IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 21-1755 & 21-1756

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. AHMAD KANAN, Defendant-Appellant.	Appeal from the United States District Court for the Western District of Wisconsin Case Nos. 3:19-CR-00147 & 3:20-CR-00081 Honorable William M. Conley Presiding

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BRIEF OF PLAINTIFF-APPELLEE

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JURISDICTIONAL STATEMENT

The jurisdictional statement set forth in the brief of the defendant-appellant is complete and correct.

STATEMENT OF THE ISSUES

1. Whether the district court procedurally erred by impermissibly predetermining Kanan's sentence when it remarked, in response to defense counsel's request for a 15-month-sentence, that the court was starting in its own mind at 37 months, referencing the term of Kanan's prior prison term for fraud and noting that the previous sentence had left Kanan undeterred since he had committed two more serious fraud offenses.

2. Whether the district court's use of the term "supervised release" instead of "pretrial release" during the sentencing hearing amounted to procedural error when the court correctly noted while pronouncing sentence and in its written Statement of Reasons after sentencing that Kanan was on "pretrial" release for one of the offenses of conviction when he committed the other offense of conviction.

STATEMENT OF THE CASE

Defendant's Prior Fraud Conviction

In 2009, defendant-appellant Ahmad Kanan, was sentenced to 37 months in prison by the U.S. District Court for the District of Vermont for his role in a three-part fraud scheme. (Second Revised Presentence Investigation Report, R. 97, ¶¶ 49, 87) [1]. The count of conviction involved tax fraud, bank fraud, and credit-card fraud. (R. 97 ¶ 87). At sentencing, Kanan told the court he was "'deeply and gratefully sorry' for his crimes and he would regret them for the rest of his life." (Id.). He acknowledged that his actions brought shame and suffering to his parents, siblings, wife, and children." (Id.). The court believed him and noted "'. . . there's a depth of regret and even despair . . . that suggests that . . . this has had a profound impact on him.'" (Id.). The court sentenced him to 37 months in prison, which was below the originally calculated guidelines range of 57 to 71 months. (Id.). Kanan's term of supervised release for the crime expired on January 12, 2017. (Id.).

Defendant's District Court Cases

On October 10, 2019, a grand jury in the Western District of Wisconsin returned a two-count indictment charging Kanan with two counts of access-

[1] "R" refers to the district court docket entry number. Unless otherwise noted, record citations will be to Kanan's access device fraud case, Western District Case No. 19-cr-147-wmc.

device related fraud, in violation of 18 U.S.C. § 1029(a)(2) and (b)(1). (R. 13). Count one charged that on July 21, 2017, and December 21, 2017, Kanan fraudulently used bank account information, specifically an account number and bank routing number of a bank account of a foreign embassy, to obtain things of value. (Id.). Count two charged that on December 21, 2017, Kanan fraudulently attempted to use the same bank account to obtain things of value. (Id.)

Kanan used the account number and bank routing number to electronically pay approximately $191,000 in delinquent sales and use tax owed by gas stations Kanan operated in Wisconsin. (R. 97 ¶¶ 25, 27, 37, 38). He also attempted to use the same account information to pay a large utility bill for the gas stations, but the payment was rejected. (R. 97 ¶ 41).

The account information Kanan misused was associated with a bank account controlled by the Embassy of the State of Libya, located in Virginia. (R. 97 ¶ 25). The Embassy's bank account was intended to be used to pay expenses for Libyan students attending school in the United States. (Id.).

On October 11, 2019, Kanan was arraigned on the indictment. He was advised that he had been indicted and about the nature of the charges pending against him. He pled not guilty and was allowed to remain out of custody under

pretrial release conditions, including that he "not commit any offense in violation of federal, state or local law while on release." (R. 8)[2].

While Kanan's access device fraud case was still pending and he was out of custody under pretrial release conditions, he submitted several loan applications on behalf of his start-up business, Altin Labs, which was a separate business from the gas stations. (R. 97 ¶ 28, 30). The loan applications sought funds under the Paycheck Protection Program (PPP), a program under The Coronavirus Aid, Relief, and Economy Security (CARES) Act. (R. 97 ¶ 30). The PPP allowed qualifying small businesses and other organizations to receive unsecured Small Business Administration (SBA) guaranteed loans. The PPP was overseen by the SBA, which had authority over all PPP loans, but individual PPP loans were issued by approved commercial lenders who received and processed PPP applications and supporting documentation. (R. 97 ¶ 9).

