

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF KANSAS

UNITED STATES OF AMERICA,
Plaintiff,

v

Case No. 07-10181-01-WEB

MALCOLM WEBBER,
Defendant.

DEFENDANT MALCOLM WEBBER'S SENTENCING MEMORANDUM

The defendant Malcolm Webber, by and through his attorney Kurt P. Kerns, submits this sentencing memorandum as an aid to the Court in selecting a reasonable sentence. The presentence investigation report (PSR), as submitted, suggests a guideline range of 135-168 months. The defense objects to the PSR and believes the correctly calculated guidelines result in a range of 8 - 14 months. The government also believes the PSR is incorrect and according to its calculations, the guidelines call for a sentence of 168-210 months.

Sadly, this case presents a situation where an elderly man's misguided notions about the propriety of his actions are now twisted and contorted by the government in such a manner as to ignore every other variable in an effort to obtain a sentence which will, in effect, be a life sentence. Under the facts and circumstances of this case, including the numerous factors the Court is required to consider under 18 U.S.C. 3553(a), the guideline range proposed by the government and as suggested by the PSR grossly

exceeds the bounds of reasonableness. This memorandum untangles those contortions by setting forth the bounds of reasonableness and then within those parameters, suggests the reasons and justifications, based both on guidelines analysis and the factors to be considered under 18 U.S.C. 3553(a), as to why a sentence of not more than twelve months and a day is reasonable.

The Bounds of Reasonableness

The reasonableness of a sentence requires that the sentence imposed be sufficient but not greater than necessary to achieve the objectives of sentencing. The objectives are “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.” *Kimbrough v. United States*, ___ U.S. ___, 128 S.Ct. 558, 569 (2007). Within those broad parameters, this Court is tasked with determining what will be sufficient, guided by the factors set forth in 18 U.S.C. 3553(a), one of which is the sentencing guidelines. No longer is this Court *required* to give the guidelines deference. *Gall v. United States*, ___ U.S. ___, 128 S.Ct. 586 (2007); *Kimbrough*, 128 S.Ct. 558. Instead, the guidelines are but one factor, deserving of nothing more than respectable consideration. *United States v. Smart*, 518 F.3d 800, 802 (10th Cir. 2008). Balanced with the other factors, in particular the nature and circumstances of the offense and Mr. Webber himself as well as the disparity between other defendants, the scales tip heavily in favor of a variant sentence. See *Gall*,

128 S.Ct. at 595 (approving a 100% variance in an ordinary, run of the mill drug case).

Application of the Guidelines

One of the factors to be considered by this Court is the guidelines calculation. The calculation in the PSR is summarized here as follows:

Base Offense Level under U.S.S.G. 2B1.1	7
Amount of loss under U.S.S.G. 2B1.1(b)(1)(H)	+14
More than 250 membership applications 2B1.1(b)(2)(C)	+ 6
Vulnerable Victims	+ 2
Role in the Offense	+4
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Total Offense Level	33

The defense objects to this calculation and contends that the properly calculated guidelines would limit the “loss” amount to \$300,000, and should not include enhancements for number of victims or vulnerable victims.

According to the PSR, the loss amount is driven by “government documents” which suggest there was more than \$400,000 in funds received from membership documents. The PSR does not identify those documents or how or why it believes that it was all ill-gotten gain from the memberships. When the KIN bank account was seized, there was approximately \$300,000. See *United States v. Tindall*, 519 F.3d 1057, 1063 (10th Cir. 2008) (requiring the government to prove by a preponderance of the evidence findings necessary to support the enhancement). Critical to the application of this enhancement is that the persons who paid these memberships are actually “victims.” If the persons who are members are illegally in this country, then they too are part of the

illegal activity and can not be both participants and “victims.” The government can not meet its burden of proof to show that each of the persons referenced on the membership applications were “victims” in that they did not know that what they were doing was illegal. Finally, the government can not proven that the members did not receive some sort of benefit from being part of KIN and thus being a member is not the equivalent of being a “victim.” Accordingly, no enhancement under 2B1.1(b)(2) should apply¹.

