

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. CR 12-96 RB
)	
DOUGLAS J. KUESTER,)	
)	
Defendant.)	

GOVERNMENT’S SENTENCING MEMORANDUM

The United States of America, by its undersigned counsel, respectfully submits this memorandum for the sentencing of Defendant Douglas Kuester. The government believes that a sentence of 48 months imprisonment, as called for by the plea agreement in this case, is the appropriate sentence under 18 U.S.C. § 3553(a). The government therefore respectfully requests that the Court accept the plea agreement and sentence Kuester to 48 months of incarceration.

Procedural History

On January 18, 2012, Kuester was indicted on a number of charges all arising of a long-term scheme to file fraudulent tax returns. On May 11, he pled guilty, pursuant to a plea agreement, to one count each of filing false claims (18 U.S.C. § 287) and aggravated identity theft (18 U.S.C. § 1028A). As part of that agreement, the United States and the defendant agreed, under Federal Rule of Criminal Procedure 11(c)(1)(C), that a sentence of 48 months imprisonment was the appropriate sentence in this case. *See* Plea Agreement ¶ 14(a) (Doc. 32).

The presentence report (PSR) prepared for Kuester concluded that the final offense level was 19 and that his criminal history category was I. *See* PSR ¶¶ 70, 75. This resulted in a guidelines range of 30-37 months. Combined with a mandatory, consecutive sentence of 24 months for the § 1028A charge, the low-end of the guidelines would be 54 months, six months longer than the sentence called for by the plea agreement in this case.

On October 18, the Court held a sentencing hearing in this case, but continued the hearing to take the case under further advisement and to decide whether to accept the plea agreement. The Court invited the parties to file sentencing memoranda. In this memorandum, the United States will address some of the particular concerns raised by the Court, as well as another pertinent feature or two of the case, and explain why the government believes that the sentence it negotiated with Kuester represents a just and appropriate sentence under § 3553(a).

Factual Background

The essence of Kuester's crimes is relatively straightforward. Using people's names, Social Security numbers, and dates of birth, Kuester would file false federal income tax returns to fraudulently generate undeserved tax refunds. The PSR in this case lays out the facts in detail and there is no need to repeat them here. Rather, the government would highlight a particular feature of Kuester's crimes that is especially relevant to the appropriate sentence: Kuester's scheme was not what might be considered a "pure" identity theft scheme.

By this, the government means that while some individuals who had their personal information used were certainly victims of identity theft, there were also others

who appeared to be complicit to one degree or another and to have perhaps knowingly provided their information to Kuester. And even for those who asserted they were true victims, there is often quite a bit of grist for cross-examination. For example, one victim admits that Kuester tried to give her a check for her refund, but denied knowing before then that Kuester had filed a return in her name, *see* PSR ¶ 10, while another victim admitted to cashing refund checks for Kuester on other occasions, *see id.* ¶ 38. The case is thus not simply one in which stolen identities are used to file false tax returns in order to steal money. That is definitely part of what Kuester did, but the full story is more complicated and involves a mix of true victims and individuals with various degree of culpability. It is against this backdrop that the case needs to be understood.

The Proper Sentence

Based on the Court's concerns at the first sentencing hearing, the United States believes there are three areas it would be fruitful to address here: 1) whether Kuester retained any of the proceeds of the offense; 2) some of the litigation hazards associated with this case; and 3) how the proposed sentence compares with the sentences defendants received in similar cases.

When all the facts are considered, the United States believes that a sentence of 48 months is appropriate. This sentence would be a small downward variance of only six months. In these circumstances, that minor variance is justified and appropriate. *See United States v. Huckins*, 529 F.3d 1312, 1317-18 (10th Cir. 2008)(observing that degree of justification needed for variance turns on degree of variance and that extraordinary circumstances are not required for a variance).

A. There is No Evidence Kuester Has Hidden Proceeds

Kuester's scheme resulted in hundreds of thousands being paid out by the Treasury. Yet the United States has recovered almost nothing of this amount. One issue the Court raised at the hearing was comments that Kuester made in a recorded jailhouse phone call indicating he had cash in his house. *See* PSR ¶ 101. While Kuester did reference having some money at home, his conversations did not indicate that it was anything substantial. In fact, the conversation actually seems to have concerned an uncashed check that Kuester had at home, rather than fraud proceeds. Had there been any firm indications Kuester retained proceeds, the United States assures the Court that it would already have sought a search and seizure warrant in an effort to obtain them.

There is no reason to believe that Kuester has retained any of the proceeds of his scheme. Before the indictment, a search warrant was executed at Kuester's home and that uncovered little in the way of proceeds. Currently, Kuester is being detained, not because the United States' motion for detention was granted, but because he has been unable to come up with the \$10,000 needed to post bond. *See* Order Setting Conditions of Release at 1 (Doc. 23). If Kuester had the funds, he probably would have been willing to post the \$10,000 bond to secure his release pending trial. And \$10,000 is not such a large amount, especially compared to the amount stolen, that it would have raised any red flags about him still having much of the money. In other words, it seems unlikely there would be any reason for Kuester to not post bond if he actually had significant stolen funds left. Furthermore, Kuester's other phone calls in jail indicate that he lacks resources and he has had several conversations about trying to find a way to post bond. These conversations underscore that it appears Kuester has no hidden funds.