The PPP loan applications and supporting documents Kanan submitted on behalf of Altin Labs contained misstatements and false information. For example, on an April 15, 2020 loan application seeking a $72,500 PPP loan through the

[2] Kanan was originally charged by complaint on September 19, 2019 and arrested. (R. 1). He was released on conditions prior to his indictment. (R. 8) (R. 97 ¶ 3). Following indictment, the court allowed Kanan to remain out of custody pending trial under the same general release conditions previously imposed. (R. 97 ¶ 5). As described herein, Kanan later violated those release conditions by committing a new federal crime and was detained. (R. 97 p. 2).

Bank of Kaukauna, Kanan used a misspelling of his own name, Ahmed Kanaan. (R. 97 ¶ 58) Additionally, when asked on the loan application, whether any person owning more than 20% equity in the applicant business, was subject to "an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction, or presently incarcerated, or on probation or parole," Kanan falsely answered, "no." (Id.). The application expressly stated that if the question were answered "yes," the loan would not be approved. (Id.).

On a May 6, 2020, loan application seeking a $47,060 PPP loan through Cross River Bank, Kanan was again asked whether he was subject to "an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction, or presently incarcerated, or on probation or parole." Again, Kanan falsely answered, "no."

Kanan was unsuccessful in obtaining funds from the Bank of Kaukauna because the bank noticed the discrepancy in the spelling of his name. (R. 97 ¶ 60). He was, however, successful in obtaining $47,060 in PPP loan funds from Cross River Bank. (R. 97 ¶¶ 63, 64).

After learning of Kanan's new criminal conduct, the United States asked the court to detain him for violating his release conditions. The court issued an arrest warrant and Kanan was arrested and detained. (R. 97 p.2). Then on July 8,

2020, the grand jury returned a two-count indictment charging Kanan with a wire fraud scheme in which he "applied for and in some cases, obtained, loan and investment-related funds using a variety of false misrepresentations and by concealing certain material facts." (Case No. 20-cr-00081-wmc, R. 2). The indictment described the PPP loan fraud as well as Kanan's actions to obtain funds from a start-up accelerator/investment company. (Id.). The indictment also charged Kanan with concealment money laundering for transferring the PPP loan from the Altin Labs business account into his personal checking account. (Id.).

Kanan eventually pled guilty to count one of each of the two indictments. (Case No. 20-cr-00081-wmc, R. 10, 69; Case No. 19-cr-00147-wmc, R. 65, 69). A combined sentencing hearing was scheduled for the two cases. (R. 69).

Pre-sentence Filings

After the probation office filed its Presentence Investigation Report (PSR), (R. 73), both the United States and Kanan lodged objections. (R. 74 & 75). The United States also responded to Kanan's objections (R. 78). After receiving letters in support of Kanan, and a victim impact statement, (R. 78, 79, & 86), the probation office filed a Revised PSR with an addendum. (R. 80 & 81). The United States and defense each filed a sentencing memorandum. (R. 83 & 87). Defendant

then filed a supplemental sentencing memorandum before Kanan's counsel withdrew from the case. (R. 91).

Kanan's new defense counsel filed more objections to the PSR, and the United States responded. (R. 95 & 96). Probation filed a Second Revised PSR with a Second addendum (R. 97 & 98). Kanan filed another sentencing memorandum and additional letters. (R. 100-102). Kanan also filed exhibits for sentencing and an exhibit addendum. (R. 103 & 105). The United States filed a response to Kanan's second sentencing memorandum and its own exhibits. (R. 104).

Going into sentencing, the parties had a myriad of disagreements about the advisory-guideline range. The parties disagreed about whether and how to combine the cases for sentencing, relevant conduct, and the loss amounts. The parties also disagreed about guideline adjustments including whether Kanan should face an adjustment for obstruction of justice under U.S.S.G. § 3C1.1 because he "logged into his iCloud account and 'wiped' it in an attempt to destroy evidence" shortly after the search warrant of his home and gas stations. (R. 97, ¶ 69). The Second Revised PSR concluded the proper advisory guidelines range was 41-51 months. (R. 97, ¶¶ 75-80, 117). The United States argued that the correct guidelines range was 37-46 months. (R. 96, 104). Kanan argued it should be 15 to 21 months. (R. 95, p. 5).

The government and Kanan both filed sentencing memoranda. The government argued that a sentence at the top of the ultimate guideline range calculated by the court was warranted based on defendant's disregard for truth and the law; his understated criminal history, which included his previous fraud conviction and 37-month sentence; and the seriousness of his two new fraud crimes, the first of which he committed six months after serving his term of supervised release for the first fraud conviction, and the second of which he committed while violating his pre-release order in the access-device fraud case. (R. 83).

