NO. 21-3207

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA
Appellee

v.

JAMES READ
Appellant

Appeal from the
United States District Court
Western District of Arkansas
Fort Smith Division

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

BRIEF OF APPELLEE

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CASE SUMMARY AND STATEMENT ON ORAL ARGUMENT

James Read ("Read") appeals the sentence imposed by the district court. Read waived indictment and pleaded guilty to a three-count information charging him with: Count One, making a false statement in violation of 18 U.S.C. § 1001(a)(3), Count Two, money laundering in violation of 18 U.S.C. § 1957, and Count Three, wire fraud in violation of 18 U.S.C. § 1343. The district court sentenced Read to 63 months imprisonment, which was at the bottom of the advisory guidelines range. Read now contends the district court erred by refusing to permit him to allocute via pre-recorded video, imposing a substantively unreasonable sentence, and imposing a sentence more than the statutory maximum sentence on Count One.

The United States submits that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, the United States does not specifically request oral argument. *See* Fed. R App. P. 34(a)(2). Should the Court determine the issues would benefit from oral argument, the United States believes ten minutes per side would suffice.

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JURISDICTIONAL STATEMENT

Read appeals the judgment entered in the United States District Court for the Western District of Arkansas (Honorable P.K. Holmes, III, presiding). On March 17, 2021, Read pleaded guilty to one count of making a false statement in violation of 18 U.S.C. § 1001(a)(3), one count of money laundering in violation of 18 U.S.C. § 1957, and one count of wire fraud in violation of 18 U.S.C. § 1343. On September 20, 2021, Read was sentenced to 63 months imprisonment per count to run concurrently, 3 years of supervised release per count to run concurrently, $277,827.00 victim restitution, and a $300 special assessment. (R.Doc. 30). The final judgment was entered on September 21, 2021. (R.Doc. 31).

The judgment of the district court constitutes an appealable final order. The United States District Court for the Western District of Arkansas had jurisdiction of this case pursuant to 18 U.S.C. § 3231. Notice of appeal was timely filed on October 4, 2021. (R.Doc. 35). This Court possesses jurisdiction pursuant to 28 U.S.C. § 1291, which gives it jurisdiction over all final decisions of the district courts of the United States. *See also*, Fed. R. App. P. 4(b)(1)(A)(i).

STATEMENT OF THE ISSUES

I. The district court did not plainly err by declining to view a video recording of Read's presentence allocution, as the court offered Read the opportunity to speak on his own behalf prior to imposition of sentence and Read exercised that right.

United States v. Thurmond, 914 F.3d 612 (8th Cir. 2019)

United States v. Kaniss, 150 F.3d 967 (8th Cir. 1998)

II. The district court imposed a substantively reasonable sentence.

United States v. McElderry, 875 F.3d 863 (8th Cir. 2017)

United States v. Barron, 557 F.3d 866 (8th Cir. 2009)

III. Because the district court sentenced Read to a term of imprisonment on count one of the information which exceeds the statutory maximum term for that offense, that portion of the sentence should be reduced to sixty (60) months.

Molina-Martinez v. United States, 136 S.Ct. 1338 (2016)

STATEMENT OF THE CASE

On March 17, 2021, Read appeared with counsel via videoconference before the Honorable Mark Ford, U.S. Magistrate Judge for the Western District of Arkansas, Harrison Division. (R.Doc. 2). At that hearing, Read waived prosecution by indictment, consented to prosecution by information, and entered his guilty plea to a three-count information filed on the same date. (R.Doc. 3, 6). Count One charged Read with making a false statement in violation of 18 U.S.C. § 1001(a)(3) on or about June 20, 2020, Count Two charged Read with money laundering in violation of 18 U.S.C. § 1957 on or about July 1, 2020, and Count Three charged Read with wire fraud in violation of 18 U.S.C. § 1343 on or about March 28, 2020. (R.Doc. 3). A written plea agreement was filed on the same date. (R.Doc. 7).

The magistrate judge issued a Report and Recommendation recommending Read's guilty plea be accepted and that the written plea agreement be tentatively approved. (R.Doc. 10). Read was released on a $5,000 signature bond conditioned on his appearance for court proceedings. (R.Doc. 8). Sentencing was deferred pending adoption of the magistrate's report and recommendation and presentence investigation. (R.Doc. 6). The Honorable Judge P.K. Holmes, III, United States District Judge, adopted the magistrate's report and recommendation and accepted Read's plea of guilty to Counts One, Two and Three of the Information on August 26, 2021. (R.Doc. 28).

The initial Presentence Investigation Report ("PSR") was filed May 11, 2021, (R.Doc. 11), a final PSR was filed on June 8, 2021, (R.Doc. 16), and the revised final PSR was filed on August 16, 2021. (R.Doc. 27). The PSR reflects that on March 27, 2020, the United States government enacted the Coronavirus Aid, Relief, and Economic Security (CARES) Act, which provided economic stimulus for individuals and businesses affected by the coronavirus pandemic. (PSR, ¶ 9). This economic stimulus included a series of forgivable loans known as the Paycheck Protection Program ("PPP"), which was guaranteed by the Small Business Administration ("SBA"). (PSR, ¶ 10). To obtain a loan under this program, qualifying businesses were required to submit a PPP loan application signed by an authorized representative acknowledging the program rules and making certain affirmative certifications. (PSR, ¶ 11).

For instance, the authorized representative of the business was required to state its average monthly payroll expense and number of employees, among other things. These figures would be used to calculate the amount of money the small business was eligible to receive under the PPP. (*Id.*). PPP loans would be processed by participating lenders, and those funds would be guaranteed by the SBA. (PSR, ¶ 12). The funds disbursed by participating lenders were required to be used on certain permissible expenses, such as payroll costs, interest on mortgages, rent, and utilities,

and the loan could be entirely forgiven if the business spent the proceeds on these items within a designated time. (PSR, ¶ 13).

The SBA also enacted the COVID-19 Economic Injury Disaster Loan ("EIDL") for the purpose of meeting financial and operating expenses which could have been met absent the disaster. (PSR, ¶ 14). Small business owners were eligible to apply for a maximum loan of $500,000 under the EIDL, and proceeds were to be used towards working capital and normal operating expenses such as rent, utilities, health care benefits and fixed debt payments. These loans were not forgivable, but an "EIDL Advance" was forgivable. (PSR, ¶¶ 14, 15). EIDL Advance funds were calculated based on the number of employees an application claimed on the EIDL application, and applicants were allowed $1,000 per employee for a maximum of $10,000. (PSR, ¶ 15).

On May 27, 2020, Read made an application for a PPP loan to an online bank, Celtic Bank Corporation, from an IP address located in Mountain Home, Arkansas. (PSR, ¶ 22). The application was submitted on behalf of "James Read," using his residence in Mountain Home as the business address, and Read indicated that he was the sole owner of the business. Read indicated that there were zero employees and that the business had an average monthly payroll of $8,041. (*Id.*). Read initialed his agreement that loan funds would be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments according

to PPP rules, and that he could be held legally liable if the funds were knowingly used for unauthorized purposes. (PSR, ¶ 23). Read also initialed the section of the form agreeing that the information he provided was true and accurate in all material respects, and that knowingly making a false statement to obtain a loan from SBA was punishable by law, including under 18 U.S.C. §§ 1001 and 3571. (PSR, ¶ 24). Along with this application, Read submitted a falsified IRS Schedule C (Profit or Loss from Business), which represented that his weather forecasting business had $128,500 in gross sales in 2019, and a net profit of $96,500. (PSR, ¶ 25). Read also submitted a fraudulent spending account statement from a bank account, as well as a void Bancorp Bank check in the name of James Read with his address in Mountain Home. (PSR, ¶ 26).

