

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(Wichita Docket)

UNITED STATES OF AMERICA,	}	
	}	
Plaintiff,	}	
	}	
vs.	}	Case No. 07-10181-01-WEB
	}	
MALCOLM L. WEBBER, et al.,	}	
	}	
Defendants.	}	

**GOVERNMENT’S KAN. RULE 32.1(c)
AMENDED SENTENCING MEMORANDUM**

Introduction

The United States, having carefully reviewed all aspects of the investigation, indictment, jury trial and conviction of lead defendant Malcolm L. Webber, urges the Court to sentence Mr. Webber to 210 months in prison as reflecting both a properly-calculated “within guidelines” sentence and a sentence that addresses the sentencing factors of 18 U.S.C. § 3553(a), as set out more fully below. This amended¹ sentencing memorandum is submitted by Brent I. Anderson, assistant U.S. attorney.

¹ On December 3, 2008, the U.S. Probation Office distributed the final version of Mr. Webber’s presentence investigation report, corrected to a total offense level of 31 instead of 33, the total offense level in the initial report. The corrected range is 108-135 months. This sentencing memorandum has been amended slightly to comport with the final version, however, the substance of this memo is the same as the one filed before the government received the final version of the PIR; the government’s recommended sentence remains 210 months.

Summary of Memorandum

The presentence investigation report (PIR) puts Mr. Webber's total offense level at 31 (criminal history category I), for an incarceration range of 108-135 months. The United States argues that the appropriate total offense level is at least 35 (a range of 168-210 months), which is arrived at by sustaining the government's objection that the two-level "sophisticated means" enhancement of USSG §2B1.1(b)(9)(C) applies; and departing upward at least two additional levels, as authorized by USSG §5K2.0(a)(3), because this is an exceptional case in which there are circumstances present to a degree not adequately taken into consideration by the present calculation. An offense level of 35 has a range (at CH I) of 168-210 months, and, as explained below, a high-end sentence at offense level 35 of 210 months is consistent with the guidelines and meets the sentencing standards of 18 U.S.C. § 3553(a).

Argument and Authority – Sentencing Guidelines Issues

1. The "sophisticated means" enhancement of USSG §2B1.1(b)(9)(C) applies.

As related in the government's PIR objection, there was substantial if not overwhelming evidence at trial that the defendant's conduct was "especially complex and especially intricate" as to the execution and concealment of the offenses. (Application Note 8 to §2B1.1.) Consider this non-exhaustive list of factors, supported by the trial evidence admitted, in support of this enhancement:

1. Mr. Webber spent more than 25 years attempting to establish himself as some sort of American Indian tribal entity.

2. Mr. Webber openly discussed with his co-conspirators ways in which he could “help” persons unlawfully present in the United States.

3. Mr. Webber used his extensive knowledge of American Indian tribal culture, history and organizational structure to provide a “front” or “cover” for the selling of “memberships” in his made up “tribe” to thousands of illegal aliens. Once he decided to target the undocumented aliens market, he used sophisticated nationwide computer emails to contact the pastors of Hispanic churches, then would send representatives, nationwide, or go himself to the churches to sell aliens on the benefits of joining the Kaweah Indian Tribe, which Webber openly claimed would make the purchasers U.S. citizens eligible to apply for U.S. identification documents and other government benefits, once their Kaweah applications were approved.

4. Mr. Webber used computer automation to create a computer-image template for the Kaweah Indian tribal identification card; he copied the template from authentic recognized tribal identification cards, the original scans of which were found on computer media seized from one of the tribe’s multiple office locations. Then, upon receipt of photographs and information from those seeking membership, the member’s photograph was scanned into Kaweah computers, cropped and scaled so it would fit

the precise size permitted for the membership card, “pasted” electronically, in color, onto the card, then the card, complete with the personal information, was printed out, front and back, then laminated and cut. The membership cards, alone, meet the “sophisticated means” definition.

5. The cards would then be distributed, together with certificates of membership, through multiple means, including the use of the pastor network described above. These memberships were actually logged and categorized in tribal membership books by tribal sub-groups, name and an identifying number, to legitimize the appearance of the organization and its membership. Those aliens who came to Wichita, Kansas, to pick up their cards, saw the “official” Kaweah offices, with all their tribal decorations and signs, tribal cars and “police officers,” and the documents themselves, and in many cases concluded, as some witnesses testified at trial, that the documents and the organization that created them must be legitimate, otherwise, how would they be able to get away with such a public display of their activities and existence.

