did not wage this campaign in the light of day, but rather used his computer hacking skills to strike at his victims while hiding in the shadows. Over months and months, he inflicted unfathomable psychic damage, making the victims feel vulnerable in their own home, while avoiding detection. Significantly, he feels no remorse for his crimes, explaining in his "Acceptance of Responsibility Statement"

that he engaged in the actions against his neighbors because he was "victimized."

Moreover, as the investigation in this case revealed, this was not the first time Ardolf had engaged in such behavior. He had stolen a former neighbor's mail, hacked into their wireless system, stolen personal financial data off their computers, and sent threats intended to terrify them - all because the personal care attendants for the neighbor's disabled daughters parked in front of Ardolf's house. And Ardolf would have gotten away with this conduct if it were not for the search warrant in this case, when investigators found financial information stolen from the former neighbors on Ardolf's computers and connected Ardolf to the threats the neighbors had received.

Barry Ardolf is a dangerous man. He uses his technical skills both to inflict harm and to avoid getting caught. Indeed, there is every reason to believe that the victims identified in this case are not his only victims. When Barry Ardolf is released from prison at the end of his term of commitment, he will do something like this again to someone else who has angered him, only this time he will be even more careful. The only way to prevent that is to incarcerate him for a very long time.

### II. The PSR

The government agrees with the conclusions set forth in the Presentence Investigation Report ("PSR") concerning the appropriate guidelines calculations. Defendant's offense level is 38 and his criminal history category is I. The appropriate Sentencing Guidelines range is 235-293 months imprisonment.

The defendant is subject to a mandatory minimum sentence of seven years in prison based on his conviction for distribution of child pornography, which carries a 5-year mandatory minimum under 18 U.S.C. § 2252(b)(1), and aggravated identity theft, which carries a mandatory consecutive sentence of 2 years under 18 U.S.C. § 1028A(b). The statutory maximum sentence the Court could impose is 528 months. The government requests that the Court sentence the defendant to 293 months in prison, the top of the guidelines range. If the Court disagrees to any extent with the PSR's conclusions, and finds an offense level less than 38, the United States moves for an upward departure, under U.S.S.G. § 5K2.0, or an upward variance, to reach a sentence of 293 months.

The United States will submit a response to the Defendant's Position Pleading, addressing his objections to the PSR, in advance of the sentencing hearing.

### I. Details of the Offense

# A. Ardolf Kisses the Kostolniks' Four-Year-Old Son Shortly after the Kostolniks Move to the Neighborhood

Matt and Bethany Kostolnik moved into their dream home in August 2008. Located on a cul-de-sac in Blaine, the home provided room for their growing family; they had two children under five years old, and were expecting another child soon. On August 2, 2008, one day after moving into their new home, the dream became a nightmare. The Kostolniks' four-year-old son, W.K., wandered into a neighbor's yard to climb on an inviting play-set. A pregnant Bethany saw W.K. in the neighbor's yard and, while standing in the driveway of her home, called for him to come back while simultaneously trying to keep her 18-month-old son, J.K., from walking out the open doorway of their home. Finally, Bethany chased after W.K.

The neighbor, who Matt and Bethany later learned was Barry Ardolf, began to play with W.K., repeatedly saying "bet you can't touch me." A game of chase ensued between W.K. and Ardolf. As Bethany continued to try to coax W.K. to come back, Ardolf picked up W.K. and followed Bethany to her home. When she reached the doorway, Bethany picked up J.K., and started inside. With her back to Ardolf, Bethany heard him plant a wet kiss on W.F. She wheeled around, grabbed W.K. from Ardolf's arms and pulled her child inside the house. After shutting the front door, she ran upstairs and cried, saying "we've just moved next door to a pedophile."

Bethany was so distraught as a result of her contact with Ardolf that, although they had just moved in, she suggested to her husband that they move. The following day, unprompted, W.F. told Bethany that Ardolf had kissed him on the mouth. Matt Kostolnik then confronted Ardolf, who admitted he had kissed W.K. on the mouth. Matt Kostolnik later reported the incident between Ardolf and W.F. to the Blaine Police Department.

It was apparently this incident which caused the defendant to begin a calculated campaign to terrorize his neighbors, doing whatever he could to destroy the careers and professional reputations of Matt and Bethany Kostolnik, to damage the Kostolniks' marriage, and to generally wreak havoc on their lives.

### B. Ardolf Begins His Terror Campaign in the Fall of 2008

In November 2008, after they had left their vehicles out in the driveway overnight, the Kostolniks woke the next morning to find that the tires on the vehicles had been slashed. The perpetrator was never identified.