Finally, the defense contends that the members of this tribe not only are not victims, they are not vulnerable victims. Pursuant to application note 2, this requires proof that the victim(s) were “unusually vulnerable due to age, physical or mental condition...” As argued in the previous objection, the defense disputes that any member was a “victim.” Second, assuming for the sake of argument that someone was a “victim”, there is no evidence to support any unusual vulnerability due to age, physical or mental condition. “[i]n order to classify a victim as ‘vulnerable,’ the sentencing court must make particularized findings of vulnerability. The focus of the inquiry must be on the victim's personal or individual vulnerability.” *United States v. Brunson*, 54 F.3d 673, 676 (10th Cir.1995) (internal quotation marks omitted); see also *United States v. Proffit*, 304 F.3d 1001, 1007 (10th Cir.2002) (“Membership in a class of individuals considered more

¹ In its objections to the PSR, the defense initially suggested that the maximum amount of loss that the government could prove is \$300,000 which was the amount in the KIN bank account when it was seized. Upon further reflection and research, the defense takes the position that the government can not prove that any member is actually a victim and accordingly, no enhancement for loss should apply.

vulnerable than the average individual is insufficient standing alone [to qualify as a vulnerable victim].”). This is exactly the situation here: that somehow because many of the members are illegally in this country or Hispanic, they are somehow more vulnerable. No one was coerced or pressured into becoming a member. No was told that if they didn’t become a member they would be “ratted out” or sent back to Mexico. To the contrary, people were offered a chance, nothing more than a chance, at United States citizenship. This does not make them vulnerable. Thus, no enhancement under 3A1.1 applies.

Under these calculations, this would result in a calculation as follows:

Base Offense Level under U.S.S.G. 2B1.1	7
Role in the Offense	+4
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Total Offense Level	11

Using an offense level of 11 and a criminal history category of I, Mr. Webber’s guideline range is 8-14 months.

In determining whether any enhancement should apply, this Court is urged to use a clear and convincing evidence standard and the defense argues that to use anything less is a violation of Due Process. In *United States v. Watts*, 519 U.S. 148, 156, 117 S.Ct. 633 (1997), the Supreme Court approved the use of acquitted conduct in determining the sentencing guidelines calculation. However, it recognized that there may be

circumstances in which clear and convincing evidence should be the standard of proof, particularly when conduct would serve to dramatically increase the sentence. Comparing the calculation proposed by the defense with the calculation proposed by the PSR/government, the disputed enhancements would serve to elevate Mr. Webber's sentence 2100%! This is the type of extreme circumstance in which the Supreme Court suggested requires a higher burden of proof to avoid violation of the Due Process Clause.

B. Other 18 U.S.C. 3553(a) Factors

_____The guideline proposed by the defense is also consistent with the other factors that this court must consider.

Nature and Circumstances of Offense/Applicability of Different Guideline

Most significant about this case is that it is an immigration fraud case. At its essence, this case involved violations of immigration law in order to allow persons here legally or illegally to become United States citizens, crimes which are ordinarily punished in accordance with U.S.S.G. 2, Part L. However, because the mail was used, this implicated a more harsh guideline under U.S.S.G. 2B1.1 (dealing with loss), even though loss wasn't the primary motive or objective of the offense. Even the government's sentencing memorandum treats this case as an immigration fraud case². In that respect, it is surely relevant to look at how immigration offenses are punished. One need only look as far as plea agreements, PSRs and judgments of the codefendants to see how such

² The government attempts to use an enhancement under application note 3 to 2L1.1(b)(2) even though that is not the guideline used by the PSR.

offenses are treated. While conviction under the immigration statute is certainly no walk in the park, it is much less onerous than mail fraud.

