No. 21-1938

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee

vs.

MELVIN STOUT,
Appellant

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

Honorable Timothy L. Brooks
United States District Judge

REPLY BRIEF

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INTRODUCTION

Mr. Stout waived his right to the formal indictment process and pleaded guilty to a one-count information charging him with making a false statement in violation of 18 U.S.C. § 1001(a)(3). (DCD 5, 7, 8). Stout, along with his wife (Tiffany Acuff) and sister (Valarie Watson), applied for certain loans made available under the Coronavirus Aid, Relief, and Economic Security ("CARES") Act that were intended to provide assistance to individuals and businesses affected by the COVID-19 pandemic. 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"). (Presentence Investigation Report ("PSR"), ¶¶ 9-10). The PPP was designed and intended to provide small businesses with loans that would be fully forgiven when used for payroll costs, interest on mortgages, rent, and utilities. (PSR, ¶ 11). EIDLs were long-term loans with lower, fixed interest rates that were made available to pay for expenses that could have been met had the public health emergency not occurred, including payroll and other operating expenses. (PSR, ¶ 14). Applicants were eligible to receive a "Targeted EIDL Advance" of up to $10,000 within 3 days of applying for an EIDL. (PSR, ¶ 16). The

advanced portion of an EIDL does not have to be repaid, but any non-advance balance of an EIDL is not forgivable and must be repaid; however, repayment on these loans is deferred for one year. (PSR, ¶¶ 14, 16). Stout, Acuff, and Watson submitted applications for PPP loans and EIDLs despite knowing that they were not eligible to receive such loans, as they were not the owners of any businesses with monthly payroll obligations or that were experiencing a temporary loss of revenue due to COVID-19.

The amounts sought by Mr. Stout, Ms. Acuff, and Ms. Watson in all of the PPP loans and EIDLs for which they applied totaled $116,525.56; the amounts actually disbursed totaled $74,600.00. (PSR, ¶ 41). The PSR reflected an intended loss amount of $116,525.56, the total amount of all of the loans applied for by Stout and his related defendants. (*Id.*). This amount corresponded to an 8-level enhancement under U.S.S.G. § 2B1.1(b)(1)(E). Stout has asserted on appeal that the intended loss amount should actually have been no more than $91,125.56, which corresponds to a 6-level enhancement under U.S.S.G. § 2B1.1(b)(1)(D), and that the court plainly erred by using the total amount of loan money sought as the intended loss amount. The intended loss amount reflected in the PSR and adopted by the court improperly included loan amounts that the defendants would have

been required to repay to the SBA, and there was no evidence before the court that any of the defendants had any intention or plan to avoid repayment of those amounts when they applied for the loans. Under this Court's precedent, such amounts should have been excluded from the amount of intended loss because there was no indication that the defendants actually intended to cause loss to the Government as to those amounts. *See United States v. Oligmueller*, 198 F.3d 669 (8th Cir. 1999). Stout's guideline range should have been 10 to 16 months rather than 12 to 18 months.

The Government has argued in response that Mr. Stout has failed to establish that the district court committed any error in determining the amount of intended loss. According to the Government, "the record provides ample support to the finding that Stout and his co-conspirators intended to cause the entire amount of loss as found by the court." (Brief of Appellee, p. 11). The Government has asserted that *Oligmueller* actually demonstrates the lack of plain error in this case.

ARGUMENT

The Government suggests that the evidence before the district court indicated that Mr. Stout, Ms. Acuff, and Ms. Watson did not intend to repay the non-forgivable portions of the EIDLs for which they applied. It should

first be clarified that Stout did not actually receive any non-forgivable EIDL proceeds, and neither did Watson. Stout received a PPP loan in the amount of $9,400 in April 2020 (PSR, ¶ 21), and he and Acuff received a $6,000 advance on an EIDL for which they jointly applied in May 2020—the remaining balance of the $27,000 loan was never disbursed because the EIDL was later declined (PSR, ¶ 28). Stout also applied for an EIDL in June 2020, but his application was immediately denied, and no funds were disbursed, because he did not meet the credit score requirement. (PSR, ¶ 30). Watson applied for a PPP loan in May 2020, but it was denied and no funds were disbursed (PSR, ¶ 26); she applied for an EIDL in June 2020 and was provided an advance of $10,000, but the loan application was later declined and no additional funds were disbursed (PSR, ¶ 31). Acuff is the only defendant who received any non-forgivable loan proceeds—she applied for an EIDL in June 2020, received a $10,000 advance, and then received an additional $18,400 in non-forgivable loan funds. (PSR, ¶ 29). She also applied for a PPP loan in April 2020 and received $20,800 in loan proceeds. (PSR, ¶ 24) It should also be noted that the Government has not disputed Stout's assertion that, when he and the related defendants applied for EIDLs, they "would have been made aware that they would eventually be required

to repay any non-forgivable amounts disbursed to them by the SBA." (Brief of Appellant, p. 25).