Also in November 2008, Ardolf created email accounts and a MySpace page designed to appear as if they belonged to Matt Kostolnik. See Indictment ¶¶ 3, 7; Govt. Tr. Exs. 1, 2, 5, 20 and 21. This was done without Matt Kostolnik's knowledge or authorization.

In or about February 2009, Ardolf illegally gained access to the Kostolniks' wireless router. To do so, he circumvented the

router's encryption by using password-cracking software called "aircrack." It took Ardolf at least two weeks to complete the hack, first identifying the Kostolniks' router out of the many in the neighborhood and then launching a series of attacks on the router designed to break its encryption password. With access to the Kostolniks' router, Ardolf was able to communicate with the Internet through the router, using the Kostolniks' Qwest Internet account, in a way that the communications would trace back to the Kostolniks. Ardolf was also able to access all of the Kostolniks' computers that were connected to the router. This was part of Ardolf's scheme to destroy Matt Kostolnik both personally and professionally.

### C. February 22, 2009 Yahoo.com Emails to Matt Kostolnik's Coworkers

Ardolf used the Kostolniks' wireless router to connect to the Internet, accessed a Yahoo.com email account he had created in Matt Kostolnik's name and, posing as Matt Kostolnik, sent three separate emails to his coworkers. Ardolf sent the emails using the Kostolniks' wireless Internet connection, with the intent that the emails would be traced back to the Kostolniks' Internet account with Qwest.

1. February 22, 2009 Email from "mattkostolnik@yahoo.com" to MurphyB@moss-barnett.com ("You are such a fox")

On February 22, 2009, Ardolf sent an email to Matt Kostolnik's administrative assistant, Brenda Murphy, with the subject line:
"You are such a fox." The text of the email read:

I was thinking of you on Valentine[']s Day.

I wouldn't mind at all if you wanted to sneak me a kiss when nobody is looking.

Remember what Bill Clinton finally fessed up to?

I want that from you!

Matt

See Govt. Tr. Ex. 1.

2. February 22, 2009 Email sent from "mattkostolnik@yahoo.com" to YoungP@moss-barnett.com ("Hey Phil, ask Brenda if she liks me.")

Phil Young, who was a shareholder at Moss & Barnett, received an email with the subject line: "Hey Phil, ask Brenda if she liks me." The woman referenced was Brenda Murphy, who was a legal administrative assistant to both Young and Kostolnik. The text of the email read:

Hey Phil, ask Brenda if she liks [sic] me. Likes me likes me. Because I like her.

What can I say? I think she's cute!

Matt

See Govt. Tr. Ex. 2.

3. February 22, 2009 Email sent from "mattkostolnik@yahoo.com" to SengerD@moss-barnett.com ("Family pic from Matt") with attachments ("Matt's Kids.jpg; Cher.jpg")

Dave Senger, a shareholder and chairman of the management committee at Moss & Barnett, also received an email from mattkostolnik@yahoo.com" on February 22, 2009. The subject line of the email was "Family pic from Matt." The email read:

Check it out. New family pic[.] I was thinking you could appreciate these.

Plausable [sic] deniability, right?

Matt K

See Govt. Tr. Ex. 5.

Attached to the email were two electronic photographs. One depicts a nude, prepubescent minor female with two nude, prepubescent minor males engaged in sexual contact. The minor female has the penis of one of the minor males in her mouth and the other minor male's penis in her hand. Ardolf named this electronic image "Matt's Kids.jpg." See Govt. Tr. Ex. 5-2. This is an image of known child pornography identified as the "Sabban series," where the children depicted have been identified. It has been confirmed that at the time the photographs were created, the children were minors. See Govt. Tr. Ex. 81. The "Sabban series" of child pornography was created by two individuals in Brazil, who sexually abused and photographed three children over a several-year period. The second image was named "Cher.jpg," and depicted an unknown,

young-looking female dressed in a cheerleading uniform displaying her breasts and vagina. See Govt. Tr. Ex. 5-3.

#### D. MySpace Page

In February 2009, Ardolf attached the same child pornography image found in "Matt's Kids.jpg," id. Ex. 5-2, to the MySpace page that he had created in November 2008 in Kostolnik's name. See Govt. Tr. Exs. 20-22. In the biographical section of the MySpace page labeled "About Me," Ardolf wrote:

I bet my coworker that since I'm a lawyer and a darn great one that I could get away with putting up porn on my site here. I bet that all I have to do is say that there is plausible deniability since anybody could have put this on my site. Like someone hacked my page and added porn without my knowledge. This is reasonable doubt. I'm a darn good lawyer and I can get away with doing anything!