As the government noted, Mr. Webber spent many years attempting to establish an American Indian tribal entity believing in his misguided way, that if he could establish his tribe, it would be a means of potential citizenship. He did things to try and establish the tribe as a legitimate tribe, including membership cards and certificates. The government contends that because tribal members received official looking membership cards and certificates, this somehow makes this a sophisticated operation. This is the equivalent of saying that because someone has nice handwriting, they must be a writer. The two simply don't correlate.

Codefendant Disparity

Mr. Webber was the only defendant out of eleven person defendants to go to trial in this matter. In an apparent effort to avoid that consequence of a mail fraud conviction with the other codefendants, the government negotiated pleas with all other defendants that allowed them to 1) avoid conviction on any mail fraud count which carries a 20 year maximum penalty, and 2) avoid application of U.S.S.G. 2B1.1. Accordingly, the other defendants, notwithstanding their participation in the mail fraud component of this case and their knowing involvement in this scheme to keep illegals or others in the United States, suffered far less severe consequences than what is suggested for Mr. Webber. Punishments have ranged as low as probation to as high as thirteen months.

Notably, neither the presentence investigation report nor the government's sentencing memorandum detail the roles of the others involved. In describing the offense conduct, the PSIR only makes mention of the fact that others were involved without describing their specific conduct. In the government's sentencing memorandum, it just discusses Mr. Webber and others without detailing which codefendant was responsible for what activity. Yet from the evidence presented at trial and the factual bases of the pleas, Mr. Webber was clearly not alone. For the convenience of the Court, counsel has prepared a chart which summarizes not just what the individuals were charged with (which reflects what the government thought they were guilty of), but their admitted wrongdoing, their ultimate pleas and the impact of the agreements on the final determination. See Exhibit A, *Summary of Defendant Dispositions*.

Defendants Debra and Chuck Flynn illustrate this disparity perfectly. Mr. Flynn had the title "tribal chief" and assisted with the processing and handling of membership applications as well as the application "fees" that accompanied the applications. He was charged with the same conspiracy charges as Mr. Webber and many of the same substantive counts. However, by pleading to 8 U.S.C. 1324 (a)(1), he was able to avoid the harsh consequences of a guideline sentence calculated under 2B1.1 and instead, his sentence was calculated under 2L1.1. Ultimately he received a sentence of 12 months and a day. Similarly, Ms. Flynn was designated as the "secretary of state", a high-ranking position in the KIN organization and she sold memberships. In fact, Ms. Flynn was the

primary administrator. She processed and handled membership applications, produced certificates and supervised others in doing so. Like Mr. Flynn, she pled to 8 U.S.C. 1324(a)(1) and received a sentence of 12 months and a day, avoiding the harsh consequences of a sentence calculated under 2B1.1.

The sentences of these codefendants reflects the actual wrongdoing and punishment that should be associated with that wrongdoing. To impose a sentence on Mr. Webber that goes so far beyond what every other coconspirator received would be grossly unjust.

The Need to Protect the Public Is Satisfied with a Sentence of 8-14 months

While recidivism is a concern to be taken seriously, the government's alleged "concern" is inconsistent with the approach it took with every other defendant, including persons like the Flynns and Victor Orellana, all persons with hands-on involvement and despite knowledge that membership in KIN would not equate to U.S. citizenship, continued to participate in tribe membership activities. Furthermore, contrary to the government's purported concern for recidivism, given that Mr. Webber is 70 years old, the likelihood of recidivism following a period of incarceration is reduced . As to persons being released from custody over the age of forty, the risk of recidivism drops dramatically, lessening the need to protect the public from crimes of the defendant. See United States Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 12 ("Recidivism rates decline

relatively consistently as age increases,” from 35.5% under age 21, to 9.5% over age 50), available at www.ussc.gov/publicat/Recidivism_General.pdf. Thus, it is ludicrous to suggest that a person who is 70 years old needs to spend 19 years in custody because the government is concerned what Mr. Webber might do if he got out too soon when not a one of the other defendants will spend more than 13 months in custody. If average life spans are any indication, all the others would have plenty of time to commit more crimes. Moreover, supervised release assures that the Court can monitor Mr. Webber and if a violation were to occur, revoke him and re-incarcerate him. In other words, neither the government’s approach to the wrongdoing of the others involved in this case nor any unique characteristics of Mr. Webber himself support a lengthy sentence. Moreover, statistical data suggests someone of Mr. Webber’s age is NOT likely to be a repeat offender.