Based on Read's representations, BlueVine, a lender acting on behalf of Celtic Bank, approved his application and wire-transferred $20,102 to his Bancorp Bank account via SBA loan on May 27, 2020. (PSR, ¶ 27).

On June 9, 2020, Read applied for a PPP loan to Ready Capital, another online bank, from an IP address in Mountain Home. (PSR, ¶ 29). This application was also submitted on behalf of James Read, but with an address in West Monroe, Louisiana. The application listed a credit privacy number (CPN), something which is frequently sold to consumers to hide a bad credit history or bankruptcy. (*Id.*). Again, Read initialed the application indicating that he would use the funds as specified under

PPP rules, and acknowledging his legal liability if he knowingly used the funds for unauthorized purposes. (PSR, ¶ 30). Read also initialed the section acknowledging his legal liability if he knowingly made a false statement on the application in order to obtain a loan from the SBA. (PSR, ¶ 31). Read again submitted a falsified IRS Schedule C, indicating his business was agriculture – legal services, with $136,500 in gross sales in 2019, and a net profit of $98,500. (PSR, ¶ 32).

Based on Read's representations, Customers Bank, a lender acting on behalf of Ready Capital, approved Read's application and wire-transferred $20,500 to Read's Bancorp account via SBA loan on June 17, 2020. (PSR, ¶ 34).

On June 22, 2020, Read applied for an EIDL loan, which was declined due to his unsatisfactory credit history. (PSR, ¶ 41). Read then requested an EIDL Advance in the amount of $10,000 which was also declined due to a duplicated application and declined again because his Centennial bank account could not be verified. (*Id.*).

On June 24, 2020, Read applied for another PPP loan to another online bank, WebBank, from an IP address located in Mountain Home. (PSR, ¶ 42). Read submitted the application on behalf of "Snowbirdbob LLC" which he indicated was an employer of 15 employees with an average monthly payroll of $22,308. (*Id.*). Read claimed he was the sole owner of the business and applied for $161,875 in PPP loans. (*Id.*). Again, Read initialed the form indicating his understanding that the loan funds would be used as specified under the PPP rules and that he could be held

legally liable if he knowingly used the funds for unauthorized purposes. (PSR, ¶ 43). Read also initialed his agreement that the form was true and accurate and that making a false statement to obtain the loan was punishable under the law. (PSR, ¶ 44). Read again submitted a falsified IRS Schedule C, representing Snowbirdbob LLC had $1.2 million in gross sales in 2019 and a net profit of $267,700. (PSR, ¶ 45). Read also submitted a fraudulent IRS Form 941 for the first quarter of 2020 claiming he had paid wages in the amount of $300,000 for his 15 employees. (*Id.*). Read also submitted a fraudulent Spending Account Statement showing a beginning balance in February, 2020, of $264,235.86 and an ending balance of $251,471.91. (PSR, ¶ 46).

Based on Read's representations, WebBank approved Read's application and wire-transferred $55,770 to Read's Centennial Bank account via SBA loan on June 29, 2020. (PSR, ¶ 47).

On June 30, 2020, Read applied for another PPP loan to Meridian, an online bank, from an IP address located in Mountain Home. (PSR, ¶ 48). Read indicated the application was submitted on behalf of "James Read," that he was the sole owner, that his business had one employee and an average monthly payroll of $8,208. (PSR, ¶ 48). Read also indicated that the business was located in West Monroe, Louisiana, and on this application, Read used a social security number which belonged to his deceased father. (*Id.*). Again, Read initialed his understanding that the loan funds

would be used as specified under PPP rules and that he could be held legally liable if he knowingly used them for unauthorized purposes. (PSR, ¶ 49). Read also initialed the section of the application indicating the truth of the information he provided and acknowledging that making a false statement to obtain the loan from the SBA was punishable under law. (PSR, ¶ 50). Read again submitted a falsified IRS Schedule C representing his business to be a farming services-scientific studies business with $136,500 in gross sales in 2019 and a net profit of $98,500. (PSR, ¶ 51). Read also submitted a fraudulent Spending Account Statement indicating that his beginning balance in February, 2020, was $460,537.92 with an ending balance of $458,263.45 in May, 2020. (PSR, ¶ 52).

Based on Read's representations, MBE Capital Partners, a lender acting on behalf of Meridian, approved Read's application and wire-transferred $20,520 to Read's Bancorp bank account via SBA loan on July 14, 2020. (PSR, ¶ 54).

On July 1, 2020, shortly after receiving the $55,770 in PPP loan proceeds from WebBank, Read obtained a cashier's check for $26,000 and used it to purchase a 2017 GMC Sierra truck from Lakeview Auto Dealership in Mountain Home. (PSR, ¶ 55). Read paid $34,900 for the truck, utilizing a trade-in vehicle which had also been purchased with PPP funds, along with the $26,000 cashier's check. (PSR, ¶ 56).

On July 23, 2020, Read made another application for a PPP loan to Radius Bank, an online bank, from an IP address located in Mountain Home. (PSR, ¶ 70). This application was submitted on behalf of "Bobs Lawnmower Repair," which Read indicated was an employer of one employee with an average monthly payroll of $8,141. Read reported himself as the sole owner of the business, gave an address in Mountain Home, Arkansas, and provided an employee identification number. (*Id.*). Read again indicated his understanding that the loan funds would be used in accordance with PPP rules and that he could be held legally liable for knowingly misusing the funds. (PSR, ¶ 71). Read also indicated his understanding that it was punishable under the law for him to make false statements to obtain a loan from SBA. (PSR, ¶ 72). Read submitted a handwritten letter with this application, indicating that he had filed an IRS Schedule C, along with a falsified IRS Schedule C, representing $185,500 in gross sales and a net profit of $97,700 for 2019. (PSR, ¶ 73).

Based on Read's representations, Radius Bank wire-transferred $20,354 to Read's Centennial bank account via SBA loan on August 27, 2020. (PSR, ¶ 75).

On August 20, 2020, Read made an application for another PPP loan to Meridian, an online bank, from an IP address located in Mountain Home. (PSR, ¶ 76). Read indicated that this application was submitted on behalf of Snowbirdbob LLC, which employed four employees and had an average monthly payroll of

$8,333. Read noted that he was the sole owner of this business and applied for $113,083 in PPP loan funds. (*Id.*). Again, Read initialed the application indicating his understanding of PPP rules and that he could be held legally liable for misusing the funds. (PSR, ¶ 77). Read also initialed the section acknowledging that it was punishable under the law to make false statements to obtain a loan from the SBA. (PSR, ¶ 78). Read submitted a falsified IRS Schedule C with the application, indicating Snowbirdbob LLC had $923,800 in gross sales and a net profit of $542,800 in 2019. (PSR, ¶ 79). Read also submitted a fraudulent spending account statement from his bank showing a beginning balance of $460,537.92, and an ending balance of $458,263.45 in May, 2020. (PSR, ¶ 80).

