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

REPLY BRIEF

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INTRODUCTION

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. He 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).

Mr. Read has argued on appeal that, in light of his well-documented mental health issues, the district court denied him his right to presentence allocution when it refused to view a 7-minute-long pre-recorded allocution video he prepared. Read has also asserted that the district court abused its discretion by imposing a substantively reasonable sentence. Read contends that the district court overstated the seriousness of his offense conduct, failed to properly credit certain mitigating factors, and failed to properly consider the need to avoid unwarranted sentence disparities. Finally, Read asserts 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.

The Government has argued in response that because Mr. Read accepted the invitation to address the court personally and was able to present some information in mitigation, no error occurred when the court failed to watch his pre-recorded allocution video. The Government has also argued that Read failed to overcome the presumption of reasonableness that may be applied by this Court when the district court imposes a guideline-range sentence. The Government agrees with Read that the district court plainly erred by imposing a sentence on Count One that exceeded the statutory maximum and suggests that it would be appropriate for this Court to exercise its discretion to correct the sentence to reflect a term of 60 months imprisonment instead of 63 months.

ARGUMENT

1. Applicable Standard of Review

As an initial matter, Mr. Read and the Government disagree on the standard of review applicable to his first claim on appeal. Read asserts that the denial of his right to presentence allocution is a "significant procedural error" that is reviewed de novo. (Brief of Appellant, p. 34) (quoting *United*

States v. Thurmond, 914 F.3d 612, 614 (8th Cir. 2019)). The Government incorrectly asserts that this claim is subject to plain error review because Read did not object at sentencing. (Brief of Appellee, p. 30).

According to Federal Rule of Criminal Procedure 51(b), "[a] party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection." "By informing the court of the action he wishes the court to take, . . . a party ordinarily brings to the court's attention his objection to a contrary decision." *Holguin-Hernandez v. United States*, 150 S. Ct. 762, 766 (2020). At sentencing, Mr. Read (through his attorney) informed the court that he would like it to watch the 7-minute pre-recorded allocution video that he had prepared. (Sentencing Transcript ("Tr."), pp. 37-38). Counsel also explained why the court was being asked to watch this video: "[Read] has an awful lot of anxiety. I don't expect that he will be able to provide much of an allocution today . . . ." (Tr., p. 38). The court then denied Read's request. (*Id.*). Read clearly informed the court of the action he wished it to take at the time the court's ruling was made or sought and informed the court why such action was being requested. As Rule 51(a) makes clear, "[e]xceptions to rulings or

orders of the court are unnecessary." "The point of requiring objections to be made at the time of sentencing is to afford the district court the opportunity to consider them, not to clutter the proceedings with needless objections after the district court has ruled." *United States v. Tate*, 630 F.3d 194, 197 (D.C. Cir. 2011). Read's request that the district court view the video was clearly sufficient to preserve the matter for review on appeal under Rule 51(b).

2. Mr. Read Was Denied the Right of Effective Presentence Allocution

The Government has asserted that, "because the district court offered Read the opportunity to speak on his own behalf, and Read accepted that opportunity by speaking at length regarding himself, his offenses, and mitigation, no error occurred . . . ." (Brief of Appellee, p. 31). As explained in his initial brief, Read has not argued that the court failed to allow him *any* opportunity to address the court before sentence was imposed. (Brief of Appellant, pp. 35-36). Instead, Read has argued that, given the circumstances, his allocution was "sufficiently limited to require resentencing." (Brief of Appellant, p. 35) (quoting *United States v. Li*, 115 F.3d 125, 133 (2d Cir. 1997)). In *Li*, the district court permitted the defendant "to address the court for some few minutes—ultimately terminating [her]

allocution after what turned out to be just over two pages of sentencing transcript." *Li*, 115 F.3d at 133. In the instant case, it appears that Read was permitted to address the court for a similarly short amount of time—his allocution lasted for only about a page and a half of sentencing transcript. [1] (Tr., pp. 39-40). The Government's assertion that Read was able to address the court "at length" is inaccurate.

The Government contends that the record belies Mr. Read's claims that he "had difficulty expressing himself to the district court during his allocution because of his anxiety and trouble remembering all that he wanted to say . . . ." (Brief of Appellee, p. 33). The Government also asserts that "Read has offered no evidence, either in the district court or on appeal, that his anxiety and mental health struggles prevented him from speaking to the court." (Brief of Appellee, p. 35). These assertions are flatly false.

[1] While it is not possible to determine from the record the exact amount of time Read spent addressing the court, the sentencing proceedings took up approximately 47 and a half pages of transcript; the hearing lasted approximately 74 minutes, having begun at 1:35 p.m. and having ended at 2:49 p.m. (R. Doc. 30, p. 2). On average, then, each page represents approximately 1.56 minutes of hearing time, or approximately 1 minute 34 seconds. Since Read's entire allocution took up only a page and a half, it is reasonable to presume that he addressed the court for between 2 to 3 minutes.

