No. 21-3207

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee

vs.

JAMES READ,
Appellant

On Appeal from the United States District Court
For the Western District of Arkansas

Honorable P.K. Holmes, III
United States District Judge

BRIEF FOR APPELLANT

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CASE SUMMARY AND REQUEST FOR ORAL ARGUMENT

This appeal in a criminal case seeks to vacate the sentence imposed by the district court upon Appellant James Read and a remand for resentencing. Mr. Read waived indictment and pleaded guilty to a criminal information charging him with one count of making a false statement in violation of 18 U.S.C. § 1001(a)(3), one count of money laundering in violation of 18 U.S.C. § 1957, and one count of wire fraud in violation of 18 U.S.C. § 1343. He was sentenced to 63 months in prison on each count, such terms to run concurrently, at the bottom of the guideline range calculated by the court. Read argues that the district court erred by: (1) refusing to permit him to allocute via pre-recorded video, (2) imposing a substantively unreasonable total sentence, and (3) imposing a sentence in excess of the statutory maximum on his false statement conviction.

Because this appeal presents nonfrivolous issues and because it is believed that oral argument would aid the court in its decisional process, oral argument is respectfully requested. *See* Fed. R. App. P. 34(a)(2). Mr. Read submits that 15 minutes of argument per side (30 minutes total) will be needed.

Appellate Case: 21-3207 Page: 2 Date Filed: 12/14/2021 Entry ID: 5107893

TABLE OF CONTENTS

Appellate Case: 21-3207 Page: 3 Date Filed: 12/14/2021 Entry ID: 5107893

TABLE OF AUTHORITIES

Cases **Page(s)**

Appellate Case: 21-3207 Page: 4 Date Filed: 12/14/2021 Entry ID: 5107893

Statutes

Rules

Sentencing Guidelines

JURISDICTIONAL STATEMENT

This appeal in a criminal case seeks relief from the final judgment entered by the Honorable P.K. Holmes, III, United States District Judge, Western District of Arkansas. The Appellant, James Read, waived indictment and pleaded guilty to a criminal information charging him with one count of making a false statement in violation of 18 U.S.C. § 1001(a)(3), one count of money laundering in violation of 18 U.S.C. § 1957, and one count of wire fraud in violation of 18 U.S.C. § 1343. On September 20, 2021, Mr. Read was sentenced to 63 months in prison per count (to run concurrently), 3 years of supervised release per count (to run concurrently), $277,827 in restitution, and a $300 special assessment. (R. Doc. 30).

The final judgment was entered on September 21, 2021. (R. Doc. 31; Add. 4). A notice of appeal was timely filed on October 4, 2021. (R. Doc. 35). The district court had subject-matter jurisdiction pursuant to 18 U.S.C. § 3231. This Court possesses jurisdiction pursuant to 28 U.S.C. § 1291, which gives it jurisdiction over all final decisions of the district courts of the United States. *See also* Fed. R. App. P. 4(b)(1)(A)(i).

Appellate Case: 21-3207 Page: 7 Date Filed: 12/14/2021 Entry ID: 5107893

ISSUES PRESENTED FOR REVIEW

I. The district court erred by refusing to permit Mr. Read to allocute via pre-recorded video.

Apposite Cases

Hill v. United States, 368 U.S. 424 (1962)

United States v. Li, 115 F.3d 125 (2d Cir. 1997)

United States v. Sparrow, 673 F.2d 862 (5th Cir. 1982)

United States v. Barnes, 948 F.2d 325 (7th Cir. 1991)

II. The district court abused its discretion by imposing a substantively unreasonable sentence.

Apposite Cases

Gall v. United States, 552 U.S. 38 (2007)

United States v. Jones, 509 F.3d 911 (8th Cir. 2007)

III. The district court imposed a sentence in excess of the statutory maximum on Mr. Read's conviction for making a false statement in violation of 18 U.S.C. § 1001(a)(3).

Apposite Cases

Rosales-Mireles v. United States, 138 S. Ct. 1897 (2018)

United States v. Gifford, 991 F.3d 944 (8th Cir. 2021)

Appellate Case: 21-3207 Page: 8 Date Filed: 12/14/2021 Entry ID: 5107893

STATEMENT OF THE CASE

On March 17, 2021, James Read appeared with appointed counsel before the Honorable Mark E. Ford, United States Magistrate Judge, via video conference for a waiver of indictment and change of plea hearing. (R. Doc. 6). A waiver of personal appearance executed by Mr. Read and his attorney pursuant to the CARES Act of 2020 was also filed with the court that same day. (R. Doc. 5). By execution of this waiver, Read consented to allow court hearings in his case to proceed via video teleconferencing or by telephone, including a change-of-plea hearing. (R. Doc. 5). Pursuant to a written plea agreement with the Government (which was also filed on March 17), Read consented to proceed with entry of a guilty plea before a magistrate judge, waived his right to the formal indictment process, and pleaded guilty to a three-count information charging him with one count of making a false statement in violation of 18 U.S.C. § 1001(a)(3), one count of money laundering in violation of 18 U.S.C. § 1957, and one count of wire fraud in violation of 18 U.S.C. § 1343. (R. Doc. 2, 3, 6, 7). Judge Ford issued and filed a report and recommendation recommending that the court accept Read's guilty plea. (R. Doc. 10; Add. 1). Read was permitted to remain free on a $5,000 signature bond pending presentence investigation and

Appellate Case: 21-3207 Page: 9 Date Filed: 12/14/2021 Entry ID: 5107893

sentencing. (R. Doc. 6, 8). On August 26, 2021, the Honorable P.K. Holmes, III, United States District Judge, entered an order adopting the report and recommendation and adjudging Read guilty of the offenses to which he had pled. (R. Doc. 28; Add. 3).

A presentence investigation report ("PSR") was prepared by the U.S. Probation Office; the initial disclosure copy was filed with the court on May 11, 2021, and the revised final version was filed on August 16, 2021. (R. Doc. 11, 27). The PSR described Mr. Read's offense conduct. (PSR, pp. 4-21). The offense conduct generally involved using falsified information to apply for certain government-guaranteed loans. On March 27, 2020, the United States Government enacted the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, which provided economic stimulus for individuals and businesses affected by the COVID-19 pandemic. (PSR, ¶ 9). The CARES Act included the Paycheck Protection Program ("PPP") and Economic Injury Disaster Loans ("EIDL") program, both of which are guaranteed by the Small Business Administration ("SBA"), an agency of the U.S. Government. (PSR, ¶¶ 10, 14). The PPP provided small businesses with funds in the form of loans that would be fully forgiven when used for certain specified purposes, such as payroll costs, interest on mortgages, rent, and utilities.

Appellate Case: 21-3207 Page: 10 Date Filed: 12/14/2021 Entry ID: 5107893

(PSR, ¶ 13). In order to obtain a PPP loan, a qualifying business was required to submit a PPP loan application signed by an authorized representative of the business. (PSR, ¶ 11). The authorized representative was required to acknowledge the program rules and to make certain affirmative certifications in order to establish eligibility for a PPP loan. (*Id.*). In a PPP loan application, the small business was required to state its average monthly payroll expense and number of employees—figures which were used to calculate the amount of money the small business was eligible to receive under the PPP. (*Id.*). Applying businesses were also required to provide documentation showing their payroll expenses. (*Id.*). PPP loan applications were processed by participating lenders; if a PPP loan application was approved, the participating lender funded the PPP loan using its own monies, which were 100% guaranteed by the SBA. (PSR, ¶ 12).

The purpose of EIDLs was to allow small businesses to pay for expenses that could have been met had the public health emergency not occurred. (PSR, ¶ 14). The proceeds of EIDLs were to be used toward working capital and normal operating expenses, such as continuation of health care benefits, rent, utilities, and fixed debt payments. (*Id.*). Unlike PPP loans, EIDLs were not forgivable. (*Id.*). However, as part of the EIDL

Appellate Case: 21-3207 Page: 11 Date Filed: 12/14/2021 Entry ID: 5107893

program, an applicant was sometimes eligible to receive an EIDL Advance of up to $10,000 upon applying for an EIDL. (PSR, ¶ 15). The advance was forgivable and did not have to be repaid. (*Id.*). Recipients of EIDL advances did not have to be approved for an EIDL loan to receive the advance. (*Id.*).