In his sentencing memorandum, Kanan focused on the guidelines' calculation, arguing that his plea agreement barred the government from recommending obstruction, given the government's recommendation of acceptance. He also contended that his two fraudulent schemes were not relevant conduct to each other and should not be aggregated under controlling Seventh Circuit case law. Kanan urged the court to sentence him to 15 months, arguing that the sentence was supported both by the ten-and-one-half months he had spent during pre-trial detention in three different jails during the COVID-19 pandemic, and by other cases he pointed to where defendants had received non-custodial sentences for what he contended were more complex schemes resulting in more actual harm. (R. 100). He also asked the court to factor in good-time

credit and, if any time remained, to allow him to serve that time in home confinement. (Id.). The government responded that its positions on obstruction and relevant conduct were proper and it did not breach the plea agreement by recommending obstruction. (R. 104).

Defendant's Combined Sentencing Hearing

Kanan was sentenced on both cases following a lengthy sentencing hearing on April 21, 2021. (App 1-79). At the hearing, the court first confirmed that Kanan did not want to withdraw his plea, since Kanan had argued the government had breached its plea agreement by arguing for obstruction. (App'x 3-6). After confirming Kanan did not want to withdraw his plea, the court acknowledged its obligation when determining Kanan's sentence, to take into consideration the advisory sentencing guidelines and the statutory purposes of sentencing under 18 U.S.C. § 3553(a). (App'x 6).

The court next asked Kanan's counsel to clarify Kanan's position on the guidelines' objections because the court wanted to make sure it understood them. The court said it wanted to emphasize, however, before ruling on the objections "particularly for Mr. Kanan" that despite the flurry of filings about the guidelines' objections, that the court viewed the driving factor for sentencing as Kanan's criminal history. (App'x 6-9). The court expressed concern that Kanan had been given a significant break by the district judge in Vermont, who credited

Kanan's expressions of remorse and regret, to justify a 37-month sentence, which was well below the advisory guideline range for the serious three-pronged fraud Kanan was involved in there. The court also expressed concern that despite the 37-month prison sentence he previously served, Kanan remained undeterred, as evidenced by his two new cases:

> [D]espite all of this hullabaloo on the number of points, the driving factor for sentencing here is the defendant's criminal history in which he engaged in not one, but three different forms of fraud; threw himself on the mercy of the court before Judge Sessions in Vermont in which he, emphasized to the court, and now I'm quoting, that "He is deeply and gratefully sorry for his crimes and would regret them for the rest of his life."
>
> And Judge Sessions, who's a tremendous judge, took him at his word, noted his strong family support and strong commitments to family and observed that there's a depth of regret, and even despair, that suggests that this has had a profound effect upon the defendant, at which point he comes to Wisconsin, commits two more serious offenses.
>
> And so, whatever the guideline range is, it's not driving this sentence. But if I've got any of that wrong, in terms of your view of these additional objections, I'd certainly want to hear them before I rule on the guideline range.

(App'x 9).

Defense counsel responded by addressing Kanan's objection to the PSR's method of grouping the two cases under U.S.S.G. § 3D1.2, (App'x 9-10) (R. 97 ¶ 74), which sparked a discussion between the court, the government, defense counsel, and probation. (App'x 9-32). During the discussion, the court noted it

wanted to "get the guideline calculation as correct as possible." (App'x 27). Following the exchange, the court concluded it would give defense counsel's grouping argument the benefit of the doubt and lowered Kanan's advisory guidelines to a range of 18 to 24 months. The court also said, however, that it found that range to be "ridiculously low, given the gravity of the defendant's past conduct in Vermont and now repeated violations here." (App'x 33).

The court next asked for sentencing arguments from both sides, acknowledging the sentencing memoranda and letters he had already received. (App'x 33-34). The government informed the court that under the plea agreement, it was bound to recommend a within-guidelines sentence. (Id.).

Defense counsel recommended a 15-month sentence, arguing it was still Kanan's position that 15 to 21 months was the correct guideline range. (App'x 34-35). The court questioned the recommendation given Kanan's criminal history:

> But here, I don't know how you can look at the sentencing by Judge Sessions. He went well below the guideline range for that conduct and gave this defendant 37 months. He served that time, came out and committed serious fraud, was put on supervised release pending sentencing for that fraud and then committed, as you've emphasized, separate set of fraud.
>
> I start at 37 months. How else do we send a message to this defendant that he's chosen a career of fraud, all the more aggravated by the fact that he's chosen it when has the ability to do very well legally? I just – it's tone deaf for you to ask for anything less than 37 months, but I understand you are asking for it. I just – can't point to anything here that would justify that sentence other than the guideline range, which just ignores the conduct that is before me.

