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

ATLANTA DIVISION

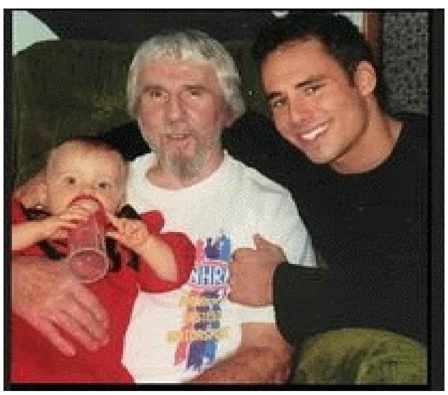
UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	No. 1:20-CR-228-MHC-JKL
	)	
DANIEL ERIC JAY	)	
	)	

SENTENCING MEMO

COMES NOW DANIEL ERIC JAY, by and through counsel, and files this memo to be considered by this Honorable Court in conjunction with his Presentence Report and all argument, evidence and allocution to be put forth at his sentencing hearing set for Friday, June 23, 2023, in Atlanta. Mr. Jay asks that this information be used to fashion a sentence which comports with the requirements of 18 U.S.C. §3553(a) and which is otherwise reasonable.

Introduction: DANIEL ERIC JAY is a 47 year-old man, raised in the small township of Bessemer, PA. He comes before the Court with no prior convictions and zero (0) criminal history points. Like many of the victims in this case, Dan Jay initially believed in MAURICE FAYNE and his trucking company's "big deal with Amazon." Dan Jay invested his own money into the operation / scheme and encouraged others to do the same. At one point, he even borrowed money from a loan-shark to meet Fayne's requests for additional funds to keep the deal alive. As time went by and the fantasy crumbled, Dan Jay remained in the scheme, hoping to recover the money he invested. Jay, like many investors, desperately desired to get his money back out of the deal, even after it became obvious the deal was suspect. As the government acknowledges, Dan Jay received comparatively little money from Fayne's fraud schemes. He did receive $30,000 from the PPP loan, most of which he used to repay the aforementioned loan-shark. It is surprising in this case that Jay got so little money from Fayne's schemes, meanwhile Fayne bought luxury cars, expensive jewelry and other high-dollar items.

[Dan with his father and newphew in the better days.]



[Dan with his father in the later days.]

Loss of his father. Dan was very close to his father, Elmer "Butch" Jay. Butch was a lineman for Ohio Edison Power Company for 40 years. He served as the union representative / "Grievance Man," and was a renowned fast-pitch softball pitcher. In 2017, Butch broke his back. This injury led to a series of medical complications and illnesses including vasculitis and COPD. (PSR ¶ 148). When his illnesses progressed, Dan moved back into the family home to take care of his father. In July of 2020, Dan was arrested on a complaint in this case. (Doc. 4). On June 30, 2021, his father passed away. Following his father's death, Dan Jay spiraled out of control. His abuse of pain medicines (including Percocet and Oxycodone) increased exponentially. He began making terrible and misinformed decisions about how to handle this legal case. He violated the conditions of his bond, and ended up living in extended-stay hotels and ultimately on the streets of Youngstown, Ohio.

Mr. Jay continues to apologize for his erratic and disruptive behavior during the litigation of this case. He has apologized for the disrespect he showed to the Court, the prosecutor and his attorney. (PSR ¶127). The undersigned counsel can attest that since being returned to custody and sobriety, Dan Jay has been a stellar and most reasonable client.

I) <u>SENTENCING GUIDELINE ISSUES</u>.

(Paragraph 134) *Role in the Offense*.

The Probation Office has awarded Mr. Jay a 2-level upward role enhancement. The government has objected and requests a 3-level role enhancement. Mr. Jay submits the Probation Officer is correct on this issue, only a 2-level adjustment is warranted. In response to the governments objection, the Probation Officer writes,

> **In response,** this officer maintains a two level, not a three level, enhancement is warranted in this case. Regarding the Ponzi scheme, this officer notes the Government did not seek a role enhancement for Michael Sargent, Jay's codefendant in this case, and this officer views both of them on a par of culpability. Regarding the PPP loan, this officer concurs with the Government that Jay exercised a managerial role by recruiting Crivilli and Capone to assist in the creation of the phony documents but does not view the procurement of the PPP loan as an "extensive criminal activity," as required for the 3-level enhancement. For all these reasons, a two-level enhancement is recommended.
>
> (PSR ¶134).