The disappearance of so much money with so little trace is, unfortunately, not uncommon. Individuals involved in this type of crime often spend the money almost as fast as they get it, on parties, drugs, and other fleeting pleasures, without ever accumulating anything permanent except the occasional fancy car, bit of jewelry, or big flatscreen TV. Kuester's fraud spanned several years and, moreover, there are at least some individuals who were complicit and getting some of the refund money themselves. Unfortunately, the United States has actually seen more money disappear in less time. In short, there is nothing to indicate that Kuester is continuing to hide any substantial sums that he gained from the scheme.

B. The Risks of the Case Support the Proposed Sentence

At least some of the individuals whose identities were used by Kuester to file tax returns were complicit in the scheme and may have willingly provided their personal information to Kuester. And many others who had their identities used, including a number of those who would have been government witnesses at trial, had various degrees of baggage, including past associations with Kuester and criminal records. While the United States believes that it would have convicted Kuester at trial, there was nonetheless at least some litigation risk to this case, especially with respect to the aggravated identity theft charges, which are the charges carrying a mandatory, consecutive sentence.

The government is confident the evidence would have shown that, as a legal matter, the individuals' means of identification was used without lawful authority. But in light of the witnesses' backgrounds, or out of a suspicion of complicity in the crimes, jurors might well view them as not being classic identity theft victims and hence acquit on charges that are after all labeled "aggravated identity theft" charges. This sort of

litigation risk is one of the factors bearing on the parties' negotiated resolution of 48 months as an appropriate sentence. An acquittal that would be unwarranted (as the guilty plea indicates) is detrimental to the interests of deterrence and respect for the law. *See* 18 U.S.C. § 3553(a)(2)(A), (B). Such risk is thus an appropriate factor that the Court can consider in deciding whether to accept the plea agreement and the sentence it requires. *See, e.g., United States v. Summers*, 506 F.Supp.2d 686, 698-99 (D. N.M. 2007) (Browning, J.).

In a related vein, the government would note that, as a matter of policy, it required Kuester to plead guilty to one count of aggravated identity theft. But had the plea instead been simply to a single count of § 287, the guidelines range would have been just 30 to 37 months and a proposed sentence of 48 months would actually be 11 months greater than the high-end of the guidelines. This too should be considered and further underscores, in light of the risks associated with the § 1028A charges at trial, that 48 months is not an unduly lenient sentence.

C. The Proposed Sentence Does Not Create Unwarranted Disparities

Finally, the government believes that the Court imposing a sentence of 48 months in this case would not create unwarranted disparities. *See* 18 U.S.C. § 3553(a)(6). While the District of New Mexico has of course seen fraud cases before, this particular type of tax fraud scheme is one that is rare in the district (and this may be the first of its kind here). For better or for worse, however, there is a sample of cases from other districts for comparison.

In particular, the undersigned would point to some cases in the Middle District of Alabama, which is a district with one of the heaviest caseloads of this particular type of

fraud. In the undersigned's experience, sentences for those who plead guilty in these cases are typically at the low-end of the guidelines, or occasionally, below-guidelines sentences of perhaps a one-third or less variance from the guidelines range. Two cases most closely analogous to the present case are those of *Ora Mae Adamson*, Case No. 2:10-cr-199 (M.D. AL), and *Jeffrey Leon Ceaser*, Case No. 2:10-cr-197 (M.D. AL). Like this case, those cases (actually separate pleas by two co-conspirators) concern a scheme that involved a mix of genuine identity theft victims and "victims" who appear to have been more complicit. Adamson, who was the leader of the conspiracy and received a 4-level role enhancement, received a sentence of 46 months, while Ceaser, who provided much of the identity information to Adamson (which he obtained from both true theft and from complicit individuals), received a downward variance from 46 months to a sentence of 36 months. Thus, the sentence proposed here is not out of line with similar cases.

The United States also understands that Kuester will be submitting further data about average sentences that reinforces that the proposed sentence would not create unwarranted disparities. The United States believes that this further information is fair and accurate, particularly given the nature of this case.

For the reasons above, the United States believes that a sentence of 48 months accurately reflects the sentencing factors laid out by Congress in 18 U.S.C. § 3553(a). Accordingly, the United States respectfully requests that the Court accept the plea agreement in this case.

Respectfully submitted,

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By: Electronically filed 11/6/12

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I HEREBY CERTIFY that a true and correct copy
of the foregoing was electronically served
on all counsel of record upon this 6th day of November,
2012, via the Court's CM/ECF automated filing system.

Electronically filed 11/6/12
Jason Poole
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