On May 27, 2020, Mr. Read made an application for a PPP loan to Celtic Bank Corporation, an online bank, from an IP address located in Mountain Home, Arkansas. (PSR, ¶ 22). The application was submitted on behalf of "James Read," with Read's home address listed as the business address. (*Id.*). The application noted that Read was the sole owner of the business and that the business was an employer of zero employees with an average monthly payroll of $8,041. (*Id.*). Read initialed the form to demonstrate that he understood that "the [loan] funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments as specifi[ed] under the PPP Rule," and that "if the funds are knowingly used for unauthorized purposes, the federal government may hold me legally liable, such as for charges of fraud." (PSR, ¶ 23). Read also initialed a section stating that "the information provided in this application and the information in all supporting documents and forms is true and accurate in all material respects," and acknowledging that "knowingly

Appellate Case: 21-3207 Page: 12 Date Filed: 12/14/2021 Entry ID: 5107893

making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including under 18 U.S.C. §§ 1001 and 3571." (PSR, ¶ 24). Along with the application, Read submitted a falsified IRS Schedule C (Profit or Loss from Business) which represented that "James Read" (which was identified as a weather forecaster—agriculture business) had $128,500 in gross sales in 2019 and a net profit of $96,500. (PSR, ¶ 25). According to the PSR, Read also submitted a fraudulent Spending Account Statement for February 2020 from a Chime account number ending in 8424. (PSR, ¶ 26). The statement showed a beginning balance of $0.78, purchases of $346.55, transfers of $346.57, and an ending balance of $0.80. (*Id.*). Read also submitted a void Bancorp Bank check reflecting an account number ending in 8424 in the name of James Read. (*Id.*). Based on Read's representations, BlueVine—a lender acting on behalf of Celtic—approved Read's application and transferred $20,102 to Read's Bancorp account ending in 8424 on May 27, 2020. (PSR, ¶ 27).

On June 8, 2020, Mr. Read made an application for a PPP loan to Ready Capital, an online bank, from an IP address located in Mountain Home, Arkansas. (PSR, ¶ 29). The application was submitted on behalf of "James Read," with an address in West Monroe, Louisiana listed as the business

Appellate Case: 21-3207 Page: 13 Date Filed: 12/14/2021 Entry ID: 5107893

address. (*Id.*). Read initialed the form to indicate his understanding of the same terms that had been included in his initial application for a PPP—i.e., that the loan funds would be used only for permissible purposes, that he could be held legally liable for fraud if the funds were knowingly used for unauthorized purposes, that the information provided in the application and supporting documents was true and accurate in all material respects, and that knowingly making a false statement to obtain a loan guaranteed by the SBA is punishable under federal law. (PSR, ¶¶ 30-31). Along with the application, Read submitted a falsified IRS Schedule C which represented that "James Read" (identified as an agriculture—legal services business) had $136,500 in gross sales in 2019 and a net profit of $98,500. (PSR, ¶ 32). Based on Read's representations, Customers Bank—a lender acting on behalf of Ready Capital—approved Read's application and wire-transferred $20,500 to Read's Bancorp Bank account ending in 8424 on June 17, 2020. (PSR, ¶ 34).

On June 22, 2020, Mr. Read applied for an EIDL. (PSR, ¶ 41). After being notified on that same date that his application was being declined due to unsatisfactory credit history, Read requested an EIDL advance in the amount of $10,000 to his Centennial Bank account ending in 8107; however, the advance was declined on that same date "due to a duplicated

Appellate Case: 21-3207 Page: 14 Date Filed: 12/14/2021 Entry ID: 5107893

application." (*Id.*). The request was again denied on that same date as Read's bank account could not be verified. (*Id.*).

On June 24, 2020, Mr. Read made an application for a PPP loan to WebBank, an online bank, from an IP address located in Mountain Home, Arkansas. (PSR, ¶ 42). The application was submitted on behalf of "Snowbirdbob LLC," which the application indicated was an employer of 15 employees with an average monthly payroll of $22,308. (*Id.*). Read indicated that he was the sole owner of Snowbirdbob LLC, and the paperwork indicated that he was applying for $161,875 in PPP loans. (*Id.*). Again, Read initialed the form to indicate his understanding of the terms surrounding and governing his PPP loan application—i.e., that the loan funds would be used only for permissible purposes, that he could be held legally liable for fraud if the funds were knowingly used for unauthorized purposes, that the information provided in the application and supporting documents was true and accurate in all material respects, and that knowingly making a false statement to obtain a loan guaranteed by the SBA is punishable under federal law. (PSR, ¶¶ 43-44). Along with the application, Read submitted a falsified IRS Schedule C which represented that Snowbirdbob LLC had $1.2 million in gross sales in 2019 and a net profit of $267,700. (PSR, ¶ 45). Read

Appellate Case: 21-3207 Page: 15 Date Filed: 12/14/2021 Entry ID: 5107893

also submitted a fraudulent 2020 1st quarter IRS Form 941 claiming that he had paid wages in the amount of $300,000 for his 15 employees. (*Id.*). Read also submitted a fraudulent Spending Account Statement from a Centennial Bank account ending in 3302 for February 2020. (PSR, ¶ 46). The statement reflected a beginning balance of $264,235.86, $79,453.92 in deposits, purchases of $85,830.42, and an ending balance of $251,471.91. (*Id.*). Based on Read's representations, WebBank approved the application and wire-transferred $55,770 to Read's Centennial Bank account ending in 3302 on June 29, 2020. (PSR, ¶ 47).

On June 30, 2020, Mr. Read made an application for a PPP loan to Meridian, an online bank, from an IP address located in Mountain Home, Arkansas. (PSR, ¶ 48). The application was submitted on behalf of "James Read," with a social security number that belonged to Read's deceased father. (*Id.*). The application indicated that this business was an employer of one employee with an average monthly payroll of $8,208. (*Id.*). Read noted in the application that he was the sole owner of the business and listed the business's address as being in West Monroe, Louisiana. (*Id.*). Again, Read initialed the form to indicate his understanding of the terms surrounding and governing his PPP loan application as he had in the

previous applications. (PSR, ¶¶ 49-50). Along with the application, Read submitted a falsified IRS Schedule C which represented that "James Read" was a "farming services – sciecntific [sic] studies" business that had $136,500 in gross sales in 2019 and a net profit of $98,500. (PSR, ¶ 51). Read also submitted fraudulent Spending Account Statements from Centennial Bank for February through May 2020; the May statement reflected a beginning balance of $460,537.92 and an ending balance of $458,263.45. (PSR, ¶ 52). A Louisiana driver's license was also submitted that apparently belonged to Read's deceased father, James R. Read; the license listed Read's date of birth as November 20, 1947, and the last two digits of the license's expiration date were altered so that it read "11-11-2020." (PSR, ¶ 53). Based on Read's representations, MBE Capital Partners, a lender acting on behalf of Meridian, approved the application and wire-transferred $20,520 to Read's Bancorp Bank account ending in 8424 on July 14, 2020. (PSR, ¶ 54).

On July 1, 2020, Mr. Read purchased a 2017 GMC Sierra pickup truck from Lakeview Auto Dealership in Mountain Home for $34,900. (PSR, ¶¶ 55-56). Read paid for the truck using credit for a vehicle trade-in along with a cashier's check from Centennial Bank for $26,000 payable to Lakeview Auto Sales that was issued shortly after Read received a wire transfer of

Appellate Case: 21-3207 Page: 17 Date Filed: 12/14/2021 Entry ID: 5107893

$55,770 in PPP loan funds from WebBank. (PSR, ¶ 56). It was later determined that the vehicle Read traded in to purchase the 2017 GMC truck had also been purchased by Read using PPP funds. (*Id.*).

On July 23, 2020, Mr. Read made an application for a PPP loan to Radius Bank, an online bank, from an IP address located in Mountain Home, Arkansas. (PSR, ¶ 70). The application was submitted on behalf of "Bobs Lawnmower Repair," which the application indicated was an employer of one employee with an average monthly payroll of $8,141. (*Id.*). The application indicated that Read was the sole owner of Bobs Lawnmower Repair, listed a business address in Mountain Home, Arkansas, and provided an Employer Identification Number. (*Id.*). Again, Read initialed the form to indicate his understanding of the terms surrounding and governing his PPP loan application as he had in the previous applications. (PSR, ¶¶ 71-72). Along with the application, Read submitted a handwritten letter stating that he had filed an IRS Schedule C as well as a falsified Schedule C which represented that Bobs Lawnmower Repair had $185,500 in gross sales in 2019 and a net profit of $97,700. (PSR, ¶ 73). According to the PSR, Read also submitted a fraudulent Spending Account Statement from a Chime account ending in 8424 for February 2020. (PSR, ¶ 74). The

Appellate Case: 21-3207 Page: 18 Date Filed: 12/14/2021 Entry ID: 5107893

statement reflected a beginning balance of $0.78, purchases of $346.55, transfers of $346.57, and an ending balance of $0.80. (*Id.*). Based on Read's representations, Radius Bank approved the loan application and wire-transferred $20,354 to Read's Centennial Bank account ending in 8107 on August 27, 2020. (PSR, ¶ 75).

