No. 21-13194-JJ

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MAURICE FAYNE,
Defendant-Appellant.

On appeal from the United States District Court
for the Northern District of Georgia
No. 1:20-CR-00228-MHC-JKL-1

BRIEF OF APPELLEE THE UNITED STATES OF AMERICA

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In addition to those listed in Appellant's brief, these people and entities have an interest in the outcome of this appeal:

Sommerfeld, Lawrence R., Assistant United States Attorney

Traynor, William G., Assistant United States Attorney

United States of America, Appellee

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary in this case. The issues and positions of the parties, as presented in the record and briefs, are sufficient to enable the Court to reach a just determination.

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STATEMENT OF JURISDICTION

(A) The district court had subject matter jurisdiction over this criminal case under 18 U.S.C. § 3231.

(B) This Court of Appeals has jurisdiction over this direct appeal from the judgment and sentence of the district court under 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

(C) Fayne timely filed his notice of appeal on September 16, 2021, the day after the district court entered its judgment and commitment order. Fed. R. App. P. 4(b)(1)(A).

(D) This appeal is from a final judgment and commitment order that disposes of all the parties' claims in this criminal case.

STATEMENT OF THE ISSUES

Defendant Maurice Fayne stole millions of dollars through his Ponzi scheme and a separate PPP fraud. At sentencing, the government maintained its below-guidelines recommendation and argued against the even-lower sentence that Fayne requested. The district court rejected the parties' requests for downward variances and imposed a low-end sentence after finding that Fayne had "earned" a guidelines sentence. Did the district court plainly err by not finding that the government breached the plea agreement?

STATEMENT OF THE CASE

Fayne pleaded guilty to running two fraud schemes: (1) a Ponzi scheme in which he and his codefendants defrauded over 20 victim investors of more than $5 million over seven years, and (2) fraudulently obtaining a Paycheck Protection Program (PPP) loan of more than $3.7 million.

A. Course of Proceedings and Disposition Below

On November 19, 2020, the grand jury issued a second superseding indictment that charged Fayne with committing 20 offenses:

- Count 1: conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349;
- Counts 2 through 4: wire fraud, in violation of 18 U.S.C. § 1343;
- Count 5: bank fraud, in violation of 18 U.S.C. § 1344;
- Count 6: making a false statement to a financial institution insured by the FDIC, in violation of 18 U.S.C. § 1014;
- Counts 7 through 16: concealment money laundering, in violation of 18 U.S.C. § 1956(a)(l)(B)(i);
- Counts 17 through 19: transactional money laundering, in violation of 18 U.S.C. § 1957; and
- Count 20: aggravated identity theft, in violation of 18 U.S.C. § 1028A.[1]

[1] Doc. 96.

Fayne entered a negotiated guilty plea to Counts 1 through 6.[2] The district court sentenced him to a low-end guidelines sentence of 210 months in prison and five years' supervised release, and ordered him to pay $4,465,865.55 in restitution.[3] Fayne timely filed his notice of appeal.[4] He is incarcerated.[5]

B. Statement of the Facts

1. Fayne's Ponzi Scheme[6]

From 2013 through May 2020, Fayne owned a trucking company that he held out to be profitable.[7] But in truth, Fayne's company did not

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[2] Doc. 186.

[3] Docs. 231, 246 (sentencing hearing transcript) at 39, 42. In citing to the record, this brief will cite the court reporter's page numbers in the upper right corner of the transcript pages. In the sentencing hearing transcript, the court reporter's pagination matches the Court's ECF pagination. *See11th* Cir. R. 28-5.

[4] Doc. 235.

[5] https://www.bop.gov/inmateloc/ (accessed March 4, 2022).

[6] The offense conduct was either admitted by Fayne during his guilty plea hearing (Doc. 202 [plea hearing transcript] at 24-35), or not objected to in the PSR and adopted by the district court. (PSR ¶¶ 24-113) (Doc. 246 [sentencing hearing transcript] at 3-4) *see United States v. Wade*, 458 F.3d 1273, 1277 (11th Cir. 2006) (defendant who fails to object to allegations of fact in a PSR admits those facts for sentencing purposes).

[7] PSR ¶¶ 25, 29-32.

make enough money to cover its expenses.[8] And because his company repeatedly failed to pay its bills, it was hit with multiple tax liens, civil lawsuits, and judgments.[9] To stay one step ahead of his creditors—and to avoid scrutiny by government agencies that regulated the trucking industry—Fayne repeatedly changed the name and location of his trucking company.[10]

Fayne met his three codefendants when they all lived in Texas in 2014.[11] Fayne asked his codefendants to help him recruit people to invest in his trucking company, and they agreed.[12]

Together, Fayne and his codefendants fraudulently caused more than 20 people to invest over $5 million in Fayne's trucking company.[13] The defendants fraudulently led investors to believe that Fayne's trucking company would generate enormous profits when, as the defendants knew, that was not true.[14] The defendants misled investors by providing them with fraudulent documents to support

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[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at ¶ 29.

[12] *Id.* at ¶¶ 29-30.

[13] *Id.* at ¶¶ 28-30.

[14] *Id.*

their false claims.[15] To keep the fraud going, Fayne gave false information about his company to the Federal Motor Carrier Safety Administration and other agencies knowing that investors could review that information on the agencies' websites.[16]

Fayne and his codefendants told investors countless lies. They fraudulently overstated the number of trucks and drivers that Fayne's trucking company had.[17] They falsely told investors that the trucking company was about to obtain a multi-million-dollar contract with Walmart.[18] They falsely told investors that Walmart was ready to sign the contract as soon as Fayne's trucking company paid a particular bill—a bill that, in truth, did not exist.[19] They asked investors for money to pay the fictional bill and promised to repay the investors in full, with generous interest, when the contract was signed.[20] They would then return to the investors and ask for money to pay another nonexistent bill, which the defendants would falsely say had to be

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[15] *Id.*

[16] *Id.* at ¶ 31.

[17] *Id.* at ¶ 30.

[18] *Id.* at ¶ 32.

[19] *Id.*

[20] *Id.*

paid to prevent the deal from falling apart.[21] The investors would usually come up with the added money because they were afraid of losing everything they had invested until then.[22] This cycle repeated for years, until the investors either ran out of money or finally realized that they had been conned.[23]

Fayne and his codefendants falsely assured the investors that a senior Walmart executive named M.B. had invested a large amount of his money in Fayne's trucking company and was helping the defendants secure the contract.[24] The defendants sent investors phony text messages from someone posing as M.B. and someone posing as T.M., a nonexistent Walmart insider.[25] To keep the Walmart story going, Fayne disguised his voice and posed as M.B. and T.M. in phone conversations with investors.[26]

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[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* at ¶ 33-34.