As shall be discussed at a later point, Dan Jay submits he was *less* culpable than Michael Sargent, a man who victimized several women through "romance fraud" and who defrauded members of his own family. Regardless, Mr. Jay agrees with the Probation Officer's ultimate conclusion and notes that Michael Sargent received zero (0) points for his role in the offense.

Furthermore, Dan Jay is being held accountable for a huge loss amount, $8,725,500, which adds 18 offense levels to his sentencing guidelines. In relation to the quantity of money for which he is being held accountable, Mr. Jay's role was deserving of only a 2-level enhancement, not the 3-level enhancement sought by the government. The level of supervisory authority which Jay exercised during this conspiracy was diminished by his lesser role with respect to the vast loss amount. "[T]he district court must measure the defendant's role against the relevant conduct for which she has been held accountable. . . . In other words, the district court must assess [the defendant's role] in relation to the relevant conduct attributed to the defendant in calculating her base offense level." *United States v. De Varon*, 175 F.3d 930, 940-941 (11th Cir. 1999).

The Application Notes to USSG § 3B1.1 direct the Court to consider a variety of factors including - the nature of participation in the commission of the offense, the recruitment of accomplices, the degree of control and authority exercised over others, **and the claimed right to a larger share of the fruits of the crime**. USSG § 3B1.1, Application Note 4 (emphasis added). Here, Mr. Jay did recruit Carrie Capone, who was not charged, however given Dan Jay's relatively minuscule share of the fraud proceeds, a 2-level role enhancement is sufficient and appropriate.

This was not a large or otherwise extensive fraud ring. Only four (4) people were indicted. Clearly, Maurice Fayne was the leader, organizer, the boss. It was Fayne's trucking company, his scheme, and he got almost all of the money. As the *Background Commentary* to USSG § 3B1.1 reads:

> In relatively small criminal enterprises that are not

> otherwise to be considered as extensive in scope or in planning or preparation, the distinction between organization and leadership, and that of management or supervision, is of less significance than in larger enterprises which tend to have clearly delineated divisions of responsibility. This is reflected in the inclusiveness of § 3B1.1 (c).

USSG § 3B1.1, *Background*.

When the totality of the circumstances are considered, including the lack of role enhancement for Michael Sargent and the absence of prosecution for several others, Mr. Jay should receive no more than a 2-level upward role adjustment.

II) <u>REQUESTS FOR A REASONABLE AND LOWER SENTENCE:</u>

Mr. Jay's current sentencing guidelines include a Final Offense Level 29, Criminal History Category I, and an advisory range of 87-108 months. As authorized by Title 18 USC § 3553 (a) and *United States v. Booker*, 125 S.Ct. 738 (2005), Mr. Jay requests a reasonable sentence lower than the advisory guidelines. After considering the Guidelines, "the District Court may impose a more severe or more lenient sentence as long as the sentence is reasonable." *United States v. Crawford*, 407 F.3d 1174, at 1179 (11th Cir. 2005). A below-Guidelines sentence is assessed for reasonableness in light of the factors set out at 18 U.S.C. §3553(a). "These factors include available sentences, the applicable Guideline range, the nature and circumstances of the offense, and the need for the sentence to reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, and provide the defendant with needed medical care." *United States v. Winingear*, 422 F.3d 1241, 1246 (11th Cir. 2005).

A) THE NATURE AND CIRCUMSTANCES OF THE OFFENSE.

Obviously, the nature of the offense is serious. Victims were defrauded out of large sums of money with promises of high returns on a non-existent insider Amazon contract, and the PPP loan program and the American taxpayers were also victims of fraud and intended fraud. Such crimes wreak havoc on the lives of the innocent and erode the trust people once had in one another. Defrauding and attempting to defraud the PPP loan program undermines an important assistance program and wastes funds and resources intended for real business owners in need of assistance during the COVID pandemic to keep their employees on the payroll. While the intended loss amount for Dan Jay is calculated to be "approximately $8,725,500," (PSR ¶123), and he has agreed to a loss amount between 3.5 and 9 million dollars, and agreed to pay restitution of $4,465,865.55, and a personal forfeiture of $250,000 - he personally received very little of the funds actually lost.

