UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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| UNITED STATES OF AMERICA<br><br>vs.<br><br>CARLOS SMITH | No. 20 CR 922<br><br>Judge Manish S. Shah |

**GOVERNMENT'S RESPONSE TO**
**DEFENDANT'S MOTION FOR REDUCED SENTENCE**

Defendant CARLOS SMITH has filed a motion under 18 U.S.C. § 3582(c)(2) seeking a reduced sentence based on Part B, Subpart 1 of Amendment 821 to the Sentencing Guidelines. The government agrees that, under the amended Guidelines, defendant's criminal history score is lower based on application of the new status-point calculations under § 4A1.1(e). However, considering the sentencing factors under 18 U.S.C. § 3553(a), a sentence reduction is not warranted. The Court's sentence of 48 months' imprisonment reflected thorough consideration of defendant's criminal history and the particularly aggravating circumstances of defendant's crimes, which occurred while he was serving a prior sentence from a separate fraud case. Even with a lower Guidelines range, consideration of the § 3553(a) factors shows that a sentence below 48 months is not appropriate. Accordingly, defendant's motion should be denied.

**BACKGROUND**

Shortly after being released to home confinement as part of his 60-month prison term for a prior fraud, defendant CARLOS SMITH decided it was time to commit fraud again. His chosen vehicles for the new fraud were pandemic relief loans under the Economic Injury Disaster Loan ("EIDL") program and the Payroll Protection Program ("PPP"), which were U.S. government programs designed to provide relief to struggling businesses impacted by the Covid-19 pandemic. Defendant, of course, did not have such a business—he had been in prison until shortly before the pandemic began.

Defendant began committing these crimes while he was serving a sentence for an earlier tax-refund fraud. *See United States v. Carlos Smith*, No. 15 CR 211 (N.D. Ill. 2015) (Alonso, J.). The crimes began while he was still in BOP custody and continued during his term of supervised release. Specifically, in January 2017, Judge Alonso had sentenced defendant to a total of 60 months' imprisonment, along with two years' supervised release, following his convictions for theft of government funds and aggravated identity theft. After serving the majority of the 60-month term in prison, on November 14, 2019, defendant was transferred into a halfway house. Two months later, on January 13, 2020, he was placed on home confinement. In April 2020, shortly after the pandemic began, defendant submitted his first fraudulent pandemic relief loan application, for an EIDL.

Defendant was officially released from BOP custody on May 11, 2020, and began serving his two-year term of supervised release. The funds from his fraudulent EIDL application were disbursed shortly thereafter, in June 2020. Defendant then submitted his fraudulent PPP application in late July 2020, and the funds for the PPP loan were disbursed in September 2020—within approximately six months of the commencement of his term of supervised release.

Defendant received a total of approximately $421,900 for the two loans. Each loan was disbursed into a different bank account he controlled. When he learned that the account with the PPP funds was under review by the bank, he quickly moved money out of the account holding the remainder of the EIDL funds—including cutting a $30,000 check to himself and depositing it into a separate account—to protect and retain the proceeds of his fraud. Fortunately, law enforcement was able to seize and recover the remaining PPP funds, which were frozen. In total, over the course of approximately five months, Smith cashed and/or spent approximately $152,962 of the fraudulently obtained funds.

Because of his scheme, his false statements, and his money laundering, defendant was charged by indictment with wire fraud, in violation of Title 18, United States Code, Section 1343 (Counts One and Two), making a false statement to a financial institution, in violation of Title 18, United States Code, Section 1014 (Count Three), and money laundering, in violation of Title 18, United States Code, Section 1957 (Count Four). Pursuant to a plea agreement, on June 22, 2022, he pleaded guilty to Count One and Count Four of the indictment. Doc. 44.

The PSR calculated a Guidelines sentencing range of 30 to 37 months, based on an offense level of 17 and a criminal history category of III. Defendant received no points for his first criminal conviction, which stemmed from his attempt to pass a forged check at the age of 35. PSR ¶ 45. Nor did he receive any points for his second conviction, at age 43, for again trying to pass multiple fraudulent checks. PSR ¶ 46. Defendant received three criminal history points based on his 60-month sentence in case number 15 CR 211, and he received two criminal history "status" points for committing the offense while under the criminal justice sentence in that prior case. PSR ¶¶ 48, 50. This yielded a total of five criminal history points, placing him in category III. PSR ¶ 51.

The Probation Office recommended an above-Guideline sentence of 74 months, noting that the defendant had stolen over $1 million from the government since 2015 and emphasizing that the prior 60-month sentence had not deterred defendant from committing a new fraud so quickly upon his release from prison. The government also recommended an above-Guidelines sentence of at least 60 months, largely because the then-applicable Guidelines range did not adequately account for his criminal history, including his commission of the offense on the heels of his prior 60-month term of imprisonment.