On August 20, 2020, Mr. Read made another application for a PPP loan to Meridian from an IP address located in Mountain Home, Arkansas. (PSR, ¶ 76). The application was submitted on behalf of "Snowbirdbob LLC," which the application indicated was an employer of four employees with an average monthly payroll of $8,333. (*Id.*). Read noted in the application that he was the sole owner of Snowbirdbob LLC, and he applied for $113,083 in PPP loan funds. (*Id.*). Again, Read initialed the form to indicate his understanding of the terms surrounding and governing his PPP loan application as he had in the previous applications. (PSR, ¶¶ 77-78). Along with the application, Read submitted a falsified Schedule C which represented that Snowbirdbob LLC had $923,800 in gross sales in 2019 and a net profit of $542,800. (PSR, ¶ 79). Read also submitted fraudulent Spending Account Statements from Centennial Bank for January through May 2020; the May statement reflected a beginning balance of $460,537.92,

Appellate Case: 21-3207 Page: 19 Date Filed: 12/14/2021 Entry ID: 5107893

with $102,744.54 in deposits, purchases of $94,355.10, and an ending balance of $458,263.45. (PSR, ¶ 80). Based on Read's representations, MBE Capital Partners, a lender acting on behalf of Meridian, approved Read's application and wire-transferred $20,832 to Read's Centennial Bank account ending in 3302 on August 20, 2020. (PSR, ¶ 81).

On January 21, 2021, after he had been made aware that an investigation was being conducted into the fraudulent PPP loans, Mr. Read applied for another PPP loan with Cross River Bank, an online bank. (PSR, ¶ 114). In the application, Read noted that the average monthly payroll for his self-employed business was $3,583, and he requested $8,957. (*Id.*). On the application, Read confirmed as follows: "I confirm that I have not applied for a PPP loan with another lender." (*Id.*). According to the PSR, Read submitted a falsified IRS Schedule C which represented that his business—identified as a weather forecasting business—had $42,796 in gross sales in 2019, and a net profit of $42,995. (PSR, ¶ 115). (Read later asserted that this was not a falsified Schedule C, and that it actually reflected accurate figures for his weather forecasting business). Based on Read's representations, Cross River Bank approved Read's application on March 4, 2021, for a loan in the amount of $8,957; however, Read was notified that

Appellate Case: 21-3207 Page: 20 Date Filed: 12/14/2021 Entry ID: 5107893

additional documents were needed for his loan funds to be disbursed. (PSR, ¶ 117). On March 10, 2021, Read executed a Second Draw Borrower Application Loan, as well as IRS Form 4506-T, and the loan was funded by Cross River Bank on that same date. (PSR, ¶ 118).

A number of EIDL and PPP loan applications were also submitted on behalf of Mr. Read's wife, Crystal Payne, and his mother-in-law, Wanda Payne ("Wanda"). (*See* PSR, ¶¶ 16, 28, 35, 58, 64). These loan applications, like the ones submitted by Read, were also submitted along with certain falsified documents. Payne would later tell investigators that applying for PPP loans was Read's idea, and that he learned about the scheme by watching YouTube videos. (PSR, ¶ 110). She advised that she signed the applications in her name at Read's request without looking over them. (*Id.*). Read also admitted to investigators that he applied for PPP loans in Payne's and Wanda's names. (PSR, ¶ 105). In total, $228,490 in PPP loans were disbursed to Read, Payne, and Wanda; Payne also received a $10,000 EIDL advance, although the loan was later rejected. (PSR, ¶¶ 88, 119).

The investigation also revealed that Mr. Read, Ms. Payne, and Wanda received Pandemic Unemployment Assistance ("PUA") benefits pursuant to the CARES Act. (PSR, ¶ 89). Claimants are required to file PUA claims in

Appellate Case: 21-3207 Page: 21 Date Filed: 12/14/2021 Entry ID: 5107893

the state where they were working at the time they became unemployed or unable to work due to a COVID-19-related reason listed under the CARES Act. (PSR, ¶ 90). If a claimant worked in more than one state prior to their unemployment, "they may file for PUA in any of those states, but they must pick one." (PSR, ¶ 91). Mr. Read applied for PUA benefits in Arkansas, Missouri, and Louisiana while he lived in Mountain Home, Arkansas. (PSR, ¶ 93). Read's application was processed by the Louisiana Workforce Commission ("LWC"); Read falsely informed the LWC that he lived at an address in West Monroe, Louisiana. (PSR, ¶ 94). Read also completed an application for PUA for Ms. Payne in which he gave the same West Monroe address. (*Id.*). Based on Read's claims, the LWC began sending monthly payments for both Read and Payne to Read's Bancorp Bank account via wire-transfer. (PSR, ¶ 95).

Mr. Read submitted a claim for PUA benefits to the State of Missouri on Ms. Payne's behalf on March 23, 2020; this claim was denied on April 22, 2020, and no PUA benefits were paid to Payne by the State of Missouri. (PSR, ¶ 96). On March 28, 2020, Read submitted a claim for PUA benefits to the LWC; he gave an address in West Monroe, Louisiana, although he was living in Mountain Home at that time. (PSR, ¶ 97). He provided a fraudulent IRS

Appellate Case: 21-3207 Page: 22 Date Filed: 12/14/2021 Entry ID: 5107893

Schedule C which reflected that his lawnmower repair business had gross sales of $191,000 and a net profit of $94,000; based on this reported net income, the LWC approved Read's PUA benefits. (*Id.*). On April 15, 2020, Read submitted a claim to the LWC on Wanda's behalf, again giving an address in West Monroe, Louisiana, despite the fact that Wanda was residing in Arkansas with him and Payne at that time. (PSR, ¶ 98). Based on fabricated information indicating she was self-employed from January through December 2019, with a net income of $58,000, the LWC approved the application submitted on Wanda's behalf. (*Id.*). On April 18, 2020, Read submitted a claim for PUA benefits to the LWC on Payne's behalf. (PSR, ¶ 99). This claim was approved based on fabricated information that Payne had a "sowing [sic] and stitching services business" with gross sales of $138,000 and net profit of $90,000 in 2019. (*Id.*). Mr. Read ultimately received $14,996 in PUA benefits; Ms. Payne received $7,777 in PUA benefits; and Wanda received $16,564 in PUA benefits. (PSR, ¶ 101). In total, the three received $39,337 in PUA benefits. (*Id.*).

On December 11, 2020, a federal search and seizure warrant was executed at the home of Mr. Read and Ms. Payne. (PSR, ¶ 103). Several items and documents were seized, as was $5,725 in U.S. currency and the

Appellate Case: 21-3207 Page: 23 Date Filed: 12/14/2021 Entry ID: 5107893

2017 GMC Sierra truck that Read purchased with PPP loan funds. (*Id.*). That truck's vehicle title was also seized, as were vehicle titles to a 2014 Ford Fusion in Read's name and to a 2003 Chevrolet Trailblazer in Wanda's name. (*Id.*). That same day, Read consented to a noncustodial interview with investigators, wherein he admitted that he had fraudulently applied for PPP loans after learning how to do so from certain YouTube videos. (PSR, ¶ 105). He acknowledged that the numbers on the IRS Schedule C forms for all the loans had been fabricated and that he had also applied for PPP loans in Payne's and Wanda's names. (*Id.*). Read also acknowledged that he had received PUA funds to which he was not entitled; he admitted that he had applied for benefits in Louisiana despite residing in Arkansas, and that he had applied for benefits for Payne and Wanda even though he knew they were not residents of Louisiana, either. (PSR, ¶ 106). Read also admitted to applying for PUA benefits for Payne in Missouri, and for himself in Arkansas. (*Id.*).