Conclusion

The guideline sentence of 8-14 months proposed by the defense is not only a correct application of the sentencing guidelines but it is also consistent with the other sentencing factors. It reflects a sentence that considers the nature of the crime and how others were punished in determining that Mr. Webber should be treated as all the others rather than receive what is tantamount to a life sentence. Accordingly, the defense suggests a sentence of 12 months and a day.

Respectfully Submitted,

ARIAGNO, KERNS, MANK &
WHITE, LLC.

/s/ Kurt P. Kerns

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CERTIFICATE OF SERVICE

I, Kurt P. Kerns, do hereby certify that a true and accurate copy of the foregoing was served on opposing counsel and counsel of record by the ECF system on December 8, 2008.

___/s/ Kurt P. Kerns_____
Kurt P. Kerns

Comparison of Disposition of All Defendants' Cases

Defendant	Original Charges	Count(s) of Conviction	Defendant's Role in the Offense	Impact of Plea	Punishment
Bergman, Britton	10, 17	8 U.S.C. 1324(a)(1): harboring of aliens unlawfully in the United States	<p>In July 2007, within the District of Kansas and elsewhere, defendant Britton A. Bergman was associated with an organization called the Kaweah Indian Nation (KIN), which was selling memberships in the KIN to aliens primarily from Mexico and Central America as a way in which the purchasers supposedly could try to establish themselves lawfully within the United States. The defendant had the title of KIN chief of security. He assisted with the processing and handling of membership applications, and also produced membership certificates and identification cards. These activities occurred primarily in Whichita, Sedgwick County, Kansas. By so doing, the organization's and defendant's actions served to encourage aliens to come to or reside in the United States in reckless disregard of whether their coming to or residing in the United States would be in violation of law.</p>	<p>By pleading to this charge as a Rule 11(c)(1)(C) plea, Mr. Bergman achieved three purposes. First, the maximum statutory penalty was 5 years rather than 20 years under the fraud statute. Second, the guidelines range used was 2L1.1 which had a far more favorable result than application under 2B1.1. Finally, this allowed the (c)(1)(C) plea to be viewed as reasonable because it was somewhat grounded in the guidelines. Initially the agreed sentence was 12 months plus one day.</p>	Two years probation.

