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

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	CASE No.
	)	1:20-CR-228-MHC-JKL
	)	
MAURICE FAYNE,	)	
Defendant.	)	

DEFENDANT'S SENTENCING MEMORANDUM

Maurice Fayne now files this sentencing memorandum in anticipation of his sentencing hearing. Based on the information below, Mr. Fayne asserts that a sentence of 120 months is sufficient but not greater than necessary to achieve this Court's sentencing goals.

I. THIS COURT IS FREE TO FASHION A NON-GUIDELINE SENTENCE TO ADDRESS MR. FAYNE'S PARTICULAR CIRCUMSTANCES.

As this Court well knows, the Federal Sentencing Guidelines are no longer mandatory. These guidelines now serve as only one factor among several that courts must consider in determining an appropriate sentence. *See Kimbrough v. United States*, 552 U.S. 85, 90 (2007); *see also United States v. Booker*, 543 U.S. 220, 244 (2005). After *Booke*r, district courts have been instructed to give "respectful consideration" to the sentencing guidelines, but as the Supreme Court's post-*Booker* decisions make clear, district courts may impose non-guideline sentences when appropriate. *See Pepper v. United States*, 131 S. Ct. 1229, 1247 (2011). In fact, "[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Pepper*, 131 S. Ct. at 1239-40 *(citing Koon v. United States*, 518 U.S. 81, 113 (1996)). "Underlying this tradition is the principle that the punishment should fit the offender and not merely the crime." *Id.; see also Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937) ("For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.").

Pursuant to 18 U.S.C. 3553(a), the Court must consider the following factors when determining a sentence that is sufficient but not greater than necessary to meet its sentencing goals:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(B) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(3) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(5) any pertinent policy statement—

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

Based on all of the circumstances outlined below, a sentence of 120 months is appropriate here.

II. THE FACTORS OUTLINED IN 18 U.S.C. 3553(A) WEIGH IN FAVOR OF A SENTENCE OF 120 MONTHS IN CUSTODY.

A. The nature and circumstances of the offense are serious, but a sentence of 10 years in prison is adequate to account for the seriousness of the offense.

Mr. Fayne comes before the Court on charges related to an investment scheme involving his trucking business and a fraudulent application for a PPP loan. Over 2.4 million dollars was solicited from investors and roughly 2 million dollars was obtained through the PPP loan. Mr. Fayne understands that the loss is sizeable, but he asserts that a sentence of 10 years in prison is sufficient to meet this Court's sentencing goals in this case.

B. A sentence of 10 years in prison is appropriate based on Mr. Fayne's personal history and characteristics.

Mr. Fayne accepts responsibility for his actions. He comes before the Court asking for a very serious sentence in connection with his actions in this case.

As outlined in the PSR, Mr. Fayne had a difficult childhood. He is not unlike other defendants who have come before the Court in that he was raised by grandparents in the absence of his own parents. His mother was incarcerated for a good portion of the time he was growing up and he was exposed to violence and substance abuse in the home at a young age. By all accounts, Maurice was a smart child with good academic and athletic abilities. He played football for his high school team and even played some in college. He later enlisted in the military, but his enlistment was short-lived. Along the way, he suffered from significant childhood trauma that has shaped who he has become as an adult. He is now addressing these issues and he is owning up to his bad choices. He has repeatedly told counsel that he is ready to accept responsibility for his actions so he can move forward with his life. The driving force for Mr. Fayne at this time is his desire to set an example for his children and to eventually be released from custody so he can continue to build a strong relationship with them.

A sentence of 10 years will be a long and difficult punishment for Mr. Fayne, but he wants to get sentenced and move a BOP facility as soon as possible so that he can begin taking part in educational classes and counseling. He hopes to finish his college degree in computer engineering and possibly learn the trade of diesel mechanics.