[25] *Id.*

[26] *Id.*

M.B. is a real person and was a senior executive at Walmart.[27] But M.B. never spoke to any of the defendants.[28] And neither M.B. nor any other Walmart executive ever invested in Fayne's trucking company.[29]

To prevent investors from discovering the truth about the phony Walmart deal, the defendants told investors not to contact Walmart directly.[30] The defendants falsely claimed that secrecy was necessary because Walmart would cancel the contract if it found out that one of its executives had invested in Fayne's trucking company.[31]

The defendants falsely told investors that one of Fayne's bank accounts had millions of dollars in it, and they falsely claimed that the IRS had temporarily frozen the account.[32] To further that story, the defendants sent investors a fraudulently altered bank record that overstated the amount of money in the account.[33] The defendants then persuaded investors to pay more phony company expenses,

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[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.* at ¶ 37.

[33] *Id.*

promising that they would be repaid with interest as soon as the account was unfrozen.[34]

Fayne falsely told victim-investor J.R. that he would receive a return of $200,000 in return for investing $80,000 to buy two trucks.[35] J.R. wired the money to Fayne, who made weekly payments to J.R. for several weeks.[36] Fayne persuaded J.R. to invest another $27,600 in the company, and then cut off all contact with him.[37]

Fayne told victim-investor S.F. that investing $10,000 in his trucking company would earn a return of "a couple of thousand dollars."[38] Between November 2017 and January 2018 S.F. exhausted all of his resources and gave about $300,000 to Fayne, based in large part on the promised return on the promised Walmart contract.[39] S.F. eventually contacted Walmart and learned that Fayne had no contract and had given S.F. falsified documents on Walmart letterhead.[40]

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[34] *Id.*

[35] *Id.* at ¶ 61.

[36] *Id.*

[37] *Id.*

[38] *Id.* at ¶¶ 62-65.

[39] *Id.*

[40] *Id.*

S.F.'s girlfriend, L.W., a single mother, invested about $236,000 with Fayne with the hope of being able to buy a house for her children.[41] Fayne promised she would receive a return of $1 million on her investment.[42] Later, he asked L.W. to send her diamond earrings to him so that he could sell them to help fund the trucking company.[43] L.W. never received any money from Fayne and ended up bankrupt, homeless, and sleeping in her car with her two children, ages 4 and 6.[44]

To make Fayne's trucking company appear legitimate, and to lull investors into a false sense of security and delay or prevent their complaints to law enforcement or regulatory agencies, the defendants made payments to some investors that they falsely represented to be trucking company profits.[45]

But most investors never received any of their investment proceeds back.[46] Instead, the defendants used most of the investors' money to

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[41] *Id.* at ¶¶ 66-69.

[42] *Id.*

[43] *Id.*

[44] *Id.*; Doc. 246 at 23-25.

[45] PSR at ¶ 39.

[46] PSR ¶ 39.

pay their personal debts and expenses.[47] As the organizer and leader of the scheme, Fayne kept most of the fraud proceeds.[48] During the seven-year course of the conspiracy, Fayne transferred more than $5 million to the Choctaw Casino and Resort in Oklahoma to cover his personal gambling and entertainment expenses.[49]

In late 2018 or early 2019, Fayne moved to Georgia to evade law enforcement and regulatory officials.[50] Agents discovered the Ponzi scheme in 2020 while investigating Fayne's phony application for a PPP loan.[51]

2. The PPP Fraud

Congress created the Paycheck Protection Program in 2020 to help small businesses survive the pandemic by paying payroll costs and operating expenses.[52] United Community Bank was a lender in the program.[53]

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[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.* at ¶ 29.

[51] *Id.*

[52] https://home.treasury.gov/system/files/136/PPP%20-%20Overview.pdf

[53] *Id.* at ¶ 40.

On April 25, 2020, Fayne submitted a fraudulent application on behalf of his trucking company for a PPP loan from United Community Bank.[54] Fayne falsely represented on his application that his company had 107 employees and an average monthly payroll of about $1.5 million.[55] To support his claimed monthly payroll, Fayne gave the bank what he represented to be October, November, and December 2019 bank statements for his company's account at Arvest Bank.[56] But Fayne knew those bank statements were phony, because Arvest Bank had closed his company's account in September 2019.[57] Fayne requested and initially received a PPP loan of $3,725,500, which the bank later reduced to $2,045,800 based on the program's loan limits.[58]

Fayne used the PPP loan proceeds to pay his personal debts and expenses, including the following:

- $40,000 for past-due child support;
- $50,000 for restitution owed in a previous fraud case;
- $65,000 in cash withdrawals;
- $85,000 for custom-made jewelry;

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[54] *Id.*

[55] *Id.*

[56] *Id.* at ¶ 45.

[57] *Id.*

[58] *Id.* at ¶¶ 40-41.

- $136,000 down payment to lease a new Rolls-Royce Wraith coupe;
- $230,000 in Ponzi payments to investors; and
- $907,000 for startup expenses related to a new company called C.R. Wilkins Trucking, LLC, which was not incorporated until after Fayne applied for the PPP loan.[59]

When agents interviewed Fayne in early May 2020, he admitted applying for the PPP loan, but insisted that he used the loan proceeds to pay his company's payroll and business expenses.[60] He denied using any loan proceeds for personal purposes.[61] Agents seized about $503,000 in PPP loan proceeds from three of Fayne's bank accounts.[62] When agents searched his house in Dacula, Georgia on May 11, 2020, they found a bag that contained exactly $70,000 in cash.[63] Fayne said that was his "personal money."[64] Most of that cash was in $2,000 bundles that were wrapped with United Community Bank wrappers.[65]

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[59] *Id.* at ¶¶ 42, 59.

[60] *Id.* at ¶ 51.

[61] *Id.*

[62] *Id.* at ¶ 52.

[63] *Id.* at ¶¶ 53-54.

[64] *Id.* at ¶¶ 54-55.

[65] *Id.*

Agents also seized about $9,400 in cash from the pockets of the clothes Fayne was wearing.[66]

During the search agents asked Fayne about the three pieces of jewelry that he had bought recently for $85,000, including a custom-made diamond-studded Rolex watch.[67] He said that he could use PPP money to buy jewelry as "working capital."[68] Agents asked Fayne if he had used PPP funds to buy the Rolls-Royce in his garage.[69] He said, "kinda, sorta, not really."[70]

3. Fayne contacts a victim and his bond is revoked.

After his arrest in May 2020, the magistrate judge released Fayne on a bond.[71] One bond condition required him to avoid contact with any person who might be a victim or potential witness in the investigation or Fayne's prosecution.[72] In December 2020, the supervising probation officer petitioned to revoke Fayne's bond because he had

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[66] *Id.*

[67] *Id.* at ¶¶ 48, 55.

