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LORI DREW

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12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA

14 UNITED STATES,

15 Plaintiff,

16 vs.

17 LORI DREW,

18 Defendant.
19

Case No. CR-08-582-GW

REPLY TO GOVERNMENT SENTENCING
BRIEF

Sentencing Date: May 18, 2009
Time: 9:00 AM

20
21 Comes now defendant Lori Drew, together with counsel, and
22 responds to the government's sentencing brief.
23

24 Dated: May 13, 2009

s./ H. Dean Steward

25 H. Dean Steward
26 Orin Kerr
Counsel for Defendant
27 Lori Drew
28

1 I. Introduction

2 Attorney General (later Associate Justice) Robert H. Jackson
3 famously warned a roomful of United States Attorneys about the
4 single greatest danger of prosecutorial abuse:

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6 If the prosecutor is obliged to choose his cases, it follows
7 that he can choose his defendants. Therein is the most
8 dangerous power of the prosecutor: that he will pick people
9 that he thinks he should get, rather than pick cases that need
10 to be prosecuted. With the law books filled with a great
11 assortment of crimes, a prosecutor stands a fair chance of
12 finding at least a technical violation of some act on the part
13 of almost anyone. In such a case, it is not a question of
14 discovering the commission of a crime and then looking for the
15 man who has committed it, it is a question of picking the man
16 and then searching the law books, or putting investigators to
17 work, to pin some offense on him. It is in this realm in
18 which the prosecutor picks some person whom he dislikes or
19 desires to embarrass, or selects some group of unpopular
20 persons and then looks for an offense, that the greatest
21 danger of abuse of prosecuting power lies.

22
23 Robert H. Jackson, *The Federal Prosecutor*, 24 J. Am. Jud. Soc'y 18
24 (1940).

25 This entire prosecution has been a case study of the dangers
26 Justice Jackson identified. The entire point of the prosecution
27 has been to try to make Lori Drew a symbol of cyberbullying. The
28 government "search[ed] the law books . . . to pin some offense on"

1 her, and then it devised a novel theory that renders millions of
2 Americans felons for their everyday conduct. Even then, the
3 government could only get a conviction for three misdemeanors, all
4 unrelated to cyberbullying. The alleged crime: assisting another
5 person, Ashley Grills, in the violation of the Terms of Service of
6 MySpace.com.

7 Undeterred, the government now seeks the statutory maximum
8 punishment: one year in prison for every Terms of Service
9 violation. On one level, the fact that the government is seeking
10 three years in prison for misdemeanors is shocking. But of course
11 it is in keeping with the government's view of the case. The
12 government's case is all about making Lori Drew a public symbol of
13 cyberbullying. The government has created a fiction that Lori Drew
14 somehow caused M.T.M's death, and it wants a long prison sentence
15 to make its fiction seem real.

16 Fortunately, this is a court of law, not a television drama.
17 This Court should squarely reject the Government's sentencing
18 recommendation.

19 20 II. Facts

21 The government's version of the facts presented in its
22 sentencing memo ignores much of the trial testimony of their own
23 witnesses. This Court heard the testimony and evidence, and can
24 easily evaluate the government's assertions. However, the defense
25 takes particular issue with the government's claim that "Defendant
26 coldly conceived of a scheme to humiliate a vulnerable girl"- govt.
27 memo, p. 1. This is simply false.

1 First of all, Ashley Grills thought up the profile, not Lori Drew.
2 Grills clearly admitted this in her testimony. [RT 11-20-08, p. 8;
3 "AUSA: A fake MySpace account? Grills: Yes. AUSA: And who's idea
4 was that? Grills: That one was mine."]. Of course, the purpose of
5 the government's prosecution is to make Lori Drew a public symbol
6 of cyberbullying, so the government chose to prosecute Drew instead
7 of Grills for actually devising and carrying out the plan. That was
8 a choice for the government to make. But it cannot prosecute a
9 secondary player in a scheme and then simply pretend that the
10 secondary player was the leader. The Court should follow the
11 evidence, not the government's fictional retelling.

12 Further, the government's claim that Drew acted to humiliate
13 M.T.M. is not supported by the evidence.¹ Its claim that Drew knew
14 that M.T.M. was "vulnerable" is also not supported by the evidence,
15 as the defense's sentencing memorandum explains.

16 17 III. Guideline Calculations

18 The Probation Officer correctly calculated the advisory
19 Guideline range in this matter. The Probation Officer treated this
20 case for what it was and is: a misdemeanor violation of the
21 Computer Fraud and Abuse Act with a dollar loss of zero. The
22 advisory Guideline range is correctly 0-6 months for the reasons
23 set out in the PSR.

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27 ¹ Reporter Phil Shumann, Fox 11 News to juror Ms. T., on the
28 courthouse steps, post-verdict: "Why did Drew do what she did?"
Juror Ms. T.: "She did it to get information." Shumann: "Did she do
it to harass M.T.M.?" Juror Ms. T.: "No." November 26, 2008.

1 The Probation Officer also properly found that the death of
2 M.T.M. was not foreseeable. This is surely correct based on the
3 evidence. The Josh Evans profile was in existence for 27 days. It
4 is undisputed that no angry or bullying messages were sent until
5 the 26th day, October 15, 2006. At that time, during the evening
6 of October 15th, juvenile J.M. sent a message to M.T.M. posing as
7 Josh Evans. It is undisputed that Lori Drew had nothing to do with
8 that message. On October 16th, the last day of the existence of
9 the Evans account, Ashley Grills wrote and sent the message about
10 the world being a better place without M.T.M. In December of 2006,
11 Grills told the FBI that Lori Drew was not home when all of this
12 occurred, and S.D. confirmed this at trial, as did FBI Agent Billy
13 Cox.