See Govt. Tr. Ex. 27.

# E. March 8, 2009 Email from "Marysill2008@gmail.com" to Kostolnik's Supervisor and Colleague

On March 8, 2009, Joseph Maternowski, the chair of Kostolnik's environmental law practice group, and another Moss & Barnett attorney in that practice group, Anthony Dorland, received an email from "MarySill2008@gmail.com." The email read:

Friday afternoon on 3/6 I was at William Mitchell College of Law. I approached Mr. Kostolnik and we talked about his presentation. We ended the conversation in the parking lot where he made sexual advances and grabbed at my breasts. I slapped his face and took off yelling at him to leave me alone.

I know the boys club sticks together so I don't expect anything to happen to Mr. Kostolnik but I'm still going to try to make it so he doesn't grope another young lady.

If I see him here again I will call the police and I will press charges.

Mary Sill Wayzata, MN

See Govt. Tr. Ex. 32.

Law enforcement later determined that Mary Sill is a real person living in Wayzata, Minnesota. Ms. Sill testified at trial that she did not send the email or create the "MarySill2008@gmail.com" email account, nor did she give anyone authorization to do so. Law enforcement also later determined that the email account was created and the email sent using the Internet connections of two of Ardolf's other neighbors, Andrew Scobbie and Mou Cheng Vang, each of whom have wireless Internet connections and live less than 200 feet from Ardolf. See Govt. Tr. Ex. 40. Both of these neighbors testified at trial that they had not given Ardolf permission to use their wireless routers.

# F. March 2009: Moss & Barnett Hire an Outside Law Firm to Investigate Emails

After the two Moss & Barnett lawyers received the email from the person claiming to be "Mary Sill" accusing Matt Kostolnik of sexual assault, senior management at the law firm confronted Mr. Kostolnik, and he denied any wrongdoing. At this point, the firm hired an outside law firm, Cousineau McGuire, to investigate. The outside firm retained a forensic computer investigator, Scott Johnson, to assist with the investigation. Matt Kostolnik agreed to let the forensic investigator do a search of the Kostolniks'

home computer and router. From an analysis of the router's logs, the investigator concluded that a device unknown to the Kostolniks had connected to the router. Even though the Kostolniks' router had been encrypted (password protected), it was encrypted with WEP (Wired Equivalent Privacy) a relatively weak encryption standard that is susceptible to being hacked.

To attempt to determine the source of any future unauthorized use of the router, the Kostolniks agreed to allow the investigator to connect a "packet capturing" device to their router, which would keep a record of all data (transmitted in units called "packets") that passed through the router.

### G. April and May 2009 Email Threats to the Vice President

In April 2009, the Secret Service visited Matt Kostolnik at his workplace after an email containing a death threat was sent on April 1, 2009 to the Vice President of the United States from a yahoo.com email address in the name of both Matt and Bethany Kostolnik ("matt\_bethany\_kostolnik\_2009@yahoo.com").

The subject line of the email read: "This is a terrorist threat! Take this seriously." The email was sent to multiple recipients, mostly public officials, including the Vice President of the United States, the Governor of Minnesota, and a United States Senator from Minnesota.

Similar emails were sent to the Vice President and other public officials on April 16 and 23 and May 6, 2009. The body of the May 6, 2009 email read, in part:

This is a terrorist threat! Take this seriously. I hate the way you people are spending money you don't have... I'm assigning myself to be judge[,] jury and executioner. Since you folks have spent what you don't have[,] it's time to pay the ultimate price. Time for new officials after you all are put to death by us.

. . .

Fuck you all for spending money you don't have. I'll kill you all one at a time. I'll take any opportunity I can get[,] so you better have eyes on the back of your heads. You guys better start watching your back. I'm coming for you all. I swear to God I'm going to kill you!

. . .

The first one of you will be dead by June 1.

Matt and Beth

See Govt. Tr. Ex. 42.

Special Agent David Ruffino of the Secret Service, who worked in a protection detail at the White House at the time the threats were sent testified concerning the serious nature of Ardolf's threat and how seriously the Secret Service responds to such threats.

### H. July 2009: the Search Warrant at Ardolf's Residence

After the May 6, 2009 email was sent to the Vice President and other public officials, investigator Johnson reviewed the "packet capture" data from around the time the email was sent. Searching

through the activity surrounding the day the threat email was sent to the Vice President, Ardolf's name and Comcast account were visible on the data pulled from the Kostolniks' router. The text of the threat email was also contained in the "packet capture" data, and a review of the data also revealed that the same computer that transmitted the data containing Ardolf's name and Comcast account also sent the threat email.