Based on Read's representations, MBE Capital Partners, a lender acting on behalf of Meridian, wire-transferred $20,832 to Read's Centennial bank account via SBA loan on August 20, 2020. (PSR, ¶ 81).

Paragraphs 82 through 86 of the PSR list monies withdrawn by Read from his Centennial Bank accounts during the months of August and September, 2020. On August 28 and 31, 2020, $11,851.42 was withdrawn from Read's Centennial bank accounts from the Indigo Sky Casino, as well as $600 in cash withdrawals. (PSR, ¶¶¶ 82-84). On September 15 and September 17, 2020, $5,769 was withdrawn from Read's Centennial bank account by Centerfield Sports Cards in Springfield,

Missouri. (PSR, ¶ 85). These purchases were for baseball, football and basketball cards. (*Id.*).

On October 19, 2020, Centennial Bank submitted a letter to Read directing him to immediately discontinue activity on his accounts and to come to the bank and close the accounts. (PSR, ¶ 87).

Read also applied for Pandemic Unemployment Assistance Benefits ("PUA"), which require a claimant to complete an application at a local "one-stop center" in any of the states in which they worked at the time they were impacted by a COVID-19 related reason. (PSR, ¶¶¶ 89-91). Claimants are allowed to file for PUA benefits in any state in which they worked, but are required to pick only one state within which to file their claim. (PSR, ¶ 91).

Read applied for PUA benefits in Arkansas, Missouri, and Louisiana. (PSR, ¶ 93). In his Louisiana PUA application, Read falsely informed the Louisiana Workforce Commission ("LWC") that he lived in West Monroe, Louisiana, and provided that same false information when he completed his wife's application for PUA benefits from Louisiana. (PSR, ¶ 94). Read provided a fraudulent IRS Schedule C with his application, reflecting that his lawnmower repair business had gross sales of $191,000 and a net profit of $94,000. (PSR, ¶ 97). The LWC began sending monthly payments for both Read and his wife via wire transfer to Read's Bancorp account. (PSR, ¶ 95). Read received $14,996 in PUA benefits. (PSR, ¶ 101).

On or about March 23, 2020, Read appears to have submitted a PUA claim to the State of Missouri on his wife's behalf, but that claim was denied due to lack of proof of wages or employment. (PSR, ¶ 96).

On April 15, 2020, Read submitted a claim to the LWC on his mother-in-law's behalf, indicating that she also lived in West Monroe, Louisiana, though she was living with Read and his wife in Arkansas. (PSR, ¶ 98). As a result of the fraudulent application, the LWC began sending Read's mother-in-law weekly PUA benefits on April 24, 2020, for a total of $16,786. (PSR, ¶ 98).

On April 18, 2020, Read submitted a claim to the LWC for PUA benefits on his wife's behalf. (PSR, ¶ 99). Again, he indicated that she was living at a residence in West Monroe, Louisiana, and the LWC began sending her PUA benefits, for a total of $7,777. (PSR, ¶¶ 99, 101).

On November 26, 2020, Read applied to the Arkansas Division of Workforce Services for PUA benefits. (PSR, ¶ 100). Read indicated that his SnowbirdBob LLC business was impacted by COVID-19 on March 10, 2020, and that the business had a net income of $403,000. The Arkansas Division of Workforce Services determined that Read was not eligible for benefits. (*Id.*).

A search and seizure warrant was obtained for Read's residence in Mountain Home, Arkansas, on December 9, 2020, and that warrant was executed on the morning of December 11, 2020. (PSR, ¶¶ 102-03). The GMC Sierra truck was seized

and towed, along with a Ford Fusion and titles to both of those vehicles, which were in Read's name. (PSR, ¶ 103). Miscellaneous tax documents, checks, computers, and currency were also seized, along with tax forms for gambling winnings of $10,000 for Read on November 17, 2020 from the Indigo Sky Casino. (PSR, ¶¶ 103-04).

Read consented to a noncustodial interview with investigators and admitted that he had fraudulently applied for PPP loans. (PSR, ¶ 105). Read estimated he had received between $100,000-$120,000, through three or four loans under his name as well as a lawnmower repair business, the SnowbirdBob business, and his deceased father's name. (*Id.*). Read admitted he had applied for a PPP loan using the credit privacy number (CPN) which he had purchased years ago due to poor credit. Read told investigators that he had "flawlessly" learned about the PPP loans from YouTube videos, and acknowledged that he had "bumped all my numbers up." (*Id.*). Read admitted that all the numbers on the IRS Schedule C forms had been fabricated, and that he had not filed taxes for his businesses. Read further admitted applying for PPP loans in his wife's name and in his mother-in-law's name. (*Id.*).

Read also admitted that he had received PUA funds to which he was not entitled, and that he had applied for those funds in Louisiana, where he did not live. (PSR, ¶ 106). Read admitted also applying for PUA funds for his wife and mother-in-law despite knowing they were not Louisiana residents. Read further admitted to applying for PUA funds for himself and for his wife in Arkansas. (*Id.*).

Read told investigators that he created the fraudulent documents using software called "Roxio," and that he earned $50,000 per year repairing lawnmowers but never filed a tax return on this income. (PSR, ¶¶ 107-08). Read and his wife were both unemployed except for Read's Facebook business which Read said had not been doing well financially during the pandemic. (PSR, ¶ 108). Read said that he and his wife and mother-in-law had opened their accounts with Centennial Bank solely for the purpose of depositing the PPP loan payments. (*Id.*).

Read said he spent approximately $20,000 on baseball cards, and that he spent the funds on gambling, baseball cards, hobby shops, and the 2017 GMC truck and the Ford Fusion. (PSR, ¶ 109). Read said that he also paid a loan from his landlord and paid his rent for a year. (*Id.*).

Read's wife Crystal Payne also consented to a noncustodial interview on the same date, and she told investigators that Read had completed the paperwork for she and her mother to receive both the PPP loans and the PUA funds. (PSR, ¶ 110). Payne said that applying for PPP loans was Read's idea, that he learned about the scheme by watching YouTube videos, and that she believed he had received approximately five PPP loans. (*Id.*). Payne told investigators that Read completed the forms, she signed them without looking over them, and that the numbers on the IRS Schedule C forms were fabricated. (*Id.*). Payne said that Read had a money spending problem with sports cards and gambling, and she estimated that

approximately 70% of the funds went to gambling and sports cards. (PSR, ¶ 111). Payne also said that she and Read had problems in their marriage because of Read's lies about money and gambling. (*Id.*).

On January 21, 2021, Read applied for another PPP loan with Cross River Bank, an online bank, and indicated that his self-employed business had an average monthly payroll of $3,583. (PSR, ¶ 114). On the application, Read indicated that he had not applied for a PPP loan with another lender, and requested $8,957. (*Id.*). Read submitted a falsified IRS Schedule C which indicated that his weather forecasting business had $42,796 in gross sales and a net profit of $42,995 in 2019. (PSR, ¶ 115). Read submitted a fraudulent spending account statement showing a beginning balance of $.78 and an ending balance of $.80 for February 2020. (PSR, ¶ 116).