[68] *Id.* at ¶ 55.

[69] *Id.* at ¶ 58. The manufacturer's suggested retail price for a 2021 Wraith is $343,350. https://www.caranddriver.com/rolls-royce/wraith.

[70] PSR at ¶ 58.

[71] Docs. 8, 9.

[72] Doc. 9 at 2 (condition 8(j)); PSR ¶ 122.

contacted J.C., a victim-investor in the Ponzi scheme, and told her to drop a lawsuit she had filed against him.[73]

At the bond revocation hearing, Fayne testified falsely under oath by claiming that (1) J.C.'s lawsuit was unrelated to this case, (2) he did not know that J.C. was a potential witness against him, and (3) he had not seen J.C.'s civil complaint against him.[74] In truth, however, when Fayne contacted J.C., he knew that J.C. was a victim of the Ponzi scheme charged in the superseding indictment that was then pending against him.[75] The civil and criminal cases were related because J.C.'s civil complaint and the superseding indictment both involved claims against Fayne based on J.C.'s investment in Fayne's trucking company.[76] Moreover, while Fayne testified that he had never seen J.C.'s complaint, he had actually received personal service of the pleading six months earlier.[77] The magistrate judge revoked Fayne's bond.[78] In his plea agreement, Fayne agreed that his contact with J.C.

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[73] Doc. 125; PSR ¶ 122.

[74] PSR ¶ 122.

[75] Doc. 41.

[76] PSR ¶ 122.

[77] *Id.*

[78] *Id.*; Doc. 126.

merited a two-level enhancement for obstructing justice.[79] At sentencing, Fayne did not object to receiving that enhancement.[80]

4. Fayne's Plea Agreement

Fayne pleaded guilty to Counts 1 through 6.[81] Counts 1, 2, 3, and 4 charged wire fraud conspiracy and three substantive wire fraud counts based on the trucking company Ponzi scheme.[82] Counts 5 and 6 charged bank fraud and making false statements to a federally insured bank based on Fayne's fraudulent PPP loan application.[83] The parties made several joint recommendations in Fayne's plea agreement concerning the application of the Sentencing Guidelines:

- The base offense level was 7 under § 2B1.1(a)(1);
- The amount of loss resulting from the offenses of conviction was between $3.5 million and $9.5 million, which resulted in an 18-level upward adjustment under § 2B1.1(b)(1)(J);
- The offense involved 10 or more victims; and it resulted in substantial financial hardship to one or more victims, which

[79] Doc. 186-1 at ¶ 13(g).

[80] PSR ¶ 122; Doc. 246 at 7-11.

[81] Doc. 186-1 at ¶ 1.

[82] Doc. 96 at ¶¶ 1-7.

[83] *Id.* at ¶¶ 8-15.

resulted in a 2-level upward adjustment under § 2B1.1(b)(2)(A);

- Fayne relocated a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; and Fayne intentionally engaged in or caused the conspiracy use sophisticated means, which resulted in a 2-level upward adjustment under § 2B1.1(b)(10);
- Fayne derived more than $1 million in gross receipts from one or more financial institutions as a result of the offense, which resulted in a 2-level upward adjustment under § 2B1.1(b)(17)(A);
- Fayne was an organizer or leader in criminal activity that involved five or more people or was otherwise extensive, which resulted in a 4-level upward adjustment under § 3B1.1(a); and
- Fayne willfully obstructed or impeded justice, or attempted to do so, with respect to the investigation of the offense of conviction, which resulted in a 2-level upward adjustment under § 3C1.1.[84]

The United States agreed in the plea agreement to recommend that Fayne (1) receive a 3-level downward adjustment for acceptance of

[84] Doc. 186-1 at ¶ 13.

responsibility for his criminal conduct, and (2) be sentenced to prison for 151 months.[85] Both parties reserved the right "to inform the Court and the Probation Office of all facts and circumstances regarding the Defendant and this case," to respond to questions from the Court, and to respond to any misstatements of fact or law.[86]

5. Fayne's Presentence Investigation Report Calculations

The PSR agreed with and applied all the Guidelines enhancements and adjustments in the plea agreement, which resulted in a total offense level of 34.[87] The PSR listed the following five convictions in Fayne's criminal history::

- In August 2002 Fayne pleaded guilty in Pulaski County, Arkansas state court to one count of forgery and was sentenced to three years of probation. His probation was revoked in 2003 and again in 2005, and in the second revocation Fayne was sentenced to five years' imprisonment, to serve three years, with the balance of the sentence suspended;[88]

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[85] *Id.* at ¶¶ 15, 18.

[86] *Id.* at ¶ 16.

[87] *Id.* at ¶¶ 114-128.

[88] *Id.* at ¶ 131.

- On May 31, 2005, Fayne pleaded guilty to first-degree battery in Crittenden County, Arkansas state court and received a suspended sentence of 120 months' imprisonment;[89]
- Also on May 31, 2005, Fayne pleaded guilty in the same Crittenden County court to one count of forgery and received a suspended sentence of 60 months' imprisonment;[90]
- In October 2012 Fayne pleaded guilty in the Pulaski County state court to one count of domestic battering and received a suspended sentence of one year of imprisonment;[91] and
- In February 2019, Fayne was convicted in Desha County, Arkansas state court of two counts of defrauding secured creditors and received a suspended and probated sentence of 60 months.[92] The court ordered Fayne to pay restitution

[89] *Id.* at ¶ 130.

[90] *Id.* at ¶ 132;

[91] *Id.* at ¶ 133.

[92] *Id.* at ¶ 134.

of $120,000.[93] A petition to revoke Fayne's probation was filed in 2019 and remains pending.[94]

Fayne's convictions, and his commission of the Ponzi scheme and PPP fraud while he was on probation for Arkansas state convictions, placed him in Criminal History category IV.[95] With a total offense level of 34, Fayne's custodial guideline range was 210–262 months.[96] The statutory maximum penalty for each count of conviction was 30 years' imprisonment.[97]

6. Fayne's Sentencing Hearing

Fayne did not object to any of the findings of fact, conclusions of law, or guidelines calculations in the PSR.[98] He did not object to the district court's finding that he owed over $4.4 million in restitution.[99] He did not object to the finding that his guideline range was 210–262

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[93] *Id.*

[94] *Id.*

[95] *Id.* at ¶ 137.

[96] *Id.* at Part D ("Sentencing Options").

[97] *Id.*

[98] Doc. 246 at 3-11.