Mr. Read told investigators that he had only earned $50,000 per year repairing lawnmowers, but that he did not file a tax return on this income. (PSR, ¶ 108). Read and Payne were both unemployed, although Read did have a Facebook weather-forecasting business that had not been doing well

Appellate Case: 21-3207 Page: 24 Date Filed: 12/14/2021 Entry ID: 5107893

financially during the pandemic. (*Id.*). Read admitted that he spent the funds he received on gambling, baseball cards, hobby shops, and the 2017 GMC Sierra pickup (and on the vehicle he traded in to purchase the Sierra). (PSR, ¶ 109). Read estimated that he spent approximately $20,000 on baseball cards. (*Id.*). Read also stated that he had borrowed money from his landlord before receiving the PPP loans, and that when he received the loan funds he repaid this loan and also paid his rent for a year. (*Id.*). He also admitted that the Ford Fusion had been purchased using PPP loan funds. (*Id.*).

Ms. Payne also consented to a noncustodial interview on December 11, 2020. (PSR, ¶ 110). Payne advised that Mr. Read had completed the paperwork for her and her mother, Wanda, to receive the PPP loans and the PUA funds. (*Id.*). She confirmed that applying for the PPP loans had been Read's idea and that he learned how to do so by watching certain YouTube videos. (*Id.*). She acknowledged that her "BBird Stitching" business had not made any money, that she was the only employee, and that the numbers submitted on the forms for the PPP loans had been fabricated. (*Id.*). She estimated that approximately 70% of the funds received went to gambling and sports cards. (PSR, ¶ 111).

Appellate Case: 21-3207 Page: 25 Date Filed: 12/14/2021 Entry ID: 5107893

The guideline range reflected in the initial PSR was calculated based upon the total amount of loan funds and PUA benefits disbursed to Mr. Read, Ms. Payne, and Wanda, which was $277,827. (PSR, ¶¶ 119, 126). The Government objected to this portion of the PSR, pointing out that, under Application Note 3(A) to U.S.S.G. § 2B1.1, the greater of actual or intended loss should be used to calculate the applicable guideline range. (R. Doc. 15, at 1-2). In this case, the Government asserted, the intended loss amount should have been used, which it calculated to be $589,350. (*Id.* at 2). The intended loss amount reflected several instances in which the loan amount requested was greater than the amount actually disbursed. (*Id.* at 1-2).

The PSR also indicated the belief of the probation officer that Mr. Read should not receive a downward adjustment for acceptance of responsibility. (PSR, ¶ 122). The probation officer's conclusion was based on the fact that, "after executing a written plea agreement on February 19, 2021, the defendant continued to apply for, and obtain, a PPP loan with fraudulent documents." (*Id.*). It was also noted that Read made a post to his Snowbirdbob Facebook page (where it could be seen by his 100,000+ followers) after his change-of-plea hearing that minimized certain aspects of his conduct and denied other aspects. (*Id.*).

Appellate Case: 21-3207 Page: 26 Date Filed: 12/14/2021 Entry ID: 5107893

On September 20, 2021, Mr. Read appeared with counsel before the court for sentencing via video conference. (R. Doc. 30). Before proceeding, the court found that holding the hearing remotely was necessary to avoid harm to the interests of justice, confirmed that Read had signed a written consent to proceed via video conference, and ensured that Read still wanted the court to conduct his sentencing hearing by video conference. (Sentencing Transcript ("Tr."), p. 2). The court reviewed the procedural history of the case and asked Read some preliminary questions. (Tr., pp. 3-4).

The court next turned to discussion of the parties' outstanding objections to the PSR. (Tr., p. 4). The court noted that Mr. Read had fourteen objections to the original PSR, while the Government had only one. (*Id.*). The court first addressed the Government's objection and found that the intended loss amount was the appropriate measure of loss for guideline-calculation purposes; the court also found that the amount of intended loss reflected in the PSR was $589,350. (Tr., pp. 5-6).

The court next indicated that it would group certain of Mr. Read's objections together for consideration. (Tr., p. 6). The court overruled Read's second and third objections which concerned his responsibility for the loans and PUA benefits received by Wanda, his mother-in-law. (Tr., pp. 6-7). The

Appellate Case: 21-3207 Page: 27 Date Filed: 12/14/2021 Entry ID: 5107893

court noted that the PSR reflected an admission by Read that he applied for PPP loans and PUA benefits in Wanda's name, and this fell under the definition of relevant conduct. (Tr., p. 7).

The court next addressed Mr. Read's objections concerning the PPP loan he received from Cross River Bank in 2021. (*Id.*). The Government put on evidence concerning the application Read submitted in connection with this loan. (Tr., pp. 8-17). The Government's witness, FBI Agent Chase Camp, noted that Read had completed a Second Draw Borrower Application; the loan application referenced a first-draw PPP loan that had previously been disbursed to Read. (Tr., pp. 10-11). The previous loan was one that Read had fraudulently obtained, and Agent Camp noted that Read had affirmed in the application that he received a first-draw PPP loan and, prior to the disbursement of the second-draw loan, that Read would have used the full amount of the first-draw loan "only for eligible expenses." (Tr., pp. 11-14). Agent Camp also testified that, as part of his investigation, he and the investigative team had sought out information concerning Read's tax filings. (Tr., p. 16). According to Agent Camp, as of the week prior to sentencing, there was no 2019 tax filing present for Read with the IRS. (*Id.*). Agent Camp testified that Ms. Payne had filed a 2019 tax return as head of household, but

Appellate Case: 21-3207 Page: 28 Date Filed: 12/14/2021 Entry ID: 5107893

that the Schedule C Read submitted in connection with his loan application to Cross River Bank was not included with that tax return or with Read's 2020 tax return. (Tr., pp. 16-17).

On cross-examination, Agent Camp was asked whether he was aware that there was a backlog of paper tax returns that had not yet been processed at the IRS, but he answered that he was not. (Tr., p. 23). While counsel's questions suggested the possibility that Mr. Read's 2019 return (along with the Schedule C) had been submitted but not yet "filed" due to a backlog, Agent Camp was not able to testify as to any backlog; he testified that the IRS representative that he talked with reviewed Read's files and did not have anything on file for 2019. (Tr., pp. 24-25).

The court noted that Mr. Read had admitted to investigators that the numbers on the Schedule C forms he submitted to obtain the loans had all been fabricated as he had not filed tax returns for his business. (Tr., p. 25). The court found by a preponderance of the evidence that the Schedule C he submitted in connection with the loan application to Cross River Bank was a fraudulent document. (*Id.*). The court also noted that Read may have made a truthful representation that he had not applied for any other second-draw loans, the second-draw application was still made on the basis of a first-draw

Appellate Case: 21-3207 Page: 29 Date Filed: 12/14/2021 Entry ID: 5107893

loan that was fraudulent. (Tr., p. 26). The court overruled Read's objections that the amount of the loan from Cross River Bank should not be used to calculate restitution or loss amount. (*Id.*).

The court next addressed Mr. Read's objection that he should have been given credit for acceptance of responsibility. (Tr., p. 27). The court overruled the objection based on the fact that Read sought and obtained another PPP loan from Cross River Bank after having been interviewed by the FBI and after having signed a plea agreement on February 19, 2021, whereby he agreed to plead guilty to the three-count information. (*Id.*). The court also noted its previous finding that the Cross River Bank loan application was based on a fraudulent Schedule C and on a fraudulent first loan that was the predicate for the second draw. (*Id.*). The court asked whether it had addressed all the parties' objections; the Government responded in the affirmative, and Read's attorney responded that he believed any remaining objections had no impact on the calculation of the guideline range. (Tr., p. 28).

The court discussed the calculation of Mr. Read's guideline range, noting that the range would differ from the one reflected in the PSR due to its rulings on the parties' objections. (Tr., pp. 29-30). Under U.S.S.G.

Appellate Case: 21-3207 Page: 30 Date Filed: 12/14/2021 Entry ID: 5107893

§§ 2S1.1(a)(1) and 2B1.1(a)(1), the base offense level was 7; a 14-level increase was applied under U.S.S.G. § 2B1.1(b)(1)(H) because the intended loss amount was more than $550,000 but less than $1,500,000. (Tr., p. 29). A 1-level increase was applied pursuant to U.S.S.G. § 2S1.1(b)(2)(A) because the defendant was convicted of a money laundering offense, and a 2-level enhancement was applied under U.S.S.G. § 2B1.1(b)(10)(C) because Read intentionally engaged in conduct constituting sophisticated means. (*Id.*). A 2-level increase was applied under U.S.S.G. § 3B1.1(c) because Read was an organizer, leader, manager, or supervisor of the criminal activity. (Tr., pp. 29-30). This resulted in a total offense level of 26 and, because Read was in criminal history category I (with zero criminal history points), a guideline range of 63 to 78 months imprisonment; 1 to 3 years of supervised release on Counts One and Two, and 2 to 5 years of supervised release on Count III; a fine in the range of $25,000 to $1,500,000; restitution in the amount of $277,827; and a mandatory special assessment of $100 per count. (Tr., p. 30).