Again, portions of the allocution were described by the court reporter as "unintelligible" due to Read's "sobbing," and Read literally told the court that he was "a mess" and that he felt like he was "probably missing a lot . . . because [his] mind [was] scattered . . . ." (Tr., pp. 39-40). Read expressly informed the court that his mental state was interfering with his ability to remember what he planned to communicate in his allocution. The concern expressed by Read's attorney at sentencing regarding his anxiety and his ability to effectively address the court lends further support to Read's claims, as does Read's well-documented, decades-long history of severe anxiety and panic attacks (as reflected in the PSR and discussed in Read's initial brief at p. 36). The record plainly supports Read's claims.

The Government also complains that Mr. Read failed to "address the contents of the video or how it would have changed the sentence he received." (Brief of Appellee, p. 33). This is true, and for good reason—appellate courts generally cannot consider evidence outside the record that was before the district court. *See United States v. Sykes*, 356 F.3d 863, 865 (8th Cir. 2004); *see also United States v. Bustamante-Conchas*, 850 F.3d 1130, 1144 (10th Cir. 2017) (citing *United States v. Kennedy*, 225 F.3d 1187, 1191 (10th Cir. 2000)). For this reason (among others), other courts have determined that a

proffered allocution statement is generally not necessary to support a decision to remand for resentencing—even when reviewing for plain error. *See Bustamante-Conchas*, 850 F.3d at 1143-44. This Court has indicated that it does not review the denial of the right of allocution for harmless error when there is a possibility that a lower sentence could have been imposed, and has "previously suggested that the failure to comply with Rule 32's requirement of affording a defendant the right of allocution constitutes reversible error per se which mandates a remand for resentencing, *see United States v. Walker*, 896 F.2d 295, 301 (8th Cir. 1990) (harmless error review not conducted)." *United States v. Patterson*, 128 F.3d 1259, 1261 (8th Cir. 1997). A lower sentence could have been imposed here, and remand is warranted.

Moreover, a significant issue in this case was the district court's unwillingness to listen to what Mr. Read wished to communicate to it. Read was denied "a meaningful right to express relevant mitigating information before an attentive and receptive district judge." *Li*, 115 F.3d at 133. Although the district court did not actively interrupt or intimidate Read (as the court apparently did in *Li*), when Read indicated his concern that he was forgetting information that was contained in the video he prepared, the court simply ignored Read's concerns, thanked him, and moved on with the

hearing. (Tr., p. 40). It is apparent that the court was not interested in actually hearing everything that Read wished to say—if it had been, it would have taken the time to view the video. Instead, the court simply let Read speak for a couple of minutes as a formality before moving on. "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). The district court here did not fulfill its obligation in this regard. This is the real error that requires correcting, and relief is warranted regardless of whether Read can show a likelihood that he would have received a lower sentence. A remand for resentencing is necessary.

3. The Court Imposed a Substantively Unreasonable Sentence

Mr. Read has argued that the district court significantly overstated the seriousness of his offense. The court called Read's "one of the more egregious fraud cases" it had seen, and implied that Read's fraud had harmed legitimate businesses (and employees) that needed Paycheck Protection Program ("PPP") funds to continue operations during the COVID-19 pandemic. (Tr., pp. 40-42). Read asserted that there was no

evidence in the record that the PPP ever ran out of funds or that any legitimate businesses were denied funding as the result of his fraud. The Government makes no suggestion that Read's assertions are incorrect. The court was incorrectly viewing Read's offenses as having had a detrimental impact on certain vulnerable victims when there was no evidence to support such a conclusion.

The Government also fails to counter Read's argument that his offenses—which were purely financial in nature, involved no violence or threat of violence, involved no element of sexual abuse or abuse of children, involved no dangerous weapons or controlled substances—fall toward the less serious end of the wide spectrum of federal offenses. The Government instead appears to suggest that a district court can determine any defense it wants to be extremely serious, relying on the fact that the court possesses discretion to assign more weight to the seriousness of the offense than to other factors. (Brief of Appellee, pp. 38-39). While it must be recognized that a district court does possess discretion to give more weight to certain sentencing factors than to others, the court still must make a correct assessment of the factor to which it wants to assign more weight. In other words, the court does not have the discretion to decide that an offense is

more serious than it objectively is. Read asserts here that the district court failed to make a correct assessment of the seriousness of his offenses, and the Government offers no compelling counterargument.

Mr. Read has also argued that the sentencing court misunderstood the argument made by his attorney concerning his gambling addiction. The Government unconvincingly responds that it did not. (Brief of Appellee, p. 39). According to the Government, because Read and his attorney both spoke about the addiction, and because the district court also mentioned it, that indicates that the court understood the argument that was being made. (*Id.*). The court's own comments show that it did not actually have a correct understanding of the argument that was presented.