The "packet capture" data was provided to SA Robert Cameron of the FBI's Cyber Crime Task Force. Agent Cameron analyzed the data and also learned, by way of grand jury subpoena, that Ardolf had Comcast Internet service. With this information, combined with other evidence developed during his investigation, Agent Cameron obtained a warrant to search Ardolf's residence. The search occurred July 21, 2009. During the search, investigators found numerous computers, electronic storage media, manuals on hacking, notes related to Ardolf's cracking of the encryption key for the Kostolniks' wireless router (essentially the password for accessing the router), as well as open pieces of the Kostolniks' mail under Ardolf's bed. See Govt. Tr. Exs. 102-108, 110-121, 123-134, 136-142 and 145.

Examination of the computers and electronic storage devices revealed that Ardolf kept detailed notes on the hacking of the Kostolniks' router and computers, as well as notes on the various emails he sent to Matt Kostolnik's coworkers and to the Vice

President. See Govt. Tr. Exs. 3, 4, 28, 29, 37, 44, 45, 50-57, 59, 61, 63, 65, 67, 73, 76 and 77. For example, on a thumb drive located in Ardolf's bedroom during the July 21, 2009 search warrant execution, Agent Cameron located a text file entitled "I bet my co2.txt" containing (1) the identifying number and encryption key to the Kostolniks' router; (2) the text of the February 22, 2009 email from "mattkostolnik@yahoo.com" to YoungP@moss-barnett.com; (3) the email addresses and telephone numbers at Moss & Barnett for Dave Senger, Brenda Murphy, Philip Young, Joseph Maternowski and Anthony Dorland; (4) the password and security question answer for the "mattkostolnik@yahoo.com" email account; (5) the text of the "About Me" section of the false MySpace page set up in Matt Kostolnik's name; and (6) the password and security question answer for the false MySpace page. See Govt. Tr. Ex. 3. Similarly, Agent Cameron located a text file on the thumb drive entitled "Alamo MATT all stuff.txt" containing passwords for several other yahoo.com accounts Ardolf had created in Matt Kostolnik's name. See Govt. Tr. Ex. 4.

Agent Cameron also found a file entitled "March 6.txt" on the thumb drive in Ardolf's bedroom, which contained (1) the password and security question and answer for "MarySill2008@gmail.com," (2) the name, phone number and city of residence of Mary Sill, (3) the names, telephone numbers and email addresses of Anthony Dorland and Joseph Maternowski, and (4) text of the March 8, 2009 email from

"marysill2008@gmail.com" to Dorland and Maternowksi. <u>See</u> Govt. Tr. Ex. 37.

Finally, Agent Cameron found the text file "matts-nics-2.txt" on the thumb drive in Ardolf's bedroom containing (1) the password and security question answer for the yahoo.com email account used to send the threat emails to the Vice President and other public officials ("matt\_bethany\_kostolnik\_2009@yahoo.com"), (2) email addresses of recipients of threat emails, and (3) the text of the May 6, 2009 email from "matt\_bethany\_kostolnik\_2009@yahoo.com" to vice.president@whitehouse.gov (with the same misspelling as in the email received by the Vice President). See Govt. Tr. Ex. 45.

In addition, FBI forensic examiners located the child pornography images Ardolf had sent to Matt Kostolnik's coworker and posted on the MySpace page on several computers and electronic storage devices found in Ardolf's bedroom. See Govt. Tr. Exs. 6-10, 13-19 and 22-26.

### I. Manuals for Hacking Wep-encrypted Wireless Routers Found in Ardolf's Cubicle at Medtronic

Up until his termination in June of 2010, Ardolf worked at Medtronic as a neuromodulation device repair technician. When he was terminated, a supervisor cleaned out his work space and found 25 printed pages containing articles relating to hacking into WEP-encrypted wireless routers. See Govt. Tr. Exs. 60 (Manual entitled "Cracking WEP Using Backtrack: A Beginner's Guide"); 62 (Manual entitled "Tutorial: Simple WEP Crack [Aircrack-ng]"); 64

(Printed on-line articles related to Back Track 3, including manual entitled "Cracking WEP with BackTrack 3 - Step by Step instructions"); and 66 (Manual entitled "Tutorial: Cracking WEP Using Backtrack 3"). One of the manuals had Ardolf's handwriting on it (Govt. Tr. Ex. 66), and another had the unique identifying ID for the Kostolniks' router typed into it (Govt. Tr. Ex. 64). Electronic versions of all theses manuals were also found on Ardolf's computers seized during the search of his residence. See Govt. Tr. Exs. 61, 63, 65 and 67.

