IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA *v.* DEREK PARKER	Criminal Action No. 1:20-CR-296-JPB

<u>United States' Sentencing Memorandum</u>

The United States of America, by Ryan K. Buchanan, United States Attorney, and Tal C. Chaiken and Nathan P. Kitchens, Assistant United States Attorneys for the Northern District of Georgia, and Babasijibomi Moore, Trial Attorney for the United States Department of Justice, respectfully files this Sentencing Memorandum in advance of Defendant Derek Parker's sentencing, which is set for August 31, 2022 at 10:00 a.m. Defendant pleaded guilty to conspiracy to commit wire fraud in violation of Title 18, United States Code, Section 1349. As set forth below, the United States respectfully agrees that Defendant's recommended sentence of 18 months' imprisonment is sufficient, but not greater than necessary, to comply with the purposes set forth in Title 18, United States Code, Section 3553(a).

<u>An 18-Month Sentence is Proper Given the Section 3553(a) Factors.</u>

1. The Nature and Circumstances of the Offense.

Defendant's offense was serious, motivated by personal greed during an unprecedented global crisis. In early 2020, the COVID-19 pandemic sent stock markets crashing and unemployment rates skyrocketing, while nationwide lockdowns ground the economy to a halt. Many American businesses – and in particular, small businesses – struggled to stay afloat as consumer demand plummeted, creating daunting uncertainty for the businesses, their employees, and the families who rely on them. Against that backdrop, Congress passed the Paycheck Protection Program (the "PPP") as one of the mechanisms for providing relief to small businesses and their employees. To obtain a loan, a business had to certify that the loan would be used to pay for payroll, lease or mortgage interest, or utilities, and the loan was forgivable if the business spent a certain percentage of the loan on payroll costs.

Because Congress's intent was to "provide relief to America's small businesses expeditiously," the PPP streamlined the Small Business Administration's typical lending requirements. Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811-01 (Apr. 15, 2020). For example, the PPP "allow[ed] lenders to rely on certifications of the borrower in order to determine eligibility of the borrower and use of loan proceeds and to rely on specified documents provided by the borrower to determine qualifying loan amount and eligibility for loan forgiveness." *Id*. These procedures were designed to quickly get much-needed funds to small businesses so they could keep their workers employed during an economic and public health crisis that threatened the viability of many small businesses and their ability to keep their employees on the payroll.

Defendant sought to take advantage of the PPP's streamlined procedures to line his own pockets by applying for an $818,102.00 PPP loan for a business that he had incorporated but that had no employees or actual business. (*See* PSR, ¶¶ 12, 76-78, 116-119.) Defendant was not a small business owner worried about his employees and the mouths they were responsible for feeding. Rather, he saw in the PPP an opportunity to get free money to use for personal expenses. Indeed, while others were struggling to stay afloat during the pandemic, Defendant personally received at least $159,856.09 from the PPP loan through payments by co-conspirators to other businesses he controlled and through multiple Rapid Pay Card payroll cards he received from his co-conspirators. (*Id.* ¶ 77.) And though Harvest Small Business Finance funded the loan, the funds that were stolen were taxpayer funds administered by the Small Business Administration.

While Defendant is not the most culpable actor in this fraudulent scheme, as he recognizes, he played a crucial part in the scheme and benefitted from it substantially. Without Defendant's willingness to use his business and its bank account to obtain a fraudulent PPP loan and get "free money" for himself, other actors would not have been able to apply for a PPP loan on D Parker Holdings' behalf. And when the entire PPP loan was deposited into an account that he alone controlled, Defendant chose to launder the proceeds of that loan rather than to do the right thing and return the funds to the lender, ultimately receiving nearly $160,000 for himself.

2. The Need for Adequate Deterrence.

The Eleventh Circuit has identified general deterrence as "an important goal of sentencing in a white-collar crime prosecution." *United States v. Kuhlman*, 711 F.3d 1321, 1328 (11th Cir. 2013); *see also Howard*, 28 F.4th at 209 ("General deterrence is more apt, not less apt, in white collar crime cases."); *United States v. Livesay*, 587 F.3d 1274, 1279 (11th Cir. 2009) ("[T]he threat of spending time on probation simply does not, and cannot, provide the same level of deterrence as can the threat of incarceration in a federal penitentiary for a meaningful period of time."); *United States v. McQueen*, 727 F.3d 1144, 1158 (11th Cir. 2013) (recognizing that general deterrence is one of the "'key purposes of sentencing'") (citation omitted).

