

March 11, 2009

The Honorable Ricardo H. Hinojosa, Acting Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Hinojosa,

The Victim Advisory Group (VAG) to the Commission met in Washington, D.C. on February 23, 2009 to discuss the Proposed Amendments to the Sentencing Guidelines published on January 27, 2009. After excellent presentations by the Commission's Staff, review of the written proposals and discussion amongst the members of the VAG, the VAG makes the following suggestions concerning the Amendments.

Proposed Amendment 1. Identity Theft Restitution and Enforcement Act of 2008.

The VAG states at the outset that the VAG considers factor (L) – Whether the term “Victim” Includes Individuals Whose Privacy was Violated as a Result of the Offense – to be the most important and relevant issue. The VAG emphatically agrees that these individuals should be counted as victims for these offenses. Nevertheless, for convenience purposes of this letter, the VAG responds to the Identity Theft factors in the order they are presented.

(D) – Intent to Cause Either Physical or Property Harm in Committing the Offense

Issue for Comment # 3

As reflected in the materials, there is a split within the Circuit regarding whether an individual who is fully reimbursed for a financial loss is a “victim” for the purposes of §2B1.1(b)(2).

- The VAG recommends that the legal fiction that a victim is not a victim if the victim is fully reimbursed be resolved by counting a person as a victim even if the victim is fully reimbursed.

The existing language is unclear. This has caused the split among the Circuits. A person who even for a short period has a financial loss is a victim and should be counted as a victim. By analogy, if an individual had his car stolen and his insurance company paid the reasonable value of the vehicle, some circuits would find that he was not a victim. This is an unrealistic assumption as he may have had to pay for rental cars, cabs, and public transportation and/or

lost other opportunities from not having his car in addition to the aggravation which occurred. Not counting a victim as a victim because someone later reimbursed the victim discounts the criminal conduct that adversely impacted the individual.

As such, for purposes of §2B1.1(b)(2) the VAG urges the commission to adopt the reasoning of the Eleventh Circuit in *United States v. Lee*, 427 F. 3d 881, 895 (11th Cir. 2005). That case stands for the proposition that the remedial efforts of one victim should not eliminate the victim status of another victim.

(E) – Extent to Which the Offense Violated the Privacy Rights of Individuals

- The VAG recommends that when “personal information” is accessed, obtained, or transferred, that there should be an enhanced specific offenses characteristic. Moreover when there is a substantial harm to a victim beyond just the mere access, obtaining, or transferring the “personal information”, an upward departure is also warranted.

In many cases, one may be able to quantify the extent of the privacy violation by the number of victims whose personal information has been accessed. However when a victim’s “personal information” has been used causing substantial harm to a victim, the actual harm caused to a victim should result in an upward departure.

(I) – Intent to Cause Injury

- The VAG recommends that injury be expanded from “serious bodily injury” to any physical, mental, or emotional injury.

The existing guidelines focus on serious bodily injury. Injury and the intent to cause injury may not be limited to serious bodily injury. The Commission should consider amending the guidelines to permit enhancements for any injury and not just when the intent is for serious bodily injury.

(K) – Disaggregate Intent to Cause Damage or Obtain Personal Information

- The VAG believes that the intent to cause damage or the intent to obtain information should be a factor to other offenses.

The intent to cause damage and the intent to obtain personal information is an objective factor that should not be limited to 18 U.S.C. § 1030 offenses. This conduct is an aggravating factor and should apply to other offenses where the defendant intended to cause damage or intended to obtain “personal information.”

(L) – Should the Term “Victim” as Used in §2B1.1 Include Individuals Whose Privacy was Violated.

- The priority recommendation of the VAG is to urge that victims whose “personal information” has been accessed, obtained, or transferred be considered as victims in §2B1.1.

While acknowledging the historic use under the guidelines of suffering monetary harm under §2B1.1, there needs to be a realization that there is a direct and proximate harm to victims where the victim’s “personal information” has been accessed, obtained, or transferred. For offenses like identity theft even without a monetary loss, victims may have to remediate the consequences of their victimization. Congress now expressly allows these victims to obtain restitution and the guidelines needs to be consistent in considering these victims as victims under §2B1.1.

(M) – Disclosure of Personal Information During the Commission of the Offenses

- The VAG recommends that disclosing or transferring “personal information” be a specific enhancement under the guidelines. Moreover when there is a substantial harm to a victim beyond just the mere disclosing, transferring, or disseminating, the “personal information”, an upward departure is also warranted.

In many cases, one may be able to quantify the extent by number of victim whose personal information has been disclosed, transferred, or disseminated. However when a victim’s “personal information” has been used causing substantial harm to a victim, the actual harm caused to a victim should result in an upwards departure.

(N) – Other Issues

- The VAG does not recommend that the Commission create a new guideline for identity theft at this time, but does recommend the Commission further consider the cases where the defendant has created large number of victims through accessing, obtaining, disseminating, or transmitting “personal information” of victims.