B) THE HISTORY AND CHARACTERISTICS OF THE DEFENDANT.

Who is Daniel Eric Jay ? Dan Jay has no prior convictions and zero (0) criminal history points. "Danny" to his family, Dan Jay is the youngest of three children born to "Butch" and Nancy Jay. They lived in a small house on a hill just above the highschool football stadium in Bessemer, PA. Dan Jay literally grew up under the Friday night lights.

[The house Dan Jay grew up in.]

[Remains of the H.S. stadium behind Dan's house. Only the lights are left.]

Dan's father played competitive softball until the age of 53. Dan grew up an obsessive sports fan with an immense knowledge of sports' statistics. He followed baseball, and, like his Dad, loved boxing.[1] Dan wanted to be a contender. Bessemer, PA, is small. As of 2000, there were 1,172 people, and 345 families residing in the borough. "Bessemer was once a thriving industrial community. It

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[1] One of Bessemer's two "Notable People" was Charley Burley, professional boxer. (https://en.wikipedia.org/wiki/Bessemer,_Lawrence_County,_Pennsylvania) (Accessed 6/19/2023).

hosted a cement plant, two brick yards, and two railroad spurs from the Pennsylvania and the Pittsburgh & Lake Erie Railroads…. Bessemer also hosted several department stores, supermarkets, businesses and a plethora of bars and restaurants. The brick yards closed by the mid-1960's and the cement plant ceased production in 2009. With the decline of industry, Bessemer also saw a decline in terms of businesses as well."[2]

[Bessemer, PA]

[2]The Borough of Bessemer, Pennsylvania (bessemerpa.com) (Accessed 6/19/2023).

[Bessemer Hotel & Diner in 2022.]

[Bessemer Bowling Alley in 2022.]

[Bessemer Presbyterian Church where the Jay family attended.]

After he left Bessemer, Dan Jay sought fame and fortune as a boxing promoter, among other endeavors. Unfortunately, he lost more money in boxing than he ever made.

As reflected in the letters provided by family members, DANIEL ERIC JAY is a loyal, giving and loving person.

His sister, CINDY BARTH, writes the following:

> Our family was a bit unusual - I am the oldest, my sister Amy is 9 years younger than me & Danny was born the summer that I graduated from high school. I married my high school sweetheart the following year & we began having our family shortly after that so my daughter &

Danny are only 3 years apart in age. Because of that, even though Danny is my brother, he grew up more as one of my "kids" in many ways. My children all adored him growing up and even though he was just a few years older than they were, he was always "Uncle Danny" to them.

He was married for many years & lived out of state but because he and his wife never had children, he always had a special place in his heart for our grandchildren. He made his way back home for every important event in our family and showed up for soccer games, wrestling matches, football & basketball games whenever possible, and of course for birthdays & Christmas. We were always grateful for the love and attention he gave the kids & they thought he was the greatest ! He was always so generous with his time as well as his money. . . .

When our father developed a life-threatening infection in the fall of 2020, my sister & I weren't sure how we could possibly keep him in the home that he loved because the care he needed was beyond our physical ability. Danny decided to step up & move back in with him so that there would be someone to care for him around the clock. . . . . It was Danny who was with him 24/7 (in the middle of the night making sure his CPAP & oxygen were working properly, helping him in and out of bed, dressing his wounds & being available when his home health nurses would be there for visits.) Without Danny stepping up as he did, our father would have had to go to a nursing home & would never have received the love and care that he got at home. He spent the last 9 months of his life very happy & comfortable with his family being able to visit in the home that he loved.

This is my brother. This is the man who stands before you. I know that the memo you have of all his crimes paints a very dark picture, but there is so much more to him & I wanted you to hear from my heart the part of him that you may not see.

He was a beloved son, Uncle Danny to my 5 children & 10 grandchildren & a man that I love dearly. May you consider all of this as pronounce his sentence. ....

(*See* Exhibit 1, attached hereto, letter from Cindy Barth).

[Dan and his sister's, Amy and Cindy.]

