IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	**Case No. 1:23-CR-00168**
v.	)	
	)	**Judge Rossie D. Alston, Jr.**
GEORGE MENSAH, JR.,	)	
	)	**Hearing: May 8, 2024**
Defendant.	)	

DEFENDANT'S POSITION ON SENTENCING

Mr. Mensah respectfully asks this Court to impose a below the Guidelines "variance" sentence of not more than 24 months of incarceration and 3 years of supervised release. Your Honor sentenced Ms. Rose-Marie Nsahlai, to *24 months*. Her guideline range was 97-121 months and *she went to trial*, unlike Mensah who pled guilty *before* he was charged by the government. Position of the United States With Respect to Sentencing in U.S. v. Rose-Marie Nsahlai, No. 1:21-CR-234-RDA (Doc. 160, filed Sept. 20, 2023).

She and her husband, Mr. Kindambu, obtained over $2.5 million in fraudulent PPP loan proceeds and spent the funds on illegitimate expenditures including his personal taxes, a luxury vehicle, a Cessna aircraft, and a beautiful luxury residence, a photo of which is attached as Exh. 1 to the Position of the United States, Doc. 55 in *United States v. Kindambu*, Case No. 1:20-cr-260-RDA.

By contrast, Mr. Mensah made about $200,000 from his criminal activity. But about half of that amount was seized from his home for forfeiture ($82,000 in cash was seized from his safe in Tysons and the government also seized miscellaneous expensive jewelry items belonging to

Mensah). Unlike Rose-Marie Nsahlai, who went to trial for no good reason, he pled guilty *before* he was indicted. He never even thought about going to trial. <u>Why should Mr. Mensah get a *longer* sentence than Ms. Nsahlai's 24 months?</u>

I. THE ADVISORY SENTENCING GUIDELINES RANGE

Under the terms of the written plea agreement, Mr. Mensah and the government agreed to recommend the application of the following United States Sentencing Guidelines ("U.S.S.G." of "Guidelines") provisions:

- A base offense level of 7, pursuant to U.S.S.G. § 2B1.1.
- A 14-level increase based on the total loss amount of $, pursuant to U.S.S.G. § 2B1.1(b)(1)(H) (actual loss greater than $550,000 but less than $1,500,000)
- A 2-level increase because the offense involved more than 10 victims, pursuant to U.S.S.G. § 2B1.1(b)(2)(A).
- A 2-level increase because the offense involved 10 or more victims, pursuant to U.S.S.G. § 2B1.1(b)(2)(S)(i)
- A 2-level increase because Mr. Mensah possessed 5 or more means of identification that unlawfully were produced from, or obtained by the use of another means of identification pursuant to U.S.S.G. § 2B1.1(b)(11)(C)(ii).

In addition to the above joint Guidelines recommendations, the United States agreed that "[I]f the defendant qualifies for a two-level decrease in offense level pursuant to U.S.S.G. §3E1.1(a) and the offense level prior to the operation of that section is a level 16 or greater, the government agrees to" move for "an additional one-level decrease in the defendant's offense level." Dkt.__at 3-4.[1] Thus, a Guidelines calculation consistent with the recommendations and

[1] The Plea Agreement provides that the parties "have not agreed on any further sentencing issues" and that both parties are free to argue for or against a 2 or 3 level increase for role in the offense. However, the government agreed that it would **not seek** a 4 level increase for a leadership role in the offense. *Id.* at 3-4. Mensah does not oppose the government's position that a 3-level increase for his role in the offense is warranted.

assumptions contained in the plea agreement, results in a total offense level of 25 or 26, with a corresponding advisory range of ***63-78 or 70-87 months of imprisonment***, assuming that Mr. Mensah receives a 2 or 3 level enhancement for his role in the offense and a 3-level adjustment for acceptance of responsibility.

The PSR, however, has recommended a markedly higher Guidelines range. Rather than a total offense level of 25 or 26, the PSR has recommended a total offense level of 31, which corresponds to an advisory Sentencing Guidelines range of 121 to 151 months of incarceration. The Probation Officer's calculations include:

- a two level (2) increase in the offense level from +14 that was provided in the plea agreement to +16, PSR, ¶79. Probation calculated the loss amount as $1,535,378 whereas the plea agreement calculated the loss amount at $1,490,860. PSR, ¶¶67-68

- a four-level (4) enhancement for Mr. Mensah's alleged aggravated role in the offense pursuant to U.S.S.G. § 3B1.1(a). *See id.* ¶¶69-73. In the plea agreement the government promised **not to seek a four-level (4) enhancement** for a leadership role in the offense. Plea Agreement at 3.

- and the Probation Officer declined to apply any reduction in the offense level for acceptance of responsibility. PSR at ¶75-76.