A sentence of 10 years in prison will be sufficient but not greater than necessary to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment to Mr. Fayne. It will also will afford adequate deterrence and will protect the public from future crimes. Although he does have prior convictions, Mr. Fayne has never spent a significant amount of time in custody. A ten-year sentence will therefore serve as a great deterrent and punishment for Mr. Fayne. He is 38 years old. In 10 years, he will be 48. His daughters will be 28 and 26. His grandmother will be 79. This loss of time with his daughters and his grandmother weighs heavily on Mr. Fayne because his own mother was absent due to incarceration for much of his childhood. He believes that her absence played a large part in shaping him into the person he is today. He recognizes that he has started this same pattern with his children, but he is regularly touch with his daughters from the detention facility and he wants to go to a BOP facility in Texarkana so he can be close to them. He wants to be present in their lives to the extent that he can while in custody.

A 10-year sentence will be a significant punishment for Mr. Fayne. He understands that punishment is appropriate in this case, but he asks the Court to exercise its sentencing discretion and impose this sentence even though it is lower than his calculated guideline range.

C. *The 2B1.1 guidelines are not based on empirical data and the resulting sentencing range established for this offense is not a reliable indicator of an appropriate sentence.*

As the Eleventh Circuit Court of Appeals has explained, "When a guidelines provision is not supported by empirical data and national experience, a district court does not abuse its discretion if it decides that a within-guidelines sentence is greater than necessary to achieve § 3553(a)'s purposes." *United States v. Sanzhez-Garcia*, 565 Fed. Appx. 831, 833 (11th Cir. 2014) (unpublished), *citing Kimbrough v. United States*, 552 U.S. 85, 109-10 (2007). Although, it "is not an independent ground that compels the invalidation of a guidelines," it is one factor that a district court could consider in exercising its post-*Booker* right to depart from the guidelines. *Id.*

As numerous federal courts have recognized, the fraud guidelines outlined in U.S.S.G 2B1.1 are not based on empirical data and often result in seemingly random and excessively harsh sentences. *See* Barry Boss and Kara Kapp, *How the Economic Loss Guideline Lost its Way, and How to Save It*, Ohio State Journal of Criminal Law at https://moritzlaw.osu.edu/osjcl/2021/07/18/how-the-economic-loss-guideline-lost-its-way-and-how-to-save-it/ (collecting cases). In a lengthy concurrence in *United States v. Corsey*, 723 F.3d 366, 380 (2nd Cir. 2013), District Judge Underhill explained the issue:

> The loss guideline, like the child pornography guideline at issue in *Dorvee*, was not developed by the Sentencing Commission using an empirical approach based on data about past sentencing practices. As such, district judges can and should exercise their discretion when deciding whether or not to follow the sentencing advice that guideline provides.
>
> The fraud guideline was initially set forth in Guideline section 2F1.1. The Sentencing Commission set the original 1987 Guidelines for economic offenses higher than historical sentences in order to further the deterrence and just punishment goals of sentencing. In 1989, in response to the savings and loan crisis, Congress passed legislation increasing the maximum penalties for financial fraud offenses and directing the Sentencing Commission to include specific offense characteristic enhancements in the fraud guideline. *See* Robert S. Bennett, et al., *Taking it to the Banks: The Use of the Criminal Process to Regulate Financial Institutions*, 109 Banking L. J. 28, 28-34 (1992). In 2001, the Sentencing Commission amended the Guidelines to combine the fraud, theft and embezzlement, and property destruction guidelines into a single guideline, section 2B1.1. That change was accompanied by the publication of a new loss table that had the effect of increasing offense level calculations, especially for high-dollar-value crimes. *See* U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: INCREASED PENALTIES UNDER THE SARBANES-OXLEY ACT OF 2002 at 7 (2003). Most recently, the fraud guideline was amended in 2003 in response to Congressional directives in the Sarbanes-Oxley Act. *Id*. Those amendments included further changes to the loss table that added offense level points in the highest loss cases. U.S.S.G. app. C amend. 647 (Nov. 1, 2003). The three sets of amendments to the loss table of the fraud guideline alone have effectively multiplied several times the recommended sentence applicable in 1987 for large-loss frauds, which itself was set higher than historic sentences. Each of the three increases in the recommended Guideline ranges for fraud crimes was directed by

> Congress, without the benefit of empirical study of actual fraud sentences by the Sentencing Commission.
>
> The history of bracket inflation directed by Congress renders the loss guideline fundamentally flawed, especially as loss amounts climb. The higher the loss amount, the more distorted is the guideline's advice to sentencing judges. As a well-known sentencing commentator has put it, "For the small class of defendants . . . convicted of fraud offenses associated with very large guidelines loss calculations, the guidelines now are divorced both from the objectives of Section 3553(a) and, frankly, from common sense. Accordingly, the guidelines calculations in such cases are of diminished value to sentencing judges." Frank O. Bowman, III, *Sentencing High-Loss Corporate Insider Frauds After* Booker, 20 FED. SENT'G REP. 167, 168 (2008).