As set forth in Mr. Read's initial brief, his attorney suggested that his gambling addiction helped explain why he continued to apply for so many loans because of the way an addict's brain becomes "rewired" by the cycle of addiction. (Brief of Appellant, p. 41). Counsel suggested that the process of applying for loans, for 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. (Brief of Appellant, pp. 41-42). But when the court mentioned Read's gambling addiction, it only recognized it

to be a reason he needed money, not as an underlying cause that contributed to his overall conduct. ("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 also appears to discount the seriousness of Read's gambling addiction by suggesting that it is not the same as a drug addiction. Read's gambling addiction was an important mitigating factor that the court appeared to simply dismiss.

Mr. Read also asserted that the district court failed to recognize the mitigating nature of his physical and mental health issues despite these having been clearly and extensively documented in the PSR. (Brief of Appellant, pp. 42-44). Although the court noted that Read "has had some health issues," it quickly—and incorrectly—concluded that these did not really affect his ability to earn an income, despite information contained in the PSR clearly indicating otherwise. The court remarked that Read had "previously operated a business in Louisiana at which he was able to provide income for his family," (Tr., p. 43), while failing to acknowledge that the PSR reflected he had to leave that employment because of his declining physical and mental health. (PSR, ¶ 174). The court also stated that Read

had a weather-forecasting business with a large number of subscribers, "so he did have a legitimate way to make business," without acknowledging that the pandemic caused Read to lose somewhere around 65-75% of his income from these subscribers. (PSR, ¶ 172). 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. (*Id.*). In its response brief, the Government does not address the court's failure to properly assess the mitigating nature of Read's mental and physical health problems.[2]

Mr. Read has also asserted that the court failed to properly consider the need to avoid unwarranted sentence disparities. The court briefly mentioned that it had "looked at some other cases," (Tr., p. 43), but did not mention any specific ones. Read cited six cases that cumulatively indicated that his sentence was out of proportion to the amount of loss he caused. The Government, like the court, failed to cite any specific cases in its response tending to show that the sentence imposed upon Read was a reasonable one.

[2] For a summary of Read's well-documented mental and physical ailments, see footnote 2 on pages 27 and 28 of his initial brief, and paragraphs 160 through 163 of the PSR.

The Government complains that Read has failed to show that all of the circumstances in the cases he cited are near-exact matches for those present in his case. Read instead chose the most obvious and apparently relevant aspects of the cases to compare, which were generally the number of PPP loans sought and the amount of loss caused. The Government has itself declined to conduct any further comparison between Read and the defendants in the cases he has cited—perhaps because a more in-depth look reveals that most of the defendants in the cases cited by Read received downward variances.

For example, Benjamin Hayford, who was charged with fraudulently seeking loans in the amount of $4,472,468 from two different financial institutions in April 2020, received a 5-level downward variance to a sentence of 24 months on each of his five counts of conviction, to run concurrently, when his guideline range was 41 to 51 months and when the Government argued against a variance. *See* Sentencing Transcript, *United States v. Hayford*, No. 4:20-CR-00088-CVE-1 (N.D. Okla. May 4, 2021), ECF No. 39, pp. 5, 16-21, 23-25.

Similarly, Shashank Rai, who filed two fraudulent PPP loan applications seeking more than $13 million in loan funds and pleaded guilty

to a one-count information charging him with making false statements to a bank, was sentenced to only 24 months in prison despite his guideline range recommending between 63 and 78 months. *See* Sentencing Minutes, *United States v. Rai*, No. 1:21-CR-00009-MAC-CLS (E.D. Tex. June 17, 2021), ECF No. 39, at pp. 3-4.

Likewise, Tarik Jafaar, who conspired with his wife to submit 18 fraudulent PPP loan applications to 12 different financial institutions on behalf of four shell companies, seeking a total of $6,640,200 in loan funds, and who received a total of $1,438,500 in loan funds, was sentenced to 12 months in prison when his guideline range was 24 to 30 months and the Government argued for a sentence of 24 months. *See* Sentencing Memorandum by USA, *United States v. Jafaar*, No. 1:20-CR-00185-CMH-1 (E.D. Va. Nov. 6, 2020), ECF No. 60, p. 1.

Finally, Cindi Denton, who 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, and who waived indictment and pleaded guilty to an information charging her with conspiracy to commit wire fraud, received only 6 months in prison (to be followed by 12 months of home confinement) when her guideline range called for between 10 and 16 months

imprisonment. *See* Sentencing Memorandum, *United States v. Denton*, No. 0:21-CR-60171-RS-1 (S.D. Fla. Sept. 26, 2021), ECF No. 44, p. 1.

Although a relatively small number of these PPP-fraud cases have been prosecuted to completion at this point in time, the number of downward variances in the cases cited by Mr. Read is telling. The courts are concluding that a guideline range sentence is typically greater than necessary to accomplish the purposes of sentencing in cases like Read's. Especially in light of the other errors the district court made in assessing and weighing the other relevant sentencing factors (discussed above), Read's sentence should be vacated and the case remanded for resentencing.

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.

Respectfully submitted,

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CERTIFICATE OF SERVICE/COMPLIANCE

I hereby certify that on February 17, 2022, 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 3,839 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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