Mr. Stout has cited *United States v. Oligmueller*, 198 F.3d 669 (8th Cir. 1999), for the proposition that, when there is no evidence that a defendant lacks the intent to repay a fraudulently obtained loan, the amount of that loan should not be included in the calculation of the intended loss. In response, the Government has pointed out that Oligmueller made extraordinary efforts to ensure that his debt to the bank was repaid, and suggests that these after-the-fact efforts were what led the Court to conclude that he had always intended to repay the loan. (Brief of Appellee, pp. 15-16). This interpretation is refuted by the Court's own words. The Court said, "There is no evidence that, *at the time of the fraudulent conduct*, Oligmueller intended to repay anything less than the full value of the loans." *Oligmueller*, 198 F.3d at 671 (emphasis added). The Court made clear that, in order to determine whether a defendant intended to cause a loss, the relevant timeframe to examine is the time of the fraudulent conduct—i.e., the time of the loan application. Moreover, a cursory review of the *Oligmueller* opinion reveals that the Court considered the defendant's extraordinary efforts at restitution to be relevant only to the issue of whether those efforts were

sufficient grounds upon which to base a downward departure; Oligmueller's efforts to repay the bank were not discussed in the portion of the opinion pertaining to the calculation of the loss amount. *See* 198 F.3d at 671-72.

As in *Oligmueller*, the Government here can point to no evidence that the defendants did not intend to repay any non-forgivable loan proceeds that may have been disbursed to them at the time they applied for the loans. If the defendants had used false identities when applying for the loans, or indicated some intent to abscond, or taken some other measures aimed at making it more difficult the SBA to locate them, then that could indicate that they possessed the intent to try to avoid repayment of any non-forgivable loan proceeds. But they did no such thing—they used their own names and addresses and bank accounts on their loan applications, and gave no indication of any intent to abscond. While some of the facts differ between these cases, *Oligmueller* is directly on-point on this issue. The instant case involved some forgivable loan proceeds, while *Oligmueller* did not, and Stout has not argued that he intended to repay those amounts he received that could have been forgiven; however, a non-forgivable EIDL is materially indistinguishable from the ordinary bank loan at issue in *Oligmueller*. In

Oligmueller, "the district court was correct in determining that the intended loss was zero" because there was no evidence at the time Oligmueller applied for the loan that he had any intent to avoid repayment. 198 F.3d at 671. In the instant case, the district court should have similarly determined that the intended loss was zero as to any non-forgivable EIDL proceeds that the defendants sought, and should have excluded these amounts from the intended loss calculation. *Oligmueller* clearly supports Stout's assertion that the district court plainly erred in its calculation of the amount of intended loss.

The Government claims, however, that the evidence shows that the defendants had no intent to repay any of the loans for which they applied. According to the Government, "Stout and his co-conspirators did not distinguish between the types of loans in any way, as they submitted false applications containing the same type of false information in order to obtain both types of loans." (Brief of Appellee, pp. 13-14). But the fact that the same type of information was required to apply for both PPP loans and EIDLs has no bearing on whether the defendants intended to repay any non-forgivable portions of the EIDLs that they may have received. And the defendants applied for the different types of loans at different times, indicating that they

did in fact "distinguish between" them. For example, Stout applied for a PPP loan on April 17, 2020, but he and Acuff did not apply for an EIDL until May 22, 2020, more than a month later; Stout then applied for another EIDL on June 19, 2020. (PSR, ¶¶ 21, 28, 30). Even if some of the same information was required, the defendants followed different application processes for seeking the different types of loans at different times. The Government also points out that the defendants "spent the funds they obtained from both types of loans on personal items." (Brief of Appellee, p. 14). While this fact affirms what has been admitted by the defendants—that the loans were fraudulently obtained, as the funds disbursed were not used for their intended purpose—it also has no bearing on whether the defendants possessed the intent to repay any non-forgivable portions of the loans which they knew they would be obligated to repay. Furthermore, as discussed above, Stout did not even receive any non-forgivable EIDL proceeds, so he could not have spent such proceeds on personal items or expenses.