When considering cases where there are mass victims such as the Countrywide identity theft case, (see “Another Insider Busted: Countrywide Financial Analyst” (Aug. 3, 2008), *available at* <http://garwarner.blogspot.com/2008/08/another-insider-busted.html>, attached here) (20,000 victims per weekend and a possible total estimate of 2,000,000 victims), the VAG urges the Commission to seriously consider the adverse consequences to multiple number of victims and have applicable enhancements for the large scale criminal data breaches. Because identity theft charges may be charged alternative under other charges and the charging practice by US

Attorneys do not always include charges for identity theft, it may not make sense to have a new sentencing guideline exclusively for identity theft at this time.

Proposed Amendment 7. This Proposed Amendment addresses a circuit conflict regarding the “undue influence” enhancement in various provisions of the Guidelines.

The VAG strongly recommends that the Commission adopt Option 1, which tracks the Eleventh Circuit’s interpretation of the enhancement in *United States v. Root*, 296 F.3d 1222 (11th Cir. 2002). The VAG’s recommendation reflects its observation that the Eleventh Circuit approach places responsibility where it belongs – on the offender, rather than the victim. The 11th Circuit’s approach to focusing on the offender and their test whether an offender’s conduct displays an abuse of superior knowledge, influence, resources, position of power or superior status.

The VAG also has a concern about the Commission’s use of the term “undue influence” to differentiate sexual assault crimes against minors. The use of “undue” influence shifts the focus from the offender to the status of the victim. The use of “undue” implies an inquiry into whether some minor victims of the offenses victims are more or less worthy. In the view of the VAG, all influence in this context is “undue.” To the extent such distinctions are warranted, they should be explicitly based on the offender’s status rather than the victim. The 11th Circuit’s opinion in *United States v. Root*, 296 F.3d 1222 (11th Cir. 2002), that focuses properly on the offender, is suggestive of a viable approach.

The VAG urges the Commission to address this issue in the present cycle.

Proposed Amendment 4. Court Security Improvement Act of 2007.

The VAG encourages the Commission to recognize that crimes where the victim suffers personal harm because of their role in the administration of justice are very significant. Crime victims rely on the courts and the executive branch officials to ensure that some measure of justice is achieved. When people working for those institutions are targeted, not only does the individual victim suffer personal harm, but all victims are potentially harmed as well.

The classification of these offenses under the Guidelines should be as crimes against persons except where they are expressly against property. For consistency of application to 18 U.S.C. § 1512, and to reflect harm against persons, crimes in 18 U.S.C. § 1513 should fall be referenced to the appropriate guidelines under Chapter 2, Part A, Offenses Against the Person rather than §2J1.2, Obstruction of Justice. If there is an applicable enhancement under §3C1.1, it should be used to reflect the additional harm of committing a violent offense or property offense in order to retaliate.

The VAG further suggests that where 18 U.S.C. § 115(a)(1)(B) (threats against an official) is violated, an enhancement should exist where such threat is intentionally or recklessly disseminated to the public or made publically available, by internet or otherwise. In the view of the VAG it is the public dissemination, rather that the mode of dissemination, that should be the focus of enhancement.

Proposed Amendment 5. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008.

Assuming the Commission has adequate information the Commission should endeavor to resolve this significant disparity in this amendment cycle.

The VAG recommends that the offense of harboring an alien for the furtherance of prostitution currently referenced to §2L1.1 (providing a base offense level of 12 for harboring) should be consistent with the commercial sex guidelines at §§2G1.1 (Promoting a Commercial Sex Act) (base offense level 34-14) and 2G1.3 (Promoting a Commercial Sex Act with a Minor) (base offense level 24-34). The VAG also notes that §2H4.1 (Peonage, Involuntary Servitude and Slave Trade) which has a base level of offense of 14 should also have a consistent base level with §2G1.1 and §2G1.3.

The VAG recommends that the measure of harm to victims should not take into account whether they are illegal non-citizens. The victims suffer the same harm and sentencing should reflect the conduct of the offender, rather than the nationality status of the victim.

Closing

The VAG thanks the Commission for the opportunity to comment. Should you have questions or need clarification, please do not hesitate to contact us.

Respectfully,
Victims Advisory Group

cc:
Hon. Ruben Castillo, Vice Chair
Hon. William K. Sessions III, Vice Chair
Commissioner William B. Carr, Vice Chair
Commissioner Dabney Friedrich
Commissioner Beryl A. Howell
Commissioner Ex Officio Edward F. Reily, Jr.
Commissioner Ex Officio Jonathan J. Wroblewski

CyberCrime & Doing Time

A Blog about Cyber Crime and related Justice Issues

Sunday, August 03, 2008

Another Insider Busted: Countrywide Financial Analyst
(updated with new information)

Rene Rebollo, a 36 year old former Countrywide employee from Pasadena, has been charged by the FBI and taken into custody with a co-conspirator Wahid Siddiqi, a 25 year old from Thousand Oaks. Its alleged that Rebollo would come into the office every Sunday and download data from Countrywide's subprime mortgage system, Full Spectrum Lending. He apparently logged in each weekend for two years, downloading information on 20,000 each weekend and carrying it home on a flash drive. For this he was paid \$500 per week. In all he is accused of selling identity information on 2 million Countrywide applicants, and pocketing \$70,000 for his efforts, which exceeded his annual salary at Countrywide. (The Ventura County Star put that figure at \$63,000.)