#### J. Other Harassment of the Kostolniks

In addition to finding evidence of the February and March emails sent to Moss & Barnett employees, the false MySpace page, and the threat emails to the Vice President and the other public officials, during the course of examination of the computers and other electronic storage media seized from Ardolf's residence, Agent Cameron identified a number of files related to other harassment of the Kostolniks.

# 1. "BethanyKostolnik" Text File Found on Ardolf's Thumb Drive

Ardolf kept a text file entitled "BethanyKostolnik" on his thumb drive, which was recovered during the search of Ardolf's bedroom. See Govt. Tr. Ex. 76. The file contained Bethany Kostolnik's contact information at work, including her email

address. Below the website address for Bethany Kostolnik's employer, Ardolf wrote the following note:

Use the above page and send bad emails from Matt to Beth['s] co-workers.

This will kill her carear [sic].

<u>See</u> Govt. Tr. Ex. 76-4. The text file contained the draft of an email to be sent to Bethany Kostolnik from a fictitious woman alleging an affair with Kostolnik. The draft email read:

I know your husband Matt, he is a lawyer of course. [W]e had sex just before you had your baby this past fall. I wanted to let you know I'm sorry but Matt and I have been having an afair [sic] behind your back. I have asked him to divorce you but he is afraid of loosing [sic] to [sic] much to you in a divorce. . . noone@noplace.com

<u>See</u> Govt. Tr. Ex. 76-4. In addition, the text file contained the draft of an email dated March 6, 2009, to be sent to "kill" Bethany's career:

I had a bit of a situation with my realtor bethanykostolnik. She suggested she would satisfy my needs if I bought a house from her. She was suggesting something inappropriate and she knew it. I don't think Edina Realty would want to keep an employee like her. I know the housing business is in a slump but Beth has gone too far. I'm to [sic] embarrassed to use my real name and I'm not going to give Edina Realty my business any longer!

Id.

# 2. July 6, 2009 Email Threat to Bethany Kostolnik From "Liz Sharpen"

On July 6, 2009, Ardolf sent an email to Bethany Kostolnik through her employer Edina Realty's website. The falsely-created

email account from fictitious "Liz Sharpen" had as its subject "Inquiries." The text of the email provided the following threat:

I know your husband Matt[,] and I'm going to get him! He's going to pay for getting me pregnant. Hell, he already has 3 kids with you. I don't blame him for asking me to have an abortion. He goes out at night but he isn't alwasy [sic] doing what you think he's doing!

See Govt. Tr. Ex. 75.

### 3. Text file found "Matt P Kostolnik Phone Number and Relatives"

Ardolf kept a text file titled "Matt P Kostolnik Phone Number and Relatives" on his thumb drive, which was recovered during the July 21, 2009 search. See Govt. Tr. Ex. 73. The file contained Kostolnik's personal contact information, including information about Kostolnik's relatives.

# 4. July 6, 2009 Email Threat to Matt Kostolnik From "noone@noplace.com"

On July 6, 2009, Matt Kostolnik received an email through the legal website FindLaw from "noone@noplace.com." The text of the email contained the following threat:

I know where you and your family live[,] and I'm going to get you back for sueing [sic] us.

See Govt. Tr. Ex. 74.

On the text file "Alamo MATT all stuff.txt," Ardolf had saved the following links:

"http://pview.findlaw.com/view/3352002\_1?noconfirm="

"http://pview.findlaw.com/cmd/emailView?wld\_id=3352002\_1&which=0" If typed into an Internet browser, these links bring up, respectively, Matt Kostolnik's Findlaw Moss & Barnett web page and a form to send email through FindLaw to Matt Kostolnik at Moss & Barnett. See Govt. Tr. Exs. 78 and 79.

#### K. Ardolf's Hacking and Harassment of His Former Neighbors

During the course of examination of the computers seized from Ardolf's residence, FBI Agent Cameron identified a file titled "Fuck me hard 425." The file contained the Social Security account numbers, dates of birth, and the home address for Karl A. Carstens, Nannette Carstens, and their minor children. Ardolf resided across the street from the Carstens in Brooklyn Park until mid-2008.

Agent Cameron stopped the search and contacted the Carstens to confirm that they did not authorize anyone to have their Social Security numbers. The Carstens also informed Agent Cameron that they had received a threatening message in their mail box in March 2009 consisting of a one-page, color print-out of their "TurboTax" return with personal identification information and several skull images. That letter threatened: "I told you about a year ago that you should be very afraid. I can destroy you at will, you sorry ass

excuse for a human." <u>See</u> Govt. Tr. Ex. 85. The Carstens had reported the letter to the Brooklyn Park Police Department.

