UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-CR-80144-SMITH(s)(s)(s)

UNITED STATES OF AMERICA

v.

JOFF STENN WROY PHILOSSAINT,

Defendant.

GOVERNMENT'S RESPONSE TO SENTENCING MEMORANDUM

The United States respectfully responds to defendant Joff Stenn Wroy Philossaint's sentencing memorandum. The government recommends a sentence at the high end of the Guidelines incarceration range. If the Court calculates that range as recommended by the government, that sentence will be 151 months.

Seriousness of the Offense

In imposing sentence, the Court is required to consider "the nature and circumstances of the offense" and "the need for the sentence imposed to reflect the seriousness of the offense . . . ." 18 U.S.C. § 3553(a)(1) and (2)(A). Philossaint's offense conduct was particularly serious, and requires a correspondingly serious sentence. He attempted to steal approximately $5.2 million from a program for emergency relief to businesses harmed by the COVID-19 pandemic, and he actually stole approximately $3.8 million from that program. Philossaint callously profited at the expense of business owners and employees suffering through a public health calamity, and he drew down funds that would otherwise have been available to such people. In fact, the emergency programs from which he stole ran out of funds several times during the pandemic. *See* Stacy Cowley, *The Paycheck Protection Program is Out of Money*, N. Y. Times, May 4, 2021, at section B; Jeanna Smialek, *Close to Losing Her Cafe as Relief Funds Run Dry*, N. Y. Times, Apr. 24, 2020, at B1. Such egregious conduct merits a significant term of incarceration.

History and Characteristics of the Defendant

The Court must also consider "the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). Philossaint argues that his offense was "totally uncharacteristic." D.E. 306 at 5. Until 2016, Philossaint lived in Haiti, and his record is therefore unknown. D.E. 295 ¶ 125. During the four years Philossaint lived in the United States before the pandemic, he has no criminal history. However, Philossaint is far more culpable than most defendants with no criminal history. He submitted fraudulent loan applications over the course of 14 months, from April 2020 through June 2021. D.E. 295 ¶ 24. If it was truly out of character for him to commit fraud, he had plenty of time to reconsider his actions and discontinue his theft. But instead of doing so, he became more brazen as his scheme progressed. Philossaint submitted his first fraudulent loan application on April 1, 2020. In that case, he applied for a loan for his company Royal Elite Trans, LLC. The application exaggerated the company's revenue and misstated its line of business. However, the company did have revenue in 2019, so apparently it was operational in some sense. D.E. 295 ¶ 60. After that, Philossaint began preparing fraudulent loan applications on behalf of others in return for kickbacks. However, he also submitted two more fraudulent applications on his own behalf. On May 29, 2020, Philossaint submitted an application on behalf of another of his companies, One Solution Group LLC. On the application, Philossaint claimed that the company paid $32,782 in average monthly payroll, whereas in fact it paid no payroll in 2019 and little if any in 2020. D.E. 295 ¶ 58. However, at least One Solution Group *existed* before the pandemic, if only on paper. *See* D.E. 204-9 (GX 22) (One Solution Group organized in November 2019). Philossaint's third loan application was even more obviously fraudulent: on August 7, 2020, he applied for a loan for Dad Money Investment Group LLC. Philossaint incorporated this business on July 6, 2020, barely a month before applying for the loan, and he opened its bank account on July 28, 2020, ten days before applying for the loan. He nevertheless reported on the application that Dad Money had gross revenue of $398,774 during the twelve months prior to January 31, 2020—a time when the company didn't exist at all. D.E. 295 ¶ 44. In short, as the pandemic continued to threaten the American economy, Philossaint learned how to defraud the government's emergency relief program, and did so with less and less restraint. This conduct is indicative of Philossaint's character, and demands a lengthy sentence.