Based on Read's representations, Cross River Bank approved and funded $8,957 via SBA loan on March 10, 2021. (PSR, ¶¶ 117-18).

The PSR found that Read had a Total Offense Level of 24. (PSR, ¶ 135). Using a base offense level of 7 pursuant to United States Sentencing Guidelines § 2S1.1, the PSR added twelve (12) points based on a loss amount of $277, 827, (PSR, ¶ 126), one (1) point for a conviction under 18 U.S.C. § 1957, (PSR, ¶ 127), two (2) points because the offense involved sophisticated means, (PSR, ¶ 128), and two (2) points because Read was an organizer, leader, manager or supervisor in the criminal activity. (PSR, ¶ 130). The PSR did not apply a deduction for Acceptance of

Responsibility, noting that Read applied for another PPP loan after he had executed a written plea agreement in this case. (PSR, ¶¶ 122, 134). The PSR also pointed out a lengthy post Read had made to his Snowbirdbob Facebook page after his change of plea hearing, in which he addressed the criminal case against him, saying "I did NOT commit Wire Fraud." (PSR, ¶ 122). In the post, Read claimed that he had severe anxiety and panic attacks and lied to get a bigger loan out of fear, saying "[s]o, I got a little more than I should have." (*Id.*). Read then warned his followers that "you can't even lie on a Department Store application and if you stretch your income $10 it's considered Bank Fraud." (*Id.*).

The government filed one objection to the PSR, arguing that the appropriate guidelines range under the United States Sentencing Guidelines is determined using the actual or intended loss, whichever is greater. (R.Doc. 15). Because Read applied for and intended to cause $589,350 in loss, the government argued that amount should have been used in the guidelines calculation rather than the $277,827 Read actually obtained. (*Id.*).

Read also objected to the PSR, arguing *inter alia*, that he should have received an adjustment to his base offense level for Acceptance of Responsibility, as he had truthfully admitted the conduct underlying his offense of conviction. (R.Doc. 14). Read further argued that the PPP loan he applied for after entering into a plea

agreement was a legitimate loan, so should not be used as evidence that he did not accept responsibility for his offenses. (*Id.*).

On September 20, 2021, a sentencing hearing was conducted, at which Read appeared with counsel via videoconference. (R.Doc. 30). The district court confirmed that Read had consented to the hearing being conducted via videoconference because of the COVID-19 pandemic and then reviewed the procedural history of the case. (Sentencing Transcript, hereinafter "Tr.," pp. 2-3). The court confirmed with the parties that the initial, revised and final revised PSR's had been reviewed. (Tr., p. 4).

The court noted that each party had filed objections to the PSR and stated that it would first address the government's objection to the calculation of the loss under the Sentencing Guidelines. (Tr., pp. 4-5). The court sustained the government's objection to the loss amount calculated in the PSR, finding that the intended loss was the appropriate measure for which Read was responsible. (Tr., p. 5). The court noted that caselaw required it to use the intended loss if that amount could be ascertained and if that amount was higher than the actual loss amount. (Tr., p. 6). The court found that the loss Read intended to cause was $589,350, and that it was the appropriate amount to use for guidelines calculation purposes. (*Id.*).

The court then grouped together some of Read's objections to the PSR, the first of which was whether Read was responsible for the PUA benefits received by

his mother-in-law. (*Id.*). The court overruled that objection based on Read's admission to investigators that he applied for the loans in his mother-in-law's name. (Tr., p. 7). The district court next addressed Read's objections related to the PPP loan he received in 2021 from Cross River Bank, allowing the government to introduce evidence on the issue. (*Id.*).

The government called Chase Camp, an investigator with the Federal Bureau of Investigation, to testify regarding the loan from Cross River Bank. (Tr., p. 8). Agent Camp testified that he worked for the FBI in Fayetteville, Arkansas, and that he worked with the Small Business Administration's Office of Inspector General to review various loan applications that were linked to Read. (*Id.*). Agent Camp identified Government's Exhibit 2 as a Cross River Bank loan application that Read had filled out. (Tr., p. 9). Agent Camp testified that the application had been made online and that the application contained identifiers associated with Read that were consistent with the other loan applications involved. (Tr., p. 10). Agent Camp agreed that the application was titled "Paycheck Protection Program, Second Draw Borrower Application," and explained that in 2021, the government allowed businesses a second draw from the PPP loans that had been issued in 2020. (*Id.*). Agent Camp agreed this was essentially a second round of loan applications, and that Read had listed the average monthly payroll of his business as $3,582.91 on the application. (Tr., p. 11). Agent Camp testified that Read indicated the business had

one employee, he was the sole owner, and that the loan would be used for payroll, rent/mortgage interest, covered supplier costs and utilities. (Tr., pp. 11-12).

Agent Camp identified the PPP first draw SBA loan number listed on the application as one of the loans which was the subject of the instant investigation and Read's conviction. (Tr., p. 11). Agent Camp agreed that Read had responded "no" to the application's questions regarding whether the applicant was subject to any criminal charges or had pleaded guilty to making a false statement on a loan application for federal financial assistance. (Tr., p. 13). Agent Camp identified Read's affirmation that he used the first draw loan for eligible expenses only, as well as Read's affirmation that the information he provided on the second draw loan application was true. (Tr., p. 14).

Agent Camp testified that he collected the documents Read submitted with the loan application, and identified Government's Exhibit 3 as a 2019 Schedule C filing for Read, which contained Read's social security number. (Tr., p. 15). Agent Camp agreed that as of the week before the sentencing hearing, Read had not filed any 2019 taxes. (Tr., p. 16). Agent Camp testified that Read's wife Crystal Payne had filed her taxes with Read listed as her dependent for 2019, but that there was no Schedule C attached which matched Government's Exhibit 3. (Tr., pp. 16-17). Agent Camp testified that there was also no such Schedule C attached to Read's 2020 tax return. (Tr., p. 17).

On cross-examination, Agent Camp agreed that Read signed the application for the loan with Cross River Bank on March 10, 2021, which was after the date Read signed his plea agreement for the instant offenses, but that Read had not yet appeared for a change of plea hearing at that time. (Tr., pp. 21-22).

At the conclusion of Agent Camp's testimony, the district court overruled Read's objection to the inclusion of the Cross River Bank loan as a fraudulent loan, noting that the first draw loan was fraudulent, and because Read used the first draw as the basis for the second draw and included a fraudulent Schedule C, it was also fraudulent and correctly included in the PSR for purposes of calculating restitution and amount of loss. (Tr., p. 26).

The district court next addressed Read's final objection to the PSR regarding acceptance of responsibility. (Tr., p. 27). The court noted that the PSR's denial of the acceptance of responsibility reduction in its offense level computation was related both to the 2021 Cross River Bank loan and to Read's Facebook post. The court overruled Read's objection, noting that Read relied on the fraudulent Schedule C in his application for the Cross River loan, and that he applied for the loan after he had been interviewed by law enforcement at his home on December 11, 2020, and after signing a plea agreement on February 19, 2021. (*Id.*).

Having ruled on the parties' objections, the court adopted the PSR with the changes made by its rulings. (*Id.*). The court confirmed with the parties that its

rulings resolved all objections to the PSR, and transitioned to an explanation of sentencing factors. (Tr., p. 28). The court listed the statutory penalties applicable to each of the three counts of conviction, stating that five years was the maximum term of imprisonment on Count One, ten years imprisonment on Count Two, and thirty years on Count Three. (Tr., pp. 28-29).