Cervantes, Jaime	15, 16	Ct. 15 False representation of a US citizen	On June 8, 2007, the defendant, Jaime Cervantes, signed and submitted to the Wichita, Kansas, office of the Social Security Administration a Form SS-5 "Application for Original Social Security Number Card" upon which he knowingly, intentionally, willfully and falsely claimed to be a citizen of the United states when he was not.	This was a plea pursuant to 11(c)(1)(C) which had an agreed upon sentence of time served.	Time served: approximately 8 ½ months.
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<p>Del Carmen-Zamora, Eduviges</p>	<p>6, 8, 9, 11, 12</p>	<p>18 U.S.C. 4 (misprison)</p>	<p>In 2007 within the District of Kansas, defendant Eduviges del Carmen-Zamora worked for a person named Malcolm L. Webber, the self-described “grand chief” of a so-called Indian Tribe, the Kaweah Indian Nation. Weber sold “memberships” in the “Indian Tribe” to foreign nationals, primary Hispanics like Mrs. Zamora, leading them to believe if they joined his “tribe,” they would be citizens of the United States. When someone applied for a membership, which cost anywhere from \$50 to more than \$1,000, Mrs. Zamora and others would generate a membership certificate and laminated card indicating “citizenship” in the tribe, then provide the certificate and card to the person applying for membership often by sending in the United States mail to the person. Many of the applications were also received by mail, and Mrs. Zamora was among those who processed the mailed-in applications. During the course of her employment in 2007, Mrs. Zamora became aware that the memberships had no value, and that persons receiving the certificates and cards could not become United States citizens merely by joining Webber’s group. Even though these applicants were being defrauded, Mrs. Zamora continued to process the applications and receiving payment from the organization for her services, but no time while she worked there did she attempt to make known what Webber and his organization were doing to a judge or other person in civil or military authority under the United States.</p>	<p>By pleading to this charge, which has a three year statutory cap and the guideline for misprison has a very favorable reduction in the offense level, Ms. Zamora was able to avoid the harsh application of the mail fraud statute.</p>	<p>Time served: approximately four months (on bond but unable to post).</p>
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Flynn, Chuck	3, 4, 5, 9, 10, 11, 12, 17	8 U.S.C. 1324(a)(1): harboring of aliens unlawfully in the United States	<p>In July 2007, in the District of Kansas and elsewhere, defendant Chuck Flynn encouraged aliens to come to or reside in the United States in reckless disregard of the fact that such coming to or residing in the United States was or would be in violation of law. The defendant was associated with an organization called the Kaweah Indian Nation (KIN), which was selling memberships in the KIN to aliens primarily from Mexico and Central America as a way in which the purchasers supposedly could try to establish themselves lawfully within the United States. The defendant had the title of KIN tribal "chief." He assisted with the processing and handling of membership applications as well as the application "fees" that accompanied the applications. These activities occurred primarily in Wichita, Sedgwick County, Kansas. By so doing, the defendant was encouraging aliens to come to or reside in the United States in reckless disregard of whether their coming to or residing in the United States would be in violation of law.</p>	<p>By pleading to this charge as a Rule 11(c)(1)(C) plea, Mr. Flynn achieved two purposes. First, the maximum statutory penalty was 5 years rather than 20 years under the fraud statute. Second, the guidelines range used was 2L1.1 which had a far more favorable result than application under 2B1.1. Finally, this allowed the (c)(1)(C) plea to be viewed as reasonable because it was somewhat grounded in the guidelines. Counts 3,4,5,9,10,11 and 12 were dismissed.</p>	12 months and one day imprisonment .
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Flynn, Debra	3, 4, 5, 9, 10, 11, 12, 17	8 U.S.C. 1324(a)(1)	<p>In 2007 within the District of Kansas, defendant Debra J. Flynn was under the employ of a person named Malcolm L. Webber, the self-described "grand chief" of a so-called Indian Tribe, the Kaweah Indian Nation. Webber and his organization, of which Debra J. Flynn was designated "secretary of state," sold "memberships" in the "Indian tribe" to foreign nationals, who thought that by obtaining the memberships, they could attain a lawful status with the United States. The defendant had various roles in the organization and served as its primary administrator. She assisted with the processing and handling of membership applications, produced membership certificates and identification cards, and supervised others in doing so. She also interacted with others around the United States who were marketing the memberships, including pastors of Hispanic churches many of whose members are not lawfully present in the United States. By September 2007, the organization had sold or received applications from more than 14,000 persons wishing to join the "Kaweah Indian Nation." These activities occurred primarily in Wichita, Sedgwick County, Kansas. The defendant knew that many of the persons who were obtaining "Kaweah Indian Nation" membership were not lawfully present in the United States or recklessly disregarded their probable unlawful status. By directing and participating in the organization's activities, the defendant's actions served to encourage aliens to come to or reside in the United States knowing or in reckless disregard of whether their coming to or residing in the United States would be in violation of law.</p>	By pleading to this charge, Ms. Flynn avoided the consequence of the application under 2B1.1 and instead 2L1.1 was used. Counts 3,4,5,9,10,11,12 and 17 were dismissed.	12 months and 1 day
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<p>Orellana, Victor</p>	<p>Dismissed the Indictment (charged in counts 9, 11, 12 and 17)</p>	<p>18 U.S.C. 4 (misprison)</p>	<p>In 2007 within the District of Kansas and elsewhere, defendant Victor W. Orellana learned through co-defendant Jorge Villareal (now a fugitive from justice) that a group in Wichita, Kansas, was selling memberships in a so-called Indian tribe going by the name Kaweah Indian Nation. Villareal told Orellana that the memberships were a way illegal aliens could obtain U.S. citizenship without going through immigration authorities. Orellana, who was living in Long Beach, California, at the time, is a citizen of Guatemala who has lawful status within the United States. Villareal told Orellana the memberships sold for \$200 plus any additional amount they could sell them for as a "processing fee." Villareal gave Orellana membership applications and Orellana began selling the memberships for around \$600. In June 2007, Long Beach police officers responded to Orellana's residence in Long Beach, where there was a line of Spanish-speaking persons out the door. They told the officers they were there to apply for Indian documents from Orellana. The officers talked to Orellana about what he was doing and ended up seizing \$12,700 in cash from him. Orellana freely admitted he was selling the memberships to illegal aliens based on what Villareal had told him, and that he was not sure whether the process actually would result in U.S. citizenship for those who bought them. Orellana knew that by selling the memberships, he was encouraging the buyers to continue to reside in the United States even though, at the time he was selling the memberships to them, they had no lawful status, which is a felony cognizable by a court of the United States, 8 U.S.C. § 1324(a)(1)(iv). Prior to the officers coming to his house, defendant Orellana had knowingly and intentionally concealed and did not as soon as possible make known the "harboring" crime to a judge or other person in civil or military authority under the United States.</p>	<p>By pleading to a misprison through a Superseding Information, avoided the harsh application of the mail fraud statue.</p>	<p>Time served.</p>
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Pena, Hector	7, 13, 14	Case dismissed.			
Villareal, Jorge	3, 4, 5, 9, 11, 12, 17	Still not arrested			
Williams, Raynal	5, 11	Government dismissed case.			