Ardolf had lived across the street from the Carstens in Brooklyn Park for several years before Ardolf moved to Blaine. Ardolf often complained to the Carstens about the personal care attendants (PCAs) who cared for the Carstens' twin daughters, both of whom are disabled. Ardolf was upset that they parked in front of his home. At one point, Ardolf demanded the full names and telephone numbers of all of the PCAs that worked at the Carstens' residence, but the Carstens declined to provide that information. Over the years, the PCAs' vehicles were vandalized; mirrors were broken and maple syrup was poured onto them. The vandalism, however, was never witnessed or definitively connected back to Ardolf.

Based on his investigation and belief that Ardolf had the technical expertise to be able to hack into the Carstens' computer account, Agent Cameron submitted an affidavit in April 2010 for a search warrant authorizing him to examine Ardolf's computers for evidence of other crimes against the Carstens.

After the search was authorized, Agent Cameron recovered evidence of other crimes, wrongs, or acts by Ardolf against his former neighbors. This evidence includes (1) a threatening letter mailed by Ardolf to the Carstens; (2) a number of text files containing personal identification and financial information of the

Carstens found on a thumb drive recovered from Ardolf's bedroom in a folder labeled "HackHimBad;" (3) images of the Carstens' payment by personal check of billing invoices to Discover Card and CenterPoint Energy, which Ardolf had scanned and saved onto a CD; and (4) Girl Scout Troop materials for the Carstens' daughters. See Govt. Tr. Exs. 85-91, 124.

Significantly, the second threatening letter to the Carstens was sent in March of 2009 - approximately nine months <u>after</u> Ardolf had moved to his new house in Blaine - showing how long Ardolf maintained his anger and continued exacting revenge.

### III. Procedural History

### A. Ardolf Agrees to Plead Guilty in June of 2010, Then Changes His Mind

In the spring of 2010, after law enforcement had a chance to review the large amounts of data seized from Ardolf's residence, definitively connecting Ardolf to the crimes in this case, the prosecutor and case agent met with Ardolf and his attorney to show them an overview of the evidence. After that meeting, the defendant agreed to plead guilty, and a plea hearing was scheduled for Tuesday, June 15, 2010.

The Friday before the plea hearing, Ardolf's lawyer contacted the prosecutor, indicating that he had been fired, that Ardolf had retained another attorney, and that Ardolf was going to withdraw from his agreement to plead guilty. On June 15, 2010, an initial appearance was held on the information filed in this case. The

Court released Ardolf, subject to a number of conditions, including that he abstain from the use of all computers and Internet-enabled devices, that all computers and Internet-enabled devices be removed from his home, and that Ardolf advise all occupants of the home of the conditions.

### B. Ardolf Violates His Conditions of Release

On June 23, 2010, a federal grand jury returned an indictment charging the defendant with one count of unauthorized access to a protected computer, in violation of 18 U.S.C. § 1030, two counts of aggravated identity theft, in violation of 18 U.S.C. § 1028A, one count of threats to the President and successors to the Presidency, in violation of 18 U.S.C. § 871, one count of possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B), and count of distribution of child pornography, in violation of 18 U.S.C. § 2252(a)(1).

On July 8, 2010, the United States moved to revoke Ardolf's release. At a hearing on the United States' motion, the government presented evidence that Pretrial Services Officers Lisa Martinetto, Tim Norgren and David Drake located a laptop computer in defendant's residence. The computer was found in the doorway of defendant's daughter's bedroom, which bedroom was located directly across from defendant's bedroom; the computer was visible to Officer Martinetto when she stood in the doorway of defendant's bedroom. When questioned by Officer Martinetto about the laptop,

defendant admitted he knew it was a violation of his release conditions.

Officer Martinetto testified that she had advised defendant at the inception of his supervision that he was required under the terms of his supervision to advise any children living in his residence that no computers were permitted in the residence. At the hearing on this matter defendant's daughter, K.A., testified that the laptop computer found in defendant's house belonged to her, that it had been there for more than a week, and that she had not been advised by her father that neither she nor anyone else could have a computer in the residence under the terms of his pretrial release conditions. K.A. further testified that she had seen her father using a computer in the house several times after June 15, 2010 (the date the conditions of release were imposed on defendant in this case), and that she had also seen him using a wireless Internet connection using a laptop at a Border's Bookstore after June 15.

Magistrate Judge Noel granted the government's motion to revoke Ardolf's release, and he was taken into custody on July 9, 2010.

### C. Ardolf Lies at the Suppression Hearing

At a motions hearing held on July 28, 2010, the defendant argued that his statement to law enforcement should be suppressed. Defendant testified at the hearing, claiming he asked to leave his

house twice during his interview, but was not allowed to go.