A substantial downward variance would do little to dissuade Defendant or others from committing a similar crime in the future. To the contrary, a lenient sentence would encourage would-be white-collar offenders to view a short prison sentence as part of the cost of doing business. Nor would a lenient sentence reflect the seriousness of fraudulently obtaining for personal gain more than $818,000 intended for struggling small businesses and their employees in the midst of a global crisis. *Hayes*, 762 F.3d at 1308 (collecting cases where the Eleventh Circuit has "set aside sentences of little to no imprisonment" in white collar cases "because they do not constitute just punishment for the offense, do not promote respect for the law, and will not do much to deter similar activity by others"); *see also United States v. Shah*, 476 F. Supp. 3d 619, 623 (E.D. Mich. Aug. 4, 2020) (noting the seriousness of an offense that involved "bilk[ing] the government out of . . . funds that were earmarked to pay for the medical expenses of vulnerable and needy individuals").

As the Eleventh Circuit has recognized, deterrence is especially important in the context of crimes, like Defendant's crime in this case, that "may easily go undetected and unpunished." *See McQueen*, 727 F.3d at 1158-59 (reversing the district court's lenient sentence because it "sap[ped] the goal of general deterrence"); *see also United States v. Engle*, 592 F.3d 495, 502 (4th Cir. 2010) (explaining that because tax evasion offenses are infrequently prosecuted, "[w]ithout a real possibility of imprisonment, there would be little incentive for a wavering would-be evader to choose the straight-and-narrow over the wayward path); *United States v. Heffernan*, 43 F.3d 1144, 1149 (7th Cir. 1994) ("Considerations of (general) deterrence argue for punishing more heavily those offenses that either are lucrative or are difficult to detect and punish, since both attributes go to increase the expected benefits of a crime and hence the punishment required to deter it.").

A recent analysis found that approximately 12.3% of the PPP loans granted to small businesses, totaling $64.2 billion, have at least one indicator of potential fraud. *See* John M. Griffin *et al.*, *Did FinTech Lenders Facilitate PPP Fraud?* (Aug. 5, 2022), available online at https://ssrn.com/abstract=3906395 (last visited Aug. 15, 2022). And because of the sheer number of PPP loans as well as the streamlined documentation necessary to obtain them, the United States is unlikely to detect and/or to prosecute most individuals who obtained fraudulent PPP loans. The need for general deterrence is therefore significant in this case.

Defendant cites various sources stating that the certainty of being caught is a more powerful deterrent than the severity of punishment. (Sent. Mem. at 8.) But in the case of white-collar crime – and in particular, crime like PPP fraud that is difficult to detect – the certainty of being caught is low. And the Eleventh Circuit has held that deterrence is a key consideration in white-collar sentencings. Simply put, a substantial downward variance would signal to others considering engaging in white-collar crime that there is a significant benefit to be gained and little to be lost by committing the offense, thereby undermining, rather than promoting, Section 3553(a)'s purposes.

3. The Sentencing Commission's Policy Statement.

"In deciding a sentence, district courts should consider the policies behind the applicable guidelines provision." *United States v. Crisp*, 454 F.3d 1285, 1291 (11th Cir. 2006); *see also* 18 U.S.C. § 3553(a)(5) (directing district courts to consider the Sentencing Commission's policy statements). For fraud-related offenses, the Sentencing Commission has explained that "along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under [U.S.S.G. § 2B1.1]." U.S.S.G. § 2B.1.1, cmt. backg'd.

The Sentencing Commission's policy statement does not support a substantial downward variance in this case, where Defendant's Guidelines are based almost entirely on the amount of loss attributable to his offense.

4. Defendant's History and Characteristics.

As described in the PSR and in Defendant's Sentencing Memorandum, Defendant's personal circumstances are compelling. Although a defendant's history and characteristics "cannot be considered in isolation and without regard to the criminal conduct for which the defendant has been convicted and the characteristics it reveals," *Howard*, 28 F.4th at 218-20, the Defendant's substantial family caretaking obligations support a three-level downward variance after taking into account his less culpable role in the offense.