[99] *Id.* at 10.

months.[100] Fayne asked that the court vary downwardly by about 43% from that range and sentence him to 120 months.[101]

The PSR contained reports of how Fayne's fraud devasted 12 of his victims.[102] In estimating the losses that Fayne caused, the PSR noted that during the conspiracy, he transferred "*at least* $5 million" to a casino in Oklahoma to pay for his personal gambling and entertainment.[103] Fayne objected that there was no evidence that all the millions he spent at that casino came from his fraud schemes.[104] But he also recognized that in his plea agreement he agreed that his schemes caused losses of between $3.5 million and $9.5 million.[105] Neither Fayne nor his trucking company filed federal income tax returns in 2017, 2018, or 2019.[106]

In reviewing the PSR's guideline calculations, the district court noted that Fayne "was the leader of this extensive criminal activity."[107]

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[100] *Id.*

[101] Doc. 215.

[102] PSR ¶¶ 60-110.

[103] *Id.* at ¶ 111 (emphasis in original).

[104] *Id.*

[105] *Id.*

[106] *Id.* at ¶ 171.

[107] Doc. 246 at 6.

The court reviewed the PSR, the victim impact statements, and Fayne's sentencing memo before the hearing.[108] The court then asked the parties for their views on a reasonable sentence.[109]

The prosecutor said that as agreed in the plea agreement, he recommended that Fayne be sentenced to prison for 151 months:

> First of all, your Honor, let me say that the government honors its commitment in the plea agreement to recommend that the defendant be sentenced to a term of imprisonment of 151 months. That will be my recommendation. So nothing I'm going to say changes that.[110]

He spent the rest of his presentation arguing against Fayne's request for a 120-month sentence:

> However, there are some things that I want to bring to the Court's attention that I think should be highlighted, because the defendant is asking for a sentence that's even lower than that.[111]

The prosecutor first explained that the sentence the United States agreed to recommend, 151 months, was substantially below the low-

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[108] *Id.* at 11.

[109] *Id.*

[110] *Id.*

[111] *Id.* at 11-12.

end of Fayne's custodial guideline range.[112] The prosecutor explained that the government agreed to recommend that sentence in part because it was mistaken about Fayne's criminal history when the parties negotiated the plea agreement.[113] The prosecutor said that was "on us," and then explained why the Court should not go even lower than 151 months.[114] The prosecutor's brief presentation—it fills only seven transcript pages—included slides that showed the receipt for $85,000 in custom jewelry that Fayne bought with the PPP loan and a picture of the Rolls-Royce.[115] The AUSA pointed out that Fayne leased the Rolls-Royce by falsely claiming an annual income of $660,000.[116] The AUSA concluded that Fayne's use of PPP money to buy these luxuries was an "outrageous and wasteful use of taxpayer money."[117] The AUSA asked the court to consider this evidence "when the defendant is asking for an even lower sentence."[118] He noted that the guidelines did not account for the fact that Fayne

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[112] *Id.* at 12.

[113] *Id.* at 11-12.

[114] *Id.* at 12.

[115] *Id.* at 16-17.

[116] *Id.* at 17.

[117] *Id.*

[118] *Id.*

committed this fraud while the country was suffering through a pandemic, and he urged the court to impose a sentence no lower than 151 months.[119]

Defense counsel asked the court to disregard Fayne's guideline range because the guidelines "are not really based on empirical data."[120] Counsel argued that a sentence of 120 months would be significant for Fayne because he had spent little time incarcerated for his prior convictions.[121]

Two victims, L.W. and S.F., described to the court how Fayne had personally enticed and betrayed them, and left them bankrupt, homeless, and heartsick.[122] They both said that Fayne had never apologized to them before making his general apology at the sentencing hearing, and they urged the court to imprison him for as long as possible, as his record and crimes gave no reason to believe that Fayne would ever change.[123]

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[119] *Id.* at 17-18.

[120] *Id.* at 20.

[121] *Id.* at 21-22.

[122] *Id.* at 23-39.

[123] *Id.*

The district court sentenced Fayne to prison for 210 months—the bottom of his guideline range.[124] It ordered him to pay $4,465,865 restitution and to serve five years of supervised release.[125] The court explained the sentence by reviewing the § 3553(a) sentencing factors in detail.[126] As for the nature and circumstances of the offense, the district court found that Fayne's crimes "may be the worst case of fraud that I have ever seen since I have been on the bench, and I have seen some bad cases."[127] The court found it "unconscionable" that Fayne stole from so many individuals for seven years.[128]

The court found that the nature of Fayne's fraud was especially troubling because he stole from working-class citizens—"people who couldn't afford to lose this money"—simply to get more for himself: more cars, more jewelry, more indulgences.[129] Worse, Fayne did not stop defrauding victims until he was caught after seven years.[130] The court explained:

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[124] *Id.* at 39.

[125] *Id.* at 39-43.

[126] *Id.* at 43-47.

[127] *Id.* at 43.

[128] *Id.* at 44.

[129] *Id.*; *see* 18 U.S.C. § 3553(a)(1) ("the nature and circumstances of the offense and the history and characteristics of the defendant.")

[130] Doc. 246 at 44.

> So just continually during this period [Fayne kept] doing everything he could to make sure that the victims kept giving him money. Kept zeroing out their bank accounts. Sold their possessions so that Mr. Fayne could have more possessions.
>
> And that was just the Ponzi scheme. Then we go off into the PPP fraud . . . which was another complete fabrication.[131]

The district court found that Fayne's crimes required a guidelines sentence, in part because Fayne had a history of defrauding others and avoiding punishment for living off of what he took from "average citizens."[132] Given the long life of the fraud scheme and the harm Fayne caused to so many victims, "how can I not give him a guideline sentence?" the court asked.[133]

The court was "flabbergasted" by the prosecutor's recommendation of a variance below the guideline range.[134] The court stressed that "even criminal history or not," Fayne's fraud "may be the worst case of continual fraud that I have seen since I have been on the bench."[135]

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[131] *Id.* at 45.

[132] *Id.* at 46.

[133] *Id.*

[134] *Id.*

[135] *Id.* at 46-47.

The court found that a prison sentence of 210 months reflected the seriousness of Fayne's offenses, and it provided general deterrence and "deterrence for Mr. Fayne, who needs deterrence . . . ."[136] The court told the victims that it would have put Fayne in prison for the rest of his life if that would "rain money on all of you," but it would not, and so it found the sentence to be reasonable and fair.[137]

Fayne's only objection at sentencing was to the substantive reasonableness of the sentence.[138]

C. Standard of Review

When a defendant does not make a timely objection to an alleged breach of a plea agreement, this Court reviews his claim only for plain error. *United States v. Puckett*, 556 U.S. 129, 143 (2009); *United States v. De La Garza*, 516 F.3d 1266, 1269 (11th Cir. 2008).

