

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

UNITED STATES OF AMERICA	:	<b>HON. JOEL A. PISANO</b>
	:	
Plaintiff	:	
	:	<b>Criminal No. 14-00128 (JAP)</b>
v.	:	
	:	
<b>SAMUEL HYDE HAWK,</b>	:	
	:	
Defendant	:	<b>NOTICE OF MOTION</b>

**TO: Lawrence Atkinson, Assistant U.S. Attorney  
 Robert A. Zink, Assistant U.S. Attorney  
 United States Department of Justice  
 Criminal Division – Fraud Section  
 1400 New York Avenue NW  
 Washington, DC 20005**

**NOW COMES** Defendant, Samuel Hyde Hawk, by and through his CJA appointed attorney, David Rudenstein, Esquire, and hereby respectfully moves this Honorable Court to grant a downward variance pursuant to United States v. Booker, 543 U.S. 220 (2005).

Respectfully submitted by:

s/ David Rudenstein DSR 2977  
 DAVID RUDENSTEIN, Esquire  
 Attorney for Defendant Samuel Hawk

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	:				

**DEFENDANT’S MOTION/REQUEST FOR DOWNWARD  
VARIANCE PURSUANT TO UNITED STATES V BOOKER**

**STATEMENT OF THE CASE**

On March 13, 2014, a sealed Indictment was filed charging the Defendant Hawk, and one Bryce Chapman, with wire fraud in violation of 18 United States Code §1343 and mail fraud, in violation of 18 U.S.C. §1341, all in violation of 18 U.S.C. §1349. On May 28, 2014, the Defendant entered a plea to Count One before the Honorable Joel A. Pisano. Sentencing is currently scheduled for December 17, 2014.

**REASONS RELIED UPON FOR BOOKER VARIANCE**

The Defendant, age 42, comes before the Court with no prior record, either as a juvenile, or as an adult. The Defendant, for reasons still very difficult to explain, engaged in criminal conduct, which is the subject matter of this prosecution. The Defendant is married and has one 9 year old son, who relies upon his father for his day-to-day care. The Defendant, Mr. Hawk, cannot hear, nor can

he speak, and that has been a life-long condition. The Defendant's Guideline Range, as calculated by the Probation Department, is 121 months to 151 months. See Paragraph 87 of the Presentence Investigation Report.

A Guideline Sentence, even at the lowest end of the Guidelines, would be an excessively harsh sentence when considering all of the circumstances. Thus, the Defendant asks for a downward Booker variance, and for the following reasons:

**1. A sentence should be sufficient but not greater than necessary to meet the requirements of §3553(a).**

A Guideline sentence in this case would be greater than necessary. Mr. Hawk, over most of his life, has clearly demonstrated that he can be a law abiding citizen. Mr. Hawk is not a threat to the community. He has learned much during this prosecution and fully understands that breaking the law leads to serious consequences. At his current age of 42, he, statistically, does not pose much of a threat to re-offend. Case law supports counsel's request. In United States v. Munoz-Nava, 524 F. 3d 1137 (10<sup>th</sup> Cir. 2008), a sentence of one (1) year and one (1) day for a man who possessed, with intent to distribute, 100 grams of heroin, despite a Guideline range of 46 to 57 months, based on his long work career, community support, lack of a criminal record, and responsibilities of sole supporter of his eight (8) year old son and his elderly parents, which reduced the likelihood that he would re-offend. Here, the Defendant does have a work career; he forged that work career even though he was faced with being unable to hear or speak; he does have community support; he does lack a criminal record; and he is the primary care giver for his 9 year old son on a day-to-day basis, while his wife works and financially supports the family.

The decision in the non-reported sentencing Opinion of United States v. Taylor, 2008 WL 2332314 (S.D.N.Y. 6208) states that the District Court rejected “Draconian” Guideline Range of 151 to 188 months for a first offender convicted of child pornography offense, where the Defendant there was thought to be no threat to minors at large. The Court imposed 60 months, but it should be noted that the 60 months was also the statutory minimum sentence. The Guidelines are greater than necessary and, hence, a downward variance should be granted.

