

Under a plea agreement, on May 2, 2012, pursuant to Rules 11(c)(1)(A) and 11(c)(1)(C), Federal Rules of Criminal Procedure, Smith pled guilty to counts one and two of the indictment. (PSR ¶ 4).

II. PRE-SENTENCE REPORT

In the Pre-Sentence Report (“PSR”), the United States Probation Office for the Middle District of Alabama computed the advisory sentencing guidelines range as 30 to 37 months’ imprisonment, based on a total offense level of 19 and a criminal history category of I. (PSR ¶ 77).

Smith has objected to paragraphs 36 and 38 of the PSR. Paragraph 36 of the PSR recommends that, pursuant to United States Sentencing Guideline § 2B1.1(b)(1)(G), Smith’s offense level be increased by 12 levels because the calculated loss attributable to her has been estimated at more than \$200,000.00 but not more than \$400,000.00. (PSR ¶ 36). Paragraph 38 of the PSR does not recommend an adjustment for Smith’s role in the offense. (PSR ¶ 38). For the reasons given below, the United States asks the Court to overrule the defendant’s objections.

III. GOVERNMENT’S RESPONSE TO THE DEFENDANT’S OBJECTIONS TO THE PRE-SENTENCE REPORT

This Honorable Court should overrule Smith’s objections to Paragraphs 36 and 38 of the PSR because the amount of loss attributable to Smith is between \$200,000.00 and \$400,000.00 and because she was more than a minimal participant in her crimes.

A. The Amount of Loss Attributable to Smith is Between \$200,000.00 and \$400,000.00.

Because Smith challenges a factual basis of the defendant’s sentence as contained in the PSR, “government has the burden of establishing the disputed fact by a preponderance of the evidence.” *United States v. Bernardine*, 73 F.3d 1078, 1080 (11th Cir. 1996)(internal cite omitted). United States Sentencing Guideline § 2B1.1(b)(1) establishes increases in offense

levels based upon the dollar amount of the loss caused by a defendant's conduct. The application notes to that guideline establish that

(A) General Rule.—Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.

(i) Actual Loss.—"Actual loss" means the reasonably foreseeable pecuniary harm that resulted from the offense.

(ii) Intended Loss.—"Intended loss" (I) means the pecuniary harm that was intended to result from the offense; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

U.S.S.G. § 2B1.1, Application Note 3(A).

In the plea agreement reached in this case, the Government agreed that, "at trial, it would be able to establish that the defendant's participation in this conspiracy was limited to helping obtain personal identifying information from the State of Alabama Department of Human Resources, Vi[n]son Guard Service, Inc., and a Montgomery, Alabama, public high school." (PSR ¶ 4). At a hearing held on this matter, the United States would be able to establish that Smith assisted Rhashema Deramus ("Deramus") in obtaining these names from the State of Alabama Department of Human Resources ("DHR"), Vinson Guard Service, Inc. ("Vinson"), and a Montgomery, Alabama public high school ("MPS") to allow the filing of fraudulent tax returns. The United States would also be able to establish at the hearing that the total amount of the refunds claimed through the use of the PII obtained by Smith from the DHR, Vinson, and MPS is in excess of \$350,000.00 and that, because the Internal Revenue Service stopped issuing refunds on the fraudulent returns, the amount of actual loss was limited to a little over \$155,000.00. Because the amount of intended loss in this case falls between \$200,000.00 and

\$400,000.00, Smith's objection should be overruled and her offense level increased by 12 levels pursuant to U.S.S.G. § 2B1.1(b)(G).

B. Smith was More than A Minimal Participant in this Crime.

The "proponent of the downward adjustment bears the burden at all times of establishing her role in the offense by a preponderance of the evidence." *United States v. Rodriguez De Varon*, 175 F.3d 930, 934 (11th Cir. 1999)(*en banc*). Because the defendant will be unable to meet her burden, the Government asks that her objection be overruled.

The Eleventh Circuit has established that, in determining whether a defendant qualifies for a minor role adjustment, the sentencing court should be guided by two principles:

First and foremost, the district court must measure the defendant's role against her relevant conduct, that is, the conduct for which she has been held accountable under U.S.S.G. § 1B1.3. The Guidelines and our case precedent plainly require the district court to undertake this method of analysis in every case where a role adjustment is at issue. *See* U.S.S.G. Ch. 3, Pt. B, intro. comment. Second, where the record evidence is sufficient, the district court may also measure the defendant's conduct against that of other participants in the criminal scheme attributed to the defendant. *See* U.S.S.G. § 3B1.2, comment. (n.3). These principles advance both the directives of the Guidelines and our case precedent by recognizing the fact-intensive nature of this inquiry and by maximizing the discretion of the trial court in determining the defendant's role in the offense.

Id.

As to the first principle, "[w]hen the relevant conduct attributed to a defendant is identical to [her] actual conduct, [s]he cannot prove that [s]he is entitled to a minor-role adjustment simply by pointing to some broader scheme for which [s]he was not held accountable." *United States v. Alvarez-Coria*, 447 F.3d 1340, 1343 (11th Cir. 2006)(*per curiam*).

As noted in the plea agreement, the defendant in this case assisted Deramus in the acquisition of PII of individuals from the DHR, Vinson, and MPS. While the scheme in which

Deramus was involved encompassed victims from outside the DHR, Vinson, and MPS, Smith will not be able to “prove that [s]he is entitled to a minor-role adjustment simply by pointing to some broader scheme for which [s]he was not held accountable.” *Id.* Should this Court find, however, that the defendant can meet her burden of establishing by a preponderance of the evidence that she is due an adjustment for having a minor role in the offense, the Government will be able to demonstrate that Smith was crucial in obtaining the PII of victims from both the DHR and Vinson and that, without her assistance, Deramus would have been unable to obtain the information. Further, the evidence would also demonstrate that the defendant was present at MPS when Deramus and another individual obtained PII from that location.

Regarding the second principle of a determining whether a defendant should receive a reduction under U.S.S.G. § 3B1.2, the Eleventh Circuit has instructed that the district court should first “district court should look to other participants only to the extent that they are identifiable or discernable from the evidence” and, “[s]econd, the district court may consider only those participants who were involved in the relevant conduct attributed to the defendant. The conduct of participants in any larger criminal conspiracy is irrelevant.” *De Varon*, 175 F.3d at 944.

At a hearing on this matter, the Government would be able to present evidence that would assist the Court in “measur[ing] the defendant’s conduct against that of the other participants in the criminal scheme attributable to the defendant.” *Id.* at 934. This evidence will demonstrate that, in comparing the defendant’s conduct with the conduct of others who were involved in the relevant conduct attributed to the defendant,” *id.* at 944, the defendant should not receive a reduction in her applicable guideline range for being a minimal participant in her crime. The defendant’s objection should, therefore, be overruled.

IV. CONCLUSION

Pursuant to the plea agreement, the United States respectfully asks this Honorable Court to sentence the defendant to 33 months of imprisonment, which is no greater than the middle of the applicable guidelines range. The United States also respectfully asks this Honorable Court to waive a fine in this case and to impose a three year term of supervised release following the Defendant's period of incarceration. The United States further asks this Honorable Court to overrule the two objections made by the defendant.

Respectfully submitted this, the 20th day of September, 2012,

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