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[136] *Id.* at 48-49; *see* 18 U.S.C. § 3553(a)(2)(A), (B), and (C) (the sentence should reflect the seriousness of the offense, promote respect for the law, and provide just punishment, afford adequate deterrence to criminal conduct, and protect the public from further crimes of the defendant).

[137] Doc. 246 at 50.

[138] *Id.*

SUMMARY OF THE ARGUMENT

As the plea agreement required, the prosecutor recommended that Fayne be sentenced to prison for 151 months. The prosecutor neither took any positions that were contrary to the plea agreement nor asked for a sentence of more than 151 months. The prosecutor did, however, urge the district court not to grant Fayne's request for a sentence of 120 months. But nothing in the plea agreement required the prosecutor to stand silent in response to Fayne's request for a lower sentence. To the contrary, the plea agreement authorized both parties to inform the court of "all facts and circumstances regarding" Fayne and this case. Moreover, Fayne cannot show that any purported error by the prosecutor was "plain," because he has not provided this Court with any controlling precedent that holds that a prosecutor breaches a plea agreement by arguing against a defendant's request for a sentence that is lower than what the prosecutor has agreed to recommend.

Even had the prosecutor breached the agreement, Fayne's sentence should be affirmed because he cannot show prejudice—that he would have received a more favorable sentence but for the prosecutor's remarks. The district court found that Fayne's frauds were among the worst it had ever seen, and the AUSA's recommendation of a variance below the guideline range left the court "flabbergasted." The court

rejected both parties' sentencing recommendations because it found that Fayne had "earned" a guideline sentence with his leadership in two fraud schemes and his preying on working-class victims like L.W. and S.F. Fayne cannot carry his burden of showing that any of his substantial rights were affected when there is no evidence in the record that the district court would have given him a lower sentence if the prosecutor had not opposed his request for 120 months.

ARGUMENT AND CITATIONS OF AUTHORITY

Fayne cannot carry his burden of showing plain error where (1) the prosecutor did not breach the plea agreement by arguing against the defense's request for a lower sentence, and (2) the district court rejected both parties' sentencing recommendations and imposed a low-end guidelines sentence.

The plea agreement required the United States to recommend that the district court sentence Fayne to prison for 151 months.[139] The AUSA did so at the beginning and end of his brief presentation, stressing that the United States stood by its commitment to make that recommendation.[140] Fayne's claim that the AUSA breached the agreement ignores that nothing in the plea agreement prohibited the prosecutor from responding to Fayne's request for an even lower sentence. The sentencing transcript shows that Fayne's claim to be the victim of a breached plea agreement has no merit.

Fayne's district court counsel, who negotiated the plea agreement and argued at the sentencing hearing, made no objection to the AUSA's arguments. Only now, on appeal, does Fayne raise this objection. Thus, this Court reviews his claim of a breached plea

[139] Doc. 186-1 at ¶ 18.

[140] Doc. 246 at 11-12, 17-18.

agreement only for plain error.[141] To show plain error, a defendant has the burden of showing that (1) there was error, (2) the error was obvious, and (3) the error caused him to suffer prejudice, "which in the ordinary case means he must demonstrate that it 'affected the outcome of the district court proceedings.'"[142] If the defendant carries his burden of showing all three of these elements, this Court may correct an unpreserved error if it seriously affected the fairness, integrity, or public reputation of judicial proceedings.[143] Meeting all four prongs of the plain-error test "is difficult, 'as it should be.'"[144]

The United States breaches a plea agreement when it fails to perform the promises on which the plea was based.[145] "Whether the government violated the agreement is judged according to the defendant's reasonable understanding at the time he entered his

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[141] *Puckett*, 556 U.S. at 143, *United States v. Pitts*, 794 F. App'x 868, 870-71 (11th Cir. 2019).

[142] *Puckett*, 556 U.S. at 135.

[143] *Puckett*, 556 U.S. at 135.

[144] *Id.* (citing and quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 83, n.9 (2004)); *see also United States v. Margarita-Garcia*, 906 F. 3d 1255, 1266 (11th Cir. 2018) ("The burden placed on the defendant under plain error is heavy.").

[145] *Santobello v. New York*, 404 U.S. 257, 262 (1971).

plea."[146] This Court applies an "objective standard" to determine whether a breach occurred, and will not read a plea agreement in a "hyper-technical" or "rigidly literal" manner.[147] Fayne cannot show any plain error here, where the prosecutor lived up to the plea agreement's promise by advocating that Fayne be sentenced to prison for 151 months, but argued against Fayne's request for an even lower sentence.[148]

A. Fayne cannot show that the prosecutor breached the plea agreement where the prosecutor consistently maintained the plea agreement's recommendation of 151 months while arguing against Fayne's request for an even lower sentence.

The prosecutor began and ended his remarks by recommending that the district court sentence Fayne to prison for 151 months.[149] The first thing he said was that the United States honored its commitment to recommend that Fayne be sentenced to 151 months.[150] The prosecutor then explained why he was recommending a downward variance from the guideline range of nearly five years,

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[146] *United States v. Hunter*, 835 F.3d 1320, 1324 (11th Cir. 2016).

[147] *Id.*

[148] Doc. 246 at 11-12, 17-18.

[149] *Id.* at 11-12, 17-18.

[150] *Id.* at 11-12.

and responded to Fayne's request for a greater downward variance.[151] The AUSA asked the court to consider his remarks "when the defendant is asking for an even lower sentence," and finished by saying, "[s]o we're standing by the 151-month recommendation, but we certainly are asking this Court not to go any lower than that."[152]

The United States never promised to be silent in the sentencing hearing, or to present only facts that would cast Fayne in a positive light.[153] Nothing in the plea agreement prohibited the AUSA from responding to Fayne's request for a sentence of 120 months. Nothing in the plea agreement prohibited the AUSA from responding to Fayne's request for an even greater downward variance than the prosecutor recommended.[154]

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[151] *Id.* at 12-17.

[152] *Id.* at 17-18.

[153] *Raulerson v. United States*, 901 F.2d 1009, 1012 (11th Cir. 1990).

[154] *United States v. Yedor*, 649 F. App'x 763, 765–66 (11th Cir. 2016) (where AUSA recommended a mid-range sentence, as agreed, the prosecutor did not breach the plea agreement by opposing the defendant's request for a lower sentence); *United States v. Anderson*, 641 F. App'x 937, 948 (11th Cir. 2016) (where the United States agreed to recommend a guidelines sentence, the AUSA did not breach plea agreement by responding to defendant's request for a below-guidelines sentence).

