UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 07 CR 18
	)	
JOHN THOMAS AMBROSE	)	Judge John F. Grady

GOVERNMENT'S RESPONSE TO THE PRESENTENCE INVESTIGATION REPORT

The United States of America, by its attorney, PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, hereby submits its Response to the United States Probation Officer's Presentence Investigation Report ("PSR"). The government stands on the factual and legal arguments made in its Government Version of the Offense, and will therefore only address those specific issues the PSR raised.

1. Defendant's Fingerprints Found on WITSEC Application, Not on Transcript

On lines 88-89, the PSR states "defendant's fingerprints were found on highly-confidential documents (including a transcript of testimony given by Nicholas W. Calabrese) maintained by the WITSEC personnel . . . ." In fact, defendant's fingerprints were found on Nicholas Calabrese's WITSEC Application, not on transcripts.[1] The PSR at lines 88-89 should therefore be corrected to read "defendant's fingerprints were found on highly-confidential documents (specifically, Nicholas Calabrese's WITSEC Application) maintained by the WITSEC personnel."

2. Loss Calculations

The PSR, on lines 136-167, states that "[t]he government makes a compelling argument that the ability to learn about Nicholas W. Calabrese's cooperation – and then to be able to react to such

[1]One of defendant's fingerprints was found on the back of the signature page of Calabrese's WITSEC application. The other print was found on a facsimile transmission cover sheet.

cooperation – was . . . worth *at least* $240,000 to the Outfit, so this is an appropriate loss figure." (Citation and quotation omitted) (emphasis added). The PSR, however, declines to use $240,000 as the appropriate loss figure because (1) the government is not a "person," and (2) the loss of information was not "monetary." *See* PSR at 162-167 (noting, in part, that the indictment charged that "defendant stole *information* from the government (the victim) . . . While there is no question that the defendant's conduct caused substantial harm, there is no evidence to date that the government has incurred any monetary loss as a result of the defendant's conduct. Because there is *no identifiable victim* who sustained pecuniary loss, [no § 2B1.1(b) enhancement is appropriate]."") (Emphasis in original.). The government, for the reasons set forth below, disagrees with this analysis.

A. *Government Qualifies as a Guideline § 2B1.1 "Victim"*

As an initial matter, the Guidelines clearly contemplate the government as a "victim" for 2B1.1 loss-calculation purposes. For example, the Application Notes to § 2B1.1 provide that "'[p]erson' includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies." *See* U.S.S.G. § 2B1.1, Application Note 1. Even more on point, Application Note 3(A)(v)(II) explicitly discusses an analogous situation, namely, procurement fraud involving a *government* defense contractor, noting that "[i]n the case of a procurement fraud, such as a fraud affecting a *defense contract* award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of *repairing or correcting* the procurement action affected . . . .). *See* U.S.S.G. § 2B1.1, Application Note 3(A)(v)(II) (Emphasis added); *see also* U.S.S.G. § 2B1.1, Application Note 3(F)(ii) (discussing loss in context of cases "involving government benefits"). The caselaw indeed confirms that the

government qualifies as a "harmed" victim for 2B1.1(b)(1) loss-calculation purposes. *See, e.g., United States v. Moore*, 991 F.2d 409, 412 (7th Cir.1993) (calculating 2B1.1 loss amount in case where government was the victim because defendant embezzled public funds through food-stamp fraud); *United States v. Coviello*, 225 F.3d 54, 55, 65 (1st Cir. 2000) ("Courts have noted that market value is inadequate in cases where the products--such as government documents--have no market value."), *citing United States v. Berkowitz*, 927 F.2d 1376, 1390 (7th Cir. 1991); *United States v. Gottfried*, 58 F.3d 648, 651 (D.C. Cir. 1995) (government documents, with no obvious market value, must be valued on the basis of replacement costs). It is, therefore, well-settled that the government can be a "victim" for Guideline § 2B1.1 loss-calculation purposes.

B. *Defendant's Theft of Information Caused Government a Cognizable Loss*

As noted above, the PSR finds "compelling" the government's position that the stolen information was worth at least $240,000 to the recipients of the information. *See* PSR at lines 153-156. The PSR, however, takes the position that the government, for § 2B1.1(b)(1) calculation-of-loss purposes, did not incur any "monetary loss" because defendant only stole "*information*" from the government, *see id.* at line 161 (emphasis in original).

As this Court held in the instant case, the information defendant stole from the government constitutes a "thing of value." *See* Doc. #81; s*ee also United States v. Howard*, 30 F.3d 871, 874 (7th Cir. 1994) ("*Intangible property* may unquestionably belong to the government.") (Emphasis added.); *United States v. Croft*, 750 F.2d 1354, 1360-62 (7th Cir. 1984) ("[W]e adopt the logical construction of section 641 mandated by the Supreme Court in *Morissette* and this court in *Bailey*, and hold that the services rendered y [EPA contractor] Laurel Johnson . . . do constitute a "thing of value" under 18 U.S.C. § 641."); *United States v. Jordan*, 2009 WL 2900710 (11th Cir. Sept. 11,

2009) (private attorney charged with violating 18 U.S.C. § 641 for converting National Crime Information Center records/information to his own use); *United States v. Herrera-Martinez*, 525 F.3d 60, 63 (1st Cir. 2008) ("[R]eading the statute to require asportation would perforce limit § 641 to tangible property, as intangibles cannot be carried away. This reading of the statute is too narrow and is contradicted by the great weight of authority.").

