JUDGE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, vs. ALEX A. KIBKALO, Defendant.	NO. CR14-87 JCC DEFENDANT'S SENTENCING MEMORANDUM Hearing: June 10, 2014, at 9:00 am

I. INTRODUCTION AND JOINT SENTENCING RECOMMENDATION

Alex Kibkalo proves that smart people sometimes do dumb things. Mr. Kibkalo is a thirty-four-year-old, well-educated, highly intelligent computer programmer with no criminal history. He holds advanced degrees in mathematics and economics, and can carry on conversations in seven languages (verging on eight given his three-month immersion in the study of Spanish while at the FDC.) A Russian national who secured employment with Microsoft in 2005, Mr. Kibkalo worked as part of the company's overseas operations in Moscow and Lebanon. In this capacity, as a senior software architect, Mr. Kibkalo traveled throughout Africa and the Middle East providing training and other support related to Microsoft products, activities and presence in those locations.

Mr. Kibkalo's poor reaction to a poor performance evaluation precipitated his offense conduct: leaking Microsoft code to a technology blogger with whom he regularly

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(and legitimately) chatted about tech developments and other industry issues. This time the defendant went too far, giving up proprietary Microsoft software without permission and cavalierly suggesting that it could be reverse engineered to produce fake activation keys. As Microsoft and the Government (in their Sentencing Memorandum, p. 2) acknowledge, based on security protocols Microsoft built into the software, this backdoor engineering step could not have been accomplished, and "the potential for harm from misuse use of the SDK [i.e. the code leaked by Mr. Kibkalo] was considered low."

When confronted by Microsoft, law enforcement and ultimately by the Court through this prosecution, Mr. Kibkalo has readily admitted his guilt, in each instance. As he writes to Your Honor:

> I deeply regret that I have shared that information. Having done that I have lost a job only one can dream about. Moreover, when I have found another interesting job a year after, the echo of my mistakes took that from me too. For sure I was given good lessons, which I deserved. It made me rethink ways of working with internal information and dealing with external audience.

Exhibit A, Mr. Kibkalo's letter accepting responsibility for his criminal conduct.

This is Mr. Kibkalo's first time in jail. He has now served 84 days – as of our sentencing hearing date – essentially the three-month term that all agree is "sufficient, but not greater than necessary" under 18 U.S.C. § 3553(a).

What led to his immediate detention is worth some brief comment. The Government timed its Complaint and Arrest Warrant to coincide with Mr. Kibkalo's pre-arranged attendance at a technology conference in Bellevue. He flew into the country (legally on a valid visa) from Moscow (where he lives), checked into his hotel in Factoria and attended several sessions of this professional meeting before being detained by the FBI and whisked away to federal court for his initial appearance (on March 17, 2014). But for his brief and transitory presence here, his lack of ties to the United States and the absence of any extradition treaty between our two countries, Mr. Kibkalo's personal

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background and history would have merited his release on pre-trial, PR status.

Furthermore, this case presents us with a first-time offender who stands convicted of a non-violent, less-serious crime; relatively speaking, this is a felony, yet theft of trade secrets is ranked by Congress as a Class C offense. In the normal course, these variables would have made a probationary term or confinement alternatives an entirely appropriate part of the sentencing conversation. While the Guideline range is 6-12 months – the defense does agree with the U.S. Probation Office's calculation as contained in the Presentence Report – all see this is too much for Mr. Kibkalo. Notably, this range falls within Zone B of the Sentencing Table where probation, alternatives and split sentences are generally encouraged by the Commission. U.S.S.G. § 5B1.1(a)(2), and § 5C1.1(c).

In the end, the parties compromised on a below-Guidelines, three-month jail term, essentially "time served" as of today's date, and the Probation department further agrees.

II. "THE GUIDELINES ARE NOT ONLY *NOT MANDATORY* ON SENTENCING COURTS; THEY ARE ALSO NOT TO BE *PRESUMED* REASONABLE."

The sea-change wrought by *United States v. Booker*, 543 U.S. 220 (2005), cannot be overstated. *Booker* reversed over twenty years of established federal sentencing practice by declaring the mandatory use of the Guidelines to be unconstitutional. It remedied this defect by requiring sentencing courts to treat the Guidelines as advisory. *Booker*, 543 U.S. at 244.