The AUSA never advocated for a sentence of more than 151 months, nor did he ever advocate any positions that contradicted any of the promises and recommendations in the plea agreement. The plea agreement did not prohibit the prosecutor from saying anything that he said in the hearing. Rather, the agreement authorized both the AUSA and Fayne to inform the Court "of all facts and circumstances regarding" Fayne and this case, which would include his criminal history and details of his two fraud schemes.[155] This reservation of the government's right to inform the district court of the facts of the case authorized the AUSA to introduce evidence that illustrated the fruits of Fayne's fraud schemes and argue against a sentence below 151 months.[156]

Fayne argues throughout his brief that nothing occurred in the case to "release" the prosecutor from his agreement to recommend a sentence of 151 months.[157] But the United States has never asserted

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[155] Doc. 186-1 at ¶ 16.

[156] *United States v. Horsfall*, 552 F.3d 1275, 1282-83 (11th Cir. 2008) (collecting cases); *United States Carrazana*, 921 F.2d 1557, 1569 (11th Cir. 1991); *see also United States v. Tilly*, 839 F. App'x 404, 407 (11th Cir. 2021); *Yedor*, 649 F. App'x at 765–66; *Anderson*, 641 F. App'x at 948; *United States v. Cochran*, 199 F. App'x 784, 790 (11th Cir. 2006).

[157] Def.'s brief at 19-29 (using the brief's pagination at the bottom center of each page).

that it was released from the agreement. To the contrary, the AUSA recommended a 151-month sentence at the start and conclusion of his argument at the sentencing hearing.[158]

Fayne argues that the AUSA undercut his sentence recommendation by showing the district court slides in a PowerPoint presentation that showed how Fayne spent some of his PPP fraud money: a picture of the receipt for $85,000 of custom jewelry, a picture of the Rolls Royce he leased with a down payment of $136,000, and a video of Fayne receiving the diamond-encrusted Rolex watch.[159] The day is long past when a lawyer's use of a slideshow in a hearing is "extraordinary."[160] The slides, moreover, simply showed what Fayne conceded he bought with the PPP loan.[161] None of Fayne's cases hold that an AUSA breaches a plea agreement by showing the sentencing court some pictures of the fruits of the defendant's fraud.[162]

Fayne also argues that the AUSA breached the plea agreement by saying that aspects of Fayne's criminal conduct were "not reflected in

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[158] Doc. 246 at 11-18.

[159] Doc. 246 at 16-17.

[160] Def.'s brief at 25.

[161] PSR at ¶ 59.

[162] Doc. 246 at 17-18.

the guidelines . . . ."[163] Fayne overlooks that immediately preceding that remark, the AUSA urged the court to consider his arguments and evidence "when the defendant is asking for an even lower sentence."[164] Then, immediately following the fragment about the guidelines, the AUSA recommended that Fayne be sentenced to 151 months—but no lower.[165] The AUSA's remark about the failure of the guidelines to reflect the circumstances of the pandemic was sandwiched within his argument against Fayne's request for an even lower sentence:

> So those are things I just wanted to bring to the Court's attention that I want the Court to keep in mind when the defendant is asking for an even lower sentence.
>
> This outrageous and wasteful use of taxpayer money is something that is—because it happened during this pandemic, that's not reflected in the guidelines, it is not reflected in the 151 months.
>
> So we're standing by the 151-month recommendation, but we certainly are asking this Court not to go any lower than that.[166]

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[163] *Id.* at 17.

[164] *Id.*

[165] *Id.*

[166] *Id.* at 17-18.

Thus, the transcript shows that when viewed in context, the AUSA's single remark about the circumstances of the pandemic cannot be construed as a rejection of the plea agreement. The prosecutor never "discounted" his recommendation of 151 months. Instead, the prosecutor's argument as a whole makes clear, from beginning to end, that the government maintained and advocated for its recommendation of 151 months.

Fayne asserts that the AUSA breached his duty to argue forcefully for a 151-month sentence. Fayne stretches the "lip service" cases of *United States v. Grandinetti* and *United States v. Taylor* far beyond their holdings.[167]

In *Grandinetti*, this Court held that the government breached its agreement to recommend that the district court impose concurrent sentences because at the sentencing hearing, the AUSA expressed his doubt about the "legality" and "propriety" of imposing concurrent

[167] *United States v. Grandinetti*, 564 F.2d 723, 726, 727 (5th Cir. 1977) (binding precedent under *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting as binding precedent all decisions of the former Fifth Circuit handed down before the close of business on September 30, 1981); *United States v. Taylor*, 77 F.3d 368 (11th Cir. 1996).

sentence and, in doing so, "was not only an unpersuasive advocate for the plea agreement, but, in effect, argued against it."[168]

Similarly, in *Taylor*, the government agreed to recommend a ten-year sentence in exchange for a guilty plea.[169] But at the sentencing hearing the AUSA persuaded the district court to include the defendant's prior drug smuggling as "relevant conduct," which resulted in a guideline range that exceeded ten years.[170] This Court held that this was only "lip service" to the plea agreement, and constituted a breach, because "[i]t was entirely reasonable for [the defendant] to understand the government's promise to recommend a ten-year sentence as including a promise not to advocate that the court adopt a position that would require a sentence longer than ten years."[171]

Grandinetti and *Taylor* dealt with situations in which the AUSA either (1) repudiated a specific sentence recommendation in the plea agreement, or (2) expressly urged the district court to calculate the defendant's guidelines to arrive at a range higher than the sentence recommended in the plea agreement. Here, in sharp contrast, the

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[168] 564 F.2d at 725, 727.

[169] 77 F.3d at 368-69.

[170] 77 F.3d at 371.

[171] *Id.* at 370.

AUSA argued specifically for the sentence recommended in the plea agreement.[172] The prosecutor's arguments complied with the plea agreement, and the government never agreed to remain silent in response to Fayne's request for a lower sentence.

Fayne cannot rely on *United States v. Johnson* because as in *Taylor*, the United States stipulated in the plea agreement that the defendant should be held responsible for trafficking 100 pounds of marijuana.[173] But at the sentencing the AUSA argued for a higher quantity that increased the defendant's guideline range.[174] The prosecutor was not responding to a defendant's request for a downward variance and a lesser sentence—as Fayne sought—but instead, he abandoned a fact that the parties had stipulated in the plea agreement.[175] Fayne cannot point to any stipulated facts in his plea agreement that the AUSA abandoned or undermined at the sentencing hearing.

The record in this case shows that the AUSA argued forcefully for his recommendation and against Fayne's request for an even lower sentence. Throughout his brief Fayne consistently overlooks that nothing in the spirit or letter of the plea agreement prohibited the

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[172] Doc. 246 at 11-12, 17-18.