The Government continues: "Moreover, when interviewed by federal agents, Stout and his co-conspirators gave no indication that they had any less culpable criminal intent with respect to non-forgivable loans as they did with forgivable loans." (Brief of Appellee, p. 14). Mr. Stout acknowledges

that he had "culpable criminal intent" with respect to all of the loans for which he applied, as he was not actually eligible to receive either the forgivable PPP loans or the non-forgivable EIDL proceeds. (He was also ineligible to receive the forgivable EIDL advances.) But having the same culpable criminal intent as to all of the loans does not mean that Stout did not understand that he would be obligated to repay any non-forgivable loan amounts that he may have received in connection with an EIDL. The Government also points out that Stout initially tried to convince federal agents that the fraudulent applications for PPP loans were legitimate. (*Id.*). Stout also acknowledges that this is true—at that point in time, he was still trying to avoid responsibility for having obtained loans to which he was not entitled. But the Government has yet again identified a fact that has no relevance to Stout's intent regarding repayment as of the time he applied for the EIDLs.

The Government also notes that, when Ms. Acuff was interviewed by federal agents, she stated that she would be willing to repay the loans, "which indicates that until she was caught, she did not have any intent to repay any of the loans, forgivable or not." (Brief of Appellee, p. 14). The Government's conclusion does not logically follow from the premise. Acuff

had received both forgivable and non-forgivable loan proceeds. It is more likely that Acuff's statement to law enforcement was an expression of an offer to repay the forgivable loans she had received in an attempt to mitigate the consequences of her fraud. It does not necessarily follow from Acuff's statement that she lacked the intent to repay the non-forgivable portion of the EIDL she received at the time she applied for it.

The Government further asserts that, "after federal agents confronted them about their fraudulent scheme in September 2020, Stout and his co-conspirators did not repay any portion of the funds they obtained through their scheme." (Brief of Appellee, p. 14). But the actions of the defendants after finding out that they were under criminal investigation are no indication of what they intended at the time they applied for what they knew to be non-forgivable loans. The PSR indicates that the defendants were interviewed in early September of 2020 (PSR, ¶¶ 32, 37, 39). By the middle of October, waiver of indictment and change of plea hearings were already being set for Stout and Acuff. (*See* DCD 1; *United States v. Acuff*, No. 5:20-CR-50069 (W.D. Ark. Oct. 19, 2020)). So the defendants did not have any significant opportunity to begin making repayment, and may have indeed been advised by their attorneys not to do so while they were under criminal

investigation. Furthermore, because repayment was deferred for one year on EIDLs, there was no expectation that Acuff would have started repaying the non-forgivable loan that she received until June 2021, so the fact that she had not started making repayment by the time of she was interviewed is likewise not probative of her intent. (*See* PSR, ¶¶ 14, 29).

As established by *Oligmueller*, if a defendant plans from the outset to repay certain loan amounts, even if he employs fraudulent means to obtain the funds, it cannot be said that he intended to cause loss as to those amounts. The Government does not dispute that Mr. Stout, Ms. Acuff, and Ms. Watson were made aware at the time they applied for EIDLs that a portion of those loans would be non-forgivable. The Government points to no evidence that the defendants intended to try to avoid repayment of any such non-forgivable amounts. Accordingly, it was error to include those amounts in the calculation of intended loss, and that error was plain. If the Court agrees that Stout has met his burden to establish these first two prongs under plain-error review, the Government has conceded that the last two prongs (prejudice to Stout's substantial rights and a serious effect on the fairness, integrity, or public reputation of judicial proceedings) have been established. (Brief of Appellee, p. 16 n.2). Stout respectfully asks this Court

to exercise its discretion to correct the district court's error and to reverse and remand for resentencing.

CONCLUSION

The district court committed procedural error by incorrectly calculating Mr. Stout's guideline range based on an incorrect intended loss amount. The error was plain, affected his substantial rights, and failure to correct it would seriously affect the fairness, integrity, and public reputation of judicial proceedings. This Court should exercise its discretion to correct the error, vacate Stout's sentence, and remand for resentencing under the correct guideline range.

Respectfully submitted,

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CERTIFICATE OF SERVICE/COMPLIANCE

I hereby certify that on August 12, 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 Microsoft Word 2016, font Book Antiqua, size 14, and that this brief contains 2,898 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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