**2. The Guidelines do not fully implement the statutory objectives of sentencing.**

In Rita v. United States, 127 S. Ct. 2456 (2007), it was said that the Commission has not developed any standards or recommendations that affect sentencing ranges for many individual characteristics, such as age, education, mental or emotional condition, medical conditions and the like. However, those are factors that a sentencing judge can consider pursuant to §3553(a). Here, there are two such factors which are not generally addressed by the Sentencing Guidelines. The Defendant’s physical condition, to wit, his lack of hearing and speech, are very important to consider because a defendant who cannot speak or hear enters the prison on a different foot than almost any other prisoner. He cannot “normally” communicate with other inmates; corrections officers; medical personnel; religious personnel; or leaders, educators or organizers of activities in the prison. Moreover, and while many defendants have children, this Defendant is in the position of being the primary care giver for the child so that his wife can maintain full time employment. If this Defendant is incarcerated, little Etzio becomes a latchkey child.

**3. Imprisonment will devastate the Defendant.**

The Defendant's inability to hear or speak is not merely an inconvenience. It is life-altering. Mr. Hawk has spent his entire life learning to accommodate himself to a hearing and speaking world. However, functioning as a non-hearer/non-speaker in a day-to-day world is far different than attempting to function as same in a prison society. In the day-to-day world, Mr. Hawk has the assistance of those who love him. Moreover, most people are patient with others who need assistance. Mr. Hawk tries his best to communicate and others work with him. However, in a prison society, Mr. Hawk will have no loved ones; his son Etzio, who speaks and hears normally, would not be present to assist his father in understanding the speaking/hearing world, and while we would all hope and pray that others in prison are kindly and courteous, I would tend to suspect that a waitress at a local diner would be far more patient with Mr. Hawk's attempt to order a meal than a fellow inmate in the prison "chow line". Thus, it seems like common sense to acknowledge that the Defendant would have a much more difficult time than a hearing/speaking individual while incarcerated. The case law would support a variance for like and similar reasons. See United States v. Alemenas, 553 F. 3d 27 (1<sup>st</sup> Cir. 2009); United States v. Kempf, 317 Fed. Appx. 342; 2009 WL 667413 (4<sup>th</sup> Cir. 03/13/2009); United States v. Duhon, 541 F. 3d 391 (5<sup>th</sup> Cir. 2008); United States v. Greenwood, 928 F. 2d 645 (4<sup>th</sup> Cir. 1991). Counsel concedes that those cases involve those inmates with serious physical problems; however, the difficulties that Mr. Hawk deals with in his life are serious and, simply because he, thankfully, has his arms and his legs does not mean that he does not have significant problems. The Defendant's position, while certainly not on all fours with that of an illegal alien, has some similarity thereto. For instance, the Courts have noted that aliens face more severe restrictions in prison than non-aliens. In United States v. Navarro Diaz,

420 F. 3d 581 (6<sup>th</sup> Cir. 2005), the Court recognized that the alien defendant would be punished more than a citizen due to his ineligibility for six (6) months of halfway house treatment at the end of his/her term. Likewise, Mr. Hawk will be punished more than the average prisoner while he is incarcerated because he simply will not be able to communicate with others, as aforementioned, when communication is a key factor, whether one is on the street or in a prison society.

**4. Community service in lieu of some prison time would be beneficial to society as well as to the Defendant.**

In Application Note 6 to U.S.S.G. 5C1.1, it is noted that it can be authorized to depart and substitute more community service than otherwise authorized for an equivalent number of months of imprisonment. Here, the Defendant, while suffering from what could be well noted as a disability, is also in a unique situation to help others. Defendant is extremely well educated and is a university graduate and holds a Master's degree. He has lived and worked in the deaf world for his entire life. He can assist other people with hearing loss. Thus, as part of any sentence, counsel beseeches this Court to permit the Defendant to serve a significant portion of time while doing community service.