On February 23, 2023, the Court sentenced defendant to concurrent terms of 48 months' imprisonment (above the then-applicable Guideline range), followed by concurrent three-year terms of supervised release. (Doc. 59.)

On May 7, 2024, defendant filed his motion seeking a sentencing reduction based on retroactive application of the status-point Guideline, which yields a new advisory guidelines range of 27 to 33 months' imprisonment. (Doc. 66, Motion at 4.) The defense asks for a commensurate reduction in the 48-month sentence the Court imposed, to 43 months. *Id.*

## LEGAL STANDARD

In Part B, Subpart 1 to Amendment 821 to the Sentencing Guidelines, the Sentencing Commission altered its instruction for calculating "status points" as part of a defendant's criminal history in new Section 4A1.1(e). On August 24, 2023, the Commission decreed that the change applies retroactively. The amended provision states:

> Add 1 point if the defendant (1) receives 7 or more points under subsections (a) through (d), and (2) committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

Previously, a defendant would receive two "status" points for having committed the offense while under a criminal justice sentence. Under the amended Guideline, a defendant with seven criminal history points or more now receives one additional "status" criminal history point, instead of two, while a defendant with six criminal history points or fewer, like defendant, receives no status points.

Defendant presents the current motion pursuant to 18 U.S.C. § 3582(c)(2), which provides:

> [I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

In Section 1B1.10 of the Guidelines, the Sentencing Commission has identified the amendments which may be applied retroactively pursuant to this authority, including Part B, Subpart 1 of Amendment 821, and articulated the proper procedure for implementing those amendments.

In *Dillon v. United States*, 560 U.S. 817 (2010), the Supreme Court addressed the process for application of a retroactive guideline amendment, emphasizing that Section 1B1.10 is binding. The Court declared: "Any reduction must be consistent with applicable policy statements issued by the Sentencing Commission." *Id.* at 821. The Court required district courts to follow a two-step approach:

> At step one, § 3582(c)(2) requires the court to follow the Commission's instructions in §1B1.10 to determine the prisoner's eligibility for a sentence modification and the extent of the reduction authorized. Specifically, §1B1.10(b)(1) requires the court to begin by "determin[ing] the amended guideline range that would have been applicable to the defendant" had the relevant amendment been in effect at the time of the initial sentencing. "In making such determination, the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected." § 1B1.10(b)(1).
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> Consistent with the limited nature of § 3582(c)(2) proceedings, §1B1.10(b)(2) also confines the extent of the reduction authorized. Courts generally may "not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) . . . to a term that is less than the minimum of the amended guideline range" produced by the substitution. §1B1.10(b)(2)(A). . . .
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> At step two of the inquiry, § 3582(c)(2) instructs a court to consider any applicable § 3553(a) factors and determine whether, in its discretion, the reduction authorized by reference to the policies relevant at step one is warranted in whole or in part under the particular circumstances of the case.

*Dillon*, 560 U.S. at 827.

Under this framework, the Court first determines whether defendant's criminal history score changes upon application of the new status-point instructions under § 4A1.1(e) and, if so, calculates the revised advisory guidelines range. Next, the Court considers the § 3553 factors, and finally decides whether a sentence reduction is warranted.

The Court's ultimate decision to reduce a term of imprisonment based on the amendment to § 4A1.1(e)'s retroactivity is discretionary. *See* 18 U.S.C. § 3582(c). Section 1B1.10 directs that "the court shall consider the factors set forth in 18 U.S.C. § 3553(a) in determining . . . whether a reduction in the defendant's term of imprisonment is warranted." *Id.* app. note 1(B)(i); *see also* U.S.S.G. § 1B1.10 backg'd ("The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.").

Subject to the limits set forth in Section 1B1.10(b), the Court may consider all pertinent information in applying the Section 3553(a) factors and determining whether and by how much to reduce the defendant's sentence. In particular, the Court must consider the danger a sentence reduction presents to the community, and may consider information regarding the post-sentencing conduct or situation of the defendant, whether positive or negative. *See, e.g.*, *United States v. Darden*, 910 F.3d 1064, 1068 (8th Cir. 2018); U.S.S.G. § 1B1.10(b), n.1(B)(ii) & (iii).

Under these rules, a district court has "substantial discretion" in deciding whether to reduce a sentence; even "[a]n agreement between the government and the defendant that a sentence reduction is appropriate does not bind the judge; nor is the judge's consideration of the question limited to the factors the parties regard as relevant." *United States v. Young*, 555 F.3d 611, 614 (7th Cir. 2009).