In assessing Philossaint's history and characteristics, the Court should also consider the fact that Philossaint interviewed for and accepted naturalization while the fraud was ongoing. Philossaint began his fraudulent scheme in April 2020. He interviewed for naturalization on December 15, 2020 and he was naturalized on February 9, 2021.[1] Once Philossaint received the privilege of U.S. citizenship, the American taxpayers were his fellow citizens. But that status did not cause Philossaint to reassess the fraud he was perpetrating on those taxpayers. On the contrary, after February 9, 2021, he prepared another 24 fraudulent loans, causing a further loss to the American people of $2,393,486. D.E. 295 ¶ 24.[2] Philossaint's disregard for his responsibilities as an American citizen is a further reason to sentence him at the high end of his range.

[1] The facts of Philossaint's naturalization were admitted at trial.

[2] The presentence report lists Philossaint's loans alphabetically by the name of the borrower. For the convenience of the Court, the following list sorts the loans by date of application:

Borrower	Application Date	Actual loss
Royal Elite Trans, LLC	4/1/2020	$299,400
Louis Mio Transportation LLC	5/22/2020	$91,970
SBT Logistics LLC	5/22/2020	$91,475
One Solution Group LLC	5/29/2020	$20,833
Premier Athlete Academy Inc.	6/5/2020	$81,892
Clear Shot Entertainment LLC	6/15/2020	$152,602
Unfold Perception LLC	6/18/2020	$81,954
Clear Shot Entertainment LLC	7/2/2020	$159,900
DDZ Family Enterprises LLC	7/4/2020	$156,900
Dulce Figueroa DBA Perfect Landscaping	7/13/2020	$72,900
Ferro's Entertainment and Production LLC	7/21/2020	$76,800
Jream Vison TV LLC	7/31/2020	$149,900
Unfold Perception LLC	8/2/2020	$20,000
Dad Money Investment Group	8/7/2020	$0
Cinda Foundation Inc	11/18/2020	$0
The Technical Advantage, Inc.	11/25/2020	$0
Black Diamond Investment Group LLC	2/11/2021	$111,267
Clear Shot Entertainment LLC	2/12/2021	$133,750
Jream Vison TV LLC	2/12/2021	$143,412
Sunrise City Construction Development LLC	2/12/2021	$143,222
Brianna Monique Gayle	2/14/2021	$20,093
Kenny Transporter Mechanic Inc	2/14/2021	$83,333
Vee & Empowerment LLC	2/14/2021	$98,323
Cinda Foundation Inc	2/15/2021	$104,167
Miaboats LLC	2/15/2021	$104,167
Azara Import & Export LLC	2/18/2021	$104,167
DDZ Family Enterprises LLC	2/20/2021	$143,445
Unfold Perception LLC	2/22/2021	$81,952
New Beginnings SoFlo LLC	2/24/2021	$142,840
Louis Mio Transportation LLC	3/18/2021	$115,780
Lema's Realty LLC	3/22/2021	$146,335
Ferro's Entertainment and Production LLC	3/25/2021	$0
Black Diamond Investment Group LLC	4/28/2021	$143,447
DDZ Family Enterprises LLC	5/5/2021	$143,447

Deterrence

Philossaint's sentence must also reflect the need "to afford adequate deterrence to criminal conduct." 18 U.S.C. § 3553(a)(2)(B). Because of the potential for economic catastrophe during the pandemic, the Paycheck Protection Program and the EIDL program were designed to make it easy for small businesses to apply for and receive loans quickly. However, that design also made it easier for unscrupulous criminals like Philossaint to defraud these programs. *See* U.S. Gov't Accountability Office, *GAO-23-105331, COVID Relief: Fraud Schemes and Indicators in SBA Pandemic Programs* at 17 ("[B]ecause the government needed to provide funds and other assistance quickly to those affected by COVID-19 and its economic effects, federal relief programs—including those implemented by SBA—were vulnerable to significant risk of fraudulent activities."). In this unique context, where the urgency of the situation required the government to dispense with some safeguards, the need for deterrence in correspondingly greater. Indeed, the Eleventh Circuit has recently upheld an upward variance in a case of COVID-loan fraud, based primarily on the need for deterrence. As the court of appeals explained,

> While the federal program [the defendant] bilked no longer exists, deterring fraud and other crimes against future multi-billion dollar government programs remains an important sentencing goal. As we had occasion to comment recently, "Like bears to honey, white collar criminals are drawn to billion-dollar government programs."