**5. A prison sentence will have more impact on a defendant, such as Mr. Hawk, who would be incarcerated for the very first time.**

In United States v. Baker, 445 F. 3d 987 (7<sup>th</sup> Cir. 2006), a variance was affirmed where the defendant in that matter received a downward variance relating to his conviction for distributing child pornography and it was justified in part by the Judge's finding that prison would be more to that defendant than one who has been incarcerated before. See similar decisions with similar

rationale in United States v. Jewell, 2009 WL 1010877 (ED Ark. 04/15/2009)—non-reported; United States v. Cull, 446 F. Supp. 2d 961 (ED Wis. 2006); and United States v. Qualls, 373 F. Supp. 2d 873 (ED Wis. 2005).<sup>1</sup>

**6. Defendant is especially vulnerable to victimization or abuse in prison.**

If an inmate is being attacked or abused in the prison system, he can always “holler or scream” in an attempt to get help. Unfortunately for the Defendant herein, he is not in that position. If the Defendant is having a medical emergency, he cannot readily explain his situation to anyone. Thus, the Defendant is not in the same position as most other prisoners in any institution. In Koon v. United States, 518 U.S. 81 (1996), there was held to be no abuse of discretion where a District Court granted a downward departure to police officers, due to their vulnerability in prison. In United States v. Gonzalez, 945 F. 2d 525 (2<sup>nd</sup> Cir. 1991), a downward departure was affirmed for a defendant who had “softness of features” that would make him prey to prisoners. Former prison guards being sent to prison were given a downward departure in United States v. LaVallee, 439 F. 3d 670 (10<sup>th</sup> Cir. 2006). With all due respect to former police officers and security/prison guards and to those of “soft face”, this Defendant, Samuel Hawk, stands in a position of peril in a prison institution as he cannot communicate. Counsel urges this Honorable Court to take that into consideration.

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<sup>1</sup> *Counsel recognizes that these decisions are not precedential but simply refers the Court to them for whatever assistance they might provide.*

**7. The Defendant's imprisonment will greatly harm his family.**

Counsel recognizes that departures on this basis are discouraged. See U.S.S.G. 5H1.6. However, the Court is still free to consider this factor when it determines what a fair and reasonable sentence will be. See Booker, supra. and Rita, supra. In United States v. Antonakopoulous, 399 F. 3d 68 (1<sup>st</sup> Cir. 2008), it was held that a District Court may consider a defendant's role as caretaker for a brain damaged son even though alternative means of care existed. Thankfully, Mr. Hawk does not face that challenge. However, he is the primary day-to-day caretaker of a 9 year old son who is currently doing well in school. Etzio has faced his own challenges growing up as a hearing child with both parents who cannot hear at all nor speak. Apparently, he is thriving and doing well and a large part of the credit should go to Sam Hawk, who is very involved in Etzio's life on a day-to-day basis.

In United States v. Dominguez, 296 F. 3d 192(3rd Cir. 2002), the Circuit found that the District Court erred in concluding that it could **not** depart four (4) levels in a bank fraud case for a defendant who resided with her elderly parents and who were physically and financially dependent on her. Thus, counsel does believe that this Court is free to consider the impact upon Etzio when it sentences this Defendant. Moreover, the spillover effect upon Mrs. Hawk, who is also completely deaf, is not insignificant. At this point, she is able to work and to provide Etzio with the needs of life. If she is unable to work or, perhaps more specifically, unable to continue to do the job she is doing, and have to seek work with less hours and far less pay, then Etzio's financial security would be impacted as well. Mrs. Hawk may also have difficulty in changing jobs or obtaining another job easily, given that she is deaf and unable to speak.