The court adopted and incorporated the sentencing guidelines calculation from the revised final presentence report, but explained and summarized that calculation. (S.Tr. p. 29). Beginning with a base offense level of seven, the district court explained that an increase of 14 points was added based on the intended loss amount of more than $550,000 but less than $1,500,000. An additional one level increase was the result of the money laundering conviction, and two more levels were added because Read used sophisticated means to commit his crimes of conviction. Because Read was a leader, organizer, manager or supervisor of criminal activity, his offense level was increased by two, bringing Read's total offense level to 26. (Tr., pp. 29-30). The court noted that Read had no criminal history points, resulting in a guidelines range term of 63 to 78 months imprisonment. (Tr., p. 30).

The court explained that calculating the guidelines range was the first step in the sentencing calculation, and continued to step two, an explanation of the other factors the court considered for sentencing purposes. (*Id.*). The court listed the factors from 18 U.S.C. § 3553(a) it would take into consideration and noted that it

had also read and taken into consideration Read's Sentencing Memorandum as well as letters of support. (Tr., pp. 30-31).

The court heard argument from counsel regarding sentencing recommendations, and the government argued against Read's request for a downward variance, asking the court to impose a sentence within the guidelines range. (Tr., pp. 31-34). Read's counsel requested a significant downward variance from the guidelines range, asking for a sentence of twelve months and one day. (Tr., pp. 34-38). Counsel argued that Read had a gambling addiction and spoke about an article that explained how the brain reacted during episodes of gambling. (Tr., p. 35). Counsel explained that he believed Read's behavior in fraudulently applying for loans was like gambling for Read and that he saw a lot of parallel in the behaviors. (Tr., p. 36). Counsel expressed his belief that Read continued his criminal behavior because of his gambling addiction. Counsel argued that a downward variance was supported because of Read's gambling addiction, lack of criminal history, the fact that Read had a child at home with health issues, as well as Read's own documented health concerns and anxiety. (Tr., p. 37).

Counsel then told the district court that Read had a video he wanted to play, that it was about seven minutes long and that it was basically Read trying to explain his thoughts on the matter. (Tr., pp. 37-38). Counsel told the district court that Read had anxiety and that counsel did not expect Read to be able to provide much of an

allocution, but requested the opportunity to play the video and then allow Read be given the chance to speak if he had something to add. (Tr., p. 38).

The district court asked if counsel could explain more about what the video was, asking whether it was Read's pre-recorded allocution. (*Id.*). After Read's counsel replied affirmatively, the court stated that it did not have notice of counsel's intent to do that, but that the court was not going to listen to the video for seven minutes of allocution and would instead give Read the same opportunity to speak that it did for every other defendant. (*Id.*).

Counsel thanked the court, and the court then invited Read to deliver his allocution. (Tr., pp. 38-39).

Read began by apologizing to the court, the United States Government, the Small Business Administration and to the people that he received Paycheck Protection Program money from which prevented other businesses from receiving the money. (Tr., p. 39). Read told the court that he accepted all responsibility and that what he did was wrong but that he was desperate. Read explained that he lost 70 percent of his business when the pandemic hit and that he tried to get unemployment. Read apologized for bringing his wife and mother-in-law into the scheme and said that it was not his intent to keep getting loan after loan after loan. Read told the court that when he got the first loan he paid some bills and then gambled most of it and just could not stop. Read said that most of it was from his

gambling, that he had a bad addiction for 24 years and that he wanted to get help for his gambling addiction for his wife and daughter, so he signed his gambling rights away in a lot of states. (*Id.*).

Read told the court that he knew he could be a productive member of society, but just got caught up in it and kept on doing it. Read told the court he wanted to apologize to all the American people and all of his followers on his page because he loved predicting weather and helping the community prepare. Read told the district court that he knew it had to punish him and that was what he put in the video. (Tr., pp. 39-40). Read said he knew he did all the crimes and he knew he could be better and that he was also sorry to himself because he was not this kind of person. (Tr., p. 40). Read explained that he tried to be a good person to his family and to everybody, but he got caught up and made some bad decisions that led him here today. Read concluded by telling the court he knew he was probably missing a lot because his mind was scattered, and that was why he put the video together. He told the court that was all he could think of and said he was a mess to everybody watching this and that was why he did the video. (*Id.*).

The court thanked Read and explained that it needed to assess the factors under 18 U.S.C. § 3553(a). (*Id.*). The court explained that this was an extensive scheme to defraud a program that was designed to help businesses that were failing during the pandemic in the year 2020 and into 2021. (*Id.*). The court stated that the

Paycheck Protection Program kept people employed and allowed businesses to have a source of income which would allow them to pay their rent and other bills. (Tr., pp. 40-41). Against that background, the court found the amount of fraud involved in Read's case occurred over more than one year and involved seven fraudulent applications in which Read not only falsified the application itself, but the supporting documents. (Tr., p. 41). The court pointed out that it took a lot of planning in order to carry out the fraud and that Read used online banks to avoid someone knowing the business or the customer. The court noted that Read applied for loans well over $589,000 and received over half of that, spending the money on gambling and a new truck. (*Id.*). The court found that what really made the case egregious was that Read got his wife and mother-in-law involved in it and the court noted it had recently sentenced Read's wife to probation, granting a downward variance to her based on their daughter and her needs. (*Id.*).

The court pointed out that Read was different, in that he did all the planning, carried out all the fraudulent acts, prepared all the fraudulent documents and submitted them. (Tr., pp. 41-42). The court also noted that Read lied about it and then even after he was interviewed by law enforcement he submitted another application for a fraudulent loan with Cross River Bank. (Tr., p. 42). The court said again that this was one of the most egregious fraud cases it had seen and opined that the nature and circumstances of the offense called for a guidelines sentence. The

court pointed out Read's gambling addiction and health issues but noted that Read had a weather-forecasting business with many subscribers, and therefore had a legitimate way to earn money. (Tr., pp. 42-43). The court noted that prior to that Read had operated a business in Louisiana with which he was able to provide income for his family as well. (Tr., p. 43).

However, the court stated that this was a very serious offense which called for a sentence that reflected that as well as the need to provide just punishment. (*Id.*). The court commented that it had looked at other cases to avoid unwarranted sentencing disparities, and that there was a wide range of cases in which people defrauded the government for much less than Read's case and in some cases a lot more than Read. (*Id.*).

The court then stated its intention to impose a sentence at the bottom of the guidelines range, and imposed a term of 63 months imprisonment on each count of conviction, to run concurrently. (Tr., pp. 43-44). The court noted that the sentence was sufficient but not greater than necessary to comply with the goals of sentencing. (Tr., p. 43). The court additionally imposed three years of supervised release on each count of conviction, to run concurrently. (Tr., pp. 43-44). The court ordered victim restitution in the amount of $277, 827, (Tr., pp. 44-45), and a mandatory special assessment of $100 per count. (Tr., pp. 45-46). Neither party offered objection to the sentence. (Tr., p. 46).