SCOTT JOHNSON, Dan's brother-in-law, (husband of sister, Amy), writes,

> I have personally known Dan for most of his life, as I was introduced to his family when he was a young boy....
>
> My three children, all adults now, really adored their uncle while growing up ! Dan was a fun loving person toward them and they looked forward to seeing him at birthday parties, holidays and various gatherings.
>
> Dan was always kind hearted towards his nieces and nephews and affectionate towards his family and friends as he would be later get on to caring and assisting my father-in-law during his last year on earth.

(*See* Exhibit 2, attached hereto, letter from Scott Johnson).

Dan's niece, HOLLY PAULIN, writes the following:

> I am aware that you will be the one to judge and sentence Dan for the crimes he committed and my heart is heavy with the knowledge that he will now have to pay the consequences for the poor choices he's made. I am saddened by this because I know there is so much more to Dan than these choices.
>
> .... Dan was always there to lift me up and cheer me on, while reminding me there are brighter days to come. He is a phenomenal motivator for anyone going through hard times.
>
> He has an absolutely kind and generous heart, and I'm not sure what our family would have done had he not stepped up to care for my grandfather during his last couple years on this earth. . . . .
>
> Grandpa was his best friend and I know that caring for him during that time was a blessing to Uncle D, while

> at the same time, incredibly painful.
>
> . . . I just wanted you to know that there's so much more to Dan than the crimes he's committed and he has a family who loves him deeply.

(*See* Exhibit 3, attached hereto, letter from Holly Paulin).

[Dan and his niece, Holly Paulin.]

C) THE NEED FOR DETERRENCE AS WELL AS THE NEED TO AVOID UNWARRANTED DISPARITIES.

Deterrence. Mr. Jay's codefendants have received substantial prison sentences. These sentences, and Mr. Jay's, will sufficiently deter members of society from committing future fraud and PPP loan fraud crimes. Furthermore, there no evidence or sentencing data to suggest that longer sentences will have a correspondingly greater deterrent effect.

Avoiding Unwarranted Sentencing Disparities.

Michael Sargent was sentenced to 60 months. He and his brother, Mark Sargent, committed "romance fraud" on unsuspecting, trusting older women. The Sargent brothers also defrauded members of their own family. The Sargents received more money from the scheme than Dan Jay. Unfortunately, Mr. Jay has picked up two (2) points for Obstruction (PSR ¶135) and lost one (1) point from Acceptance of Responsibility (PSR ¶138). Had Mr. Jay not spiraled out of control and behaved badly after his father died, he would have been in a good position to request a variance down to somewhere between 36 and 44 months. In light of his lesser culpability, but taking into account his pre-trial transgressions (obstruction), Daniel Jay submits **60 months** is a reasonable sentence.

D) ADDITIONAL GROUNDS FOR VARIANCE.

In *Kimbrough v. United States*, the Supreme Court made clear that a sentencing court had the authority to downwardly vary if there was no empirical evidence supporting the applicable guideline. *Kimbrough,* 552 U.S. 85, 108-10 (2007). Here, the fraud guidelines overly inflate Mr. Jay's sentence in light of his criminal conduct and personal history. As numerous federal courts have recognized, the fraud guidelines outlined in USSG §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 concurrence in *United States v. Corsey,* 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 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. Corsey, 723 F.3d 366, 380 (2nd Cir. 2013).

Meanwhile, the United States Sentencing Commission has recently proposed new Sentencing Guidelines, some of which are persuasive or relevant here. For instance, the new Guidelines which take effect November 1, 2023, will create an additional 2-level reduction for defendants who have zero (0) criminal history points. Additionally, there has been extensive debate and discussion about removing intended-loss from the offense level calculation and sentencing only upon actual loss.

Request for Recommendation to the RDAP Program.

Mr. Jay requests a recommendation to the BOP's Residential Drug Treatment Program. He clearly suffered from substance abuse problems (PSR ¶¶ 155-164), and would benefit from drug treatment.

WHEREBY, based upon the above, DANIEL ERIC JAY requests that this Honorable Court deny the government's role objection to the PSR, grant him variance down from 87 months, and impose a reasonable sentence no longer than **60 months**.

Dated: This 20th day of June, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing Sentencing Memo upon the following:

Russell Phillips
Assistant United States Attorneys
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by CM/ ECF delivery.

DATED: This 20th day of June, 2023.

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