Mr. Mensah respectfully disagrees with the PSR's Guidelines calculations and asks this Court to calculate the Guidelines range as recommended by the parties in the plea agreement; and to give Mr. Mensah a 3-level reduction for acceptance of responsibility. Mr. Mensah preserved all of these issues for sentencing by sending a timely objection letter to the Probation Officer on January 19, 2024. A copy of that letter is attached as **Exhibit A**. At the government's suggestion, Mr. Mensah thereafter attempted to convince Probation that he accepted responsibility by sending a letter to Probation on April 2, 2024, expressing his agreement with everything in the revised Statement of Facts. A copy of that letter is included in the final PSR at page 29.

In further support of his position, Mr. Mensah offers the following:

A. The Court Should Not Follow the PSR's Recommendation as to Loss Amount, Leadership Role in the Offense and Acceptance of Responsibility.

1. Role in the Offense

Mr. Mensah respectfully disagrees with the PSR's application of a four-level enhancement based on his role in the offense. The PSR provides that Mr. Mensah has been assessed the four-level enhancement because "[a]ccording to the Statement of Facts, the defendant and his conspirators recruited others to have PPP loan applications prepared in others' names. The defendant approached at least one person in a club to prepare a PPP loan application on their behalf. The defendant also communicated with individuals over social media and text messaging about preparing PPP loan applications." PSR, ¶69. "Regarding the UI scheme, the defendant texted Coconspirator-1 the PII of 20 individuals, whose names were used to obtain Way2Go cards that were mailed to his mother's address." ¶70 (relying on ¶25 of the Statement of Facts). The PSR cites similar evidence in ¶¶71-72. It concludes that "the defendant…. was an organizer of a criminal activity that involved five or more participants or was otherwise extensive pursuant to USSG § 3B1.1(a)." ¶73.

Because ¶25 of the Statement of Facts was in error (later corrected by the government on Jan. 23, 2024, and in its Objections to the PSR), it does not support the PSR's recommended 4-level role enhancement, contrary to ¶70 of the PSR. "While reviewing the texts for sentencing we realized that the SOF should have read that Coconspirator-1 sent the defendant the PII of 20 individuals, including B.J., whose names were used to obtain Way2Go Cards that were mailed to the Beechcliff address. Coconspirator-1 also mentioned the Beechcliff address in the next chain." Jan. 23, 2024 email from AUSA Kathleen Robeson to David Smith.

The PSR also relies on a report of an interview that took place on Oct. 25, 2022 with a man who allegedly approached Mr. Mensah in a "club" on U Street in D.C. to inquire how he made enough money to afford the gold medallion he was wearing around his neck. He was then assisted by Mr. Mensah in applying for a fraudulent PPP loan, so he could make some money. PSR, ¶69. Counsel has read a slightly redacted copy of S/A Swanson's report of that interview, which was one of two interview reports provided by the government to the Probation Officer to assist her in writing the PSR. This man (his name is redacted on the report) said that Mr. Mensah (known to him by his nickname, Flex) charged him $6000 for his services, which corroborates Mr. Mensah's statement to the government that he charged individuals a fee of between $4000 and $6000 for preparing the fraudulent PPP loan applications. See PSR, ¶69. Counsel has never had an opportunity to interview this witness or to cross-examine him. *More importantly*, ¶69 of the PSR mentions this man using the following language: "The defendant approached *at least one person* in a club to prepare a PPP loan application on their behalf." (italics added). It is doubtful whether Mr. Mensah even "approached" this one man since the report of interview clearly states that this man approached Mr. Mensah in the club. Yes, when asked how he could afford to buy his gold medallion, Mr. Mensah told him how to make easy money through a fraudulent PPP loan. But just as a single swallow does not make it spring, the "recruitment" of one willing individual to engage in PPP fraud does not make Mr. Mensah an "organizer" of the conspiracy. The PSR also refers, in ¶72, to "[o]ne individual [who] stated that the defendant directed him to open a bank account and send him (the defendant) the account and routing numbers" and advised him to transfer the loan to another bank account and then withdraw it as cash. It doesn't even state that Mr. Mensah "recruited" that unnamed individual, who may be the same person mentioned in ¶69. Merely telling a person how to commit a PPP fraud does not make one an "organizer" of the conspiracy either. The PSR does not provide a factual basis to support a finding that Mr. Mensah "controlled" or "directed" the activities of others, which is what the law requires for a 4-level enhancement, as discussed below.

Moreover, the Plea Agreement binds the government *not* to recommend a 4-level role enhancement and the government has honorably stood by its deal with Mr. Mensah. Accordingly, the Court should not follow Probation's recommendation.

