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Attorney for the Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, vs. ERIC J. O'NEIL, Defendant.	Case No. :22-cr-00153-AKB **DEFENDANT ERIC O'NEIL'S SENTENCING MEMORANDUM AND REQUEST FOR DOWNWARD VARIANCE**

Defendant Eric J. O'Neil is a 58 year old currently receiving worker's compensation for injuries related to his truck driving career. He and his wife receive a modest income from retirement benefits, his Workers' Compensation benefits, and income from his tax preparation business that is entirely used for living expenses and loan payments. Mr. O'Neil lived a law-abiding life for twenty-five years and had been sober for more than twenty when he decided to apply for the PPP loans.

After considering Mr. O'Neil's history and characteristics and the nature of the offense, the Court must "impose a sentence sufficient, but not greater than necessary" to meet the purposes of sentencing, including adequate deterrence, community protection and preventing unwarranted sentencing disparities. *See* 18 U.S.C. § 3553(a). The Sentencing Guidelines are just one factor among several that courts must consider in determining an appropriate sentence." *Kimbrough v. United States*, 552 U.S. 85, 105 (2007); *United States v. Booker*, 543 U.S. 220 (2005). While the Guidelines serve as the "starting point and the initial benchmark" of this inquiry, the sentencing court "may not presume that the Guidelines range is reasonable." *Kimbrough*, 552 U.S. at 105; *Gall v. United States*, 552 U.S. 38, 49–50 (2007); *Rita v. United States*, 551 U.S. 338, 351 (2007); *United States v. Whitehead*, 532 F.3d 991, 993 (9th Cir. 2008). District courts may vary from the Guidelines on policy grounds provided that the disagreement is reasonable. *Spears v. United States*, 555 U.S. 261, 264 (2009) (per curiam); *Kimbrough*, 552 U.S. at 106–07.

Here, the guidelines recommend a sentence of twenty-one to twenty-seven months. Unlike white collar offenders contemplated by the guidelines, who consider financial penalties the cost of doing business, Mr. O'Neil will require much of his remaining life to repay restitution and any forfeiture. And Mr. O'Neil will lose his benefits and home if incarcerated for twenty-one months, which will further impair his ability meet financial obligations. On the other hand, Mr. O'Neil can be sufficiently punished and deterred by the financial penalties, a short term of incarceration and supervised release conditions including home detention. Accordingly, the guidelines recommend a sentence that is longer than necessary to meet the purposes of sentencing outlined in 18 U.S.C. § 3553(a).

A. Mr. O'Neil's history and character

Born in 1965, Mr. O'Neil was raised in Queens, New York and had a troubled adolescence. At age twenty, Mr. O'Neil was sentenced to prison for theft and robbery. 34-35. After release from prison, Mr. O'Neil married his wife and they have two children. Mr. O'Neil turned to drug use after his grandmother passed away and was fined from criminal possession of a controlled substance in 1998. Mr. O'Neil voluntarily sought help and joined Narcotics Anonymous (NA) meetings. Mr. O'Neil celebrated twenty-four years of sobriety with his home group this past September, regularly attends meetings, participates in service activities and offers support and guidance to those struggling with addiction at meetings.

Mr. O'Neil and his wife live in Danbury, Connecticut and enjoy caring for their grandchildren. Attached Photos. They receive a modest income from retirement benefits, Workers' Compensation benefits, and income from his tax preparation business. The entirety of these funds is used for living expenses and loan payments.

B. The guideline range

Mr. O'Neil's two loans totaled $777,501 and his base offense level of seven is increased by 14 because the total loss is more than $550,000, but less than $1,500,000. U.S.S.G. § 2B1.1(a)(1). Mr. O'Neil clearly accepted responsibility, which reduces his offense level by three and meets the criteria at Section §4C1.1(a)(1)-(10) for a "Zero-Point Offender, which reduces the level by two, for a total offense level of 16. Based upon a total offense level of 16 and a criminal history category of I, the guideline imprisonment range is 21 to 27 months.