Jream Vison TV LLC	5/5/2021	$143,447
New Beginnings SoFlo LLC	5/5/2021	$143,447
Sunrise City Construction Development LLC	5/5/2021	$143,447
Jream Vison TV LLC	5/28/2021	$0
Dulce Figueroa DBA Perfect Landscaping	6/10/2021	$0
Ferro's Entertainment and Production LLC	6/10/2021	$0

> The crimes are serious and the monetary losses are large . . . . The need for deterrence of government fraud crimes is great.

United States v. Oudomsine, 57 F.4th 1262, 1268 (11th Cir. 2023) (quoting *United States v. Howard*, 28 F.4th 180, 186 (11th Cir. 2022)). The government is not seeking an upward variance here. On the contrary, we have recommended a downward variance. But the considerations discussed in *Oudomsine* support a sentence at the high end of the resulting incarceration range, and counsel against the further variances sought by Philossaint.

Sentencing Guidelines

The Court is required to consider the Sentencing Guidelines in imposing sentence. 18 U.S.C. § 3553(a)(5). The government's recommendation follows this mandate, and we recommend a sentence within Philossaint's Guidelines incarceration range. Philossaint argues that the Court should disregard the Guidelines range, for several reasons.

In the first place, Philossaint argues that the Sentencing Commission did not determine the offense levels applicable to economic offenses based on empirical data. D.E. 2–3. As the Sentencing Commission explained, it developed the Guidelines "by taking an empirical approach that used as a starting point data estimating pre-guidelines sentencing practice." U.S.S.G., Part A(1), § 3. It's questionable how meaningful such data would be for sentencing Philossaint, because Philossaint's crime occurred in the context of the COVID-19 pandemic. However, even considering economic crimes generally, "[t]he Commission did not simply copy estimates of pre-guidelines practice as revealed by the data . . . . Rather, it departed from the data at different points for various important reasons. . . . . The data revealed inconsistencies in treatment, such as punishing economic crime less severely than other apparently equivalent behavior." U.S.S.G., Part A(1), § 3. In other words, the

Sentencing Commission considered prior practice in designing the Guidelines, but then exercised its informed judgment. Of course, that was the Sentencing Commission's job. The Supreme Court has praised the Sentencing Commision because it "has the capacity courts lack to base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise. *Kimbrough v. United States*, 552 U.S. 85, 109 (2007) (internal quotation marks and citation omitted). The fact that, in setting out guidelines for economic crimes, the Sentencing Commission relied more heavily on experience and expertise than on raw empirical data does not undermine the persuasive authority of those guidelines. "Although a sentencing court may be entitled to consider policy decisions underlying the Guidelines, including the presence or absence of empirical data, it is under no obligation to do so." *United States v. Rivera-Santana*, 668 F.3d 95, 101 (4th Cir. 2012) (internal citations omitted). For all the reasons discussed in this memorandum, the Sentencing Guidelines are right to recommend that Philossaint serve a lengthy sentence.

Philossaint also argues that the Guidelines unfairly base his offense level on "the total reasonably foreseeable loss attributable to all co-conspirators/co-defendants, regardless of how much each conspirator personally profited from that amount." D.E. 306 at 3. But the losses in this case were far more than "reasonably foreseeable" to Philossaint. He was the primary orchestrator of those losses. Furthermore, he personally benefitted substantially from the fraud. Philossaint prepared 40 fraudulent loan applications, for an intended loss of $5.2 million and an actual loss of $3.8 million. D.E. 295 ¶ 24. Philossaint submitted three of the fraudulent applications on his own behalf. Just these three loans caused an intended loss of $512,008 and an actual loss of $320,233. D.E. 295 ¶¶ 44, 58, 60–63. Nor did Philossaint prepare the remaining 37 applications as a favor to his conspirators or without compensation. He prepared eight applications for his fiancée, Mariel Tollinchi, for an actual loss of another $253,867 and an intended loss of another $1,067,633.34. D.E. 295 ¶¶ 28–35, 45–48, 68 (loans on behalf of Perfect Landscaping, Ferro's Entertainment and Production LLC, Cinda Foundation Inc, and The Technical Advantage, Inc.). Of the remaining 29 applications, he received kickbacks of approximately 10% of the value of the loans in 18 cases. *See* D.E. 303-1 at 1–2. In short, Philossaint knew what he was stealing, and he and his fiancée received many hundreds of thousands of dollars of the proceeds. His intimate involvement in the fraud and his enormous personal profit support the government's recommended sentence.