(App'x 35-36).

Defense counsel disagreed that Kanan had chosen a career of fraud and then finished his sentencing argument. Counsel reiterated that the correct guideline calculation was 15 to 21 months and also argued that Kanan's original fraud was a desperate decision to save his failing business, he was paying a price by being back in prison, the guidelines adequately accounted for the court's concerns, and other fraud defendants had received similarly low sentences. (App'x 36-40).

The court invited Kanan to allocute and Kanan began by asking about the guideline calculation, "So just to be clear, what is the range that you're starting with, Your Honor?" (App'x 43-44). The court responded, "I'm starting with the guideline range which I find is just not applicable to the seriousness of your conduct. I'm starting, in my own mind, with 37 months that you received for similar crimes for Judge Sessions. But at this point you're not limited in any way. You can comment in any way you wish." (Id.).

Kanan persisted that "I just wanted to understand . . . the legal process on establishing the correct guideline range . . . I think this is very very important to establish." (Id.). Noting that no one had addressed the § 3553(a) factors, the court cautioned Kanan that it was "not bound by the guideline range, whatever it is. And you and your counsel have very effectively poked holes in the original

guideline range, but that's all it is. It's an advisory guideline range . . . And I'm concerned that just like you seem to view everything else in your life, that this is just a game that you think we're engaged in, it's not a game. And whatever we derive [sic] at, an advisory guideline range is only one factor I'm required to consider." (App'x 44-45).

Kanan apologized for his misconduct and for twice betraying the court's trust, stating that he "appear[ed] before the Honorable Court today as a defeated, lost, humiliated and broken man." (App'x 47). He pointed both to the poverty and hardships of his childhood in Libya and to his successful completion of supervised release, stating that supervised release had given him the needed guidance and structure to control his impulsive behavior. (App'x 47-50). He said there were no excuses for his failings and he should have known better. (App'x 50). He also noted that his pre-trial detention was difficult because of Covid-19 and then stated he had conducted research "to extrapolate a quantitative relationship between the length of a sentence and confinement conditions." (App'x 51). Based on cases he selected, he then concluded that the ten-and-a-half months he had spent in pretrial detention "would have the same punitive and deterrent effects of a 53-month sentence." (App'x 53).

At the conclusion of these remarks, the court thanked Kanan and said that but for his previous conviction for a very similar crime, it would be in general

agreement with everything he said. (App'x 61). The court had previously acknowledged it would factor into the sentence the impacts of COVID-19 and the severity of his time in jail. (App'x 52). Following further back-and-forth with the defendant, during which Kanan characterized his jail time as the "deterrence of a lifetime" and the court confirmed with defense counsel that all mitigating arguments had been made, (App'x 64-65), the court took a brief recess (App'x 65).

Upon returning to the bench, the court pronounced sentence. The court decided to rule with the defense on every sentencing issue, resulting in a 15 to 21 month advisory guideline range. (App'x 66-67). After weighing the mitigating factors of defendant's difficult upbringing, the impact of COVID-19 during his jail time, and the impact on his family against the aggravating factors of his repeated crimes and misuse of government COVID-19 funds, the court imposed a 42-month prison term on each count to run concurrently, (App'x 70-71), ordered $147,060 in restitution, (R. 74), and confirmed that it would have given the same sentence regardless of the guideline calculation and loss figures in each case. (R. 76-78).

Following pronouncement of the sentence, the court asked, "Anything more for the defense?" In response, Kanan asked the court to recommend that he be transferred to a prison as soon as possible and the court agreed to make that

recommendation. Kanan also complained to the court that the 42- month sentence was longer than similarly situated offenders because he would not get good time credit for the time he had already served. (App'x 77-79). The court dismissed the argument and adjourned the hearing. (Id.).

At times during the sentencing hearing, the court correctly referred to Kanan being on "pretrial release" when he committed the 2020 fraud and at other times the court referred to it as "supervised release." (Compare App'x 7, 35, & 36 with App'x 69, 70, & 71). When pronouncing sentence, the court correctly said that Kanan committed the 2020 fraud after being released on "pretrial" conditions. (App'x 69). The court's written Statement of Reasons also correctly noted that Kanan was on "pretrial release" when he committed his 2020 fraud, noting:

> . . . and the outrageous, fraudulent schemes here, involving the stealing of scholarship funds from the Libyan Embassy and COVID-19 moneys, the latter of which occurred while defendant was on pretrial release pending resolution of the former.