The Supreme Court continues to emphasize and enforce *Booker*'s point: "The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable." *Nelson v. United States*, 555 U.S. 350, 352 (2009) (emphasis in original). In *Nelson*, the Supreme Court – by a *per curiam* decision – summarily reversed the Fourth Circuit for affirming a district judge who called the Guidelines "presumptively reasonable" and who said that "unless there's a good reason in the [3553(a)] factors . . ., a

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Guideline sentence is the reasonable sentence." *Id.*

And last year, the Supreme Court further underlined the importance of individualized sentences by reversing the Eighth Circuit's ban on consideration of post-sentencing rehabilitation at resentencings following a remand. *See Pepper v. United States*, ___ U.S. ___, 131 S.Ct. 1229 (March 2, 2011). Writing for the Court, Justice Sotomayor sums it up in her first line:

> This Court has long recognized that sentencing judges "exercise a wide discretion" in the types of evidence they may consider when imposing sentence and that "[h]ighly relevant - if not essential - to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." *Williams v. New York*, 337 U.S. 241, 246-247, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949).

Pepper v. United States, 131 S.Ct. at 1235. The Court reminds us that Congress has codified the importance of individual circumstances at sentencing in both 18 U.S.C. § 3661 – i.e. "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence" – and, of course, in 18 U.S.C. § 3553(a)(1)'s reference to "the history and characteristics of the defendant." *Id.*

These and other high court opinions emphatically restate the message of *Booker*: the Guidelines are simply one factor to be considered in tailoring a sentence that is "sufficient, but not greater than necessary."[1] Sentencing judges are not bound by the

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[1] In addition to considering the advisory Guidelines and their policy statements, under §§ 3553(a)(4) and (5), sentencing courts must also consider Congress's other objectives in achieving a least-restrictive sentence under § 3553(a):

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed–
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

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Guidelines or their policy statements, and may vary where the Guidelines are not the product of the Commission's exercise of its traditional institutional role, or if the underlying policy is contrary to an individualized analysis of § 3553(a). *See also Spears v. United States*, 555 U.S. 261 (2009), *Rita v. United States*, 551 U.S. 338 (2007), *Gall v. United States*, 552 U.S. 38 (2007), and *Kimbrough v. United States*, 552 U.S. 85 (2007).

As the Supreme Court has long recognized, every case reflects "a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Koon v. United States*, 518 U.S. 81, 113 (1996). Following *Booker*, there are few limitations on what a sentencing judge can consider as a basis for just punishment. Factors which the Guidelines deem "not ordinarily relevant" under USSG Chapter 5, Part H – considerations like age (including youth), education and vocational skills, mental and emotional conditions, physical conditions (including drug, alcohol and gambling addictions), employment record or employment-related contributions, family ties and responsibilities, military/civic/charitable/public service, record of prior good works and lack of guidance as a youth and disadvantaged upbringing – now merit our renewed attention under 18 U.S.C. § 3553(a), as the District Court arrives at a parsimonious sentence, i.e. one that is "sufficient, but not greater than necessary."

III. CONCLUSION

Mr. Kibkalo regrets his mistakes. These mistakes have cost him dearly. He has tarnished his personal reputation and with it his prospects for advancement in his chosen field, particularly at companies with significant ties to this country. Mr. Kibkalo's very

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(B) to afford adequate deterrence to criminal conduct;
(C) to protect the public from further crimes of the defendant; and
(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

. . .

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

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public failure, as represented by this case, is at odds with his otherwise exemplary history of being a trustworthy and valued family member, friend and employee.

Relentlessly upbeat, genuinely optimistic and intensely curious, Mr. Kibkalo will bounce back from this self-imposed setback. His plan is to return to his family and home in Russia and start over. Given his education, experience and energy, Mr. Kibkalo will undoubtedly prove successful at whatever he turns his attention to. As isolated as this offense has proven to be, in terms of this defendant's past behavior, it is equally unlikely to recur in the future given everything this intelligent and skilled young man has going for him.

DATED this 3rd day of June, 2014.

Respectfully submitted,

s/ Russell V. Leonard
RUSSELL V. LEONARD
Attorney for Alex A. Kibkalo

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CERTIFICATE OF SERVICE

I hereby certify that I filed Defendant's Sentencing Memorandum with the Clerk of the Court using the CM/ECF system, which will send notification of filing to the Assistant United States Attorneys of record. I further certify that I emailed a copy of the foregoing memorandum to United States Probation Officer Michael Markham.

DATED this 3rd day of June, 2014.

s/ Suzie Strait
SUZIE STRAIT
Paralegal

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