C. The recommended sentence is greater than necessary to achieve just punishment or adequate deterrence

Generally, prison sentences are justified in white collar cases to achieve both individual and general deterrence because white collar crimes are often committed by defendants who would view restitution and forfeiture as the cost of doing business. *See* https://www.gsb.stanford.edu/insights/how-stop-white-collar-crime. Mr. O'Neil is of limited financial means and will lose his worker's compensation benefits and his home if incarcerated for any length of time. Thus, unlike many white collar cases, Mr. O'Neil will be devastated by restitution and any financial penalty.

Any property that "constitutes or is derived from proceeds traceable to" offenses fraud offenses is subject to forfeiture to the United States. 18 U.S.C. § 981(a)(1)(C). Forfeiture is a penalty intended to deprive Mr. O'Neil of ill-begotten gains whereas the goal of the Mandatory Victims Restitution Act ("MVRA") is to restore the victim by requiring the Court to "order a defendant to make restitution" of the victim's "actual losses," which were the direct and proximate result of the defendant's offense. 18 U.S.C. § 3663A; *see also United States v. Thomsen*, 830 F.3d 1049, 1065 (9th Cir. 2016); *United States v. Anderson*, 741 F.3d 938, 951 (9th Cir. 2013).

Both Mr. O'Neil's gain and the victim's' loss are $777,501 and the combined restitution and forfeiture awards could total more than $1.5 million. Given Mr. O'Neil's age, finances and health, forfeiture will inflict substantial punishment and several months of incarceration is longer than necessary.

What's more, a lot can be accomplished with a little when it comes to incarceration. Ex. B. There is evidence suggesting that short sentences may be a deterrent whereas longer sentences can exacerbate, not reduce, recidivism and desensitize many to the threat of future imprisonment. *Id.* For a person like Mr. O'Neil who is "naturally aging out of crime," achieves punishment and incapacitation but is a costly way to deter future crimes by individuals who already are less likely to commit those crimes by virtue of age. *Id.*

Given Mr. O'Neil's finances and age, adequate punishment and deterrence can be accomplished with minimal incarceration and financial penalties. The sentence recommended by the guidelines is longer than necessary to achieve those goals.

D. § 2B1.1's focus on the loss amount is unsupported by studies

The theft guideline range applies to a wide range of conduct and largely driven by the amount of loss without consideration of other factors relevant to the sentence necessary to achieve adequate deterrence. A district court's decision to vary from the advisory Guidelines may attract greatest respect when the sentencing judge finds a particular case outside the heartland to which the Commission intends individual Guidelines to apply. *Kimbrough*, 552 U.S. at 89; *United States v. Mitchell*, 624 F.3d 023, 1030 (9th Cir. 2010). The guidelines recognize that there may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense, including when individuals are not harmed.

U.S.S.G. 2B1.1, cmt. C

Here, the loan amount results in a guideline range of twenty-one to twenty-seven months. Had Mr. O'Neil committed the arguably more severe offense of stealing $5,000 from the person of another (2 levels) and the conscious or reckless risk of death or serious bodily injury (2 levels), his guideline range would have been 10 to 16 months. The guideline range determined by the loss amount overstates the seriousness of the offense and a sentence of minimal incarceration that allows Mr. O'Neil to repay the loans is sufficient.

E. Imprisonment would a substantial, direct, and specific loss of essential financial support to mr. o'neil's family that is irreplaceable and will inflict irreparable damage

Mr. O'Neil's incarceration for more than a minimal period will cause the loss of essential financial support for his wife that will be irreplaceable. Section 5H1.6 addresses a departure "based on loss of caretaking or financial support"when the sentence will cause a substantial, direct, and specific loss of essential financial support to the defendant's family that is irreplaceable. U.S.S.G. § 5H1.6(1)(B).

While Mr. O'Neil does not qualify for a departure, the consideration is relevant to whether the recommended sentence is necessary. Mr. O'Neil's community benefits from him supporting his wife and grandchildren and the victims benefits from his ability to correct his wrong. the nature and circumstances of the offense; and the factors under 3553(a) dictate that a sentence of minimal incarceration and forfeiture are sufficient and necessary.

Dated this 30th day of January, 2024.

/s/ Robyn Fyffe
ROBYN FYFFE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 30, 2024, I filed the foregoing document through the CM/ECF system and served the following parties via email:

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