(R. 108, p. 5; Case No. 20-cr-00081-wmc, R. 100, p. 5).

The combined judgment of conviction was entered on April 27, 2021, (App'x 80-85, 86-91), and docketed in both cases on the same day. (R. 110; R. 102 Case No. 20-cr-0081-wmc). These timely appeals followed.

SUMMARY OF ARGUMENT

There was no procedural error in this case, plain or otherwise. The district court followed all required sentencing procedures—it calculated the guideline range, gave the parties a chance to advocate for the appropriate sentence, allowed the defendant to meaningfully allocute, and then issued a 42-month sentence. The court's remark about starting in his own mind at 37 months was not an impermissible predetermination of Kanan's sentence. Instead, the court was being transparent in its thinking about the factors it believed would drive the sentence, informing defense counsel that his recommendation of a 15-month sentence was not likely to be persuasive considering the court's concerns that the prior 37-month sentence had not deterred Kanan.

The district court simply misspoke by saying at times during the sentencing hearing that Kanan was on "supervised release" instead of "pretrial" release when he committed the loan fraud that underlies his 2020 fraud conviction. But this misstatement about the type of release does not, as Kanan contends, amount to inaccurate information material to the court's sentencing rationale. Plus, when pronouncing sentence, the court correctly stated that Kanan committed the 2020 fraud after being released on "pretrial" conditions. (App'x 69). Further, since the court corrected any misstatements in its Statement of

Reasons, it is clear that the court did not rely on any inaccurate information in sentencing Kanan.

ARGUMENT

I. The district court followed the required sentencing procedures and did not impermissibly predetermine Kanan's sentence.

A. Standard of Review

Procedural errors at sentencing are ordinarily reviewed *de novo*. *See, e.g.*, *United States v. Esposito*, 1 F.4th 484, 487 (7th Cir. 2021). To the extent the appellant is arguing that the error the district court committed was denying Kanan meaningful allocution, then the standard of review is plain error because defense counsel did not raise that objection at sentencing. *See United States v. Hoke*, 569 F.3d 718, 721-22 (7th Cir. 2009); *United States v. Luepke*, 495 F.3d 443, 448 (7th Cir. 2007). To demonstrate plain error, a defendant must show that (1) the court committed error; (2) it was plain; (3) it affected the defendant's substantial rights; and (4) the court should exercise its discretion to correct the error if it determines the error seriously affects the fairness, integrity, or public reputation of the judicial proceedings. *Id.*

B. Discussion

The district judge followed the required sentencing procedures—he reviewed the parties' extensive pre-sentencing filings, (R. 73-75, 78-81, 83, 86, 87, 91, 95-98, 100-106), calculated the guideline range, (App'x 33, 66-7), gave the parties a chance to advocate for the appropriate sentence, (App'x 9-65), allowed the defendant to allocute, (App'x 44-65), and then issued a sentence. By telling

defense counsel, "I start at 37 months," in response to defense counsel's request for a 15-month sentence, the court was simply explaining its current thinking about the appropriate sentence, which is neither an error nor an impermissible predetermination of a sentence. *See United States v. Dill*, 799 F.3d 821, 825 (7th Cir. 2015) (finding no procedural error despite court announcing at the start of the hearing that it would "probably" impose a term of reimprisonment between one and two years in light of the previous revocation; record as a whole showed court gave careful and individual consideration to defendant's case and the judge did not "disable himself" from considering a lower term before hearing all of the relevant information).

Since the court's statement was not an impermissible pre-determination of a sentence, it did not deprive Kanan of his right to allocution. *See United States v. Hoke*, 569 F.3d at 722 (court did not deny defendant a meaningful right to allocution when, before allocution, it stated in response to a guidelines' objection regarding obstruction, it would "'be taking into account [the defendant's] testimony when it issues its sentence, which will be within the advisory guideline range . . . ." because context made clear court meant that it would use the sentencing guidelines as a baseline).

The statement that the court started at 37 months was not a seemingly conclusive determination of the defendant's sentence. *See, e,g*, *Dill*, 799 F.3d at

825 ("a judge who begins the hearing without any preliminary idea of appropriate sanctions is probably not prepared. Having such an idea does not disable the judge from making the sentencing decision.") (citations omitted). The court left open the opportunity for meaningful advocacy and a meaningful allocution that could influence the ultimate sentence.