2. Leader, Organizer or Manager

Factors distinguishing a leadership or organizational role from lesser roles include the exercise of decision-making authority, the nature of the participation in the offense, recruitment of accomplices, the claimed right to a larger share of the proceeds, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised. U.S.S.G. § 3B1.1, cmt. n. 4. Importantly, according to Fourth Circuit law, a role adjustment can only be given under this section if the defendant had ***control over others***:

> In *United States v. Cameron,* we recently explained that, in assessing whether a defendant played an aggravating role in the offense of conviction, the key inquiry is whether the defendant's role was that of "an *organizer or leader of people*," as opposed to that of a manager over the property, assets, or activities of a criminal organization. 573 F.3d 179, 185 (4th Cir.2009); *see also United States v. Sayles,* 296 F.3d 219, 226 (4th Cir.2002) (emphasizing that aggravating role adjustment is proper "only ... if it [was] demonstrated that [the defendant] was an organizer, leader, manager or supervisor *of people*"). Thus, the aggravating role adjustment is appropriate where the evidence demonstrates that the defendant "controlled the activities of other participants" or "exercised management responsibility." *United States v. Bartley,* 230 F.3d 667, 674 (4th Cir.2000).

See United States v. Llamas, 599 F.3d 381, 390 (4th Cir. 2010) (emphasis added); *see also United States v. Carter,* 300 F.3d 415, 426 (4th Cir. 2002) and *United States v. Darakshan,* Case No. 1:21-

cr-267-LO, discussed below, where despite the recommendation of a four-level enhancement by both the government and the probation officer, the Court (Judge O'Grady) declined to impose the role enhancement because the defendant did not exercise control over the other participants, even if he played a larger role and at times gave instructions or direction. (Dkt. 21 at 9-10).

Here, the facts contained in the PSR do not establish that Mr. Mensah *controlled* the actions of anyone else, let alone any criminally responsible participants. Indeed, the PSR only refers to Mr. Mensah as playing an "organizer" role (¶73) and does not provide a factual basis to support a finding that Mr. Mensah controlled the activities of others, which is what the law requires. Rather, it appears that Mr. Mensah did all the work on the PPP loan applications himself, without ordering anyone else to play any role in that. It appears that the only role any other individual played was to merely sign the application on behalf of their respective company or purported company and to open bank accounts in which the proceeds of the fraud could be deposited. That makes Mr. Mensah guilty of conspiracy to commit wire fraud, but not as a leader or organizer of others under § 3B1.1(a).

Moreover, the distribution of the proceeds of the loans demonstrates that when "others" were involved, the "others" received a considerably larger share of funds than Mr. Mensah. There is no evidence and no allegation that he himself made a large amount of money from the fraud activity. See PSR, ¶¶119-122 (defendant has a negative net worth and does not have the means to pay a fine). His "take" from the frauds—about $200,000--was vastly less than the loss amount attributable to the entire conspiracy. Yet he will be saddled with a restitution order equal to the full amount of the nearly $1.5 million loss amount.

B. Acceptance of Responsibility

As noted in its sentencing memorandum, the government has asked this Court to grant Mr. Mensah a three-level reduction for early acceptance of responsibility. Mr. Mensah asks this Court to grant him the three-level reduction for acceptance based on the government's recommendation and in light of his overall cooperation since learning of the government's investigation. He has saved the government and the Court a lot of time and energy by pleading guilty early before he was charged. Mr. Mensah met with the government to detail his involvement in the frauds prior to pleading guilty and without any promises or understandings.

Throughout the entire duration of these proceedings, Mr. Mensah has not contested his guilt or called into question the veracity of his admissions or the accuracy of the extensive Statement of Facts. On the contrary, Mr. Mensah made a good faith effort to resolve all claims and has never denied legal responsibility for his actions and those of his co-conspirators.

Probation denied him acceptance of responsibility for the reasons stated in ¶75 of the PSR and on pages 31 to 33 of the final PSR, dealing with his objection to Probation's denial of acceptance of responsibility and quoting his factual response to the government's April 22, 2024 letter to Probation. As this Court knows, he did not need to make any statement to Probation about what he did and didn't do and most defendants in our district simply tell Probation that the defendant does not dispute anything in the Statement of Facts.

What happened here shows that the usual posture—electing not to discuss the offense conduct at all--is the only safe course of action. Any attempt to relate the details of what the defendant did and didn't do in the conspiracy, beyond what is contained in the Statement of Facts, may cost the defendant dearly. In this case, the Statement of Facts did not go into "who did what" and Mr. Mensah sought to clarify "who did what." ¶75.