Id. at 380. *See also United States v. Musgrave*, 674 Fed. App'x 529, 530 (6th Cir. 2016) (affirming downward variance for defendant with offense level of 25 and a $1.7 million loss to a sentence of one day of imprisonment, reasoning that "because the loss Guidelines were not developed using an empirical approach based on data about past sentencing practices, it is particularly appropriate for variances."); *United States v. Johnson*, 2018 U.S. LEXIS 71257 at *16-20 (E.D. N.Y. 2018) (finding that application of the 16-point loss enhancement corresponding to loss amount would result in a sentence well out of the proportion to [an] appropriate sentence"); *United States v. Parris*, 573 F. Supp. 2d 744 (E.D. N.Y. 2008) (varying down from 300 months to a 60-month sentencing and finding that the guidelines have "run so amok that they are patently absurd on their face" after conviction for 6 counts of securities fraud and witness tampering); United States v. Gupta, 904 F. Supp. 2d 349, 351 (S.D. N.Y. 2012) ("By making a Guideline sentence turn, for all practical purposes, on [loss enhancement], the Sentencing Commission . . . effectively guaranteed that many such sentences would be irrational on their face."); *United States v. Lenagh*, No. 8:07-CR-346, 2009 U.S. Dist. LEXIS 9226 at *17-18 (D. Neb. Feb. 6, 2009) (issuing 24-month sentence in a case involving $1.4 million fraud and affording the fraud guidelines "less deference" because they are not empirically grounded and as such are "not always a reliable proxy for the culpability of an individual defendant."); *United States v. Moody*, 2013 U.S. Dist. LEXIS 109506 (D. Colo. 2013) (finding that the sentencing commission's conclusions underlying the 2B1.1 guidelines are "apparently based on a gestalt formed by the review" of cases by the commission and noting that "the absence of hard data makes it impossible to form an opinion about the reasonableness of the guideline recommendation).

As district judge Nicholas Garaufis from the Eastern District of New York noted in 2018:

> Many in the legal community have urged the Sentencing Commission to right this grievous wrong, and today I add my name to that lengthy list of judges, practitioners, scholars, and other commentators. The problems with the loss enhancement have been evident since the inception of the Guidelines. In 2004, then-District Judge Gerard Lynch generously called the loss enhancement a "questionable" aspect of the guidelines. *United States v. Emmenegger*, 329 F. Supp. 2d 416, 427 (S.D.N.Y. 2004). He identified all of the problems with this scheme: the weakness of the correlation between loss and moral seriousness; the rigidity of the loss amount overriding the diverse reality of complex financial crimes; the lack of any consideration of danger to society; and so on. *Id.* at 427-28. These concerns have continued unabated. Three years ago, the Sentencing Commission underwent the process of

> amending the fraud Guideline but left the loss-enhancement provision untouched. Representing the American Bar Association, James E. Felman, a prominent federal criminal defense lawyer, urged the Commission to overhaul the fraud Guideline to "reduce the unwarranted emphasis on both loss and multiple specific offense characteristics that, alone and especially in combination, tend to overstate the seriousness of many offenses." Mark W. Bennett et al., *Judging Federal White-Collar Fraud Sentencing: An Empirical Study Revealing the Need for Further Reform*, 102 Iowa L. Rev. 939, 979 (2017) (citing James E. Felman, Chairman, Am. Bar Ass'n Criminal Justice Section, Testimony on Behalf of the American Bar Association Before the United States Sentencing Commission for the Hearing on Proposed Amendments to the Federal Sentencing Guidelines Regarding Economic Crimes 9 (Mar. 12, 2015))).