[173] *United States v. Johnson*, 132 F.3d 628, 630 (11th Cir. 1998).

[174] *Id.*

[175] *Id.* at 631.

AUSA from responding to the defense's request for a sentence of 120 months.[176] And Fayne has not produced a single case from this Court that holds that a prosecutor breaches a plea agreement by responding to a defendant's request for a sentence that is lower than the government's recommendation.

Fayne states in his brief than when a plea agreement binds the United States to recommend a certain sentence, "it is almost always the case" that the defendant asks for a lower sentence.[177] Just as the prosecutor should have reasonably expected Fayne to request a sentence below 151 months, Fayne should have reasonably expected the AUSA to respond to his request for an even lower sentence.[178] The prosecutor did not breach Fayne's plea agreement.

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[176] *Yedor*, 649 F. App'x at 765-66; *Anderson*, 641 F. App'x at 948.

[177] Def.'s Br. at 28 n.3.

[178] *See United States v. Wilson*, 517 F. App'x 844, 846 (11th Cir. 2013) (where the government reserved the right to make recommendations "as to the quality and quantity of punishment," the defendant could not have reasonably assumed that the prosecutor would not advocate for a sentencing enhancement, if applicable.)

B. Fayne has not carried his burden of showing that any error that purportedly occurred at his sentencing was "plain."

Fayne concedes that he has the burden in this appeal of showing that the alleged breach of his plea agreement was plain error.[179] "Plain" is synonymous with "clear" or "obvious."[180] Thus, Fayne has the burden of showing that this Court's precedent or Supreme Court precedent established at the time of the sentencing hearing that the AUSA breached the plea agreement by responding to Fayne's request for a lower sentence.[181] "Before an error is subject to correction under the plain error rule, it must be plain under controlling precedent or in view of the unequivocally clear words of a statute or rule."[182] Fayne, however, does not provide any controlling authority holding that a prosecutor breaches a plea agreement where he argues against a defendant's request for a lower sentence.[183] Without such authority,

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[179] Def.'s brief at 14.

[180] *United States v. Olano*, 507 U.S. 725, 734 (1993) (internal citations omitted).

[181] *Id.*; *United States v. Innocent*, 977 F.3d 1077, 1081-82 (11th Cir. 2020).

[182] *United States v. Schmitz*, 634 F.3d 1247, 1270-71 (11th Cir. 2011) (internal citations omitted).

[183] This Court has held to the contrary at least twice in unpublished decisions. *Yedor*, 649 F. App'x at 765-66; *Anderson*, 641 F. App'x at 948.

Fayne cannot carry his burden of showing any purported breach of the plea agreement was plain.[184]

With nothing in the plea agreement text to support his argument, Fayne relies on the cases that prohibit the prosecutor from paying lip service by stipulating to one thing in the plea agreement (an offense level or a drug quantity), but then advocating for contrary positions at the sentencing hearing. As developed above, Fayne's reliance on *Grandinetti, Taylor*, and *Johnson* is mistaken, because in opposing Fayne's sentence request, the AUSA never came close to repudiating the sentence recommendation in the plea agreement, or urging the court to impose a sentence higher than 151 months. Nothing as regrettably extreme as *Grandinetti*, *Taylor*, or *Johnson* occurred in this case.

Fayne's reliance on cases from other circuits is misplaced because, as developed above, he must produce controlling precedent from this Court to establish plain error.[185] And his cases from other circuits are irrelevant because none of them deal with prosecutors who had to

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[184] *United States v. Lejarde-Rada*, 319 F.3d 1288, 1291 (11th Cir. 2003).

[185] *United States v. Bankston*, 945 F.3d 1316, 1318 (11th Cir. 2019); *Lejarde-Rada*, 319 F.3d at 1291.

respond to a defendant's request for a sentence below the prosecutor's recommendation.

A closer case that Fayne never addresses is this Court's decision in *United States v. Carrazana*.[186] There, the government promised in the plea agreement to make no recommendation as to the length of the defendant's sentence.[187] As in this case, the plea agreement authorized the prosecutor to inform the district court of all facts relevant to the sentencing process.[188] The defendant, who pleaded guilty to conspiring to traffic cocaine, asked for a sentence of 20 years.[189] In response to that request, the AUSA said that the defendant was more culpable than his codefendants because he "was the kingpin in this organization. It was clearly his organization."[190]

The defendant argued that the prosecutor's statement about the defendant's leadership in the conspiracy was "disparaging criticism" of his request and amounted to "an abbreviated but emphatic closing

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[186] 921 F.2d at 1557.

[187] *Id.*

[188] 921 F.2d at 1569

[189] *Id.*

[190] *Id.*

statement urging the court to find the defendant guilty of managing a continuing" drug trafficking conspiracy.[191]

This Court rejected the defendant's claim of breach because the government had reserved in the plea agreement the right to inform the court "of all facts relevant to the sentencing process."[192] This Court held that the "prosecutor's statement concerning [the defendant's] leading role in the offense was relevant to the sentencing process."[193] Consequently, the prosecutor's statement in response to the defendant's sentence request did not breach the plea agreement.[194]

Carrazana shows that the plea agreement did not bar the AUSA from responding to Fayne's sentence request, but authorized it. Everything the AUSA said in the sentencing hearing pertained to the facts and circumstances of Fayne's case and sentencing, and was

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[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] *Id.*; *see also Yedor*, 649 F. App'x at 765-66 (where AUSA recommended a mid-range sentence, as agreed, the prosecutor did not breach the plea agreement by opposing the defendant's request for a lower sentence); *Anderson*, 641 F. App'x at 948 (where the United States agreed to recommend a guidelines sentence, the AUSA did not breach plea agreement by responding to defendant's request for a below-guidelines sentence).

relevant to "the sentencing process" and the reasonableness of the recommendation of a sentence of 151 months.[195]

"An error is obvious when it flies in the face of either binding precedent or the explicit language of a statute or rule."[196] Fayne has not pointed this Court to any binding precedent that holds that any purported breach of his plea agreement was plain and, therefore, his sentence should be affirmed.[197]

C. Fayne cannot show plain error because he cannot show that the alleged breach of his plea agreement affected his sentence, particularly where the district court rejected both parties' recommendations and explained the sentence it chose to impose.

After reviewing Fayne's leadership in the two fraud schemes, the district court asked the parties, "how can I not give him a guideline sentence?"[198] After reviewing the facts of the case in the PSR, the district court was "flabbergasted" by the AUSA's recommendation that Fayne be sentenced to only 151 months.[199] The district court rejected the parties' requests for a downward variances and imposed a

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[195] *Carrazana*, 921 F.2d at 1569.

[196] *Bankston*, 945 F.3d at 1318 (internal quotation omitted).