At his pre-plea meeting with the prosecutors and agents on August 29, 2023, at which undersigned counsel was present, Mr. Mensah told them *exactly the same thing that he told the Probation Officer* and he was not contradicted by the government at that time. No one accused him of lying or threatened that he would not be credited with accepting responsibility. But his oral explanation describing what he did and didn't do was not included in the Statement of Facts drafted by the government, which is why Mr. Mensah thought it was important to make Probation aware of those same facts. He did not contradict the Statement of Facts, but even if he did, it was unintentional and minor. He had been warned by his counsel to say *nothing* inconsistent with the Statement of Facts and he promised that he would not do that.

C. Loss Amount

The government initially calculated the total loss amount at $1,490,860.91. Plea Agreement ¶9. It provided Probation with an updated loss amount and restitution amount on April 22, 2024. PSR, ¶65, ¶68. The updated loss and restitution amounts are the same: $1,476,001—a *reduction* of the original calculation. Thus, the parties agreed that "the total actual loss, for the PPP loan fraud and unemployment insurance fraud, is between $550,000 and $1,500,000." Plea Agreement, ¶32. That placed the loss amount in Guideline category § 2B1.1(b)(1)(H), which added 14 offense levels to the final offense level. PSR, ¶3 (quoting Plea Agreement, ¶4), PSR, ¶79.

The Probation Officer calculated the total loss *and intended loss* at $1,535,378.11. PSR, ¶79. That added 16 offense levels, 2 levels more than what the government agreed to recommend to the Court in the Plea Agreement. The draft PSR did not dispute the accuracy of the government's calculation. But it added the value of some additional cashed stolen Treasury checks found in Mr. Mensah's apartment "and *intended* loss as to the stolen Treasury Checks that were located in the defendant's apartment, but not cashed or canceled ($23,945.39)." PSR, ¶¶66-67.

U.S.S.G. § 2B1.1, Applic. Note 3(A) provides that "Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss." That has long been the law. *See, e.g., United States v. Hughes*, 396 F.3d 374, 382 (4th Cir. 2005)(applying what was then U.S.S.G. § 2F1.1, comment. (n. 8)); *United States v. Mallory*, 709 F. Supp. 2d 455, 457 & n. 2 (E.D. Va. 2010)(same). Accordingly, the intended loss of $23,945.39 with respect to the stolen Treasury checks that were not cashed or cancelled cannot be counted because that intended loss is far, far *less* than the amount of the actual loss determined by both the government and the Probation Officer. That small difference is not a good enough reason for the Court to go with the higher amount rather than the one agreed to in the Plea Agreement, which the government still supports, as it must.

Federal courts, probably including all judges in the E.D.Va., normally resolve differences between the plea agreement and the Probation Office in favor of the stipulated amount in the plea agreement—even when there is a far larger difference between the loss amounts than here. Why is that? Because it is obvious that the criminal justice system in our country could not survive in its present size and cost to the tax payers if a large number of convictions were obtained only after an expensive and time-consuming trial. Guilty pleas are *essential* to the viability of the entire justice system, as the courts have candidly recognized. The vast majority of defendants plead guilty because they can reasonably rely on the agreement they have negotiated with the prosecutor to be honored and to largely determine the parameters of their sentence. If federal judges frequently allowed Probation Officers to substitute their own guideline and sentencing recommendations for those negotiated in the plea agreement, plea agreements would lose much of their value to the government, defendants and defense attorneys. Far more cases would go to trial than today. This case illustrates that consideration. Mr. Mensah would simply not have agreed to a guilty plea with guidelines as sky-high as those recommended by the Probation Officer.

Counsel addresses the factual bases of the convictions listed in ¶¶92-93 of the PSR, in his Objections letter to Probation on January 17, 2024, attached as **Exhibit A**.

II. 18 U.S.C. § 3553(a) FACTORS

In the post-*Booker* era, the sentencing court's duty is to consider all of the factors identified in 18 U.S.C. § 3553(a) and "impose a sentence sufficient, but not greater than necessary" to comply with the four purposes of sentencing set forth in the statute. Pursuant to the statute, the sentence imposed must: (1) reflect the seriousness of the offense, promote respect for the law, and provide just punishment; (2) afford adequate deterrence to criminal conduct; (3) protect the public from further crimes of the defendant; and (4) provide the defendant with needed training, medical care, or other correctional treatment in the most effective manner. 18 U.S.C. § 3553(a)(2). In addition, § 3553 requires the sentencing court to consider the following factors (in addition to the advisory Guidelines range and any pertinent policy statements issued by the Sentencing Commission) in imposing a sentence: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the kinds of sentences available; (3) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (4) the need to provide restitution to any victim(s). 18 U.S.C. § 3553(a)(1)-(7).

Under § 3553, the advisory Guideline range receives no presumption of reasonableness, nor does any presumption of unreasonableness attach to a sentence that varies from the Guideline range. *See Gall*, 522 U.S. at 50; *see also id.* at 52 ("It 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.") (quoting *Koon v. United States*, 518 U.S. 81, 98 (1996)).