The court next explained Read's appeal rights. (Tr., pp. 46-47). The court allowed Read to remain at liberty and self-report to his designated facility on November 4, 2021. (Tr., p. 47). The court noted the parties' agreement to administrative forfeiture of the GMC Sierra that was seized from Read's residence on December 11, 2020. (Tr., p. 48).

This appeal follows.

SUMMARY OF THE ARGUMENT

Read claims the district court erred by denying him his right to effective allocution in violation of Federal Rule of Criminal Procedure 32(i)(4)(A)(ii). Read says the district court erred by refusing to watch a seven-minute video, which counsel explained was Read's "prerecorded allocution." The district court declined to view the video but instead invited Read to address the court personally. Read did not object to this ruling, thus it is reviewed for plain error. Because Read accepted the court's invitation and spoke on his own behalf before the imposition of sentence and presented information in mitigation, no error, plain or otherwise, occurred.

Read next argues that the district court abused its discretion by imposing a substantively unreasonable sentence. Read has failed to show the district court abused its discretion in imposing a sentence at the bottom of the guidelines range. The district court properly considered the mitigating factors presented at the sentencing hearing and correctly refused to vary downward from Read's sentencing guidelines range, enunciating multiple reasons in support of its decision.

Finally, Read argues that the district court plainly erred by imposing a sentence on Count One that exceeded the statutory maximum by three months. Read requests, and the Government agrees, that this error could be addressed by the Court exercising its discretion to correct the sentence on Count One to reflect a term of 60 months imprisonment rather than the 63 months imposed by the district court.

ARGUMENT

I. The district court did not plainly err by declining to view a video recording of Read's presentence allocution, as the court offered Read the opportunity to speak on his own behalf prior to imposition of sentence, and Read exercised that right.

A. Standard of Review

Because Read failed to preserve this lack-of-allocution claim by timely objecting during the sentencing hearing, this Court reviews for plain error. *Id.*; *see also United States v. Hoffman*, 707 F.3d 929, 937 (8th Cir. 2013). "Under plain error review, the defendant must show: (1) an error; (2) that is plain; and (3) that affects substantial rights." *United States v. Puckett*, 715 Fed.Appx. 578, 579 (8th Cir. 2018)(per curiam)(quoting *United States v. Vaughn*, 519 F.3d 802 (8th Cir. 2008). Even when these conditions are met, an appellate court will only exercise its discretion to correct a forfeited error if it "seriously affects the fairness, integrity, or public reputation of the judicial proceedings." *Id.*

B. Discussion

Read argues on appeal that "the district court denied him his right to presentence allocution by refusing to view a 7-minute-long pre-recorded video he prepared." (App.Br., p. 33). Read claims on appeal that his mental health issues prevented him from allocuting "effectively," and that the district court should have made a reasonable accommodation for him by watching the video rather than requiring him to address the court "live." (*Id.*). Read concludes that the district

court's treatment of his allocution gave the strong impression that it considered his allocution a "meaningless formality." (*Id.* at 37). The government asserts 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, plain or otherwise.

Federal Rule of Criminal Procedure 32(i)(4)(A)(ii) states that "[b]efore imposing sentence, the court must: …address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence." *United States v. Murillo-Mora*, 703 Fed.Appx. 435, 437-38 (8th Cir. 2017)(per curiam). "The right of allocution is not violated if the defendant knows he may speak on his behalf before the imposition of the sentence and does so." *United States v. Kaniss*, 150 F.3d 967, 969 (8th Cir. 1998).

At Read's sentencing hearing, his attorney reviewed Read's background with the district court, including Read's gambling addiction and documented health and anxiety issues. (S.Tr., pp. 34-37). Read's counsel informed the court that he would like to play a video that was about seven minutes long and that the video was:

> "basically Mr. Read trying to explain to the Court his thoughts on the matter. He has an awful lot of anxiety. I don't expect that he will be able to provide much of an allocution today, but what I would request is the opportunity to play the video, and then if Mr. Read has something he would like to add, that he be given the chance to do so."

(S.Tr., pp. 37-38). The district court inquired whether the video was Read's pre-recorded allocution, noted "I didn't have notice of your intent to do that," and then informed counsel that it would not listen to the video, but would simply allow Read the opportunity to speak "just like I do every other defendant." (S.Tr., p. 38).

The court then offered Read the opportunity to speak, and Read addressed the court at length, accepting responsibility for the offenses of conviction, explaining the reasons behind his behavior, and further explaining that he gambled most of the proceeds of his offenses. (S.Tr., p. 39). Read explained to the court that he had a gambling addiction, had been under its influence for 24 years, and had "signed my gambling rights away in a lot of states." (*Id.*). Read further explained that he enjoyed his job predicting weather on Facebook because it helped the community prepare, and that he knew the district court had to punish him. (S.Tr., pp. 39-40). Read told the court "[t]hat's what I put in the video about – I put in the video. I know you have to punish me." (S.Tr., p. 40). Read went on to explain that he was a good person and that he just got caught up and made bad decisions which "led me here today." (*Id.*). Read then explained that his mind was scattered and he was probably missing a lot, which was why he put the video together. (*Id.*).

The court met its obligation under Rule 32(i)(4)(A)(ii) by allowing Read to speak or present any information to mitigate the sentence. Read clearly enunciated some of the reasons he committed the crimes for which he was being sentenced, as

well as his remorse and his belief that he was not a bad person. Read also explained that he addressed the issue of punishment in the video but did not explain what else was in the video which might have aided the court more than his live spoken words.

Read now argues 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, (App.Br., p. 37), though the record cited above belies that claim. He argues that his sentence should be vacated, as it was error for the district court to fail to provide reasonable accommodation for Read's mental condition by watching the video. (App.Br., p. 38). He cites no authority for the proposition that the court was required to watch the video, nor does he address the contents of the video or how it would have changed the sentence he received. In fact, Read's counsel said the video contained Read's "thoughts on the matter" and Read himself told the court that it contained his thoughts on punishment, which he was able to express to the court himself. "[I]f the defendant fails to explain what exactly he or she would have said during allocution that might mitigate the sentence, then the case is one of those 'limited class of cases' in which we will decline to exercise our discretion to correct the error." *Thurmond*, 914 F.3d at 615, quoting *United States v. Avila-Cortez*, 582 F.3d 602 (5th Cir. 2009). Read cannot establish any error at all since he was invited to address the court prior to pronouncement of sentence, and did so at length. The

district's court's decision to listen to Read's live allocution rather than watch a seven minute pre-recorded video was in accordance with Rule 32(i)(4)(A)(ii).

While Read describes the district court's treatment of his allocution as "not careful enough" to avoid the appearance of dispensing assembly-line justice, (App.Br., p. 38), there is no evidence in the record to support that conclusion. During Read's allocution the court did not interrupt or attempt to cut Read off, and at the conclusion of Read's statement, the court thanked him. This is far different than the circumstances Read presents from the Second Circuit Court of Appeals' decision in *United States v. Li*. 115 F.3d 125 (2d Cir. 1997). In *Li*, the Second Circuit found the defendant's right to allocution sufficiently limited by the district court that resentencing was required. *Id.* at 133. The Second Circuit found that the district court repeatedly interrupted the defendant, beginning only nine lines into the transcript of the allocution, and created an atmosphere which rendered it difficult for the defendant to present an effective and potentially persuasive allocution. *Id.* The Second Circuit found that the transcript suggested the district court caused the defendant to feel intimidated and confused. *Id.*

No such circumstances existed in the instant case, in which the transcript reveals a respectful exchange which led to Read's uninterrupted allocution. Though Read sobbed at one point after admitting he had gambled most of the proceeds of his crimes of conviction, he was able to continue uninterrupted to discuss many aspects

of his offenses, gambling addiction, family life, job, remorse, and punishment.