Philossaint also argues that the Court should vary from the Guidelines incarceration range because district courts frequently do so. D.E. 306 at 4–5. But this bare fact does not suggest that a variance is appropriate in Philossaint's case; Philossaint's reasoning is essentially circular. Courts that have varied downward when sentencing defendants for economic crimes presumably did so based on the individualized facts of the defendants in question. But Philossaint now relies on those variances in the aggregate to argue that district courts should disregard the Guidelines and vary downward in general when sentencing defendants convicted of economic crimes. If this Court, and others, adopt that reasoning, then presumably those district courts that wish to vary downward based on individualized facts will have impose even larger variances, in order to stay ahead of the variance curve. This "variance inflation" would not serve the interests of justice. Philossaint is the kind of defendant for whom a lengthy sentence, without a downward variance, is appropriate: He was the key man in a vast and long-running conspiracy, he stole millions of dollars from a program designed to provide relief to small businesses and workers during a public health emergency, his conduct became more brazen as the scheme progressed, he obtained American citizenship illegally in addition to committing his fraud, and he actually accelerated the fraud after becoming an American citizen. If the Court were going to disregard the Guidelines in Philossaint's case, it would be more appropriate to vary upward than downward. Nevertheless, in light of all the factors specified in section 3553(a), including the Sentencing Guidelines, the government recommends a sentence at the high end of the incarceration range.

Unwarranted disparities

Philossaint further argues that the sentences imposed on David Andre Johnson in case no. 22-60201-CR-Smith and on Philossaint's co-defendant, Brianna Monique Gayle, "support a variance well below" his Guidelines incarceration range. D.E. 306 at 14. But the reverse is true. In imposing sentence, the Court must consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct". 18 U.S.C. § 3553(a)(6). Johnson and Gayle were each sentenced within his or her Guidelines incarceration range, without a variance. To vary downward and sentence Philossaint comparably to Johnson or Gayle would create the unwarranted disparity, because Philossaint is so much more culpable than they are. Johnson and Gayle each submitted loan applications on their own behalf, and they were sentenced based on those loans.[3] By contrast, Philossaint masterminded the scheme. He prepared

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[3] Philossaint argues that Gayle had "pervasive involvement in the conspiracy." D.E. 306 at 15. Gayle submitted a fraudulent loan application on February 14, 2021 and received $20,093. D.E. 295 ¶ 24. That was her only loan application. Unlike Philossaint's other customers who received PPP loans, Gayle did not open an ADP account. D.E. 295 ¶ 24. Later, from May 2021 through July 2022, Gayle worked as Philossaint's assistant. In that capacity, she helped him to obtain records from and otherwise deal with ADP. In his memorandum, Philossaint emphasizes her work as his assistant. Gayle, Philossaint's assistant, was surely less culpable than Philossaint, her boss. More importantly, Philossaint appears to assume that Gayle *knew* that Philossaint was using his ADP accounts to

Johnson's three applications and Gayle's application, as well as 36 other fraudulent loan applications. D.E. 295 ¶¶ 17, 24. Johnson, Gayle, and the other loan applicants who conspired with Philossaint are criminally responsible for their portion of the fraud, but Philossaint, who facilitated and induced the entire fraud, deserves a much longer sentence.