In the instant case, we submit that a sentence of no more than 24 months is appropriate after consideration of all of the § 3553(a) sentencing factors. In particular, Mr. Mensah heavily relies on a comparison of his relatively small size fraud with the PPP fraud of other defendants sentenced by Your Honor and other judges in the Alexandria Division of the U.S. District Court for the Eastern District of Virginia, below.

A. The Nature and Circumstances of the Offense

The nature and circumstances of Mr. Mensah's offense are largely addressed in the offense conduct portion of the PSR as well as in the Statement of Facts submitted at the time of Mr. Mensah's guilty plea. However, for the purposes of determining a proper punishment, the Court should consider the additional information provided below - not to diminish Mr. Mensah's responsibility, but to provide the proper context within which this Court must determine the appropriate sentence.

And while it does not excuse his criminal behavior, the Court should consider that Mr. Mensah's conduct did not occur in a vacuum. Indeed, the Small Business Administration itself has estimated that it disbursed over $200 billion in potentially fraudulent loans related to pandemic relief – equating to a staggering 17 percent (at least) of all Covid-related EIDL and PPP loans. *See* SBA Fraud Landscape Three Pager *available at* https://www.sba.gov/sites/sbagov/files/2023-06/Fraud%20Landscape%20OnePager%20June%202023.pdf. As a result, on March 10, 2022, the DOJ appointed an Associate Deputy Attorney General as Director for COVID-19 Fraud Enforcement and reported prosecutions and civil enforcement proceedings that had *already* resulted in the prosecution of thousands of defendants with alleged losses exceeding $2 billion and investigations of fraud involving loans totaling more than $6 billion. *See* DOJ Press Release, Justice Department Announces Director for COVID-19 Fraud Enforcement (March 10, 2022), *available at* https://www.justice.gov/opa/pr/justice-department-announces-director-covid-19-fraudenforcement.

The recent and ongoing wave of PPP fraud prosecutions suggests that far too many Americans took advantage of what appeared to be free money with little to no deliberation as to their conduct or its consequences. It's a sad picture.

B. History and Characteristics of the Defendant

While there is no doubt that he took advantage of available pandemic relief, there is also no dispute that he grew up disadvantaged and in many ways "beat the odds" for many who grew up as he did. He was raised in Alexandria by his single mother and his maternal grandmother, immigrants from Ghana with very limited financial resources. [2] His father left his mother two weeks after he was born. He lived with his mother and grandmother in Section 8 housing until 2005. PSR, ¶¶101-102. From age five to seven he physically abused by two of his maternal uncles. He was "beat up and hospitalized on three occasions as a result of the abuse, as he suffered broken bones and two shoulder dislocations." He did not report the abuse to his mother until two years ago. He "rolled with the punches." "There was no male figure in my life, ever." PSR, ¶103. He continues to live with his mother in Alexandria. ¶105. Despite this humble beginning, he managed to graduate from college with a B.A. degree in May 2014. ¶111. He also has an IT Certificate in Security Plus. ¶112. He has never married but has a two year old daughter, Imani Mensah, who

[2] *See United States v. Adelson*, 441 F. Supp. 2d 506, 513-14 (S.D.N.Y. 2006) ("But, surely, if ever a man is to receive credit for the good he has done, and his immediate misconduct assessed in the context of his overall life hitherto, it should be at the moment of his sentencing, when his very future hangs in the balance. This elementary principle of weighing the good with the bad, which is basic to all the great religions, moral philosophies, and systems of justice, was plainly part of what Congress had in mind when it directed courts to consider, as a necessary sentencing factor, 'the history and characteristics of the defendant.'").

resides with her mother (Isa Lehn) in Woodbridge, VA. He visits with her three times a week and has a good relationship with the girl's mother. He notes that they are both good parents. ¶104.

Among the history and characteristics this Court should consider, is Mr. Mensah's poor health. He has a heart murmur and has been hospitalized five to seven times due to bronchitis and/or asthma related illnesses. His last hospitalization was in 2019 when he was diagnosed with spondylolysis, which has affected his L4 and L5 vertebral discs. He suffers from chronic back pain due to that condition, which he believes was caused by playing sports. He also suffers from leg and ankle pain from a dislocated ankle in 2019. ¶107.

Mr. Mensah was a self-employed hip-hop artist from 2016- March 2022. He has performed publicly on at least 10 different occasions, typically earning $2000 to $5000 per performance. ¶115. He was also a remote IT employee for Kairos Vision Consulting, based in Hartford, CT from 2019 to March 2022. Kairos report that they have no employment records for him. ¶114. But he has informed counsel that he was paid "off the books" in cash by Kairos and he believes that is why Kairos said it had no records of his employment. He has also helped out in his mother's African clothing store (Nana Bour Boutique) in Alexandria "whenever she has needed him." ¶116. He now has a negative net worth and cannot pay a fine. ¶122. He is unable to keep up with his legal fees and other debts.

