UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

v. Case No. 3:23-cr-68-TJC-MCR

DECONNA BURKE

DEFENDANT'S SENTENCING MEMORANDUM

Defendant, DeConna Burke, by and through undersigned counsel, submits this Sentencing Memorandum for this Court consideration in determining an appropriate sentence.

Mr. Burke was arrested for the charge in this case on April 25, 2023. He was subsequently released to the supervision of Pretrial Services and has been supervised for the past seven months. Just three months after his arrest, on July 26, 2023, Mr. Burke pled guilty to Count One of the Indictment, pursuant to a Notice of Maximum Penalties. On July 31, 2023, this Court accepted the plea, adjudicated Mr. Burke guilty, and set the Sentencing Hearing.

This conviction subjects Mr. Burke to a statutory maximum penalty of twenty (20) years in prison. *See* 18 U.S.C. § 1343. Any term of imprisonment may be followed by a maximum of three years of supervised release. *See* 18 U.S.C. § 3583(b)(2). Alternatively, Mr. Burke may be sentenced to a maximum of five years of probation. *See* 18 U.S.C. § 3561(c)(1). Correct application of the United States Sentencing Guidelines results in a Total Offense Level of 7 for Mr. Burke. *See* USSG §§ 2B1.1, 3E1.1, 4C1.1. Given Mr. Burke's lack of criminal history, the Guidelines place him in Criminal History Category I. *See* USSG §§ 4A1.1, 4A1.2. This results in an advisory sentencing range of zero to six months imprisonment, and places Mr. Burke within "Zone A" of the Sentencing Table. *See* USSG § 5A.

Mr. Burke takes full responsibility for his actions and is prepared to accept the sentence of this Court. He respectfully requests that this Court sentence him to probation, with standard conditions, including restitution, continued mental health treatment, and any other reasonable and appropriate special conditions. Additionally, he requests that this Court allow him to continue his work as a truck driver, which requires him to regularly travel outside of the Middle District of Florida.

THE SENTENCING GUIDELINES

Mr. Burke objects to the sentencing guidelines calculation in the Final Presentence Report ("PSR"). (Doc. 35). Specifically, he objects to the two-level upward adjustment under USSG § 2B1.1(b)(12), a special offense characteristic that applies only if "the offense involved conduct described in 18 U.S.C. § 1040." Mr. Burke made this objection in response to the Initial PSR. The United States Probation Office reviewed the objection and maintained its position that the special offense characteristics applies to this case. (Doc. 35 at 19-20). Probation concludes that the creation of PPP Loans "pursuant to the CARES Act was a response to the pandemic's widespread adverse economic impact . . . and falls under the COVID-19 pandemic emergency determination under the [Stafford Act]." *Id.* However, this is simply not true.

Section 1040 prohibits fraud "involving any benefit authorized, transported, transmitted, disbursed, or paid in connection with a major disaster declaration ... or an emergency declaration under ... the Robert T. Stafford Disaster Relief and Emergency Assistance Act." 18 U.S.C. § 1040(a). The Stafford Act, 42 U.S.C. §§ 5121-5208, governs federal assistance to state and local governments in the event of an officially declared "emergency" or "major disaster." *Id.* § 5122(1). It authorizes a wide array of federal aid, including coordination services, "technical and advisory assistance," and help with distributing "medicine, food, and other consumable supplies." *Id.* § 5170a(2)-(4). The Act allows various government agencies to automatically provide this assistance once the president issues an executive order, without Congress having to pass a new law.

On March 13, 2020, the former president declared the COVID-19 pandemic a national emergency, pursuant to Section 501(b) of the Stafford Act (42 U.S.C. § 5191(b)). *See* Pres. Proc. No. 9994, 85 Fed. Reg. 15337 (Mar. 13, 2020). The Small Business Administration followed by issuing disaster declarations for each State. *See* Notice, Administrative Declarations of Economic Injury Disasters for the Entire United States and U.S. Territories, 85 Fed. Reg. 19,052 (Apr. 3, 2020). These declarations enabled the Small Business Administration to exercise its *preexisting authority* (under the Stafford Act) to make or guarantee loans to small businesses that suffer a "substantial economic injury" caused by a disaster where the business is located. 15 U.S.C. § 636(b)(2)(A), (C).