Additionally, such a spontaneous statement should not be taken in its strictest sense. What the transcript indicates the court likely meant to convey was: unless he learned something new, which would be unusual considering the comprehensive record he had, he intended to sentence Kanan to at least 37 months. *See Dill*, 799 F.3d at 86 ("Explanations are more often extemporaneous than carefully scripted . . . . For all these reasons, we must 'be careful when a judge has made a spontaneous sentencing statement not to impose an unrealistically literal interpretation on his words.'") (quoting *United States v. Tatum*, 760 F.3d 696, 697 (7th Cir. 2014)). The court here made an effort to keep an open mind throughout sentencing, encouraged Kanan to make any comments he wished, and sincerely wrestled with the issues.

Further, the court did not commit an error by being transparent in his thinking—he let defense counsel know that asking for 15 months was not likely to be persuasive. *United States v. Davis*, 685 Fed. Appx. 483, 486 (7th Cir. 2017)("[Sentencing] Judges are allowed to express preliminary thoughts before

reaching a final decision in a case."). It hurts the quality of advocacy to force judges to stoically listen to a lawyer make an argument or recommendation that is unpersuasive. *See United States v. Thomas*, 815 F.3d 344, 347 (7th Cir. 2016).

The context of the court's alleged pre-determination also matters; the court did not make this comment at the change of plea hearing before he received the PSR or sentencing memoranda. Here, the transcript makes clear that he reviewed the extensive pre-sentencing filings. (R. 73-75, 78-81, 83, 86, 87, 91, 95-98, 100-106). He also asked meaningful questions of the parties and the probation agent who was present about the guideline calculations and ruled on the guideline range. (App'x 10-33). In the middle of trying to figure out the correct sentencing guidelines, the court then noted that "I'm sorry to have belabored all of this, but I want to get the guideline calculation as correct as possible." (App'x 27). He heard the government's sentencing argument and the beginning of the defense's sentencing argument—that he was recommending 15 months—before observing that he would start in his own mind at 37 months. (App'x 34-35; 44).

At that point in the proceeding, it was reasonable for the court to have some idea of the sentence he anticipated imposing even without hearing the remainder of defense counsel's sentencing argument and the allocution. *Dill*, 799 F.3d at 825 ("Rarely does a judge walk into a sentencing hearing without a fairly clear idea of an appropriate sentence."); *United States v. Ochoa-Montano*, 666 F.

Appx 554, 557 (7th Cir. 2016) ("What is more, there is no reason why a judge cannot have a particular sentence in mind after reviewing the presentence report and the parties' written submissions so long as the judge is open to further argument during the sentencing hearing.") (citing *Dill*, 799 F.3d at 825). Here, the court's sincere efforts and time he took to listen to and understand the parties' arguments make clear that despite his statement, he had an open mind and was open to hearing other arguments. (App'x 27). Responding to points Kanan made in his allocution, the court said it would factor into the sentence the impacts of COVID-19 and the severity of his time in jail as well as his difficult upbringing and the impact on his family. (App'x 52, 62, 70). This shows that the judge was open to mitigating arguments and that the allocution was meaningful.

The cases the appellant relies on are distinguishable: *United States v. Tatum*, 760 F.3d 696 (7th Cir. 2014) and *United States v. Luepke*, 495 F.3d 443. First, in *Tatum*, the district court sentenced the defendant to 24 months of probation, but noted that "we'll see what the next two years are going to bring in terms of your ability to conform your conduct to the requirements of the law, because if you don't, the 24 months of probation is going to be 24 months in prison." 760 F.3d at 696. Two months later, defendant violated his terms of release. *Id.* at 697. At his revocation hearing, the court sentenced him to 24 months in prison because it had previously promised to do so. *Id.*

Tatum is distinguishable in three ways. First, the judge in *Tatum* pronounced a specific sentence two months in advance, without knowing the crime, or having any information about how the defendant changed in those two months, or input from either party. *Id.* That is a far cry from Kanan's case, where the court had much more information, including Kanan's past criminal fraud conviction that had not deterred him from committing two new crimes of fraud, including one while on pretrial release. Second, the judge in *Tatum* expressly committed to a specific 24-month sentence. Here, the judge did not commit to any specific sentence. (App'x 35). Third, *Tatum* was a decision declining to grant an *Anders* motion to dismiss and ordering briefing on a nonfrivolous ground for appeal; it was not a direct appeal from sentencing addressing the merits of the argument. *Tatum*, 760 F.3d at 699.

