

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

UNITED STATES OF AMERICA,
Plaintiff,

v.

JAMES WAYLON HOWELL,
Defendant.

No. 3:21-cr-109

Judge Jordan

**SENTENCING MEMORANDUM AND RESPONSE TO DEFENDANT'S
MOTION FOR A VARIANCE OR DOWNWARD DEPARTURE**

The sentencing factors in 18 U.S.C. § 3553(a) support a sentence within the guidelines range of 18 to 24 months' imprisonment. Neither the sentencing factors in § 3553(a) nor any provision in the Sentencing Guidelines supports a below-guidelines sentence in this case.

I. Introduction

Defendant submitted four fraudulent loan applications for Covid-19 relief funds, resulting in a total loss amount of \$154,700. [*See generally* R. 3, Plea Agreement ¶ 4(r)-(tt).] Defendant pleaded guilty to one count of wire fraud and one count of money laundering. [*Id.* ¶ 1(a)-(b).] Based in part on the agreed-upon loss amount, the probation office calculated a guidelines range of 18 to 24 months' imprisonment, which is in Zone D of the Sentencing Table. [R. 9, (Sealed) Presentence Investigation Report ("PSR") ¶ 92.]

Defendant seeks a downward departure from the guidelines range or, in the alternative, a downward variance based on the sentencing factors in 18 U.S.C. § 3553(a). [R. 12, Sentencing Mem. and Mot. at 1, 19.] Defendant has not requested a specific sentence; instead, he asks the Court to craft a sentence "utilizing a number of sentencing alternatives." [*Id.* at 18.] Probation did not identify any grounds for a departure or variance in the presentence report. [R. 9, PSR

¶¶ 108, 109.] As explained below, the United States opposes defendant's motion and asks the Court to impose a sentence within the Guidelines range.

II. Relevant Facts

Defendant submitted four fraudulent loan applications seeking Covid-19 relief funds on behalf of two companies defendant owned or claimed to own. [R. 3, Plea Agreement ¶¶ 4(b)-(d), (z), (ff)-(ss).] Each of the fraudulent applications included misrepresentations about the number of employees, gross revenue, income, monthly wages, or taxable income. [See e.g., *id.* ¶ 4(rr).] The fraudulent loan applications were approved by the Small Business Administration, and defendant received \$154,700 in Covid-19 relief funds to which the companies were not entitled. [*Id.* ¶ 4(tt).] Defendant accomplished the fraud in part by creating false tax-return documents that inflated the gross revenues of the companies. [E.g., *id.* ¶ 4(w).] Defendant then attempted to conceal the fraud by transferring the Covid-19 relief funds from the business accounts to his personal bank account. For example, a few weeks after defendant received \$83,700 in Covid-19 relief funds on behalf of Advanced Strategy Holdings, Inc., he transferred the entirety of the proceeds to his personal account. [*Id.* ¶ 4(x), (y), (bb).]

III. Guidelines Range

The base offense level for wire fraud is 7, per U.S.S.G. § 2B1.1. [R. 9, PSR ¶ 63.] Based on the loss amount being more than \$150,000 but not more than \$250,000, probation applied a ten-level increase, resulting in a base offense level of 17. [*Id.*] An additional one-level enhancement applied because defendant also pleaded guilty to money laundering. [*Id.* ¶ 64.] After a three-level reduction for acceptance of responsibility, probation calculated a total offense level of 15. [*Id.* ¶¶ 70-72.] Defendant has a criminal history score of 0, so his criminal history category is I. [*Id.* ¶ 77.] A total offense level of 15 and a criminal history category of I yields a

guidelines range of 18 to 24 months' imprisonment, which is in Zone D of the Sentencing Table. [*Id.* ¶¶ 77, 92, 99.] A guidelines range in Zone D of the Sentencing Table makes defendant ineligible for probation under the Sentencing Guidelines. [*Id.* ¶ 99 (citing U.S.S.G. § 5B1.1, comment. (n.2).] The maximum term of imprisonment is 20 years for wire fraud (Count One) and 10 years for money laundering (Count Two). [*Id.* ¶ 92.]

IV. Relevant sentencing factors in 18 U.S.C. 3553(a)

“The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [Section 3553(a)(2)].” 18 U.S.C. § 3553(a). In determining the appropriate sentence, the court “shall consider,” the following sentencing factors, among others:

- The nature and circumstances of the offense. § 3553(a)(1).
- The history and characteristics of the defendant. § 3553(a)(1).
- The need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense. § 3553(a)(2)(A).
- The need for the sentence imposed to provide adequate deterrence. § 3553(a)(2)(B).
- The need for the sentence imposed to protect the public from further crimes of the defendant. § 3553(a)(2)(C).

