UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

v. **Case No. 2:23-cr-88-SPC-KCD**

DIOP MCKENZIE
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SENTENCING MEMORANDUM;
MEMORANDUM IN SUPPORT OF GUIDELINE OBJECTION;
AND MOTION FOR A DOWNWARD VARIANCE

DIOP MCKENZIE, through counsel, files his Sentencing Memorandum; Memorandum in Support of Guideline Objection; and Motion for a Downward Variance, and states:

INTRODUCTION

Mr. McKenzie is charged in a multi-count indictment alleging two counts of Bank Fraud in violation of 18 U.S.C. § 1344; two counts of Wire Fraud in violation of 18 U.S.C. § 1343; and one count of Aggravated Identity Theft in violation of 18 U.SC. § 1028A. On June 11, 2024, pursuant to a written plea agreement with the Government, Mr. McKenzie pled guilty to Count I, Bank Fraud; Count IV Wire Fraud; and Count V Aggravated Identity Theft. These allegations relate to various fraudulent loan applications under the Paycheck Protection Act (PPP) and the Emergency Injury Disaster Loan (EIDL) programs during the COVID pandemic. Additionally, in Count V it is alleged that Mr. McKenzie used without authorization the identity of an individual identified as M.D. to apply for a loan.

GUIDELINE CALCULATION

The PSR calculates the guideline range for Counts I and IV as follows:

BOL	2B1.1(a)(1)	7
Loss Amount	2B1.1(b)(1)(F)	+10
conduct described in 18 U.S.C § 1040	2B1.1(b)(12)	+ 2
Acceptance of Responsibility	3E1.1 (a) and (b)	-3
Total Offense Level		16
Guideline Range Level 16 CH III		27-33 months imprisonment

Under § 1028A, Count V requires a 24-month consecutive sentence. This brings the effective total guideline range to 51-57 months imprisonment. Of course, the Court cannot vary from the statutory range as to Count V. The Court can vary with respect to the guideline range for Counts I and IV.

GUIDELINE OBJECTION

Mr. Mckenzie's only objection to the guideline calculation is to the two-level enhancement under USSG §2B1.1(b)(12). This provision applies only where a defendant engages in conduct that violates 18 U.S.C. § 1040. Section 1040 in turn prohibits engaging in a fraud in connection with a benefit authorized by 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). Mr. McKenzie maintains that to trigger this provision, therefore, the benefits must be authorized specifically by the Stafford Act as opposed to other statutory authority. The PSR indicates solely that Mr. Mckenzie made fraudulent statements and representations involving a benefit in connection with an emergency declaration (Coronavirus Aid, Relief, and Economic Security (Cares) Act/Covid-19 pandemic).PSR ¶ 57.

By extending the pre-existing EIDL loan program to include economic losses sustained due to the COVID-19 pandemic, the CARES Act provided a separate statutory source of authorization and funding for EIDLs that was unrelated to any Stafford Act declaration. EIDLs authorized under the CARES Act were forgivable grants, whereas the pre-existing EIDL program administered by the SBA which was authorized by 21 U.S.C. § 636 provided for actual loans that needed to be repaid. This distinction demonstrates the separate authority of EIDLs authorized by the CARES Act. Because Mr. McKenzie applied for benefits authorized by the CARES Act, he did not seek a benefit "authorized" or "paid in connection with" a Stafford Act declaration, as required to apply § 2B1.1(b)(12). Accordingly, the guideline increase should not be imposed.

<u>MR. MCKENZIE'S BACKGROUND AND CHARACTERISTICS</u>

Mr. McKenzie's statement to Court is attached. Appendix A. In accepting responsibility, Mr. McKenzie pulls no punches, explicitly admitting that he "stole" $ 237,000 from the U.S. Government. As opposed to making excuses, equally explicitly, he acknowledges that this was a "cowards" way out of dealing with his financial circumstances.