6. When questions arose about the authenticity of the group, Mr. Webber immediately took steps to further dramatize the organization’s legitimacy (and to conceal its illegitimacy). He sent a “delegation” to the Office of Indian Affairs in Washington, D.C., so he could say they were there to confirm for themselves that his

claims were true. He had a “public affairs” employ, Manuel Urbina, who would tell news reporters of the goings on of the Kaweah “Indian Nation” and that it was a recognized tribe who had the authority to do what it was doing, including the bestowing of memberships which, in turn, gave U.S. citizenship to those who paid their fee and joined. He had representatives meet with lawyers so he could tell people the lawyers would help them if they had any problems with government officials or employers questioning the validity of their documentation.

7. Mr. Webber went so far as to threaten, in writing, state and local government officials who had detained aliens, claiming they were members of a “sovereign” Indian tribe and that those officials were detaining them unlawfully. (See Gov. Exhibits.) He also interjected himself as the Kaweah “grand chief” in child custody and child welfare matters in states outside of Kansas. (*Id.*) All these actions reinforced the perception Mr. Webber had created, that his “tribe” was real, and that its members really were U.S. citizens. Of course, it had no basis whatever, in fact, history or any other semblance of official or recognized existence or, for that matter, unofficial existence. It is best described, as it was by the Office of Indian Affairs in its rejection of the Kaweah application for U.S. government recognition, as nothing more than a loosely organized group of people interested in the history and culture of Native Americans. Mr. Webber himself has no connection by blood to any recognized

American Indian tribe. (Gov. Exhib. 4.)

8. Mr. Webber and his co-conspirators even discussed the purchase of land in New Mexico that the “tribe” could claim as sovereign so that aliens having no status in the United States could stay there until legal status could be obtained. Of course, having no official recognition, the “tribe” would have no power to claim any land as “sovereign.” This was just another of Mr. Webber’s deceptions to lead others to think there was something legitimate or official about what he was doing.

These facts prove, by at least a preponderance of evidence (*See United States v. Gambino-Zavala*, 539 F.3d 1221, 1228 [10th Cir. 2008]), that Mr. Webber’s offense conduct, as well as his attempts to conceal his offenses while they were under way, meets the “sophisticated means” definition. It is understandable that the U.S. Probation Office, which has great wisdom in such matters, is reluctant to apply the enhancement, in that its officers do not have the luxury of being present for the entire trial, nor are complete trial transcripts yet available to them. But a review of the evidence admitted strongly supports application of this enhancement.

The recent Tenth Circuit case of *U.S. v. Jones*, 530 F.3d 1292, 1305-07 (10th Cir. 2008) discusses application of the sophisticated means enhancement in that and other cases in which it has been applied. For example, in the Jones case, the defendant’s produced approximately 100 fraudulent checks as a part of their scheme

to defraud. It wasn't the production of the checks, but the sophistication of how they used as part of the overall scheme, that resulted in proper application of the 2-level enhancement. Jones, 530 F.3d at 1306.

The Jones example, as well as the other examples cited by Jones panel, are rudimentary in their sophistication and intricacy in comparison to Mr. Webber's nationwide Kaweah Indian Nation scheme. Mr. Webber created an entire *government* as part of his scheme to defraud, and his fraudulent conduct was directed not only against those who purchased "memberships" in his supposed governmental entity, but against the United States government and state governments as well. His "government" was complete with a secretary of state, cabinet members, articles of incorporation, multiple offices complete with official seals (and portable seal-embossing equipment), full automation, official-looking signs and banners, an Indian store complete with Kaweah trinkets and merchandise, actual Kaweah Indian Nation license plates, and a police department with vehicles, uniformed officers, badges and guns. When considered *in toto*, the depth and breadth of Mr. Webber's scheme was far more complex and intricate certainly than any Tenth Circuit case has contemplated.

2. An upward departure of at least two levels is authorized by because this is an exceptional case in which there are circumstances present to a degree not

adequately taken into consideration by the present calculation. Mr. Webber's convictions on Counts 1 and 11 for violating 8 U.S.C. § 1324(a)(1)(A)(iv) relate to the more than 10,000 people (the evidence was closer to 12,000), most of whom are unlawfully present in the United States, who bought "memberships" in Mr. Webber's so-called Indian tribe thinking that would allow them to be lawfully present. Under such circumstances, and those discussed in section 1 above, an upward departure of at least two levels is warranted. As is noted in the PIR, although those victimized in this case are "vulnerable victims" as defined by USSG §3A1.1, that two-level enhancement is not applied because the six-level enhancement applicable to "more than 250 victims" was applied (from USSG §2B1.1[b][2][C]). Here, we have thousands and thousands of persons who gave what little money they may have had to Mr. Webber in the hope he could make good on his promise of making them U.S. citizens. Of course, we know it was not possible for him to do that, but the persons Mr. Webber victimized either did not know that or naively believed, in their desperation to stay in the United States, that he somehow could make that happen. The sentencing commission could not have taken such a scenario into consideration in formulating the fraud guideline.