The court next discussed its obligation to apply the 18 U.S.C. § 3553(a) factors in determining an appropriate sentence, and it listed several of those factors. (Tr., p. 30). The court stated that it had read and taken into account the sentencing memorandum submitted on behalf of Mr. Read, and noted

Appellate Case: 21-3207 Page: 31 Date Filed: 12/14/2021 Entry ID: 5107893

that a downward variance had been requested in that memo. (Tr., pp. 30-31). The court also indicated that it had read and taken into account the letters of support that had been submitted on Read's behalf. (Tr., p. 31).

The court next heard arguments of counsel. (*Id.*). The Government opposed Mr. Read's request for a downward variance, arguing that the nature and circumstances of the offense were aggravating. (Tr., pp. 31-33). The Government did acknowledge as mitigating the fact that Read pleaded guilty to an information and did not require the Government to secure an indictment, as well as Read's lack of criminal history, but asserted that the aggravating factors outnumbered the mitigating. (Tr., p. 33).

Mr. Read's attorney discussed Read's background and characteristics, noting that he is 44 years old, attended some college, and is married with one dependent daughter (who had been having some problems that were discussed during Ms. Payne's sentencing).[1] (Tr., p. 34). Counsel also discussed Read's gambling addiction and quoted from an article regarding the psychology of such an addiction. (Tr., pp. 34-35). As counsel explained, the "reward uncertainty" of gambling leads to a release

[1] According to the PSR, Read's daughter has been diagnosed with bipolar disorder. (PSR, ¶ 154).

Appellate Case: 21-3207 Page: 32 Date Filed: 12/14/2021 Entry ID: 5107893

of dopamine in the brain, particularly during the moments leading up to a potential reward. (Tr., p. 35). This "anticipation effect" likely plays a role in reinforcing risk-taking behavior. (Tr., p. 35-36). For someone with a gambling problem, losing eventually comes to trigger the rewarding release of dopamine almost to the same degree that winning does, which means that losing sets off the urge to keep playing—a phenomenon known as "chasing losses." (Tr., pp. 36-37). Counsel suggested that, to someone with a gambling addiction like Read, applying for PPP loans was like playing a slot machine. (Tr., p. 36). Counsel suggested that, while Read's gambling addiction did not excuse his crimes, it appeared to be one of the underlying reasons why Read behaved as he did. (*Id.*). Counsel requested a downward variance to a sentence of 12 months and a day in prison, suggesting that such a sentence would be appropriate in light of Read's gambling addiction, his lack of criminal history, the issues with his daughter, and Read's own mental and physical health concerns.[2] (Tr., p. 37).

[2] As indicated in the PSR, Read suffers from severe panic attacks, anxiety, depression, and bipolar episodes. (PSR, ¶ 163). He began seeing a mental health counselor at age 16 due to childhood abuse inflicted by his father. (*Id.*). Read was under the care of a doctor (who he visited monthly) at Baxter Regional Medical Center ("BRMC") in Mountain Home, and he had been prescribed and taking Klonopin and Prozac for the past 17 years as of the

Counsel also stated that Mr. Read had pre-recorded an allocution video, seven minutes in length, that he wished to present to the court. (Tr., pp. 37-38). Counsel noted that Read "has an awful lot of anxiety," and that it may be difficult for him "to provide much of an allocution today" other than via the video. (Tr., p. 38). The court stated, "I do not want to listen to the video for seven minutes of allocution. I will give him an opportunity to speak just like I do every other defendant." (*Id.*). The court gave Read the opportunity to speak, and he apologized and accepted responsibility for his conduct. (Tr., p. 39). After he received the first loan, Read stated that he "paid some bills, and then [he] gambled most of it." (*Id.*). At that point, the

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time of the presentence investigation. (*Id.*). Read also suffers from a number of physical ailments, including carpal tunnel syndrome, degenerative disc disease in his back, and stomach issues. (PSR, ¶ 160). Records from Interventional Pain Management show that Read was being treated for chronic pain syndrome. (PSR, ¶ 161). Read's medical records "reflect evidence of moderate spinal stenosis at C5-C6 due to degenerative cervical spondylosis noted also at C4-C5, moderate bilateral foraminal stenosis also noted at those two levels, and results of the lumber spine noted mild degenerative concentric disc bulging at L4-L5 with mild bilateral facet degenerative changes from L4-S1." (*Id.*). Read has been officially diagnosed with: "degenerative disc disease; radiculopathy, cervical region; intervertebral disc disorder with radiculopathy of lumbosacral region; radiculopathy, lumbosacral region; [and] sacroiliitis . . . ." (*Id.*). BRMC records also show that Read was being treated for hypertension, diabetes mellitus, gastroesophageal reflux disease without esophagitis, low back pain without sciatica, and asthma. (Tr., ¶ 162).

Appellate Case: 21-3207 Page: 34 Date Filed: 12/14/2021 Entry ID: 5107893

transcript reflects that Read was "([u]nintelligible, sobbing)" and that he then said, "I just couldn't stop." (*Id.*). Read said he has had "a bad addiction for 24 years," but that he had finally realized that he needed to get help and that he had "signed [his] gambling rights away in a lot of states." (*Id.*). Read continued to apologize and acknowledged that the court had to punish him for his crimes. (Tr., pp. 39-40). Read stated that he tries to be a good person, but acknowledged that he had "made some bad, bad decisions" that led him to where he was. (Tr., p. 40). Read continued:

> I know I'm probably missing a lot, Your Honor, because my mind is scattered right now. That's why I put the video together. But I—that's all I can, that's all I can think of, Your Honor. I'm sorry. I'm a mess to everybody watching this and everything. That's why I did the video.

(*Id.*). The court responded, "Okay. Thank you, Mr. Read." (*Id.*).

Turning to its evaluation of the § 3553(a) factors, the court stated that "this was an extensive scheme to defraud a program that was designed, intended to help businesses that were failing . . . during the pandemic, during the year 2020 and then into 2021." (*Id.*). The court discussed the falsification of documents by Mr. Read and the large amount of planning that was required to carry out the fraud. (Tr., p. 41). The court noted that Read had applied for loans in excess of $589,000 and then concluded

Appellate Case: 21-3207 Page: 35 Date Filed: 12/14/2021 Entry ID: 5107893

(incorrectly) that "he received over half of that." (*Id.*). The court said that "what really makes this offense egregious is how he got his wife involved in it, how he got his mother-in-law involved in it . . . ." (*Id.*). The court noted that it had just sentenced Read's wife to a term of probation "because I'm aware of the daughter and her needs, and the mother has the ability to take care of her." (*Id.*). But Read's case was different, according to the court, because "[h]e is the one who did all the planning. He is the one who carried out all the fraudulent acts. He's the one who prepared all the fraudulent documents . . . ." (Tr., pp. 41-42). The court noted that Read had applied for the Cross River Loan even after he was aware of the investigation into his fraud. (Tr., p. 42). The court opined, "[T]his is one of the more egregious fraud cases that I've seen." (*Id.*). The court went on:

> I think that the reason his counsel gives for this is a gambling addiction. That may have been one of his needs for money, but this case is not analogous to a drug case where someone has a methamphetamine addiction, because they are—even in those, in those particular cases, those individuals are often sent to long terms of imprisonment.

(*Id.*).

The court acknowledged that Mr. Read had a gambling addiction, and noted that "he has had some health issues as well, but, you know, he did, in

Appellate Case: 21-3207 Page: 36 Date Filed: 12/14/2021 Entry ID: 5107893

fact, have a business, a weather-forecasting business for which he had a large number of . . . subscribers to his business, so he did have a legitimate way to make business . . . ." (Tr., pp. 42-43). The court also noted that Read "previously operated a business in Louisiana at which he was able to provide income for his family." (Tr., p. 43). The court found that Read had committed a "very serious offense" that "calls for a sentence that shows the seriousness of the offense and the need to provide just punishment." (*Id.*).