Finally, while Read argues and the PSR supports the existence of his anxiety and mental health struggles, no evidence was offered that Read's mental health issues prevented him from speaking on his own behalf. In fact, Read's counsel asked that the district court first view the video, then allow Read a chance to speak if he chose to do so. Further, the district court may have noted that when Read was confronted unexpectedly by law enforcement officers executing a search warrant at his residence on December 11, 2020, he consented to a noncustodial interview and gave a detailed description of his crimes, even commenting on how he "flawlessly" learned the scheme by watching YouTube videos. (PSR, ¶¶¶¶¶ 105-109). Read was able to estimate how much of the proceeds of his crimes he had spent on baseball cards, gambling, hobby shops and a truck. (PSR, ¶ 109). Though that scenario is different than speaking at a sentencing hearing, 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.

The district court did not plainly err by declining to watch Read's pre-recorded video when Read was able to exercise his right of presentence allocution and address the court with his live spoken comments. Accordingly, his claim of error should be denied.

II. The district court imposed a substantively reasonable sentence.

A. Standard of Review

"We review the denial of a motion for downward variance by reviewing the sentence for reasonableness, applying a deferential abuse-of-discretion standard." *United States v. Angeles-Moctezuma*, 927 F.3d 1033, 1037 (8th Cir. 2019)(quoting *United States v. Acosta*, 619 F.3d 956 (8th Cir. 2010)). "An abuse of discretion occurs when: (1) a court fails to consider a relevant factor that should have received significant weight; (2) a court gives significant weight to an improper or irrelevant factor; or (3) a court considers only the appropriate factors but in weighing them commits a clear error of judgment." *United States v. Fitzpatrick*, 943 F.3d 838, 840 (8th Cir. 2019)(quoting *United States v. Williams*, 624 F.3d 889 (8th Cir. 2010)).

B. Discussion

Read does not contest the district court's calculation of his guidelines sentencing range in accordance with his PSR at 63-78 months, but argues that it abused its discretion by refusing to vary downward from that range. Read argues that the district court subsequently imposed a sentence that was greater than necessary to achieve the purposes of sentencing pursuant to the factors set forth in 18 U.S.C. § 3553(a). (App. Br., p. 47). The government responds that the district court properly weighed the § 3553(a) factors, enunciated its justifications for its sentence in relation to those factors, and imposed a substantively reasonable

sentence at the bottom of the guidelines range. Because the district court sentenced Read to a term within the advisory guidelines range recommended by the United States Sentencing Commission, this Court presumes that sentence is substantively reasonable. *United States v. Barron*, 557 F.3d 866, 870 (8th Cir. 2009); *United States v. Godsey*, 690 F.3d 906, 912 (8th Cir. 2012).

At the sentencing hearing, the district court first heard argument regarding an appropriate sentence from both government counsel and Read's counsel. Read's counsel asked the court to consider a significant downward variance based on the factors enumerated in 18 U.S.C. § 3553(a), highlighting multiple mitigating factors in support of that request, particularly Read's gambling addiction, but also his lack of criminal history and his physical and mental health issues. (S.Tr., pp. 34-38). Following Read's counsel's argument, Read spoke on his own behalf as referenced above.

At the conclusion of Read's allocution, the district court began an analysis of the § 3553(a) factors, opining that the nature and circumstances of Read's offense called for a guidelines range sentence. (S.Tr., pp. 40-42). The court began by pointing out that "this was an extensive scheme to defraud a program that was designed, intended to help businesses that were failing during the…pandemic[.]" (S.Tr., p. 40). The court pointed out that the amount of fraud involved in Read's case "occurred over a period of more than one year, it occurred on – he received money

in seven fraudulent applications." (S.Tr., p. 41). The court noted that Read not only falsified the applications themselves, but the nature of the business, the Schedule C tax returns, and bank accounts. (*Id.*). The court noted that Read applied for over $589,000 from the programs and received over half of that, but stated that "what really makes this offense egregious is how he got his wife involved in it, how he got his mother-in-law involved in it[.]" (*Id.*). The court found that Read was "the one who carried out all the fraudulent acts. He's the one who prepared all the fraudulent documents, submitted all the fraudulent documents. He lied about it[,]" submitting another application for a fraudulent loan after being interviewed by law enforcement. (S.Tr., p. 42).

Read disagrees with the court's conclusion that his was one of the more egregious fraud cases it had seen, arguing on appeal that this was an overstatement of the severity of his offense. (App.Br., p. 41). In his view, the Paycheck Protection Program never ran out of money, and because the entire base of United States taxpayers will bear the cost of Read's fraud, the court was incorrect if it believed Read's fraud hurt businesses that legitimately applied for these funds. (App.Br., p. 40). However, the district court permissibly considered Read's offenses "very serious," pursuant to the Section 3553(a) factors, and noted that they "call[ed] for a sentence that shows the seriousness of the offense and the need to provide just punishment." (S.Tr., p. 43). The district court has discretion to rely more heavily on

some sentencing factors than others, and a defendant challenging the district court's sentence must show more than the fact that the district court disagreed with his view of what weight ought to be accorded certain sentencing factors. *United States v. Long*, 906 F.3d 720, 727 (8th Cir. 2018). Read has not shown more than the district court's disagreement with his views, and the district court was entitled to assign more weight to the seriousness of Read's offenses than other factors.

The district court specifically mentioned Read's history and characteristics, noting his gambling addiction and health issues, (S.Tr., p. 42), but recognizing that Read was able to have a legitimate weather-forecasting business at the time of his offenses of conviction, and had previously operated a business in Louisiana. (S.Tr., pp. 42-43). The court found those factors to be outweighed by the seriousness of Read's offenses, however, as well as the need to provide just punishment. (S.Tr., p. 43). Read argues on appeal that his history and characteristics should have been given significant mitigating weight, and that the district court did not recognize that addiction was an underlying cause of Read's criminal conduct. (App.Br., p. 42). The district court did, however, recognize and address Read's gambling addiction during the sentencing hearing, and Read and his counsel both highlighted that addiction extensively in their spoken comments to the court at sentencing. The record demonstrates that the court assigned greater weight to the gravity of offenses Read committed than to his addiction. This was well within the court's purview, as "[a]

district court's choice to assign relatively greater weight to the nature and circumstances of the offense than to the mitigating personal characteristics of the defendant is well within its wide latitude in weighing relevant factors." *United States v. Farmer*, 647 F.3d 1175, 1180 (8th Cir. 2011).