The LA Times reported yesterday that this means Rebollo was selling identities for about 2.5 cents each. They quote Beth Givens from the Privacy Rights Clearinghouse as saying "This guy obviously didn't do his homework. He doesn't know the value of these on the black market", noting that often social security numbers are sold for dollars each, not pennies.

According to Thom Mrozek, of the US Attorney's Office in Los Angeles, the buyers of the stolen data were using it as lead generators to offer the same subprime loan customers other financial offers.

Its not clear yet how the data was normally transferred from Rebollo to Wahid Siddiqi, but what we do know is that Siddiqi was a reseller of the data Rebollo accessed by logging in with his credentials as a Senior Financial Analyst. According to his LinkedIn Profile, Rebollo worked at Countrywide since September of 1999.

The FBI came into the case when one of their confidential witnesses made a buy from Siddiqi of the stolen customer profiles for several thousand countrywide customers for \$4,000. According to the Ventura County Star, the witness met both Siddiqi, who he called "Nico", and Rebollo, who he called "Rob Bello", in a night club and exchanged cash for CDs containing the stolen data.

The charges against Rebollo, who stole the data, could include up to five years in federal prison. Siddiqi, the reseller, could face up to fifteen years.

This isn't the first major mortgage broker to face insider jobs. Online mortgage broker Lending Tree Inc accused two former employees of illegally accessing information on "potentially millions of clients".

Update: We've received a copy of two affidavits sworn by FBI Special Agent Richard Ryan that were presented to the courts. One is a 13-page document, in support of the charges being brought against Rebollo and Siddiqi.

The charge against Rebollo is a violation of Title 18 USC Section 1030(a)(2)(A), "Exceeding Authorized Access to the Computer of a Financial Institution". The charge against Siddiqi is Title 18 USC Section 1028(a)(7), "Fraud and Related Activity in Connection with Identification Documents".

On July 7th, second Confidential Witness made consensually recorded telephone calls to "Nico" (Siddiqi) and ordered several thousand leads, negotiating a price of \$4,000 for the data. He met with Nico on July 9th while wearing a wire, and received the data on CDs, which he loaded into an FBI undercover laptop, and got Nico to confirm that they were "fresh Countrywide" leads, and that they contained "full socials" (full social security numbers). He paid Nico the \$4,000 in cash, provided by the FBI. Armed with this information, Ryan was ready to go interview Rebollo.

Rebollo was interviewed at his place of employment on July 15th by SA Ryan and SA Medrano. During the interview he confirmed the previous information about his weekly practice of stealing data by exporting it to a personal thumb drive. Rebollo actually opened a bank account at Washington Mutual "Doing Business As" RR Consulting. This account was specifically for receiving and holding the profits from his stolen data.

In the beginning, Rebollo would email the contents of his thumb drive to his buyers from a public computer at Kinko's. Frequently he would export data requested by his buyer, such as "new declines", or people who had a loan offered, but chose not to take the loan. Rebollo confirmed that he knew there was a company policy against sharing Lead Sources outside the company. He also confirmed that he knew that most CountryWide computers had a security feature which prevented the use of a thumb drive. He had found that he had access to one computer which did not have this feature.

According to the affidavit, on July 15th, Rebollo voluntarily turned over the flash drive he used to transport the data and the personal computer he used to broker the data. The flash drive had about "thirty to fifty" spreadsheets on it, each containing thousands of records with names, telephone numbers, addresses, and social security numbers of Countrywide applicants.

Rebollo agreed to sign a "CONSENT TO SEARCH" and to allow the FBI to follow him to his home and allowed them to take his thumb drive and his computer. He also printed many of the email messages showing that he had sent the stolen data from his home computer to various buyers.

Two days after SA Ryan returned to his office with Rebollo's computer and thumb drive, he was contacted by Rebollo's attorney who said their "Consent to Search" had been revoked.

Thanks for reading along . . . here comes the best part!

FIVE DAYS AFTER THAT, a Confidential Witness provided a recording from Rebollo, informing him that he was "camping at Mammoth" and implying he had data to sell. After consulting with the FBI, the CW called Rebollo back, in the presence of the FBI, and asked for 7,000 to 8,000 leads for customers in the states of California, Oregon, Florida, and New York. Rebollo agreed to provide the leads for \$400. This a full week AFTER Rebollo had confessed everything to the FBI, lead them to his home, and offered them his thumb drive and computer!!!

Shortly after the call, an email, containing 8,000 leads, was received by the CW.

This second Affidavit, dated July 31st, was for permission to go back and do a court-ordered search (as opposed to the friendly "consent" search previously performed.)

Permission was granted.

Available at: <http://garwarner.blogspot.com/2008/08/another-insider-busted.html>