The court mentioned the need to avoid unwarranted sentence disparities and stated that it had looked at some other cases and found that "there's a wide range of cases that are out there where people have defrauded the government for much less than this and even in some cases a lot more than this." (*Id.*). The court announced its intention to impose a sentence of 63 months imprisonment on each count, to run concurrently, at the bottom of the guideline range. (Tr., pp. 43-44). The court also stated its intention to impose a term of supervised release of 3 years per count, to run concurrently. (*Id.*). The court listed the special conditions of supervised release it intended to impose, and stated that it would order restitution in the total amount of $277,827. (Tr., p. 44). Because of the large amount of

Appellate Case: 21-3207 Page: 37 Date Filed: 12/14/2021 Entry ID: 5107893

restitution, the court declined to impose a fine, but announced that the mandatory special assessment would be imposed. (Tr., p. 45).

The court asked the parties if they knew of any legal reason why the sentence should not be imposed and, when they responded in the negative, imposed the sentence as stated. (Tr., p. 46). The court explained Mr. Read's appeal rights to him. (Tr., pp. 46-47). The court found that Read had complied with all of his conditions of release, that he was not likely to flee or pose a danger to the safety of another person or the community, and that detention pending execution of sentence was not mandatory; therefore, Read was permitted to self-report to his designated facility by November 4, 2021. (Tr., p. 47). The court indicated its understanding that the parties had agreed to administrative forfeiture of the GMC Sierra that was seized from Read's residence on December 11, 2020, and the Government confirmed this to be correct. (Tr., p. 48). When the court asked the parties if there was anything further, Read's attorney asked if the court would recommend designation to either FPC Yankton in South Dakota or MCFP Springfield; the court indicated that it would include such a recommendation in the judgment. (Tr., pp. 48-49). The court then recessed the hearing. (Tr., p. 49).

Appellate Case: 21-3207 Page: 38 Date Filed: 12/14/2021 Entry ID: 5107893

Mr. Read directed counsel to file a notice of appeal. A timely notice of appeal was filed on October 4, 2021. (R. Doc. 35). Read reported as directed to the Bureau of Prisons facility to which he was designated.

SUMMARY OF THE ARGUMENT

Mr. Read first argues on appeal that the district court denied him his right to presentence allocution by refusing to view a 7-minute-long pre-recorded allocution video he prepared. Although the court allowed Read to address the court, his mental health issues did not permit him to allocute effectively. The court should have made a reasonable accommodation for someone such as Read who has suffered for years from severe anxiety and panic attacks and viewed the allocution video rather than putting Read on the spot and requiring that he address the court live.

Second, Mr. Read argues that the district court abused its discretion by imposing a substantively unreasonable sentence. The court overstated the seriousness of Read's offenses and failed to properly credit certain mitigating factors, such as Read's gambling addiction and myriad health problems. The court also failed to properly consider the need to avoid unwarranted sentence disparities. A review of the sentences imposed in

Appellate Case: 21-3207 Page: 39 Date Filed: 12/14/2021 Entry ID: 5107893

numerous cases involving fraudulently obtained PPP loans shows that Read's 63-month prison sentence is overly harsh.

Finally, Mr. Read argues that the district court plainly erred when it imposed a sentence in excess of the statutory maximum in connection with his conviction for making a false statement in violation of 18 U.S.C. § 1001, and he requests that the Court exercise its discretion to correct this mistake if the case is not otherwise remanded for resentencing.

ARGUMENT

I. The district court erred by refusing to permit Mr. Read to allocute via pre-recorded video.

Standard of Review

The denial of a defendant's right to presentence allocution is a "significant procedural error" that is reviewed de novo. *United States v. Thurmond*, 914 F.3d 612, 614 (8th Cir. 2019).

Discussion

While a defendant's right to presentencing allocution is "a matter of criminal procedure and not a constitutional right, it is nonetheless considered an 'absolute right' in the federal courts." *United States v. Li*, 115 F.3d 125, 132-33 (2d Cir. 1997) (citing *Hill v. United States*, 368 U.S. 424, 428

Appellate Case: 21-3207 Page: 40 Date Filed: 12/14/2021 Entry ID: 5107893

(1962); *United States v. Sparrow*, 673 F.2d 862, 865 (5th Cir. 1982)) (internal citations omitted). Federal Rule of Criminal Procedure 32(i)(4)(A)(ii) requires that a district court "address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence . . . ." A sentencing judge must not comply with the Rule "merely in form". *Li*, 115 F.3d at 133. The Rule "denies any judge the discretion to reduce the hearing on sentence to a meaningless formality." *Sparrow*, 673 F.2d at 865 (quoting *United States v. Long*, 656 F.2d 1162, 1165 (5th Cir. 1981)). "Instead the Rule demands that each defendant be allowed a meaningful right to express relevant mitigating information before an attentive and receptive district judge." *Li*, 115 F.3d at 133. While "a defendant's right to allocution is not unlimited in terms of either time or content[,] a 15 to 20 minute allocution is most often ample to satisfy a defendant's Rule 32[] rights." *Id.* at 133-34.

In the "more typical situation" in which a defendant is denied the right of allocution, "a sentencing judge has simply failed to allow the defendant *any* opportunity to address the court before sentence was imposed." *Id.* But under certain circumstances, a defendant's allocution may be "sufficiently limited to require resentencing." *Id.* While Mr. Read was permitted an

Appellate Case: 21-3207 Page: 41 Date Filed: 12/14/2021 Entry ID: 5107893

opportunity to allocute, the court's refusal to view his pre-recorded allocution video denied him the right of effective allocution under the circumstances of the instant case.

As Mr. Read's counsel indicated at sentencing, he gave notice to the court prior to the first sentencing setting that Read had recorded a 7-minute-long allocution video that he wished to play for the court. (Tr., pp. 37-38). Counsel specified that the reason Read wished to present a video to the court was because of his anxiety; counsel expressed concern that Read would have a hard time trying to allocute on-the-spot. (Tr., p. 38). Indeed, as reflected in numerous sections of the PSR, Read has a well-documented history of severe anxiety and panic attacks stretching back decades. (PSR, ¶¶ 163-65). Read first began experiencing anxiety toward the end of his high school years. (PSR, ¶ 152). His anxiety worsened during his third year of college, and was a major factor that contributed to his decision to drop out before completing his meteorology degree. (PSR, ¶¶ 153, 171). Read's anxiety caused problems at his job that led him to begin his weather-forecasting business on Facebook. (PSR, ¶ 163). Despite having ample notice of the state of Read's mental health from the PSR, the court responded that it "d[id] not want to listen to the video for seven minutes of allocution"—apparently

Appellate Case: 21-3207 Page: 42 Date Filed: 12/14/2021 Entry ID: 5107893

indicating by its emphasis on video's length that the court believed it to be too long. (Tr., p. 38).

Indeed, Mr. Read, who had expected that he would be allowed to present his pre-recorded video to the court, had difficulty expressing himself during his allocution due to his anxiety. (Tr., pp. 39-40). The transcript reflects that portions of Read's allocution were "[u]nintelligible," due in part to his "sobbing." (Tr., p. 39). Read indicated that there were other things he wished to say to the court, but he could not recall them. (*Id.*). As Read stated at the conclusion of his allocution:

> I know I'm probably missing a lot, Your Honor, because my mind is scattered right now. That's why I put the video together. But I – that's all I can, that's all I can think of, Your Honor. I'm a mess to everyone watching this and everything. That's why I did the video.

(Tr., p. 40).

Especially at the point at which Mr. Read informed the court about the trouble he was having remembering what he intended to say, the court should have taken 7 additional minutes to view Read's allocution video. Instead, it simply responded, "Okay. Thank you, Mr. Read," and then moved on. (Tr., p. 40). This gives the strong impression that the court considered Read's allocution a "meaningless formality," and that it was not

Appellate Case: 21-3207 Page: 43 Date Filed: 12/14/2021 Entry ID: 5107893

concerned with actually listening to what Read wished to express prior to being sentenced. As the Seventh Circuit has warned, "Because the sentencing decision is a weighty responsibility, the defendant's right to be heard must never be reduced to a formality. . . . [C]ourts must continue to be cautious to avoid the appearance of dispensing assembly-line justice." *United States v. Barnes*, 948 F.2d 325, 331 (7th Cir. 1991). Unfortunately, the court was not careful enough to avoid giving such an appearance in its treatment of Read's allocution in the instant case.