Moreover, the PSR does not dispute – and the caselaw in fact clearly endorses – the "thieves market" as an alternative method of determining the loss in a case such as this. *See generally United States v. Oberhardt*, 887 F.2d 790, 792 (7th Cir. 1989) ("It is now well settled that the valuation of stolen goods according to the concept of a 'thieves' market' is an appropriate method for determining the 'market value' of goods for the purposes of § 641."), *cited in United States v. Armstead*, 524 F.3d 442, 446 (4th Cir. 2008). This method of valuation is premised on the principle that the "value of property taken . . . is an indicator of . . . the harm to the victim . . . ." *United States v. Warshawsky*, 20 F.3d 204, 212 (1994) ("Where the market value [of the stolen item] is difficult to ascertain or inadequate to measure harm to the victim, the court may measure loss in some [non-market] way, such as reasonable replacement costs to the victim," *citing* Guideline § 2B1.1, comment); *see also United States v. Wilson*, 900 F.2d 1350, 1356 (9th Cir. 1990) ("This policy is particularly appropriate in the context of the Guidelines because 'value' under the Guidelines is an indicator of both the harm to the victim and the gain to the defendant.") (citation and quotation omitted). In cases, as here, where the retail market value of the stolen thing of value is not readily ascertainable, "the standard test [is to determine] the price a willing buyer would pay . . . at any time during the receipt or concealment of the stolen property." *Warshawsky*, 20 F.3d 204 at 213 (citations and quotation omitted). The fact that valuing the stolen information is not straight-

forward, and can be achieved using different methodologies, *see* Government Version at 42-46, does not support the PSR's conclusion that there consequently is *no* intended loss. To the contrary,

> [i]f the sentencing court concludes that the market value inadequately measures the harm or the gain, then the court *must select* some appropriate alternative valuation technique.

Warshawsky, 20 F.3d at 213 (emphasis added); *see also* Guideline § 2B1.1, Application Note 3B ("The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.").

As noted at the outset, the PSR's conclusion that the theft of information, as opposed to something tangible, cannot be valued under 2B1.1(b)(1) is not legally or logically supported. *See id.*; *see also* U.S.S.G. § 2B1.1, Application Note 9 (addressing loss issues in the context of identity theft); *United States v. Havens*, 424 F.3d 535, 538-39 (2005) (same); *Jordan*, 2009 WL 2900710, at *3 (finding that value of stolen NCIC records did not exceed $1,000). Indeed, if the PSR is right, then the counter-intuitive result would be that, even though the Seventh Circuit has held ruled the theft of information is violative of § 641, the value of the information is in all such cases irrelevant for purposes of § 2B1.1(b)(1)'s loss calculations. *Compare United States v. Bailey*, 734 F.2d 296, 304 (7th Cir. 1984) ("[T]he purpose of § 641 . . . is to provide a sanction for intentional conduct by which a person either misappropriates or obtains a wrongful advantage from government property.").

Here, defendant clearly stole a thing to which the defendant was not entitled (namely, highly-sensitive information), and PSR agrees that this thing (information about the fact of, and nature of, Nicholas Calabrese's cooperation) was worth *at least* $240,000 on the thieves market. Therefore,

pursuant to Guideline § 2B1.1(b)(1)(G), defendant's total offense level must, at a minimum, be increased by 12.

C. *Upward Departures Warranted*

The PSR accurately recognizes that Application Note 19 of Guideline § 2B1.1 provides for an upward departure if the offense level understates the seriousness of the offense. *See* PSR at lines 528-557.[2] The PSR concludes that:

> [A] plethora of non-monetary harm was caused [to the government], including, but not limited to: irreparable damage to the reputation of the United States Marshal[]s Service and its officers, risk to the current and future participants of the WITSEC program, future costs associated with training and policy development within the United States Marshals Service, potential grave danger for Nicholas W. Calabrese and his family, endangerment to the witnesses housed at the safe site and those employed at the location, and an overall public distrust of law enforcement.