[197] *Lejarde-Rada*, 319 F.3d at 1291.

[198] Doc. 246 at 46.

[199] *Id.*

sentence at the low end of Fayne's guideline range.[200] Thus, Fayne's appeal should also be denied because he cannot show that but for the AUSA's arguments he would have received a more favorable sentence.[201]

The third step of plain error review requires Fayne to show prejudice—that the error affected his substantial rights.[202] A defendant's burden to show prejudice in plain error analysis is "anything but easy."[203] Fayne cannot make this showing because the district court stated repeatedly that Fayne earned and deserved a guideline sentence, regardless of the parties' recommendations.[204] Instead of evidence of prejudice Fayne offers this Court only his hope that he might have received a lower sentence but for the prosecutor's alleged breach.[205]

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[200] *Id.*

[201] *Puckett*, 556 U.S. at 141-42 & n.4.

[202] Defendant's brief at 30-31; *see also De La Garza*, 516 F.3d at 1269.

[203] *United States v. Rodriguez*, 398 F.3d 1291, 1299-1300 (11th Cir. 2005).

[204] Doc. 246 at 43-50.

[205] *De La Garza*, 516 F.3d at 1270 (no prejudice despite breach where the district court imposed a low-end guideline sentence and defendant only speculates he would have received a lower sentence); *United States v. Pitts*, 794 F. App'x 868, 871 (11th Cir. 2019) (same).

The district court started the sentencing hearing by describing Fayne as "the leader of this extensive criminal activity."[206] The court said twice that the long life of Fayne's Ponzi scheme, combined with his stealing from the "average citizens" he drove into bankruptcy, was perhaps "the worst case of fraud that I have seen since I have been on the bench, and I have seen some bad cases."[207] The district court found Fayne's fraud to be "unconscionable" and inexcusable.[208] The district court said that Fayne's schemes amounted to "the most serious fraud that I have seen."[209]

The district court was particularly disturbed that Fayne enriched himself for seven years by "stealing from people that couldn't afford to lose this money and making himself rich" while the victims "kept zeroing out their bank accounts."[210] The PSR set out the financially and emotionally devastating experiences of 12 victims.[211] Two victims, L.W. and S.F., spoke at the sentencing hearing and described how

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[206] Doc. 246 at 6.

[207] *Id.* at 43; *see also* 46-47.

[208] Id. at 44.

[209] *Id.* at 48.

[210] *Id.* at 44-45.

[211] PSR at ¶¶ 60-110.

Fayne's Ponzi scheme had left them bankrupt and homeless.[212] Their statements were compelling, and the district court referred to the victims' suffering throughout its explanation of its sentence.[213] Fayne "just kept doing it and doing it," the court said, "[a]nd the lies just kept on" in the seven-year Ponzi scheme and then in the PPP loan fraud.[214] Fayne never had a legitimate job, the court found, but lived "off the proceeds that he took from average citizens."[215]

The district court then turned to Fayne's history of fraudulent crimes and asked, "Was this the first time that Mr. Fayne has committed fraud? No, it isn't."[216] The difference with this case, the court said, was that Fayne "has never had to pay like he's going to have to pay now, that's for sure, but he graduated to the big leagues with this one."[217]

Given that Fayne had "graduated to the big leagues" for sentencing, the district court was "flabbergasted" by the

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[212] Doc. 246 at 23-39.

[213] *Id.* at 11, 31, 44 (Fayne stole "from people that couldn't afford to lose this money . . . ."), 46.

[214] *Id.*

[215] *Id.*

[216] *Id.* at 46.

[217] *Id.*

recommendation in the plea agreement that Fayne be sentenced with a downward variance.[218] "When you think about the amount and the time that this went on, how can I not give him a guidelines sentence?" the court asked.[219]

The court dismissed the prosecutor's admitted confusion about Fayne's criminal history, saying "even criminal history or not, this, as I said, may be the worst case of continual fraud that I have seen since I have been on the bench."[220]

The district court told Fayne that he had earned a guidelines sentence:

> You earned this sentence by what you did to these people and what you did with respect to the PPP loan.[221]

The court noted that the sentence was comparable to sentences it had given in comparable fraud cases, and it deterred Fayne from future criminal conduct, protected the public, and was sufficient but not greater than necessary to satisfy the goals of § 3553(a).[222]

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[218] *Id.*

[219] *Id.*

[220] *Id.* at 46-47.

[221] *Id.* at 47.

[222] *Id.* at 48-50.

Faced with the district court's finding that Fayne had graduated to the big leagues of fraud and earned a guideline sentence, Fayne seeks a new sentencing by speculating that had the prosecutor spoken more enthusiastically for a sentence of 151 months, "it is likely" that the court would have imposed a sentence "of at least somewhat lower than" the bottom of the guideline range.[223] Based on hope but devoid of any support in the record, Fayne speculates that the district court "may have" imposed a sentence somewhere between 151 and 210 months.[224] This speculation cannot stand in light of the district court's repeated statements that Fayne had earned a guideline sentence for perpetrating one of the worst continual frauds the court had seen.[225] This is the same type of speculation this Court rejected in *De La Garza*[226] and *Pitts*,[227] where the district court's statements in the sentencing hearing established that the court intended to impose a guideline sentence regardless of the parties' recommendations.[228]

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[223] Def.'s brief at 31.

[224] *Id.*

[225] Doc. 246 at 43-50.

[226] 516 F.3d at 1270.

[227] 794 F. App'x at 871.

[228] *See also United States v. Williams*, 438 F. App'x 828, 830 (11th Cir. 2011) (defendant cannot show prejudice from a breached plea agreement based on an "unclear" possibility of a lower sentence);

The district court said repeatedly in this case that Fayne deserved a guideline sentence and, therefore, this Court's precedent establishes that Fayne cannot carry his burden of showing that he suffered any prejudice from the alleged breach of his plea agreement.

United States v. Lynn, 385 F. App'x 962, 965 (11th Cir. 2010) (defendant cannot show prejudice from prosecutor's failure to recommend a low-end sentence when the district court stated that the defendant deserved a high-end sentence).

CONCLUSION

The plea agreement did not bar the prosecutor from responding to Fayne's request for a lower sentence, and the prosecutor did not breach the plea agreement. Nor would any purported breach have been plain, considering this Court's previous decisions permitting prosecutors to respond to defendants' requests for lower sentences. Additionally, Fayne cannot show that he suffered any prejudice from any alleged breach because the district court expressly rejected the parties' sentencing recommendations and found that Fayne had earned a guideline sentence with his leadership in two fraud schemes that destroyed the lives of his victims. There was no plain error and, therefore, the district court's sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 word processing software in 14-point Goudy Old Style.

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