Even a modest upward departure of two or three levels pursuant to §5K2.0(a)(3) (the facts support a much greater departure) places Mr. Webber in a sentencing range

that encompasses the 210 months sought by the United States.

Argument and Authority – § 3553(a) Sentencing Factors

The Court is well-acquainted with the factors it considers in crafting a sentencing sufficient, but not greater than necessary, to address the factors:

- (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;
 - (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;
- (4) the kinds of sentence and the sentencing range established;
- (5) any pertinent policy statement;
- (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. 18 U.S.C. § 3553(a).

As the United States often argues, the sentencing guidelines calculation itself specifically was designed to address and incorporate these factors. Therefore, by definition, a properly-calculated guidelines sentence should meet these standards.

However, even when breaking the factors down, whether done in close concert with or more independently of the sentencing guidelines, the 210-month recommended sentence is sufficient, but not greater than necessary, to address the factors. The PIR sets out in great detail the nature and circumstances of the offense and the history and characteristics of the defendant. The crimes committed are serious, and include conspiracy to defraud the United States. Their nature and scope call for a lengthy sentence so as to promote respect for the law and a just punishment. The defendant and others need to be deterred from similar conduct, which strikes at both highly vulnerable victims, as well as the United States government itself. As stated above, this was an operation that was national in scope and resulted in the defrauding of thousands of people, many of whom are naive about the ways of the United States and desperate for a means – any means – by which they would be able to lawfully remain here. For those who are here lawfully, their status has been impaired by Mr. Webber's actions, because if it is determined that they made a false

claim of U.S. citizenship, which would happen because Mr. Webber led them to believe they gained U.S. citizenship by joining his “tribe,” not only are they subject to removal from the United States, they are banned for life from reapplying for admission. So, by supposedly trying to “help” people, in some cases Mr. Webber has irreparably damaged their ability ever to lawfully apply for U.S. admission.

Conversely, federal, state and local government databases are subverted when false and erroneous information is placed into them. This occurs when people who may think they are U.S. citizens apply for documents like drivers licenses and Social Security cards, or for government benefits, even passports (as the Zamoras and others associated with Webber did). This is but one illustration of the pervasive and subversive nature of Mr. Webber’s crimes and their nefarious consequences. Those who might be inclined to engage in criminal activities similar to those of Mr. Webber need to know that serious consequences await when they are caught and convicted, and the public needs to be protected from such crimes.

As to the issue of possible sentencing disparities, this case is analogous to this Court’s *U.S. v. Alapizco-Valenzuela* case, ___ F.3d ___, 2008 WL 4866609 (10th Cir. 2008), in which the panel explained that in cases in which egregious facts place the defendant in different circumstances from co-defendants and other who have engaged in somewhat similar conduct, a higher sentence is proper and appropriate. (Pp. 21-23

of slip opinion.) While others have engaged in conduct similar to that of Mr. Webber, no one holds a candle to the nature, scope and sheer magnitude of his operation. A long incarceration sentence would protect the public and the government by deterring others from engaging in similar conduct. There are an estimated 20 million foreign nationals unlawfully present in the United States. They need documents and other help in order to maintain that unlawful presence, and they are desperate for it, even if it means paying all their money they may have for something that may be worthless, as was the case with Mr. Webber's phony documents. Criminals, and many people like Mr. Webber who don't consider themselves criminals, stand ready to satisfy and exploit that market, as they do every day. That's another reason the United States seeks a 210-month sentence for Mr. Webber.

Conclusion

Despite Mr. Webber's age and his relatively limited criminal history, the scope of his criminal conduct, when combined with his lack of remorse and unwillingness to acknowledge the criminal nature of his acts; its serious nature, especially in undermining the integrity of governmental systems; and the crucial need that Mr. Webber and others be deterred from future similar conduct; all support the government's request and recommendation that Mr. Webber be sentenced to 210 years in prison. It is especially important that those like Mr. Webber who seek to put

themselves above the law be incapacitated by substantial incarceration.

Respectfully submitted,

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NOTICE OF ELECTRONIC FILING

I certify that on December 9, 2008, I electronically filed this Memorandum using the CM/ECF system, which will send a notice of electronic filing to the attorneys of record herein.

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