These loans were called "economic injury disaster loans," or EIDLs. *See* 13 C.F.R. §§ 123.300-123.304.

On March 27, 2020, Congress passed, and the former president signed, the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, in response to the COVID-19 pandemic. *See* CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (2020). Among many other things, the CARES Act created the Paycheck Protection Program ("PPP"), which authorized potentially forgivable loans to small businesses to help cover certain expenses, such as payroll, mortgage and rent payments, utilities, and other operating costs. *Id.* § 1102 (codified at 15 U.S.C. § 636(a)(36)-(37) (2020)). PPP Loans did not exist prior to the enactment of the CARES Act, the legislation that created them. They were not created nor authorized by the executive emergency/disaster declarations referred to in 18 U.S.C. § 1040 or the Stafford Act.

While Congress may have been motivated to pass the CARES Act for the same reasons that led the former president to declare a national emergency under the Stafford Act, that does not make the CARES Act an executive action falling under the Stafford Act. This is an uncomplicated separation of powers issue. Congress could have passed the CARES Act regardless of whether a national emergency was declared. Further, if the United States Sentencing Commission intended for the adjustment in section 2B1.1(b)(12) to apply to, for example, "fraud involving any benefit program created by future legislation enacted to provide relief from a national emergency that is also the subject of a separate executive emergency declaration under the Stafford Act," it could have stated so.

Similarly, if Congress intended for enhanced penalties to apply to PPP Loan fraud, it could have directed the Sentencing Commission to do so in the CARES Act. In fact, a congressional directive is how the adjustment in USSG § 2B1.1(b)(12) came into existence. On January 7, 2008, the Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007 was signed into law. *See* Pub. L. No. 110-179, 121 Stat. 2556 (2008). This legislation created 18 U.S.C. § 1040 and added to two other sections language that increased the maximum penalties for fraud involving benefits connected to disaster/emergency declarations under the Stafford Act. *Id.* at §§ 2-4 (amending 18 U.S.C. §§ 1341 and 1343).[1] It also ordered the Sentencing Commission to:

[1] The amendments to 18 U.S.C. § 1343 provide for a 30-year maximum prison sentence if the

> [P]romulgate sentencing guidelines or amend existing sentencing guidelines to provide for increased penalties for persons convicted of fraud or theft offenses in connection with a major disaster declaration under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170) or an emergency declaration under section 501 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5191).

Id. at § 5.

Undersigned counsel was able to find one appellate case addressing this issue. In an unpublished opinion, the Fourth Circuit Court of Appeals noted, in dicta, its approval of the sentencing court's decision to apply the enhancement in USSG § 2B1.1(b)(12) to the defendants' fraud in relation to EIDLs and to not apply the enhancement to the defendant's fraud in relation to PPP Loans. *See United States v. Redfern*, No. 22-4196, 2023 WL 2823064 (4th Cir. Apr. 7, 2023) (unpublished). The court wrote the following:

> As many will recall, in March of 2020, the [former president] issued a Stafford Act emergency declaration in response to COVID-19. So the question, as the district court explained, was whether loans under the PPP and EIDL program were "authorized" or "paid" "in connection with" that declaration.

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wire fraud involved benefits connected to disaster/emergency declarations under the Stafford Act. Most other violations of section 1343 carry a 20-year maximum. This is notable because Mr. Burke is charged in this case with violating section 1343, and all parties have agreed since the beginning that his maximum exposure is 20 years in prison. *See* the Notice of Maximum Penalties (Doc. 26). Further, the Indictment (Doc. 1) does not allege (and rightly so) that Mr. Burke's crimes have anything to do with declarations under the Stafford Act.

> After undertaking a detailed canvass of the legislative origins and regulatory features of the two programs, the district court concluded that EIDL benefits (*though not PPP benefits*) were authorized "in connection with" a Stafford Act declaration, and accordingly applied the enhancement.
>
> Although we have no reason to doubt the district court's analysis, we also have no need to pass on it here.