Zamora, Angel	8, 9,	18 U.S.C. 4 (misprison)	<p>In 2007 within the District of Kansas, defendant Angel O. Zamora occasionally assisted a person named Malcolm L. Webber, the self-described "grand chief" of a so-called Indian Tribe, the Kaweah Indian Nation. In truth, Webber's organization was nothing more than a limited liability company formed by Webber to have the appearance of a legitimate Indian tribe. Webber sold "memberships" in the "Indian Tribe" to foreign nationals, primary Hispanics like Mr. Zamora, leading them to believe if they joined his "tribe," they would be citizens of the United States. When someone applied for a membership, which cost anywhere from \$50 to more than \$1,000, persons working for Webber would generate a membership certificate and laminated card indicating "citizenship" in the tribe, then provide the certificate and card to the person applying for it often by sending in the United States mail to the person. Many of the applications were also received by U.S. Mail, and Mr. Zamora's wife, Eduviges del Carmen-Zamora, was among those who processed the mailed-in applications. Mr. Zamora sometimes helped out at the location where the applications were being processed and the certificates and cards were produced. During the time Mr. Zamora and his wife were associated with Mr. Webber, Mr. Zamora questioned whether the Kaweah memberships had any value and whether the persons receiving the certificates and cards could become United States citizens merely by joining Webber's group, and knew that if the memberships had no value, that the people buying the memberships were being defrauded, and that the U.S. mails were often used to receive applications and send out membership documents. However, at not time did he attempt to make known what Webber and his organization were doing to a judge or other person in civil or military authority under the United States.</p>	<p>By pleading to this charge, which has a three year statutory cap and the guideline for misprison has a very favorable reduction in the offense level, Mr. Zamora was able to avoid the harsh application of the mail fraud statute.</p>	<p>Time served: approximately 13 months.</p>
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