Specifically, the record establishes that Defendant is the primary caretaker for his wife, who suffers several debilitating health conditions, and for a granddaughter who suffers from depression. In addition, the Defendant assists with the care of his 90-year-old mother, who suffers from dementia. The United

States is mindful of the Guidelines' admonition that "family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted." U.S.S.G. § 5H1.6. Moreover, the Guidelines note that a departure based on the caretaking of family members requires a showing that: (1) the defendant's incarceration "will cause a substantial, direct, and specific loss of essential caretaking . . . to the defendant's family"; (2) the loss of caretaking "substantially exceeds the harm ordinarily incident to incarceration"; (3) "no effective remedial or ameliorative programs reasonably are available, making the defendant's caretaking or financial support irreplaceable"; and (4) the departure will address the loss of caretaking. U.S.S.G. § 5H1.6 cmt n.1(B). Cases interpreting a departure based on family caretaking recognize that it is proper only in "extraordinary" circumstances. *United States v. Allen*, 87 F.3d 1224, 1225 (11th Cir. 1996) (reversing downward departure for defendant who was primary caregiver of her seventy-year-old father who suffered from Alzheimer's and Parkinson's diseases); *see also United States v. DeVegter*, 439 F.3d 1299, 1307 (11th Cir. 2006) (reversing downward departure based on defendant's caretaking of his dyslexic son and mother-in-law in "failing health," concluding that "[t]here is nothing inherently extraordinary about caring for a child or a sick parent. Innocent young family members, including children, commonly suffer as a result of a parent's incarceration").

But the United States recognizes that Defendant's incarceration will place an unusually difficult burden on Defendant's wife and grandchildren, in particular, which distinguishes Defendant from many others who cause hardship to family members from their incarceration. Based on its consideration of his caregiving responsibilities as part of a full analysis of Defendant's history and characteristics under Section 3553(a), the United States submits that a three-level downward variance appropriately accounts for these mitigating circumstances and the need to provide just punishment and afford adequate deterrence.

5. Unwarranted Sentencing Disparities.

The parties' sentencing recommendation of 18 months' incarceration avoids creating unwarranted sentencing disparities between Defendant and other individuals involved in this fraudulent scheme whose conduct was most similar to Defendant's – that is, other business owners who were recruited into the scheme by others and who did not themselves prepare the fabricated loan application and documentation. The Court has already sentenced several of these co-defendants to sentences at the low end of their applicable Guidelines ranges. *See* DE 84 (sentencing Kahlil Green to 41 months' incarceration); DE 380 (sentencing Bern Benoit to 27 months' incarceration); *United States v. Charmaine Redding*, 1:21-cr-178, DE 17 (N.D. Ga. Oct. 27, 2021) (sentencing Charmaine Redding to 27 months' incarceration). But the Court varied downward for another co-defendant, David Belgrave, who also had substantial family caregiving obligations and was a relatively less culpable business owner. *See* DE 552. Other co-defendants who received downward variances had different mitigating circumstances from Defendant, including full payment of restitution before the sentencing hearing and serious health conditions.[1] The recommended three-level downward variance

[1] Defendant is not similarly situated to Andre Gaines, both in terms of the nature and circumstances of the offense and in terms of the history and characteristics of the defendant. He is not similarly situated to Charles Hill, who received a sentence of probation with home confinement due to a rare autoimmune disease.

appropriately balances the downward variance granted to Mr. Belgrave with the low-end Guidelines sentences received by business owners who pleaded guilty earlier in this case.

6. The Need to Provide Restitution.

The Eleventh Circuit has rejected the argument that a large restitution award warrants a shorter custodial sentence. *See Crisp*, 454 F.3d at 1291 (explaining that shortening a defendant's sentence "in order to increase the time for the defendant to earn money to pay restitution" would turn the Sentencing Commission's policy on its head because it would mean that the more loss a defendant inflicts, the shorter their sentence). While Defendant's restitution obligation is significant, the need to provide restitution does not outweigh Section 3553(a)'s other considerations and does not warrant a substantial downward variance.

Conclusion

For these reasons, the United States respectfully requests that the Court grant a three-level downward variance and impose a sentence at the low end of the resulting Guidelines range of 18 months.

Dated: August 29, 2022.

Respectfully submitted,

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August 29, 2022

/s/ NATHAN P. KITCHENS

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