Id. at 3–4 (emphasis added) (internal citations omitted). This Court should adopt the same analysis as the district court in *Redfern* and sustain Mr. Burke's objection to the Final PSR's use of the upward adjustment under USSG § 2B1.1(b)(12).

MR. BURKE'S SENTENCE

Regardless of this Court's calculation of the advisory sentencing guidelines for Mr. Burke, a non-custodial sentence is sufficient to meet the statutory goals of sentencing. A supervisory sentence would provide the government an opportunity to recover restitution from Mr. Burke and provide Mr. Burke an opportunity to continue bettering himself. Such a sentence is appropriate given the nature and circumstances of the offense and the history and characteristics of Mr. Burke. While he knowingly committed a crime here, it appears that this was truly a "one-off" for a young man with a history of working hard and treating others with respect.

As outlined in the PSR, Mr. Burke's childhood was not ideal, but he managed to get through without any major issues in school or involvement with the juvenile justice system. *See* PSR ¶¶ 36-45. Prior to his arrest in this case, he has never been arrested or otherwise charged with a criminal offense. *See* PSR ¶¶ 30-35. While in high school in New Jersey, he was an athlete and played on the varsity football and basketball teams. He also participated in his school's track and field team and the drama/theater club, and was active in his church.

He was primarily raised by his Aunt Agnes, who unfortunately passed away in April 2004, shortly after Mr. Burke turned 15 years old. A few years later, in January 2008, his stepfather Kevin, who Mr. Burke viewed as a father figure, died of suicide. This deeply affected Mr. Burke, but he continued to move forward and stay on the right track. He considered pursuing a career in law enforcement as a New Jersey State Trooper, but decided to enlist in the Army instead. In March 2008, just two months after his stepfather's passing, he reported for Basic Training in Georgia.

Mr. Burke trained as an Infantry Specialist and is a combat veteran. His service included a tour of duty in Iraq. While in Iraq, he was the victim of an IED attack, leading to several physical and mental health issues. As outlined in the PSR, he suffers from Traumatic Brain Injury, ongoing neck and back pain, and Post-Traumatic Stress Disorder. He is now receiving treatment for these issues and is responding to well to mental health treatment provided through the VA. *See* PSR ¶¶ 49, 54, 59-61. Almost five years after enlisting, Mr. Burke was honorably discharged from the Army with the rank of Specialist (E-4) in December 2012. PSR ¶ 78.

After leaving the Army, Mr. Burke had multiple jobs in the decade that followed. *See* PSR ¶¶ 68-77. This included work with two defense contractors, through which he spent time in Dubai, Switzerland, the Netherlands, Afghanistan, and Kuwait. He most recent job was with the Jacksonville Sheriff's Office, where he served as a corrections officer. He graduated from the JSO Corrections Academy in 2021 and was selected as Call Leader of his graduating class. His job with JSO unfortunately ended after he was suspected of committing the crime in this case.

Since February 2023, Mr. Burke has been employed as a full-time truck driver with Swift Transportation. He enjoys this work and the challenges it presents. It requires him to stay focused and healthy and to be responsible and reliable, while also giving him a sense of independence and the ability to travel to different parts of the country. He hopes to continue this line of work and perhaps one day own his own trucking company.

Mr. Burke's has been doing well while on pretrial release for the past almost eight months. He has been compliant with reporting requirements and has not otherwise violated. He has been employed the entire time and has also been working on obtaining a Bachelor of Arts in Criminal Justice through online classes at Colorado Technical University. He has high hopes for the future and undersigned counsel has no doubt that he will have no further involvement with the criminal justice system. He will do well on probation and make genuine efforts to pay the restitution owed. At the Sentencing Hearing, Mr. Burke plans to further address this Court and express his sincere remorse for his actions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of December 2023, a true copy of the foregoing was served by electronic notification to Assistant United States Attorney Kevin Frein, Esq., and to United States Probation Officer Chavi Cheatham.

/s/ Scott Schmidt
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Assistant Federal Defender