14 It is simply unforeseeable that a death would result from the
15 few non-threatening messages that Ms. Drew was aware of. The
16 tragic death of M.T.M. was a shock to everyone.² It is in keeping
17 with the government's theory of the case to say that Lori Drew
18 somehow caused M.T.M.'s death. The government wants the narrative
19 to be that Lori Drew bullied M.T.M. into committing suicide. This
20 Court should stick to the facts and testimony that the Court
21 observed during the trial. The government's narrative simply does
22 not match the evidence.

23
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25 _____
26 ² "As jurors streamed out of the Courtroom Wednesday, nearly all
27 declined to speak with reporters. One, who identified himself only
28 by his first name of M_____, said he felt the case was a tragedy
for both the Meiers and the Drews, and that neither family could
have anticipated what happened." *Los Angeles Times*, California
sec. p. 1 , Nov. 26, 2008

1 IV. 18 USC § 3553(a) Factors

2 The government's argument for a high sentence boils down to
3 this: "Defendant has become the public face of cyberbullying."
4 Govt. memo, p. 17. Having become "the public face of
5 cyberbullying," Drew must be punished severely to deter others. As
6 the Government puts it, "[a] probationary sentence might embolden
7 others to use the Internet to torment or exploit children." Govt.
8 memo, p. 17

9 This is utterly absurd. From day one, the goal of the
10 government's case has been to make Lori Drew the public face of
11 cyberbullying. It conjured up a novel theory to prosecute Drew
12 after the District Attorney's Office of St. Charles County,
13 Missouri and the U.S. Attorney's Office in Missouri concluded that
14 she had committed no crime. It gave immunity to the individual who
15 actually created the account and who sent the critical messages.
16 It then had her testify against the defendant, who did neither of
17 these things.

18 The government's own prosecution ensured that the name "Lori
19 Drew" would be known to millions of Americans. If Lori Drew is the
20 public face of cyberbullying, it is only because the prosecutors in
21 this case have made that their goal. Having worked to make Lori
22 Drew the public face of cyberbullying, it is simply outrageous that
23 the Government insists a long prison term is necessary because Drew
24 has become the public face of cyberbullying.

25 Further, the government's deterrence claim ignores the
26 remarkable legislative response to the government's prosecution.
27 The great majority of legal observers have expected that this Court
28 or the Ninth Circuit will reject the government's theory that

1 violating Terms of Service violates an unauthorized access statute.
2 (Given that the defense's motion to dismiss is still pending, the
3 defense hopes that this Court will fulfill that expectation.)
4 This understanding has triggered a nationwide rush to enact new
5 state laws that specifically prohibit cyberbullying. See, e.g.,
6 Ashley Surden, *In Several States, A Push to Stem Cyber-Bullying*,
7 *The Washington Post*, January 1, 2009 at A3 (summarizing state law
8 developments).

9 Such efforts have occurred in Congress as well as state
10 legislatures. Rep. Linda T. Sanchez and 14 other members of the
11 U.S. House of Representatives have introduced H.R. 1966, "The
12 M.T.M. Cyberbullying Prevention Act," that would create a new
13 federal crime of cyberbullying. The purpose of the bill is to
14 make cyberbullying a federal crime for the first time, on the
15 assumption that violating Terms of Service is not an unauthorized
16 access crime so the United States cannot validly prosecute
17 cyberbullying under the existing 18 U.S.C. § 1030.

18 The rush to enact new statutes to prohibit cyberbullying, both
19 at the state and federal level, reveals the absurdity of the
20 government's claim that a severe prison sentence in this case is
21 needed to deter cyberbullying. This prosecution has put
22 cyberbullying on the front pages. Legislatures are now acting to
23 prohibit it. The idea that a Court must impose a severe sentence
24 for conduct that occurred before legislatures actually prohibited
25 cyberbullying is absurd. The passage of statutes criminalizing
26 cyberbullying will deter cyberbullying, not the imposition of a
27 severe sentence in this case brought under the Computer Fraud and
28 Abuse Act.

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V. Conclusion

This case never should have been indicted. The sentence suggested by Probation -- minus the fine -- is reasonable, fair and appropriate.

Dated: May 13, 2009

s./ H. Dean Steward
H. Dean Steward
Orin Kerr
Counsel for Defendant

1 **CERTIFICATE OF SERVICE**

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3
4 IT IS HEREBY CERTIFIED THAT:

5 I, H. Dean Steward, am a citizen of the United States, and am at
6 least 18 years of age. My business address is 107 Avenida Miramar,
7 Ste. C, San Clemente, CA 92672.

8 I am not a party to the above entitled action. I have caused,
9 on May 13, 2009, service of the defendant's:

10 **RESPONSE TO GOVT SENTENCING BRIEF**

11 On the following parties electronically by filing the foregoing
12 with the Clerk of the District Court using its ECF system, which
13 electronically notifies counsel for that party.
14

15 **AUSA MARK KRAUSE- LA**

16
17
18 I declare under penalty of perjury that the foregoing is true and
19 correct.
20

21 Executed on MAY 13, 2009

22 H. Dean Steward

23 H. Dean Steward
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