Mr. Read has a diagnosed and documented mental illness that interfered with his ability to effectively allocute. It was error for the court to fail to provide reasonable accommodation for Read's condition at sentencing, which it could have done by simply taking 7 minutes to view his pre-recorded allocution video. Read's sentence should be vacated and the matter remanded for resentencing.

II. The district court abused its discretion by imposing a substantively unreasonable sentence.

Standard of Review

This Court "review[s] all sentences, whether inside or outside the Guidelines range, under a deferential abuse of discretion standard." *United*

Appellate Case: 21-3207 Page: 44 Date Filed: 12/14/2021 Entry ID: 5107893

States v. Martinez, 557 F.3d 597, 599-600 (8th Cir. 2009) (citing *Gall v. United States*, 552 U.S. 38, 51 (2007)). "On appeal, [this Court] may consider both the procedural soundness of the district court's decision and the substantive reasonableness of the sentence imposed." *United States v. Merrival*, 521 F.3d 889, 890 (8th Cir. 2008).

If this Court is "certain that the district court's decision is 'procedurally sound' [it] is to 'then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.'" *United States v. Washington*, 515 F.3d 861, 865 (8th Cir. 2008) (quoting *Gall*, 552 U.S. at 51). A district court commits an abuse of discretion and imposes a substantively unreasonable sentence when "it fails to consider a relevant factor, gives significant weight to an irrelevant or improper factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case." *United States v. Jones*, 509 F.3d 911, 913 (8th Cir. 2007) (citing *United States v. Haack*, 403 F.3d 997, 1004 (8th Cir. 2005)). The defendant "bears the burden of proving that his sentence is unreasonable." *United States v. Luleff*, 574 F.3d 566, 569 (8th Cir. 2009).

Appellate Case: 21-3207 Page: 45 Date Filed: 12/14/2021 Entry ID: 5107893

Discussion

In sentencing Mr. Read to 63 months imprisonment, the district court failed to properly consider certain relevant factors and failed to properly weigh certain other relevant factors. First, the court found the offense itself to be more serious than the record actually indicated that it was. The court spent quite a bit of time discussing the nature of the PPP and how it was designed to help keep people employed and businesses running during the pandemic. (Tr., pp. 40-41). The court's implication was that Read's fraud hurt the legitimate businesses that needed PPP funds to continue operations, and their employees. There is no indication in the record, however, that the PPP ever ran out of money or that any legitimate businesses were denied needed funds due to the fraud perpetrated by Read. None of the banks to which Read made loan applications suffered any lasting harm, either, as the loans were 100% guaranteed by the SBA. A federal government entity was the victim of Read's offenses, and any loss that is not ultimately recovered from Read through restitution and forfeiture will be borne by the entire base of U.S. taxpayers rather than any particular smaller group of vulnerable victims. While Read has acknowledged responsibility for committing multiple federal felonies, these crimes were purely financial in nature.

Appellate Case: 21-3207 Page: 46 Date Filed: 12/14/2021 Entry ID: 5107893

Read's offenses involved no element of violence or threat of violence; Read committed no sexual offenses or offenses involving the abuse or exploitation of children; Read did not traffic controlled substances or illegally possess or distribute firearms or other dangerous weapons. On the wide spectrum of federal offenses, Read's crimes decidedly fall toward the less serious end. Even the amount of loss caused (a little over a quarter of a million dollars) and intended (somewhat over half a million dollars), while not insignificant, is less than in many similar cases involving defendants who have defrauded the government. The court's statement that "this is one of the more egregious fraud causes that I've seen" (Tr., p. 42) is an overstatement of the severity of the offense.

At sentencing, the court briefly acknowledged and dismissed important aspects of Mr. Read's history and characteristics that should have been given significant mitigating weight. The court appeared to misunderstand the argument put forward by Read's counsel concerning his gambling addiction. Counsel suggested that Read's gambling addiction helped explain why he continued to apply for so many loans because of the manner in which an addict's brain becomes "rewired" by the cycle of addiction. As counsel analogized, the process of applying for loans, for

Appellate Case: 21-3207 Page: 47 Date Filed: 12/14/2021 Entry ID: 5107893

Read, became like playing a slot machine, and he was compelled to continue applying for loans by the same mechanism that compelled him to continue to gamble. In addressing this argument, the court stated, "I think the reason his counsel gives for this is a gambling addiction. That may have been one of his needs for money, but this case is not analogous to a drug case where someone has a methamphetamine addiction . . . ." (Tr., p. 42). The court only recognized Read's gambling addiction to be a reason he needed money, not as an underlying cause that contributed to his overall conduct. It also appears that the court may have discounted the seriousness of a gambling addiction by suggesting that it is not the same as a drug addiction. Read's gambling addiction should have been given significant mitigating weight, but instead the court appeared to dismiss it out of hand.

The court also failed to recognize the mitigating nature of Mr. Read's physical and mental health issues, although these were clearly and extensively documented in the PSR. *See* footnote 2, *supra*. The court noted that Read "has had some health issues as well," but quickly concluded that these did not really affect his ability to earn an income: "[Y]ou know he did, in fact, have a . . . weather-forecasting business for which he had a large number of . . . subscribers . . ., so he did have a legitimate way to make

Appellate Case: 21-3207 Page: 48 Date Filed: 12/14/2021 Entry ID: 5107893

business . . . ." (Tr., pp. 42-43). The court failed to acknowledge that the pandemic caused Read to lose somewhere around 65-75% of his income from these subscribers—Read's income from his weather-forecasting business dropped from around $60,000 per year before the pandemic to around $15,000 to $20,000 per year during the pandemic. (PSR, ¶ 172). The court further remarked that Read "also previously operated a business in Louisiana at which he was able to provide income for his family." (Tr., p. 43). As reflected in the PSR, Read did own and operate an automotive repair shop in Louisiana from 2003 to 2015. (PSR, ¶ 174). As the PSR also indicates—but as the court again failed to acknowledge—Read's "declining physical and mental health forced him to leave this employment." (*Id.*). Read has a good work history, but as he has aged and his overall health condition has worsened, his employment options have narrowed. Although he had been enjoying a reasonable degree of success with his weather-forecasting business, a sudden pandemic-related drop in that income caused him to panic. He could not go back to work operating an automotive repair shop, and problems with his back, neck, wrists, and hands rule out almost any other job with even moderate physical demands. His severe anxiety, panic attacks, depression, and bipolar episodes also lessened his prospects

Appellate Case: 21-3207 Page: 49 Date Filed: 12/14/2021 Entry ID: 5107893

for securing and retaining other outside employment. The court ignored all this mitigating context surrounding Read's unfortunate decision to apply for PPP loans to which he was not entitled.

Although the court briefly mentioned that it had "looked at some other cases" (without naming any specific ones) (Tr., p. 43), it also failed to properly consider the need to avoid unwarranted sentence disparities. The sentence imposed is out of proportion to the loss intended and actually caused by Read. As the court recognized, "there's a wide ranges of cases that are out there where people have defrauded the government for much less than this and even in some cases a lot more than this." (*Id.*). In a case involving a similar loss amount, the defendant pleaded guilty to conspiracy to commit wire fraud after fraudulently obtaining a PPP loan in the amount of $285,742; he was sentenced to 18 months in prison and ordered to pay $285,742 in restitution. *See* Factual Proffer Statement, *United States v. Garcia*, No. 0:21-CR-60146-RKA-1 (S.D. Fla. July 6, 2021), ECF No. 24; Amended Judgment, *id.* (S.D. Fla. October 19, 2021), ECF No. 45. Another defendant prosecuted in Florida falsified bank statements and payroll tax forms in connection with a PPP loan application and fraudulently obtained a loan in the amount of $491,310; she waived indictment and pleaded guilty to an

Appellate Case: 21-3207 Page: 50 Date Filed: 12/14/2021 Entry ID: 5107893

information charging her with conspiracy to commit wire fraud. *See* Information, *United States v. Denton*, No. 0:21-CR-60171-RS-1 (S.D. Fla. June 21, 2021), ECF No. 20. She was sentenced to 6 months in prison and 12 months of home confinement and ordered to pay restitution in the amount of $377,883.91. *See* Amended Judgment, *id.* (S.D. Fla. Oct. 11, 2021), ECF No. 53, pp. 2, 5, 6.