Magistrate Judge Noel found that Ardolf lied during his testimony:

Both [the FBI and Secret Service] agents [who interviewed Ardolf] also testified that the Defendant never asked them for permission to leave to pick up his son until the conclusion of the Defendant's interview with [Secret Service Special Agent] Humbert. Both agents further testified that when the Defendant asked to leave to pick up his son, he was granted permission to do so and did in fact leave the premises. The Defendant, in contrast, testified that he repeatedly asked to leave to pick up his son and was ignored. The Court finds that the Defendant's testimony in this regard is not credible. The Court expressly finds that the Defendant was told that he was free to leave.

August 13, 2010 Report and Recommendation, Dkt. 46, at 27.

### D. Ardolf Pleads Guilty Three Days into Trial

On December 17, 2010, three days into a jury trial in this case, defendant Barry Ardolf entered pleas of guilty to all counts with which he was charged, admitting under oath to all of the allegations in the indictment and providing a detailed factual basis for each charge. Defendant decided to plead guilty after the jury had been selected and after the government had given its opening statement, called thirteen witnesses, admitted nearly 70 exhibits, and was prepared to present a full day of testimony (including that of the victims). Prior to taking defendant's plea, the Court engaged in a thorough examination of the defendant to ensure that his plea was knowing, voluntary and intelligent. See Transcript of December 17, 2010 Change of Plea Hearing, at 5 - 40.

### E. Ardolf Tries to Withdraw His Guilty Plea

On March 18, 2011, Ardolf moved to withdraw his guilty plea, claiming that he had been coerced into entering the plea. He also claimed that he had lied at the change of plea hearing and that he did not commit the criminal acts to which he had pleaded guilty. He also indicated that, if given an opportunity for a "do over" trial, he would use defenses such as: (1) suggesting he was "framed" by the victims in this case (see Defendant's Memorandum in Support of his Motion to Withdraw (Dkt. 86) at 13) and (2) trying to show that the previous neighbors he hacked and terrorized had not obtained a permit for remodeling their basement and were "thus unreliable citizens" (id. at 14).

After a full briefing and a hearing at which both defendant and his stand-by counsel were heard, the Court denied defendant's motion to withdraw on May 19, 2011. Dkt. 94.

# F. In Letters Sent from Jail, Ardolf Coaches His Son's Trial Testimony, Tells Relatives What to Write (and to Conceal) in Letters to the Court, and Disparages the Victims

In a November 1, 2010 letter from Ardolf to his son, T.A., he provided T.A. with a script of 48 questions he will be asked at trial, as well as the 48 answers he expected T.A. to give. In addition, Ardolf coached T.A. as to how he should testify at trial concerning the incident between Ardolf and the Kostolnik's 4-year old son:

You have to confirm that you watched [W.K.] and your father, and that no kiss occurred. If you don't I will likely go to prison. . . .

Tell the court you saw the whole thing and that nothing innapropriet [sic] occurred. I don't know if you watch Mr. Kostolnik come over the next day, but if you did, keep to my story.

After Ardolf pleaded guilty, he coached his children and his sister as to how to write letters to the Court in connection with his sentencing. In a January 25, 2011 letter to his minor daughter, K.A., Ardolf he tells her how to write her letter:

I suggest some wording about how you will figuratively be an orphan and tell him you are crying about not having me there for you. You have about a month to write this letter. I figure you can write it, mail it to me so I can add suggestions and we can mail it back and forth a few times to make it as good as it can be. This is for you and Taylor to do so I get a letter from each of you. You can cry about how you lost mom, now you are loosing [sic] Dad. The better the letter, the smaller jail time the judge gives me.

Similarly, in a Janaury 6, 2011 letter to his son, T.A., Ardolf tells him to contact Ardolf's sister Sheri Anderson, who will be writing a letter to the Court in connection with his sentencing:

[T]ell Sheri, do not say anything bad about my life. Tell her the gov only needs my adult life history. Specifically, tell Sheri to say nothing at all about my childhood life, except our parents were divorced but we all enjoyed our childhood. Tell Sheri this report will stay with me all my life so don't say anything like I skipped school all the time or shit like that.

Ardolf also writes in the same letter to T.A. that, in order to get their computers back, Ardolf will lie to the Court at sentencing, saying that "there are pictures on there of mom which are one of a kind. I may say anything I can think of to get the judge to give back everything."