C. The Need for the Sentence Imposed to Reflect the Seriousness of the Offense, to Promote Respect for the Law, and to Provide Just Punishment for the Offense

Mr. Mensah acknowledges that he has committed a serious criminal offense and must suffer the consequences of his actions. The requested sentence sufficiently accounts for this important sentencing consideration. For the reasons outlined in the disparity analysis below, a sentence no more than 24 months would provide just punishment for Mr. Mensah's offense as balanced against other sentences recently imposed in similar cases in the Alexandria Division and when balanced against all of the factors this Court must consider.

D. Afford Adequate Deterrence to Criminal Conduct and Protect the Public from Future Crimes of the Defendant

Although general deterrence remains a required consideration under § 3553(a), there is little evidence to support a finding that harsh sentences deter future criminal conduct. The unique combination of motivation and circumstance that lead otherwise law-abiding citizens to risk imprisonment are not so easily overcome by the simple imposition of lengthy sentences. While such a theory might be appealing on its face, the reality is that that there is little to no difference in the deterrent effect between probation and imprisonment. *See* Francis T. Cullen *et al.*, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48S, 50S-51S (2011) (according to "the best available evidence…prisons do not reduce recidivism more than noncustodial sanctions"); Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime & Just. 1, 28 (2006) ("increases in severity of punishments do not yield significant (if any) marginal deterrent effects."). Indeed, available research suggests that the certainty of being caught and punished carries far greater deterrent effect than the *severity* of the punishment. *See id.* ("Three National Academy of Science panels…reached that conclusion, as has every major survey of the evidence.").[3] Moreover, there is a moral limit on the extent to which the need for general deterrence

[3] *See also* David Weisburd *et al.*, *Specific Deterrence in a Sample of Offenders Convicted of White Collar Crimes*, 33 CRIMINOLOGY 587 (1995); *see also* Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime*, 8 CARDOZO J. CONFLICT RESOL. 421, 448-49 (2007) ("[T]here is no decisive evidence to support the conclusion that harsh sentences actually have a general and specific deterrent effect on potential white-collar offenders."); *see also* Symposium, U.S.S.C., Federal Sentencing Policy for Economic Crimes and New Technology Offenses, Plenary Session I, "What Social Science Can Contribute to Sentencing Policy for Economic Crimes," at 22 (Oct. 12, 2000) ("One consistent finding in the deterrent literature is that the certainty rather than the severity of punishment seems to be the most effective deterrent."), *available at* http://www.ussc.gov/sites/default/files/pdf/research-

can or should be heaped on the shoulders of one person. *See United States v. Meyers*, 353 F. Supp. 2d 1026, 1029 n. 1 (S.D. Iowa 2005) ("…the weight of society's need to send a message to potential wrongdoers can only be borne to a limited extent by one individual."); *see also* Paul H. Robinson, *Distributive Principles of Criminal Law*, at 223 (2008) (noting potential ethical objection to overemphasis on general deterrence, which "relies on treating the person being punished as a mere instrument by which to influence the conduct of others").

Nevertheless, the sentence proposed in this case will serve as an appropriate deterrent for those who would consider engaging in fraudulent conduct similar to that of Mr. Mensah.

E. The Need to Avoid Unwarranted Sentencing Disparity

Sentences imposed in this district for recent PPP and unemployment fraud cases demonstrate that imposition of a sentence of *not more than 24 months* will avoid unwarranted sentencing disparity. They also highlight the arbitrary and inconsistent application of various Guidelines enhancements. Most notable perhaps, on both points, is the recent case of *United States v. Quin Ngoc Rudin* (Case No. 1:22-cr-00046AJT). According to the Government's sentencing memorandum, Rudin was released from prison in 2018 after having served five years "for a massive fraud scheme" that resulted in a restitution judgment of ***$39,943,267.71.*** (Dkt. 54 at 1). *While on supervised release* for his previous fraud conviction, "the defendant almost immediately embarked on another." *Id.* First, the defendant, through his company, Mana Tax, "assisted in the preparation and filing of false tax returns on behalf of a number of professional athletes that reported fabricated business losses and other false items to support large tax refund claims from the IRS to which the athletes were not entitled." *Id.* at 2. The defendant's actions resulted in over

andpublications/research-projects-and-surveys/economic-crimes/20001012symposium/cPlenaryI.pdf.