In *Luepke*, this Court held that the district court committed plain error because in sentencing the defendant for conspiring to distribute methamphetamine, it had announced a seemingly conclusive sentence before giving the defendant a chance to allocute. 495 F.3d at 452. The district court in *Luepke* calculated the guideline range, asked the defense counsel for sentencing advocacy, made a statement about the appropriate sentence, and "adjudged the defendant is committed to the custody for the Bureau of Prisons for

imprisonment for a term of 240 months," all before asking the defendant to allocute. *Id.* at 445.

In Kanan's case, the court did not formally pronounce a specific sentence, nor did the court make any "seemingly conclusive" sentencing determination prior to allocution. Instead, the court merely explained its current thinking to defense counsel by stating what it was considering as its "starting point."

Some arguments in appellant's brief ignore the context of the court's remarks and overlook the court's valid concerns. For example, Kanan contends that such a statement accepts the appropriateness of his previous 37-month sentence without examining any of the factors leading to its selection, thereby subjecting defendant to an unfair prison sentence for a subsequent crime if the previous sentence was overly punitive, and regardless of any new circumstances that led Kanan to reoffend. (Appellant's Br., p. 11). Such contentions, however, miss the point that the court was understandably concerned that the previous 37-month sentence – whatever its merits – had simply not deterred Kanan from committing his new and similar white-collar crimes. The court also knew that the previous court had given Kanan a lower sentence because his allocution gave that judge the impression that Kanan had learned his lesson—words that turned out not to be true. (R. 97, ¶ 87); (App'x 9). Moreover, the court was well aware,

through pre-sentence filings and argument, of all of the circumstances that led Kanan to re-offend. (R. 97).

Finally, appellant faults the sentencing court for failing to give appropriate weight to the sentencing guidelines. (Appellant's Br., p. 12). However, the sentencing court is simply required to calculate the guidelines; it is not required to give them any weight. *United States v. Sachsenmaier*, 491 F.3d 680, 685 (7th Cir. 2007) ("The district courts must calculate the advisory sentencing guideline range accurately, so that they can derive whatever insight the guidelines have to offer, but ultimately they must sentence based on 18 U.S.C. § 3553(a) without any thumb on the scale favoring a guideline sentence.").

Indeed, this case illustrates the limitations of the sentencing guidelines, because the guideline calculation varied widely on the esoteric question of whether to aggregate the loss amount of two offenses grouped together but that are not relevant conduct to each other. As this Court has noted:

> In a case . . . presenting a rather technical and arcane question in applying the Sentencing Guidelines, it is perhaps worth another reminder that the Guidelines are, after all, guidelines. They must be considered seriously and applied carefully. In the end, however, the defendant's sentence is the responsibility of the district judge, after careful consideration of all of the relevant factors under 18 U.S.C. § 3553(a) ….

United States v. Lopez, 634 F. 3d 948, 953-54 (7th Cir. 2011) (citations omitted). That is exactly what the court did in this case. It ruled on the sentencing

guidelines, ultimately accepting the defendant's proposed calculation, allowed the parties to make sentencing arguments, allowed the defendant to allocute, and then pronounced a sentence based appropriately on the factors in 18 US.C. § 3553(a). Accordingly, the sentencing court committed no procedural sentencing error, plain or otherwise.

II. The district court did not procedurally err by at times referring to "pretrial release" as "supervised release."

A. Standard of Review

Procedural errors, such as relying on inaccurate information in sentencing, are reviewed *de novo. United States v. Pennington,* 908 F.3d 234, 240 (7th Cir. 2018).

B. Discussion

Defendants have a due process right to be sentenced based on accurate information. *See, e.g*, *Pennington,* 908 F.3d at 239 *(citations omitted).* To prevail on his claim that this right was violated by the court's references to "supervised release," Kanan must show that the references amounted to inaccurate information and that the court relied on that information in passing sentence. Id. Neither are true here. First, there was no inaccurate information before the court—the court simply misspoke.

The district court misspoke at sentencing when at times saying Kanan was on "supervised" release instead of "pretrial" release when he committed the loan

fraud that underlies his 2020 fraud case. *See United States v. Nowicki*, 870 F.2d 405, 408 (7th Cir. 1989) (no error when "the judge's reference to thirty-five arrests instead of thirty-one cannot be considered a material misstatement. It is obvious that the judge simply misspoke."). Appellant points to four instances in which the court used that phrase during the sentencing hearing, but the transcript makes clear that in each instance, the court meant to say that Kanan was on pretrial release when he committed the loan fraud in the 2020 case. (Appellant's Br., p. 15); (App'x 7, 35, 36-37, & 61).