Mr. McKenzie's describes his personal history in detail in his letter to the Court. This description is consistent with what is the PSR and only does not require significant elaboration. In short, Mr. McKenzie was born to a single mother and spent his formative years in Lauderhill Florida, which he describes a rough area in Broward County. He recalls his father spent time in jail. He has no memory of his parents living in the same home. PSR ¶ 92. His mother had to work long hours, sometimes working multiple jobs to make ends meet. PSR ¶ 93. As a result, Mr. McKenzie recalls he was frequently home alone and "inevitably spent a lot of time 'running the streets' and 'raising myself.'" Exhibit A. After his mother and stepfather divorced the family moved to Cape Coral. His mother had found employment with Keiser University. Mr. McKenzie felt that he never fit in in Cape Coral and did not do well in school. Still, he pursued unsuccessfully his dreams of playing basketball on the college level or alternatively serving his country in the military.

Mr. McKenzie has eight children, two of whom have special needs. PSR ¶¶ 96, 98. Contrary to what might be expected under the circumstances, two of his mothers of his children think enough of him as a father to write to the Court. Kristina Stewart, a Lee County School teacher, speaks in glowing terms of Mr. McKenzie's positive relationship with their ten-year daughter. Appendix E. Lindsay Neal, the mother of his younger three children, describes the diagnosis of their four-year old son with two congenital conditions leading to blindness. She also indicates that her son was diagnosed with autism. She describes Mr. McKenzie's active role in her son's journey and particularly an occasion when they spent five nights in the ICU together. Appendix F. This child will require constant care in the future.

Both of Mr. McKenzie's parents, as well as his younger sister, have also written letters to the Court on his behalf. Appendix B, C, and D.

GROUNDS FOR A VARIANCE

Mr. McKenzie recognizes that any variance from the guideline range would be limited Count I and Count IV. He maintains that there are grounds for a variance as to those counts for the following reasons.

Insufficient Credit for Acceptance of Responsibility

Due to the mandatory consecutive 2-year sentence for Count V, the reduction Mr. McKenzie receives for acceptance of responsibility is minimal. Should the guideline range remain as calculated, the total sentence *with acceptance of responsibility* would be 51 months on the low-end. (27 months on counts I and IV plus 24 months on Count V). This is based on a total offense level of 16, Criminal History Category III. *Without acceptance of responsibility*, Mr. McKenzie would be at a level 19, Criminal History Category III on those counts. This would result in a guideline range of 37-46 months. As a practical matter, if sentenced to the low-end of the guidelines, Mr. McKenzie would receive only a total reduction for acceptance of responsibility of 10 months. Mr. McKenzie respectfully maintains that the Court should vary to more fully credit his acceptance of responsibility.

Unwarranted Sentencing Disparities

18 U.S.C. § 3553 (a)(6), of course, directs the Court to avoid unwarranted sentencing disparities. In this regard, the total sentence of 51 months sought by the Government exceeds sentences imposed in other COVID fraud cases. In a case involving a former public official, the sentence was minimal compared to the sentence Mr. McKenzie is facing. *See United States v. Harding*, 1:22-CR-00032-001 (N.D. FL. October 19, 2023)(former Florida State representative sentenced to 4 months for fraudulently obtaining $ 150,000 in Covid-19 relief funds);https://www.justice.gov/usao-ndfl/pr/former-florida-state representative-sentenced-federal-prison-wire-fraud-money. In another case, although there was not a § 1028A count, the defendant's conduct was at least as severe and the loss amount was far greater. *See United States v. Crowther*, 2:20-cr-114 (M.D.FL. June 29, 2021), *affirmed* 2023 WL 3813509 (11th Cir. June 5, 2023)(37-month sentence following a trial for a defendant who fraudulently obtained 2.1 million dollars in PPP funds and whose conduct included submitting 39 fake social security and green cards for nonexistent

employees). In comparison to these two cases, as examples, Mr. McKenzie maintains that his proposed guideline sentence is disproportionately severe.

CONCLUSION

Mr. McKenzie maintains that a modest variance is appropriate as to the non-mandatory portion of his sentence.

Respectfully submitted,

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Federal Defender
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of September 2024, a true copy of the foregoing filed in this court and a copy was forwarded using CM/ECF to Yolande Viacava, Office of the United States Attorney, 2110 First Street, 3-137 Fort Myers, Florida 33901.

/s/ Russell K. Rosenthal
Russell K. Rosenthal, Esq.
Assistant Federal Defender