Finally, in multiple letters - to family, friends, and even a newspaper reporter - Ardolf disparages the victims in this case, repeatedly blaming them for his situation and sometimes claiming he was "framed" by them. For example, in a letter from April of 2011, Ardolf writes that, if the Court grants his motion to withdraw his guilty plea, he is going to sue the Kostolniks. In other letters, he promises to "expose" the victims or otherwise make them look bad in court.

### IV. The Appropriate Sentence in Light of 18 U.S.C. § 3553(a)

In addition to determining defendant's Sentencing Guideline range, 18 U.S.C. § 3553(a)(4), this Court is required to assess the other applicable sentencing factors under Section 3553(a) of federal sentencing law. Those factors include the nature and circumstances of the offense; the history and characteristics of the defendant; the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment for the offense, to afford adequate deterrence to criminal conduct, and to protect the public from further crimes of the defendant; the need to avoid unwarranted sentencing disparities; and the need to provide restitution to victims. See 18 U.S.C. § 3553(a).

In this case, considering all the appropriate factors, the government respectfully submits that a sentence of 293 months is appropriate for Ardolf. Such a sentence would be sufficient but not greater than necessary to accomplish federal sentencing goals in this case.

First, serious punishment is called for by the nature and circumstance of defendant's offenses and the need for the sentence to reflect the seriousness of the harm caused by defendant. There are real victims here. To vent his anger, defendant engaged an extensive and cruel campaign to terrorize the Kostolniks, which the defendant's own notes show was calculated to destroy the Kostolniks' reputations, careers, and marriage. Ardolf dedicated countless hours to his scheme, starting in or before November of 2008 and continuing into the summer of 2009, hiding behind his computer keyboard as he struck repeatedly at the victims. hard to image the emotional trauma inflicted on the Kostolniks over the months as each new email was uncovered, living under a cloud of suspicion and enduring uncomfortable meetings with law firm management and workplace visits from the Secret Service. Moreover, Ardolf perpetrated a similar campaign of terror against his previous neighbors. Ardolf hacked their wireless router and stole personal identity and financial information and threatened to cause them significant harm, sending his last threatening letter many months after he had moved to a new residence. But for the

aggressive law enforcement in this case (and the expenditure of significant resources to uncover it), they might never have known that it was Ardolf had caused them harm.

Second, a lengthy sentence is called for to promote respect for the law, to provide just punishment, to afford adequate deterrence, and to protect the public from further crimes of defendant. Not only has defendant failed to accept responsibility for his conduct in the instant offenses, his post-plea actions also show no regard for the law. After entering his guilty plea, defendant attempted to withdraw it for a "do over" trial. He sent letters to friends and family members to tell them what they could and could not tell this Court for purposes of sentencing. And, repeatedly, defendant has attempted to portray himself as a "victim." Indeed, even when given a chance to write an "Acceptance of Responsibility Statement," with the guidance of his attorney, and with the opportunity to consider every word, he still attributes his actions to the fact that he felt "victimized."

Moreover, throughout this case, Ardolf has shown his complete lack of respect for the law. In addition to the depraved criminal acts that form the basis of the charges against him, he also has shown utter disregard for this Court and the rule of law since he was charged in this case. Indeed, he blatantly violated his conditions of pretrial release, he lied at the suppression hearing, he attempted to influence witnesses in their testimony at trial or

in writing letters to the Court, and he lied again in connection with his motion to withdraw his guilty plea. For Barry Ardolf, in particular, a lengthy sentence is appropriate to promote adequate respect for the law.

Finally, and perhaps most important, a lengthy sentence is necessary to protect the public against further crimes by the defendant. Barry Ardolf is a dangerous man. As he has amply demonstrated, he uses his technical skills both to cause harm and to avoid getting caught. Based on his actions, there is every reason to believe that when Barry Ardolf is released from prison at the end of his term of commitment, he will do something like this again to someone else who has angered him, only this time he will be even more careful. The only way to prevent that is to incarcerate the defendant for a very long time.

At every turn, the defendant has chosen not to accept responsibility for his actions and to obstruct justice. This Court has had a firsthand opportunity to see defendant's dangerousness, lack of remorse, and disregard for the law. A lengthy sentence is needed to prevent the defendant from engaging in any further harm.

### CONCLUSION

Defendant is dangerous. Defendant is remorseless. The crimes he committed caused serious harm to the victims. Just punishment calls for a sentence commensurate with the defendant's conduct. In light of all of the guideline factors in this case, the government

respectfully requests that the Court sentence defendant Barry Vincent Ardolf to a sentence of 293 month in prison.

Dated: July 8, 2011 Respectfully submitted,

B. TODD JONES United States Attorney

s/Timothy C. Rank

BY: TIMOTHY C. RANK Assistant U.S. Attorney

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