**ARGUMENT**

The government agrees that defendant is eligible for retroactive application of § 4A1.1(e), which would place him in criminal history category II, with a resulting advisory guidelines range of 27 to 33 months' imprisonment. But the Court nevertheless should deny defendant's request for a sentence reduction based on the § 3553 factors. Analysis of those factors shows that a sentence of 48 months' imprisonment remains appropriate.

First, a sentence reduction would not reflect the seriousness of the offenses, which warranted significant punishment, nor would it provide adequate deterrence. Defendant exploited pandemic-relief loan programs, which were intended to provide relief to struggling businesses at the beginning of the Covid-19 pandemic. Instead of allowing a business experiencing a downturn to meet its expenses and payroll, defendant used the funds to support his own lifestyle. To obtain the loans, in addition to his lies about his purported business's operations, he lied about his lack of criminal convictions or imprisonment during the prior five years, and he submitted phony tax documents to support the existence of his bogus "employees." The Court's sentence of 48 months' imprisonment sent a message to others who, like defendant, would exploit national emergencies for personal gain. While less than the government's and the Probation Office's recommendations, the sentenced served as a means of both general and specific deterrence. Reducing it would undermine those ends.

Second, defendant's crimes began while he was in BOP custody and continued during his term of supervised release as part of his sentence for his earlier tax-refund fraud. In other words, his prior 60-month prison sentence did not deter him at all. Defendant's willingness to engage in fraud shortly after being released from prison demonstrates the acute need for his sentence to promote respect for the law and protect the public from further crimes of the defendant. A further reduction in his sentence would not be responsive to that need.

Third, the defendant's personal history and characteristics warrant the same sentence that the Court previously imposed. The defendant is 59 years old. He has committed some form of fraud multiple times over the past 24 years. His first criminal conviction, which stemmed from his attempt to pass a forged check, was at the age of 35. PSR ¶ 45. He followed that up at age 43, when he again tried to pass multiple fraudulent checks. PSR ¶ 46. For both crimes, he received sentences of probation. *Id.* ¶¶ 45-46. By 50, Smith had committed his most serious offense. *See United States v. Carlos Smith*, No. 15 CR 211 (N.D. Ill. 2015) (Alonso, J.). The conduct underlying that case, which was detailed in the Government's Version of the Offense, involved defendant using his purported company to obtain personal identifying information for taxpayers, filing false federal income tax returns purportedly on their behalf, setting up bank accounts in the taxpayers' names, and collecting their refunds for himself. PSR ¶ 48. In short, defendant's frauds have escalated as he ages.

Finally, a reduction in defendant's sentence would not be consistent with the policy justifications articulated by the Sentencing Commission in connection with the amended status-point calculation in Guideline § 4A1.1(e). Specifically, as part of its justification for the amendment, the Commission noted other ways in which the Guidelines account for offenses committed while on supervised release and probation:

> [T]he Commission observed that the operation of the *Guidelines Manual* separately accounts for consecutive punishment imposed upon revocations of supervised release, a likely occurrence if an offender was under a criminal justice sentence during the commission of another offense. The Commission further recognized that it is also possible that an offender's criminal history score would be independently increased as the result of additional time imposed as the result of a revocation of probation or supervised release for the offense that also results in the addition of status points.

*See* U.S. Sent'g Comm'n, Amendment 821, Reason for Amendment – Part A Status Points, available at https://www.ussc.gov/guidelines/amendment/821 (last visited May 29, 2024). Notably, those circumstances did not hold true in defendant's case. Specifically, approximately one month after the indictment was returned in this case, a special report noting defendant's non-compliance was filed in 15 CR 211 (Dkt. # 95). PSR ¶ 48. However, no summons was issued, and defendant's term of supervised release expired on May 10, 2022. PSR ¶ 50. As a result, he was not separately punished for his violation of the terms of his supervised release in case number 15 CR 211, and thus did not receive any additional criminal history points as a result of that violation. The absence of a consequence for that violation illustrates that defendant is not an appropriate beneficiary of a sentencing reduction based on the amendment.

## CONCLUSION

Defendant should not be afforded a sentence reduction based on the Guidelines' revised criminal history status-point calculation. His conduct was egregious: he submitted fraudulent applications for Covid-19 relief funds while he was still in BOP custody and later on supervised release as part of a prior fraud sentence. His swift and brazen recidivism following his prior 60-month prison term warranted a comparable term of imprisonment. The government respectfully requests that the Court deny defendant's motion and maintain the 48-month term of imprisonment that it imposed.

Respectfully submitted,

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