Philossaint's other requested variances

Philossaint argues that the Court should depart downward to account for his anticipated removal from the United States. D.E. 306 at 11–14. In support of this argument, he cites *United States v. Hercules*, 947 F.3d 3 (1st Cir. 2020). However, that case does not support his position. Hercules was convicted of an aggravated felony, and therefore, by statute, faced mandatory removal. 947 F.3d at 7. Philossaint is indeed in the same situation. Nevertheless, the district court declined to reduce Hercules's sentence, explaining that Hercules's removal was not a certainty and expressing concern that routinely granting variances for defendants who faced removal would effectively require citizens to serve longer sentences than non-citizens. *Id.* at 6. The First Circuit affirmed. *Id.* at 15. It held that a district court is permitted to vary based on the likelihood that a defendant will be removed, but expressed the expectation that such variances will be "rare." *Id.* at 9.

The government agrees that the Court's broad discretion over sentencing includes the discretion to consider the immigration consequences of Philossaint's case. It is true that denaturalization is a mandatory collateral consequence of Philossaint's violation of section 1425. *See*

commit fraud. Philossaint personally might know whether this is true, but counsel cites no evidence of that knowledge available in the record. Gayle was sentenced based on the relevant conduct that could be attributed to her by preponderance of the evidence at the time of her sentencing, which consisted of a single loan for $20,000. Philossaint should also be sentenced based on his relevant conduct, only in his case that conduct consists of $3.8 million worth of loans.

18 U.S.C. § 1451(e). But his denaturalization will only put Philossaint back in the same position he would have been if he had not obtained citizenship through false statements in the first place. Once Philossaint is denaturalized, he will revert to his prior status as a legal permanent resident. At that point, he will be amenable to removal proceedings, the same as Hercules or any other resident convicted of an aggravated felony. Effectively, Philossaint's argument is that Haitian nationals convicted of aggravated felonies are entitled to downward variances. Even if the Court were inclined to accept that premise, which the government submits is not an appropriate exercise of the Court's discretion, Philossaint's case for a variance is actually much worse than was Hercules's, or the cases of many other Haitian nationals who commit aggravated felonies. Philossaint first applied for citizenship by submitting a Form N-400 in February 2020, before he began his fraud. D.E. 204-53 (GX 47) (Form N-400). As of that time, Philossaint was eligible for citizenship. And he knew that, during the naturalization process, he would have to disclose any crimes for which he was not arrested and any misrepresentations he had made to gain public benefit in the United States, because he was asked about those subjects on his February 2020 Form N-400. D.E. 204-53 at 15–16. Yet, even knowing that his naturalization application was pending, and knowing that crimes or misrepresentations to gain public benefits could threaten his citizenship, Philossaint chose to begin his fraud in April 2020 and continue that fraud through and beyond his naturalization interview and ceremony. In short, Philossaint had every opportunity to obtain and retain American citizenship, and chose to give up that opportunity in order to acquire quick riches through fraud. That conduct does not warrant a downward variance.

Finally, Philossaint request a downward variance to conform to proposed section 4C1.1 of the Sentencing Guidelines, which is scheduled to become effective in November. Under the proposed amendment, a defendant would receive a two-level downward adjustment if he met certain criteria. *See* 88 Fed. Reg. 28254, 28271 (May 3, 2023) (to be codified at U.S.S.G. § 4C1.1). The government agrees that the Court has the discretion to vary from the existing Guidelines to match proposed amendments, but such variances will not always be appropriate, particularly not for a defendant such as Philossaint's, whose offense conduct is so egregious. However, Philossaint would not be eligible for the adjustment anyway, even if the proposed guideline is adopted. Criterion 10 specifies that a defendant is not entitled to the adjustment if the defendant receives an aggravating role enhancement. As the government established in our response to Philossaint's objections to the presentence report, Philossaint was a leader and organizer of the money laundering conspiracy. D.E. 304 at 5–7. Moreover, he was a leader and organizer of the fraud itself, even though that status doesn't affect his total offense level because of the grouping rules. *See* D.E. 304 at 2 n. 1. Therefore, the Court should not vary downward on this basis.

WHEREFORE, the government respectfully recommends a sentence at the high end of Philossaint's Guidelines incarceration range, which the government anticipates will be 151 months.

Respectfully submitted,

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