**8. Cost of incarceration to tax payers.**

Our Courts have recognized that the cost to tax payers of a defendant's incarceration can be considered when deciding on a sentence. Several Courts have spoken to the cost of taxpayers of lengthy incarceration. See United States v. Chavez, 230 F. 3d, 1089 (8<sup>th</sup> Cir. 2000) and United States v. Angelos, 345 F. Supp. 2d, 1227 (D. Utah 2004). This law abiding Defendant did a dumb thing (and kept doing it).

Counsel is not making a motion for a downward departure based on aberrant behavior, as counsel believes that the time frame over which the crime was committed was too long to qualify for such a departure. At the same time, the Defendant's criminality was focused on a singular type of behavior. In the course of the Defendant's forty-two (42) years of law-abidingness, the Defendant's criminal activity with regard to Hawk Relay was, perhaps, much too long in tenure but much more isolated in scope. Other than the criminality seen in this case, the Defendant engaged in no other such type of behavior in any other facet of his life. In United States v. Howe, 543 F. 3d 128 (3<sup>rd</sup> Cir. 2008), the Circuit affirmed the probationary sentence for wire fraud despite an eighteen (18) to twenty-four (24) month guideline where the Appellate Court construed the District Court to have termed the offense an "isolated mistake" in the context of the defendant's otherwise long and entirely upstanding life. See United States v. Hadash, 408 F. 3d 1080 (8<sup>th</sup> Cir. 2005) for a similar decision.

**9. The Defendant's otherwise outstanding character.**

I think that all, or at least most, could agree that the Defendant has led a very decent life but for his involvement in this affair<sup>2</sup>. That can be considered as an important factor when determining whether a downward variance is called for. In United States v. Wachowiak, 496 F. 3d 744 (7<sup>th</sup> Cir. 2007), the Circuit affirmed the District Court's imposition of a 70 month sentence for a defendant convicted of receipt of child pornography, where the Guideline range was 121 to 151 months, in part because the record demonstrated that that defendant was a kind, caring individual who enjoyed broad support of family, friends and colleagues and had otherwise outstanding character.

**10. The loss table potentially overstates the amount of loss or seriousness of the offense.**

While the Defendant has pled guilty to a loss of over \$18 million (\$18,000,000), counsel wishes to point out that \$18 million dollars did not go into Mr. Hawks' pocket. Apparently, little money went into Defendant's pocket. Counsel has spoken with Assistant United States Attorney Robert Zink, Esquire, who has represented that funds diverted to the Defendant Hawk, that he actually spent, were about \$300,000 and that most of that went to pay off a credit card. Counsel is not arguing that Mr. Hawk is free from blame, but simply arguing that \$18 million dollars did not go into his pocket. Counsel is not a forensic accountant and is relying upon a proffer made by AUSA Zink to this counsel. This is a multi-faceted issue because, obviously, money went to fund the business and all that counsel is attempting to establish, perhaps laboriously so, is that Mr. Hawk was not living on the Riviera, nor driving a Rolls Royce as a result of his involvement in this affair.

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<sup>2</sup> *Please see attached character letters.*

**11. The loss amount causes multiple overlapping enhancements.**

In United States v. Jackson, 346 F. 3d 22 (2<sup>nd</sup> Cir. 2003), the defendant had pled guilty to a credit card fraud and there were multiple overlapping enhancements. The Court found that the overlapping enhancements could be a reason for a downward departure because “although the enhancements imposed by the District Court are permissible, they are all little more than different ways of characterizing closely related aspects of Jackson’s fraudulent scheme.

Here, that factor is present. In Paragraph #49 of the Presentence Report, the Defendant’s Guidelines are increased by twenty (20) levels because the loss exceeded \$7 million dollars but was less than \$20 million dollars. The Defendant was then given two (2) extra levels because the offense involved sophisticated means. Frankly, where so much is said to have been the target of the scheme, it is hard to imagine that it could be accomplished by less than sophisticated means. Likewise, the Defendant was awarded four (4) extra levels for his role in the offense, to wit, the Defendant was an organizer or leader of the criminal activity. Counsel would argue that the 20 levels previously given to the Defendant also encompassed the fact that he was a leader or organizer. Thus, the Defendant has actually been given six (6) points which are fully accounted for where the Defendant is given a 20 level upward bump because of the amount of money involved. Thus, counsel would respectfully request that the Court consider that the Defendant’s Offense Level may be the partial result of double-counting or, at least “unfair” counting, which artificially inflates the Offense Level. Counsel asks that the Court consider this when determining what a fair and reasonable sentence is.