First, the court stated, "[a]nd that means that there certainly would be no credit for acceptance under the 2019 offense because he committed another crime while on supervised release from that offense." (App'x 7). Obviously, Kanan could not have been on supervised release from the 2019 offense because he had not yet been sentenced for that crime. However, Kanan was on pretrial release for the 2019 case when he committed the 2020 offense, (R. 97, ¶ 52), a factor the judge found was aggravating.

Second, the court stated, "[h]e served that time [2007 Vermont fraud], came out and committed serious fraud [2019 fraud case], was put on supervised release pending sentencing for that fraud and then committed another, as you've emphasized, separate set of fraud [2020 fraud case]." (App'x 35). A person cannot be "put on supervised release pending sentencing" as the court stated.

(App'x 35). His statement, however, makes complete sense if "pretrial release" is substituted for "supervised release," because Kanan committed the 2020 offense while on pre-trial release in the 2019 case. (R. 97, ¶ 52).

Third, the court stated, "[t]o commit another fraud [2019 fraud], having committed three separate fraud schemes that put him in federal prison once before [2007 Vermont fraud], desperate or not, there's no justification for what he did . . . . And then while on supervised release, he does it again [2020 fraud]?" (App'x 36-37). Again, it is clear from context that the judge meant "pretrial release."

Finally, in responding to the point Kanan made during his allocution that he had not committed any new crimes while serving his five years of supervised release following his 2007 Vermont fraud conviction, the court stated, "[y]ou're asking for credit for behavior on supervised release when you committed a third case of fraud [the 2020 fraud], a third felony offense of fraud, while you were on supervised release."(App'x 61). As before, that last reference to "supervised release" obviously refers to "pretrial release."

When pronouncing sentence, the court three times correctly referred to the release as "pretrial." The court said that Kanan committed the 2020 fraud after being released on "pretrial" conditions, that a 42-month sentence was necessary because (among other reasons) Kanan committed an offense while on "pretrial

supervision," and that supervised release was going to be critical in Kanan's case because he committed one of his offenses while on "pretrial release," "underscoring the need for close supervision." (App'x 69, 70, & 71).

The sentencing transcript makes clear that the court did not have a genuine belief that Kanan was on supervised release when he committed the 2020 fraud, but simply misspoke at times. Therefore, there was not any inaccurate information before the sentencing court when it imposed sentence.

Nevertheless, to the extent that the court's misstatements are construed as factual inaccuracies, the written Statement of Reasons, which corrected the misstatements, shows the court did not rely on those inaccuracies. (R. 108); *United States v. Pennington*, 908 F.3d at 240 (looking to the statement of reasons to correct the court's factual misstatement). Here, the court noted in its Statement of Reasons:

> . . . the outrageous, fraudulent schemes here, involving the stealing of scholarship funds from the Libyan Embassy and COVID-19 moneys, the latter of which occurred while defendant was on *pretrial* release pending resolution of the former.

(R. 108, p. 5) (emphasis added). The Statement of Reasons correctly states that Kanan was on "pretrial release" for one fraud offense when he committed the other. (Id.).

In *Pennington*, the sentencing court stated that the defendant had been involved in selling drugs for two years, when she had only been involved for one year. 908 F.3d at 234, 240. Noting that "[s]uch factual errors in a judge's explanation of a sentence can easily require a remand for re-sentencing based on accurate information if there are indications that the inaccurate information mattered in the sentencing decision," this Court was "satisfied that this error was corrected in the court's written explanation of reasons" indicating that the misstatement did not affect the sentence. *Id.* Accordingly, even if this Court concludes that inaccurate information was before the sentencing court, as with *Pennington*, the Statement of Reasons shows that the court did not rely on it. *Id.* *See also*, *United States v. Chavez*, 12 F.4th 716, 734 (7th Cir. 2021) (finding no error even if the defendant's "sentence was based, in part, on inaccurate information" because "the district court properly 'corrected his oral misstatements of the facts' in his written explanation") (quoting *Pennington*, 908 F.3d at 240). Therefore, the court did not commit any error and the sentences should be affirmed.

CONCLUSION

For the foregoing reasons, the government respectfully requests that the Court affirm the defendant's sentences.

Dated this 8th day of December, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached brief complies with the Court's type-volume limits in Fed. R. App. P. 32(a)(7)(B), Fed. R. App. P. 32(g), and Circuit Rule 32(c), and with the Court's typeface and type-style requirements in Fed. R. App. P. 32(a)(5), Fed. R. App. P. 32(a)(6), and Circuit Rule 32(b). This document contains 6,737 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f), and was prepared using Microsoft Word 365 in Book Antiqua font size 13 for the body and Book Antiqua font size 12 for footnotes.

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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh 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.

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