Id. at lines 5398-44. The PSR also points to another valid justification for an upward departure, namely, § 2K2.7 ("considerable disruption of a governmental function"), *see id.* at 545-57. Providing added support for the PSR's position, in *United States v. Robie*, 166 F.3d 444 (2nd Cir 1999), the defendant stole misprinted stamps with no value to the Postal Service. Although the court found "no [monetary] 'loss' for Guidelines purposes" resulting from the theft of the misprinted stamps, *id.* at 455, the court noted that there was a "real but intangible loss in the form of embarassment and the appearance of incompetence inflicted on the Postal Service as a result [of the

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[2]In addition to the information concerning the foreseeable impact of defendant's conduct contained in the Government Version at 43-54; the WITSEC Director's Letter to the Court attached to the Government's Version; and the PSR at lines 162-63, 173-95, 204-24, and 538-57, the United States Marshal's Service on October 14, 2009, advised that defendant's crime forced it to initiate an extensive preventative administrative program, requiring more than 200 hours of government executive time to review, revise, and implement non-disclosure agreements, and to travel to various locations in order to discuss and train Deputy United States Marshal's on the new procedures. The United States Marshal's Service estimates the costs of these efforts, necessitated by defendant's criminal conduct, to exceed $40,000.

thefts]," *id.* at 456. The court held these circumstances justified an upward departure. In the instant case, defendant's conduct caused similar – and in fact far greater – reputational damage to the United States Marshal's Service, thus additionally putting Guideline § 2B1.1, Application Notes 19(A)(I), (ii), and (iv) into play as additional available grounds for upward departure. *See also United States v. Medford*, 194 F.3d 419, 425 (3rd Cir. 1999) (authorizing upward departure where intangible value of cultural objects stolen from museum was not adequately accounted for by market valuation). The facts of this case, and the caselaw, support both upward departures, whether standing alone, or should the Court reject the government's above analysis and conclude that the government suffered no cognizable harm for sentencing purposes.

3. Abuse of Trust Enhancement

Turning finally to the issue of abuse of trust, as discussed below, the PSR should be amended to state more explicitly that the PSR takes no position on whether defendant told the truth during his suppression hearing testimony. The government, furthermore, challenges the PSR's conclusion that defendant's failure to *successfully* obstruct the investigation makes him ineligible for § 3C1.1's obstruction enhancement.

A. Clarification Concerning PSR's Not Taking Position on Truthfulness of Defendant's Sworn Testimony During Sentencing

The PSR at the outset accurately notes the government's position that defendant attempted to obstruct justice by (1) not telling the truth during his suppression hearing testimony, and, *alternatively*, by (2) providing false statements to the FBI during his debriefing." *See* PSR at 109-122 (emphasis added); *see also id.* at 225-28. The PSR goes on to conclude, however, that because the false statements to the FBI purportedly did not *in fact* impact the instant investigation into defendant's criminal conduct, no obstruction enhancement pertains, *see id.* at 236-240 (concluding

that 3C1.1 enhancement is not warranted because the FBI agent who was interviewed advise that defendant's false statements did not in fact adversely impact the instant investigation).

The government disagrees with the PSR's conclusion that defendant's false statements to law enforcement need to have *in fact* adversely impacted the investigation into defendant's criminal conduct. As the language of the Guidelines, as well as the caselaw, amply demonstrate, all that is required is for the government to establish that defendant "*attempted* to obstruct or impede," Guideline § 3C1.1 (emphasis added), the progress of the investigation into his conduct. *See generally United States v. Garner*, 454 F.3d 743, 750 (7th Cir. 2006) (approving of obstruction enhancement in case where defendant "attempted" to cause another to lie to investigators); *United States v. Owens*, 308 F.3d 791, 795 (7th Cir. 2002) ("[Defendant's]' pre-trial statements to the police were an *attempt* to waste valuable police resources by setting the police on a wild goose chase for a helmet-clad car thief who did not exist . . . .") (Emphasis added); *United States v. Gaddy*, 909 F.2d 196, 199 (7th Cir. 1990) (because § 3C1.1 applies to attempts to obstruct justice as well as actual obstruction, court rejected defendant's claim that lie had no impact on investigation), *cited in United States v. Harrison*, 42 F.3d 427, 430 (7th Cir. 1994) ("Whether the magistrate judge ultimately relied on [defendant's false statements concerning his] parole status in ordering his detention is not relevant to the application of the [obstruction] enhancement."). In the context of the investigation, defendant's false denials of knowledge and involvement in the instant offense constitute an attempt to obstruct justice (that is, they represent defendant's attempt to falsely persuade government investigators that his actions were innocent, and that he should not be charged with any wrong-doing); this is all that § 3C.1 requires.

The government, furthermore, understands the Probation Office's long-standing policy of not taking a position on whether a witness testified falsely. However, the PSR for clarity-sake should at lines 239-40 and 257-58 be amended to read, in keeping with the language found in lines 114-16), as follows: "Therefore, an enhancement, pursuant to 3C1.1, based on defendant's allegedly false statements to the FBI is not warranted; should this Court determine that the defendant's sworn testimony during the suppression hearing was an attempt to obstruct the administration of justice, the two-level enhancement would apply."

Respectfully submitted,

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CERTIFICATE OF SERVICE

T. MARKUS FUNK, an Assistant United States Attorney assigned to the instant matter, hereby certifies that the attached GOVERNMENT'S RESPONSE TO THE PRESENTENCE INVESTIGATION REPORT was served on October 15, 2009, in accordance with FED. R. CRIM. P. 49, FED. R. CIV. P. 5, LR 5.5, and the General Order on Electronic Case Filing (ECF) pursuant to the district court's system as to ECF filers.

s/ T. Markus Funk
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