David T. Hines waived indictment and pleaded guilty to an information charging him with wire fraud after he fraudulently obtained approximately $3.9 million in PPP loans; he used the funds for his own personal purposes, including the purchase of a Lamborghini automobile using $318,000 in PPP funds. *See* Information, *United States v. Hines*, No. 1:21-CR-20011-MGC-1 (S.D. Fla. Jan. 8, 2021), ECF No. 29, p. 3; Factual Proffer Statement, *id.* (S.D. Fla. Feb. 10, 2021), ECF No. 41, p. 3. Hines also assisted other individuals in obtaining fraudulent PPP loans. Factual Proffer Statement, pp. 3-4. He was sentenced to 78 months in prison and ordered to pay restitution in the total amount of $4,809,307. Amended Judgment, *id.* (S.D. Fla. May 17, 2021), ECF No. 62, pp. 2, 5.

Tarik Jafaar conspired with his wife, Monika Jaworska, to submit 18 fraudulent PPP loan applications to 12 different financial institutions on

Appellate Case: 21-3207 Page: 51 Date Filed: 12/14/2021 Entry ID: 5107893

behalf of four shell companies; the loan applications sought a total of $6,640,200 in loan funds, and a total of $1,438,500 in loan funds were disbursed to them. *See* Information, *United States v. Jafaar*, No. 1:20-CR-00185-CMH-1 (E.D. Va. Aug. 25, 2020), ECF No. 33, pp. 6-8. Jafaar pleaded guilty to conspiracy to commit bank fraud and to defraud the United States and was sentenced to 12 months in prison and ordered to pay $220,573 in restitution. Judgment, *id.* (E.D. Va. Nov. 18, 2020), ECF No. 67, pp. 2, 4.

Shashank Rai filed two fraudulent PPP loan applications seeking more than $13 million in loan funds. *See* Factual Basis, *United States v. Rai*, No. 1:21-CR-00009-MAC-CLS (E.D. Tex. Feb. 9, 2021), ECF No. 28, at pp. 3-4. Rai pleaded guilty to a one-count information charging him with making false statements to a bank and was sentenced to 24 months in prison. Judgment, *id.* (E.D. Tex. June 23, 2021), ECF No. 44, pp. 1-2.

Benjamin Hayford, a resident of Centerton, Arkansas, was charged with fraudulently seeking loans in the amount of $4,472,468 from two different financial institutions in April 2020. *See* Indictment, *United States v. Hayford*, No. 4:20-CR-00088-CVE-1 (N.D. Okla. July 7, 2020), ECF No. 15, pp. 5-6. He pleaded guilty to one count of bank fraud and four counts of making false statements to a financial institution and was given a total sentence of

Appellate Case: 21-3207 Page: 52 Date Filed: 12/14/2021 Entry ID: 5107893

24 months in prison. Judgment and Commitment, *id.* (N.D. Okla. Dec. 9, 2020), ECF No. 38, pp. 1-2.

When Mr. Read's case is viewed in light of the cases listed above, it is evident that the sentence imposed upon him is substantively unreasonable. Defendants who sought PPP loans in amounts similar to and often much greater than the amounts sought by Mr. Read have regularly received sentences only a fraction as long as that imposed upon him. The only defendant listed above who was sentenced in the same general range as Read was Mr. Hines, who received around $3.9 million in loan funds and spent over $300,0000 of those funds—an amount greater than the total PPP, EIDL, and PUA funds received by Read, Ms. Payne, and Wanda combined—on a Lamborghini. For a defendant such as Read, who is in criminal history category I and who waived indictment to plead guilty to an information, a 63-month sentence is simply unreasonable under all the circumstances of the case. The court erred in its weighing of the sentencing factors and committed a clear error of judgment in imposing a sentence that was greater than necessary to accomplish the purposes of sentencing.

Appellate Case: 21-3207 Page: 53 Date Filed: 12/14/2021 Entry ID: 5107893

III. The district court imposed a sentence in excess of the statutory maximum on Mr. Read's conviction for making a false statement in violation of 18 U.S.C. § 1001(a)(3).

Standard of Review

When a defendant fails to raise an objection at sentencing, this Court reviews for plain error. *See United States v. House*, 923 F.3d 512, 514 (8th Cir. 2019). To obtain reversal on plain error review, a defendant must show (1) an error; (2) that is plain; (3) that affects his substantial rights; and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.* (citing *United States v. Boman*, 873 F.3d 1035, 1040 (8th Cir. 2017)).

Discussion

Mr. Read was sentenced to a term of 63 months imprisonment on each count of conviction, to run concurrently. (R. Doc. 31, at 2 ; Add. 5). Read's conviction on Count One was for making a false statement in violation of 18 U.S.C. § 1001(a)(3). (*Id.* at 1; Add. 4). The maximum penalty for that offense is generally 5 years (or 60 months) imprisonment under the statute.[3] It was

[3] Section 1001(a) provides for a maximum sentence of 8 years imprisonment if the offense involves international or domestic terrorism or relates to a specified sex offense, but this provision of the statute is not applicable in the instant case.

Appellate Case: 21-3207 Page: 54 Date Filed: 12/14/2021 Entry ID: 5107893

noted in the PSR that the maximum term of imprisonment that could be imposed in connection with Read's conviction on Count One was 5 years. (PSR, ¶ 182). The district court imposed a sentence in excess of the statutory maximum on Count One.

Mr. Read suggests that the court likely overlooked the PSR and the statutory limitation on the maximum sentence that could be imposed on Count One in light of the fact the Read was subject to up to 10 years imprisonment in connection with his conviction on Count Two and up to 30 years on Count Three. *See* 18 U.S.C. § 1957; 18 U.S.C. § 1343. Read submits that this mistake constituted an error that was plain. *Cf. United States v. Gifford*, 991 F.3d 944, 948 (8th Cir. 2021) (finding that the district court plainly erred in imposing a term of supervised release in excess of the statutory maximum). This error affected Read's substantial rights, because he would have been sentenced to a term of imprisonment for no more than 5 years on Count One if not for the error. *See Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904-05 (2018) ("To satisfy [the] third condition [i.e., that the defendant's substantial rights were affected], the defendant must show a reasonable probability that, but for the error, the outcome of the proceeding

would have been different.") (cleaned up).[4] Finally, Read contends that this error seriously affects the fairness, integrity, or public reputation of judicial proceedings, as a punishment in excess of that authorized by statute was imposed upon him. The Supreme Court recently noted that it "repeatedly has reversed judgments for plain error on the basis of inadvertent or unintentional errors of the court or the parties below." *Rosales-Mireles*, 138 S. Ct. at 1906. Read suggests that this is such a case, and respectfully requests that this Court exercise its discretion to correct this error. If the Court does not remand for resentencing on either of the first two points on appeal, it should reduce the term of imprisonment on Count One to 60 months.

[4] Read recognizes that this Court has previously held that a defendant's substantial rights were not affected when a sentence in excess of the statutory maximum was imposed on one count because he was still subject to the same total sentence due to his conviction on another count. *See Gifford*, 991 F.3d at 948. Read suggests that such a view does not account for the very real possibility that a defendant's other convictions may be vacated (or sentences reduced) at some point in the future such that he ends up being subject to an erroneously imposed, illegal sentence with no recourse. When the correction of a plain error such as this requires the expending of virtually no additional judicial resources, Read suggests that the court should exercise its discretion to correct the error.

Appellate Case: 21-3207 Page: 56 Date Filed: 12/14/2021 Entry ID: 5107893

CONCLUSION

The district court erred by refusing to allow Mr. Read to allocute via pre-recorded video at sentencing, and also abused its discretion by imposing a substantively unreasonable sentence. These errors require that Read's sentence be vacated and that this case be remanded for resentencing. The district court also erred by imposing a sentence in excess of the statutory maximum on Read's conviction on Count One of the Information for making a false statement. If the case is not remanded for resentencing on either of the first two points on appeal, this Court should order the sentence on Count One reduced to 60 months, the statutory maximum for that offense.

Appellate Case: 21-3207 Page: 57 Date Filed: 12/14/2021 Entry ID: 5107893

Respectfully submitted,

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CERTIFICATE OF SERVICE/COMPLIANCE

I hereby certify that on December 13, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. I certify the brief has been scanned for viruses and is virus-free. I further certify the full text of this brief was prepared in Word for Microsoft 365, font Book Antiqua, size 14, and that this brief contains 12,217 total words and accordingly complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B).

/s/ *C. Aaron Holt*
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Appellate Case: 21-3207 Page: 58 Date Filed: 12/14/2021 Entry ID: 5107893