$19,000,000 in loss to the government and Rudin collected for himself 30% of the illegal refunds that were obtained as part of the conspiracy. *Id.* at 4-5. In addition, through the use of Mana Tax, Rudin also assisted clients in the filing of approximately 80 fraudulent PPP loan applications that resulted in a ***loss amount of $43,810,330***, and to which he was also entitled to 30% of the proceeds. *Id.*

Despite the fact that Rudin decided how to prepare the tax returns, supervised others including his own family members, recruited small business owners for the PPP fraud, and instructed others on how to prepare and file the loan applications, the government agreed to a 3 level role enhancement rather than the 4-level enhancement recommended by the PSR. *Id.* at 810. Remarkably, neither the government nor the probation office sought a 2-level increase for the use of sophisticated means even though the evidence overwhelmingly supported the enhancement.

Rudin had a criminal history category III. Despite the fact he caused a combined loss in excess of $60,000,000, the Guidelines agreed to by the parties recommended a sentence of 108-135 months. The disputed Guidelines as calculated by the probation office

(151-188 months) were *not much higher than* what the probation office has recommended in Mr. Mensah's case. Rudin was ultimately sentenced to two consecutive 60-month terms of imprisonment. (Dkt. 63).

Perhaps no comparison better illustrates the limitations of the Sentencing Guidelines than that between Rudin's case and Mr. Mensah's. Rudin's offense conduct was unquestionably more widespread, serious, harmful, and began almost immediately after his release from a five-year sentence on fraud charges. Yet he faced an agreed Guidelines range of only 108-135 months. Mr. Mensah's conduct involved a loss amount only about **1/60th** that of Rudin's and he received far, far less money for his part in the conspiracy---only about $200,000. He barely has a Criminal

History of II, based on old minor offenses. Despite those dramatic differences, the Probation Office has recommended a Guidelines range that tops out at 151 months, 16 months higher than the top of the Guideline range the government agreed to in *Rudin*, and 31 months *higher* than the 120 month sentence Rudin received from Judge Trenga.

No reasonable person comparing Mr. Mensah's and Rudin's cases could justify the position that they should be sentenced similarly. Or that their Guideline range should be similar.

In another recent case, *United States v. Jaafar*, Case No. 1:20-cr-00185-CMH, the defendant and his wife filed 18 fraudulent PPP loan applications despite not owning any active or operating businesses. (Dkt. 60 at 6). Upon being informed that they were the targets of a criminal investigation, the defendant and his wife attempted to flee the country (after having previously met with prosecutors) and were arrested at John F. Kennedy airport in possession of multiple passports, 18 bags, 14 cell phones, and $49,875.65 in cash. *Id.* at 4. Highlighting again the arbitrary application of the Guidelines, neither defendant received an obstruction of justice enhancement despite *being caught attempting to flee prosecution, and thereby justice, entirely*. Based on an intended loss of $6.6 million, the Guidelines recommended a sentence of 24-30 months and <u>Jaafar was sentenced by Judge Hilton to only 12 months of incarceration.</u> (Dkt. 67). The loss attributable to Mr. Mensah is far lower in this case but he is facing Guidelines far higher than Jaafar did.

Other cases in this District lend support for Mr. Mensah's recommendation for a sentence of *not more than 24 months*. In *United States v. Kindambu*, Case No. 1:20-cr-260-RDA, the defendant obtained over $2.5 million in completely fraudulent PPP loan proceeds and spent the funds on illegitimate expenditures including his personal taxes, a luxury vehicle, a Cessna aircraft, and a beautiful luxury residence, a photo of which is attached as Exh. 1 to the Position of the United States, Doc. 55. The PSR recommended a Guidelines sentencing range of only 41-51 months and

Your Honor sentenced him to serve 33 months of incarceration. (Dkt. 64). The amount of proceeds Mr. Mensah personally obtained from his fraud—around $200,000--is a tiny fraction of the $2.5 million Kindambu and his wife, Rose-Marie Nsahlai, stole through PPP fraud. Mr. Mensah did not use his proceeds to buy any house, even an inexpensive one. He still lives with his mother. Moreover, the government took back around half of Mensah's $200,000 in profit through seizures of his property before his guilty plea. And he is *not opposing* a large restitution order for the full amount of the losses in the entire conspiracy, which will hang over him for the rest of his life, including a requirement that he shall pay 25% of his net income each month toward restitution beginning 60 days after his release—the maximum percentage permitted by statute.

Your Honor also sentenced Mr. Kindambu's wife, Rose-Marie Nsahlai, to *24 months*. Her guideline range was 97-121 months and *she went to trial*, unlike Mensah, who pled guilty before he was charged by the government. The government observed that Nsahlai "does not appear to have been facing any significant crisis or other desperate circumstances….She appears to have had ample resources, including a home in Ashburn, a vacation home in Virginia Beach, and a well-paying senior-level job in cybersecurity with the federal government. She simply chose to commit this crime because she believed she could get away with it, and because she wanted to live a life of considerable luxury." Position of the United States With Respect to Sentencing in U.S. v. Rose-Marie Nsahlai, No. 1:21-CR-234-RDA (Doc. 160, filed Sept. 20, 2023).