18 U.S.C. § 3553(a)(1)-(2).¹

The offenses in this case are serious, as evidenced by the loss amount, which exceeded \$150,000, and the purpose of the scheme, which was to unlawfully obtain Covid-19 relief funds specifically intended to assist struggling small businesses affected by the pandemic. Defendant's

¹ Additional factors that the Court “shall consider” include the kinds of sentences available; the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines; any pertinent policy statements in the guidelines; the need to avoid unwarranted sentencing disparities; and the need to provide restitution to any victims. *See* 18 U.S.C. § 3553(a)(3)-(7).

conduct demonstrates a disregard for the law and a fundamental failure to appreciate the true purpose of the Covid-19 relief funds. The sentence in this case should reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offenses. The sentence should also promote adequate deterrence to defendant and others.

Moreover, in imposing a sentence in this case, the Court should consider defendant's history and characteristics, which are included in the presentence report. [R. 9, PSR ¶¶ 81-89.] Defendant is 39 years old, unmarried, and has lived most of his life in East Tennessee. [*Id.* ¶¶ 81-83.] Defendant graduated from Halls High School in 2001 and the University of Tennessee in 2006. [*Id.* ¶ 88.] Defendant has no prior criminal convictions. [*Id.* ¶¶ 75-76.] The presentence report indicates that defendant has been self-employed since 2007, primarily as a consultant. [*Id.* ¶ 89.] Defendant was also employed by two businesses in East Tennessee—one from 2013 to 2015 and another from 2016 to 2021. [*Id.*]

V. A downward variance is not warranted based on the sentencing factors in § 3553(a).

“[A] ‘variance’ refers to a sentence outside the Guidelines range based on the district court’s consideration of one or more of the 18 U.S.C. § 3553(a) sentencing factors.” *United States v. McFarland*, 766 F. App’x 301, 310 (6th Cir. 2019). Defendant argues that a downward variance is justified based on the nature and circumstances of the offense and defendant’s history and characteristics—specifically, because defendant accepted responsibility and repaid a portion of the unlawfully obtained loan proceeds before sentencing. [R. 12, Motion at 12-15, 17.]

A downward variance is not warranted here. Probation already applied a three-level reduction for acceptance of responsibility, and that calculation is reflected in the guidelines range. [R. 9, PSR ¶¶ 70-71.] Moreover, to the extent defendant is asking the Court to consider his partial payment of restitution in determining either the applicable guidelines range or his

sentence [*see* R. 12, Motion at 13-15], that would be an impermissible consideration of defendant's socioeconomic status, which is "not relevant in the determination of a sentence." *See* U.S.S.G. § 5H1.10. Neither the nature and circumstances of the offense nor defendant's history and characteristics supports a downward variance. Defendant's request should be denied.

VI. A downward departure for aberrant behavior under U.S.S.G. § 5K2.20 is not warranted because the fraud scheme was not a "single criminal occurrence or single criminal transaction."

"A 'departure' refers to the imposition of a sentence outside of the calculated Guidelines range based on the district court's application of a particular Guidelines provision . . ." *United States v. McFarland*, 766 F. App'x 301, 310 (6th Cir. 2019).

Under U.S.S.G. § 5K2.20, courts may apply a downward departure based on aberrant behavior "only if the defendant committed a single criminal occurrence or single criminal transaction that (1) was committed without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law-abiding life." U.S.S.G. § 5K2.20(b). The commentary to § 5K2.20 clarifies that "a fraud scheme generally would not meet such requirements because such a scheme usually involves repetitive acts, rather than a single occurrence or single criminal transaction, and significant planning." U.S.S.G. § 5K2.20, comment. (n.2).

Defendant's conduct does not qualify as aberrant under § 5K2.20. First, defendant submitted four fraudulent loan applications over a three-month period, which does not qualify as "a single criminal occurrence or single criminal transaction." U.S.S.G. § 5K2.20(b). Second, defendant's subsequent transfer of the fraudulent loan proceeds to his personal bank account [*see* R. 3, Plea Agreement ¶ 4(bb)], undercuts any argument that his submission of the fraudulent loan applications was aberrant behavior. *See, e.g., United States v. Lepird*, 142 F. App'x 880, 881 n.1 (6th Cir. 2005) (affirming district court's refusal to apply a downward departure for aberrant

behavior where, as here, the defendant committed “repetitive acts” in committing and then concealing the fraud scheme). Finally, defendant’s submission of the fraudulent EIDL application on behalf of Advanced Strategy Holdings alone demonstrated “significant planning,” as defendant created false tax-return documents, emailed the Small Business Administration, and submitted a second application after his first application was rejected based on “unverifiable information.” [R. 3, Plea Agreement ¶¶ 4(u)-(w).] Defendant’s submission of four fraudulent loan applications (and his transfer of illicit proceeds to his personal bank account) undercuts his argument that his conduct was aberrant. His motion for a downward departure should be denied.

VII. CONCLUSION

This Court should deny defendant’s motion for a downward departure and/or downward variance and should impose a sentence within the guidelines range.

Respectfully submitted,

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