United States v. Johnson, 2018 U.S. Dist. LEXIS 71257 at *13 (E.D. N.Y. 2018). Because the fraud guidelines are not based on empirical data, this Court should give less weight to the advisory guideline range and, instead, craft a sentence that addresses Mr. Fayne's unique circumstances.

D. A sentence of 10 years in prison will help avoid unwarranted sentencing disparities.

Mr. Fayne's co-defendant, Michael Sargent, was permitted to plead to a separate information charging him with conspiracy under 18 U.S.C. 371. This charge carries a maximum penalty of 5 years and the government has agreed to recommend 5 years for Mr. Sargent. This is true despite the fact that Mr. Sargent has admitted to cultivating close (sometimes intimate) relationships with several of the victims in this case in order to solicit money from them. "Romance fraud" was not a scheme that Mr. Fayne devised or participated in; Michael and Mark Sargent devised this part of the money-making scheme. Both brothers took part in the same "ponzi" scheme alleged against Mr. Fayne but, due to plea negotiations, Mr. Sargent will be permitted to escape any risk that his guidelines could be hire than 5 years.

It is unclear what the remaining co-defendant, Day Jay, will receive if or when he is ultimately sentenced.

The only defendants that defense counsel is aware of to be sentenced in this district in connection with PPP or CARES Act fraud cases have received sentences far lower than 10 years. *See United States v. Green*, 1:20-cr-00296-JPB-CMS-3 ($830,000 loss amount, but scheme involved $4 million in funded loans, sentenced to 41 months); *United States v. Wright*, 1:20-cr-00285-LMM-1 (loss amount of $300,000, sentenced to 12 months and 1 day).

In other districts, PPP fraud cases with similar or higher loss amounts have resulted in defendants receiving sentences much lower than 10 years. *See e.g.*, Andre Clark, who pleaded guilty to one count of conspiracy to commit wire fraud and was sentenced to 33 months in prison after admitting to seeking $6,774,999 in fraudulent PPP loans with the help of co-conspirators[1]; Austin Hsu, who was sentenced to 2 years in prison after submitting nine fraudulent disaster loan applications seeking over $1.1 million[2]; Donald Trosin, who conspired to launder over $1.3 million in

[1] DOJ Press Release: https://www.justice.gov/opa/pr/man-sentenced-covid-19-relief-fraud

[2] DOJ Press Release: https://www.justice.gov/usao-wdwa/pr/issaquah-man-sentenced-covid-19-relief-fraud-scheme

fraud, was sentenced to 40 months in federal prison after submitting more than 20 fraudulent applications claiming that he had 120 employees on his payroll and over $5 million in payroll expenses.[3]

Based on these sentences for similar crimes, Mr. Fayne asserts that a sentence of 10 years in prison is more than sufficient to meet this Court's sentencing goals.

E. Mr. Fayne has not contested the restitution amount or the list of victims provided by the probation department.

One of this Court's consideration in sentencing is the need to pay restitution to the victims of the case. Mr. Fayne has not contested the restitution amount and he asserts that the sooner he is released from custody, the sooner he can begin to pay back the money that he owes. Mr. Fayne wants to finish his college degree and get training in the field of diesel mechanics. Once he completes these goals, he will be further along the road to legitimate employment and paying back the victims in this case. Therefore, this factor weighs in favor of Mr. Fayne's requested sentence of 10 years in prison.

For all of the reasons outlined here, Mr. Fayne asks the Court to impose a sentence of 120 months in this case.

Respectfully submitted this 8th day of September 2021.

s/Saraliene S. Durrett

---

[3] DOJ Press Release: https://www.justice.gov/usao-ndia/pr/armstrong-man-sentenced-federal-prison-defrauding-united-states-out-more-1-million

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date electronically filed the foregoing sentencing memorandum with the Clerk of the Court using the CM/ECF system which will automatically send email notification of such filing to the following attorney(s) of record:

All Defense Counsel

All AUSAs of record

Respectfully submitted this 8th day of September 2021.

s/Saraliene S. Durrett
SARALIENE S. DURRETT
1800 Peachtree Street
Suite 300
Atlanta, GA 30309
(404) 433-0855
ssd@defendingatl.com