By contrast, Mr. Mensah made about $200,000 from his criminal activity. But about half of that amount was seized from his home for forfeiture ($82,000 in cash was seized from his safe in Tysons and the government also seized miscellaneous expensive jewelry items belonging to Mensah). Unlike Rose-Marie Nsahlai, who went to trial for no good reason, he pled guilty *before* he was indicted. He never even thought about going to trial. Why should Mr. Mensah get a *longer* sentence than Ms. Nsahlai's 24 months? If anything, Mensah's sentence should be shorter than Ms. Nsahlai's 24 months.

In *United States v. Darakshan*, Case No. 1:21-cr-267-LO, the defendant and his family members filed 63 loan applications on behalf of 14 different entities and obtained over $3,000,000 in fraudulent loan proceeds. Neither the government nor the Probation Office recommended an enhancement for the use of sophisticated means. And, despite the fact that the defendant appeared to be the head of a criminal enterprise involving more than 5 participants, and despite the recommendation of a four-level enhancement by both the government and the probation officer, the Court declined to impose the role enhancement because the defendant did not "exercise control" over the other participants, even if he played a larger role and at times gave instructions or direction. (Dkt. 21 at 9-10). As a result, Judge O'Grady found a total offense level of 21 as opposed to the recommended level of 25. (Dkts. 14, 15, and 19). As calculated, the Guidelines recommended a range of 37-46 months and the defendant was ultimately sentenced to serve 33 months of incarceration.

Bennie Earl Magee was sentenced to serve 60 months by Judge Hilton in a case involving $7 million in fraudulent PPP and EIDL loans. Defendant Magee created false payroll statements, forget IRS business tax returns and false business reports. The PSR's recommended Guideline range in his case was 168-210 months, far above the sentence he received. He did not cooperate with the government. *U.S. v. Magee*, Case No. 1:23-cr-00091-CMH.

A 28 year old Chicago rapper known as G Herbo, whose real name is Herbert Wright III, pled guilty in Springfield, Massachusetts federal court to conspiracy to commit wire fraud and making false statements; prosecutors dismissed several counts of aggravated identity theft. The government said the conspiracy was a $1.5 million scheme that involved several other people. He "used stolen credit card information to pay for an opulent lifestyle including private jets and designer puppies." "'On social media, Mr. Wright boasted an extravagant lifestyle. He gave the impression that his use of private jets, luxury cars and tropical villas were the legitimate fruits of is booming rap career as G Herbo. However, his lavish lifestyle was shamelessly built on deceit and fraud using stolen account information that inflicted substantial harm on numerous businesses, leaving a wake of victims burdened with financial losses.'" Prosecutors asked the district court to impose a sentence of only a year and a day. But the court imposed a "no jail" sentence of three years' probation instead. Michael Casey, *Rapper G Herbo sentenced to probation in fraud plot to fund lavish lifestyle*, ABC News, Jan. 11, 2024. Undersigned counsel would hardly recommend that sentence but it is his duty to bring instances of sentencing lenity for similar offenses to the court's attention.

Mr. Mensah respectfully submits that the foregoing sentences imposed on defendants guilty of committing PPP loan fraud (or in G Herbo's case stolen credit card fraud) support the requested sentence of a *not more than 24 months*. Imposition of a longer prison sentence than 24 months will create unwarranted disparity and run contrary to the spirit and intent of 18 U.S.C. § 3553(a).

WHEREFORE, based on the foregoing reasons and any others that may appear to the Court or that may develop at the sentencing hearing, Mr. Mensah respectfully requests that this Honorable Court sentence him to *not more than 24 months* of incarceration and 2 or 3 years of supervised release. He asks the Court to recommend to the BoP that Mr. Mensah be designated to serve his time at (1) FCI Cumberland, at the minimum-security satellite camp, which is closest to his home, or if that camp is not available, then (2) the minimum security camp at Hazleton, WV. If neither of those facilities is available, then (3) the minimum security camp at FCI Morgantown, WV. He also requests that the Court afford him the privilege of voluntarily surrendering at the prison gate at the time directed by the U.S. Marshals Service. He has obeyed all of his release conditions over an extended period of time.

Respectfully submitted,

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Certificate of Service

I hereby certify that on the first day of May, 2024, I electronically filed the foregoing Position on Sentencing and exhibits with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following CM/ECF user(s):

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And I hereby certify that I have mailed the document by United States mail, first class postage prepaid, to the following non-CM/ECF participant(s), addressed as follows: [none].

/s/ David B. Smith

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