Read also argues that the district court failed to properly consider the need to avoid unwarranted sentencing disparities, and that his sentence is out of proportion to the amount of intended and actual loss he caused. (App.Br., p. 44). In support of this argument, Read compares his case to six other cases out of Florida, Texas, and Oklahoma, in which the defendants committed crimes he has determined to be like his own. (App.Br., pp. 44-46). Read concludes that because those defendants generally received lower sentences than his own, the district court failed to consider the need to avoid unwarranted sentence disparities. (App.Br., p. 44). Read did not object to the district court's discussion of the need to avoid sentencing disparity during the sentencing hearing, nor did he bring the out-of-state cases to the court's attention at the hearing. Read mentioned three of the cases in his Sentencing Memorandum (R.Doc. 19, p. 12), which the district court read and considered for sentencing purposes, (S.Tr., pp. 30-31), but never brought the other three to the district court's attention at all. The district court stated on the record that it was aware of its obligation to avoid unwarranted sentencing disparities and informed the parties that it had looked at other defendants situated similarly with Read. The court

indicated that it found a wide range of cases in which people had defrauded the government for less than Read's conduct, and in some cases a lot more than Read's conduct. (S.Tr., p. 43). The court then stated its intention to impose a sentence at the bottom of the guidelines range. (*Id.*).

Read argues this was error considering the sentences of other defendants he references on appeal, but it is only *unwarranted* disparities that are to be avoided in sentencing, while disparate sentences among defendants who are not similarly situated are not unwarranted. *United States v. Fry*, 792 F.3d 884, 893 (8th Cir. 2015)(emphasis added). "An argument that non-conspirator defendants received shorter sentences for comparable offenses is at base a disagreement with the weighing of the § 3553(a) factors." *United States v. McElderry*, 875 F.3d 863, 864-65 (8th Cir. 2017). Read does not indicate on appeal whether each of the defendants he cites used their wife and mother to complete their scheme, how many times they fraudulently applied for loans, whether they used their deceased father's social security number to carry out the crime, whether they additionally defrauded state unemployment offices, or whether they continued to apply for loans following contact with police and following the date on which they signed their plea agreements. Read does not list the guidelines range for each of the defendants, whether they received sentencing enhancements for being the leader or organizer of the scheme, whether or not the judge in each case deviated from that guidelines

range, or even what reasons might have supported such decisions. His argument does not show that each of those defendants were similarly situated with Read and that there was consequently an unwarranted disparity between his sentence and their sentences.

Indeed, because of the wide discretion now accorded district judges in applying the § 3553(a) factors, this Court has declined to impose a procedural requirement that a district court judge must compare and contrast the defendant under consideration with similar offenders who have been sentenced by federal judges in other judicial districts. *Barron*, 557 F.3d at 869. This Court found it "unrealistic" to expect that in any given case, the parties would be able to produce information about individual sentences imposed in numerous proceedings around the country that may involve offenders like the defendant under consideration. *Id*. Further, such a practice would give "too much weight to the decision of one district judge if we were to require that the sentencing court use a single example cited by one party as the reference point for an appropriate sentence under § 3553(a)." *Id.* For these reasons, Read's citation of cases out of Florida, Oklahoma, and Texas, three of which were never even brought to the district court's attention, are not supportive of his argument that the district court failed to avoid unwarranted sentencing disparity.

The United States Supreme Court has held that "[t]he sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." *Rita v. United States*, 551 U.S. 338, 356 (2007). When the record established that a district court heard and rejected the defendant's arguments in favor of a lower sentence pursuant to the § 3553(a) factors, the Eighth Circuit found no abuse of discretion. *Vaughn*, 519 F.3d at 805. The same principles apply in the instant case, and the district court established for the record that it properly considered each of the § 3553(a) factors in declining to vary downward pursuant to Read's request.

The district court's justifications for imposing the guidelines range sentence were based on "precisely the kind of defendant-specific determinations that are within the special competence of sentencing courts, as the Supreme Court has repeatedly emphasized." *United States v. Feemster*, 572 F.3d 455, 464 (8th Cir. 2009)(quoting *United States v. Gardellini*, 545 F.3d 1089 (D.C.Cir. 2008)).

Because the United States Sentencing Commission Guidelines are now advisory only, "substantive appellate review in sentencing cases is narrow and deferential." *Id.* "As the caselaw in the courts of appeals since *Gall* demonstrates, it will be the unusual case when we reverse a district court sentence – whether within, above, or below the applicable Guidelines range – as substantively unreasonable."

Id. The district court's justifications for imposing the 63-month sentence were based on defendant-specific determinations that were explained in detail on the record. The district court did not err in weighing the relevant factors and arriving at a sentence within the guidelines range, and did not abuse its discretion in doing so.

III. Because the district court sentenced Read to a term of imprisonment on count one of the information which exceeds the statutory maximum term for that offense, that portion of the sentence should be reduced to sixty (60) months.

Standard of Review

Federal Rule of Criminal Procedure 52(b) provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the [district] court's attention." To obtain relief under a plain-error standard of review, the party seeking relief must show that there was an error, the error is clear or obvious under current law, the error affected the party's substantial rights, and the error serious affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Poitra*, 648 F.3d 884, 887 (8th Cir. 2011). Once those conditions have been met, "the court of appeals should exercise its discretion to correct the forfeited error if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Molina-Martinez v. United States.*, 136 S.Ct. 1338, 1343 (2016).

Discussion

As Read correctly points out on appeal, the district court sentenced him to a 63-month term of imprisonment on each count in the Information to which he pleaded guilty, while Count One carried a statutory maximum sentence of only sixty (60) months imprisonment. The government agrees that this constituted plain error and also agrees with Read's request that this Court exercise its discretion to correct the error and reduce the term of imprisonment imposed on Count One to sixty (60) months.

The PSR correctly noted the guidelines range for a term of imprisonment on Count One was no more than five years (60 months) imprisonment pursuant to 18 U.S.C. § 1001(a)(3), (PSR, ¶ 182), and the district court correctly repeated that term on the record during the sentencing hearing. (Tr., p. 28). However, at the conclusion of sentencing arguments and allocution, the court sentenced Read to a term at the bottom of the guidelines range, which was sixty-three (63) months, on each count to run concurrently. (S.Tr., pp. 43-44). No error occurred regarding Counts Two and Three, as the maximum term of imprisonment for those counts was not exceeded and Read does not appeal them.

Accordingly, the government joins Read's request that this Court exercise its discretion to correct the error by reducing the term of imprisonment imposed on

Count One to sixty (60) months, or to remand for the limited purpose of allowing the district court to enter an amended judgment correcting the error.

Conclusion

The district court did not plainly err in refusing to view a prerecorded presentence allocution video, as it invited Read to speak on his own behalf before imposition of sentence and Read did so. The district court did not abuse its discretion in denying Read's motion for downward variance and sentencing Read to a term at the bottom of his guidelines range after considering the totality of the circumstances. While the district court did sentence Read to a sentence on Count One that exceeded the statutory maximum for that offense, this Court could correct that error without remanding the entire case. As such, the court's decision to overrule Read's objections should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 2, 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.

/s/ Hunter Bridges
Hunter Bridges
Assistant United States Attorney

CERTIFICATE OF COMPLIANCE

I hereby certify that the brief has been scanned for viruses and that to the best of my knowledge the brief is virus free.

I further certify that Word software was used to prepare this brief.

I further certify that this brief complies with the type-volume limitations as set forth in Fed. R. App. P. 32(a)(7)(c). There are 44 pages containing 10,757 words, using Times New Roman 14 point, in the brief.

/s/ Hunter Bridges
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Assistant United States Attorney