**12. The Defendant stands a very good chance of rehabilitation.**

The Defendant is a very educated man. The Defendant does not have any drug or alcohol problems. The Defendant is not a gambler. The Defendant is, basically, a family man, who spends much of his time at home with his young son. In short, the Defendant will not be back before the Court.

**13. Findings of Dr. Steven Samuel, Forensic Psychologist.**

Dr. Samuel's report has been provided to the Court and is attached to the Defendant's Presentence Memorandum. Dr. Samuel concluded that Mr. Hawk presented himself without attempting to impress an overly positive or overly negative image of himself. Dr. Samuel noted that there was no diagnosis of anti-social personality disorder and there was no history of repetitive acts of anti-social or violent behavior as a child or an adult. Dr. Samuel recognizes that Mr. Hawk's behavior was both patently unlawful and out of character. The doctor attempted to analyze how the criminal behavior came about. He says, "He [Hawk] was carried away by wanting to help and to be accepted by deaf and hearing impaired individuals at any personal or legal cost to himself. This aspect of his behavior is underwritten in part by his reaction to being abandoned and rejected by his father." Dr. Samuel notes that the "types of deception that Mr. Hawk engaged in arose from trauma imposed upon [him] by his father, who abandoned and rejected him". . . . "Each act of deception constituted an unconscious, psychic maneuver on his part to change his reactions to being abandoned and rejected by his father". (See Page 6 of Dr. Samuel's report). Dr. Samuel sums up his 6-1/2 page report by saying the following:

Children need parents, perhaps most significantly when they are growing up. In most cases, children benefit when they are raised by a mother and father whenever possible. What is significant about Mr. Hawk's circumstances is that he is the full-time parent to his son. He's stated that his son is his 'favorite person in the world'. This perspective, which is blind to his son's mother, allows Mr. Hawk to give his son what he did not receive from his father. Being abandoned by his father created a pox on Mr. Hawk's sense of self and self esteem and it resulted in his feeling that whatever he does is never enough. It is my conclusion that Mr. Hawk's son would experience significant emotional suffering in the event that he had to leave the home. In my opinion, losing a father as one's primary psychological parent and caretaker would create vulnerabilities in Mr. Hawk's son that would make him vulnerable to experience life-long psychological difficulties.

Counsel would respectfully request that this Honorable Court factor in Dr. Samuel's findings when determining what a fair and reasonable sentence should be.

**WHEREFORE**, and for all of the reasons stated above, the undersigned respectfully requests that this Honorable Court grant this Defendant a Booker Downward Variance.

Respectfully submitted by:

s/ David Rudenstein DSR 2977  
DAVID RUDENSTEIN, Esquire  
Attorney for Defendant Samuel Hawk

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	:	
<b>SAMUEL HYDE HAWK,</b>	:	
	:	
Defendant	:	<b>CERTIFICATE OF SERVICE</b>
	:	

I, David Rudenstein, Esquire, CJA appointed attorney for defendant, Samuel Hawk, certify that on the **6th** day of **JANUARY, 2015** , I caused true and correct copies of Defendant's **corrected** Motion/Request for Booker Downward Variance to be served via Email and/or Facsimile and/or First Class U.S. Mail to Assistant United States Attorney Lawrence Atkinson, Esquire and Assistant United States Attorney Robert A. Zink , Esquire, United States Department of Justice, Criminal Division, Fraud Section, 1400 New York Avenue NW, Washington, DC 20005.

*s/ David Rudenstein DSR2977*  
 DAVID RUDENSTEIN  
 Attorney for defendant Samuel Hawk