

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
BROWARD DIVISION**

CASE NO. 21-60029-CR-WPD

UNITED STATES OF AMERICA

vs.

ANDRE CLARK,

Defendant.

/

GOVERNMENT’S SENTENCING MEMORANDUM¹

The United States of America, by and through its undersigned counsel, hereby submits this Sentencing Memorandum as to Defendant Andre Clark (the “Defendant”). The Defendant is presently set for sentencing before the Court on July 30, 2021 for his conviction by guilty plea to one count of conspiracy to commit wire fraud, in violation of Title 18, United State Code, Section 371. The offense stems from the Defendant’s application for a fraudulent Paycheck Protection Program (“PPP”) loan of \$488,565 on behalf of his company, Top Choice, LLC (“Top Choice”), and \$6,774,999 in fraudulent loans sought through other conspirators that the Defendant referred to the scheme, for a total intended loss of \$7,263,564.

For the reasons set forth herein, the United States respectfully recommends that the Court sentence the Defendant to a term of imprisonment of 41 months, to be followed by three years of supervised release.² A sentence of 41 months’ imprisonment represents the bottom of the

¹ This Sentencing Memorandum also addresses the Defendant’s Objections to the PSR (ECF No. 41).

² The United States is also seeking forfeiture of \$488,565 and restitution of \$2,975,086. The Defendant has also agreed to pay a special assessment of \$100 (ECF No. 38 ¶ 5).

applicable range of the United States Sentencing Guidelines (the “Guidelines”) as calculated by the United States Probation Office (“Probation”) in the draft of the Presentence Investigation Report, disclosed June 25, 2021 (ECF No. 40) (the “PSR”), to which the government has no objection. Furthermore, the sentence recommended herein by the United States will provide punishment for the offense of conviction that is sufficient, but not greater than necessary, to accomplish the purposes of sentencing set forth in 18 U.S.C. § 3553(a).

I. FACTUAL BACKGROUND

In early 2020, as the COVID-19 pandemic spread across the country and disrupted everyday life, causing illness, death and economic distress, the U.S. government assembled relief programs to help those whose livelihoods were jeopardized. One of those programs was the PPP. Against this backdrop, the Defendant and his co-conspirators participated in a scheme to obtain by fraud millions of dollars in forgivable loans through the PPP, and have done so by conspiring with a person now cooperating with the investigation (“Individual 1”) and others. The Defendant obtained a fraudulent PPP loan for his own company, Top Choice, with James Stote providing falsified documents and submitting the application on the Defendant’s behalf in exchange for a kickback from the loan proceeds. To inflate the size of these PPP loans, and the corresponding kickbacks, the conspirators relied on a variety of false statements, including by submitting falsified bank statements and payroll tax forms.

A. The CARES Act

In March 2020, in response to the many challenges presented by the pandemic, Congress passed the CARES ACT, Pub. L. 116-136, which created the PPP. The PPP authorized \$349 billion in forgivable loans to small businesses to be used for payroll, mortgage interest, rent/lease

payments, or utilities. In April 2020, Congress authorized an additional \$310 billion for PPP funding. These funds were designed to address the unprecedented crisis facing Americans—especially business owners whose livelihoods were threatened by the public health emergency. PPP funds were designed as a lifeline.

The program was designed to provide funds quickly and easily to qualifying individuals. PPP loans were not dispensed through any government bureaucracy; funds were distributed by banks who had existing relationships with many of the people in need. To apply, individuals submitted an application to a participating financial institution along with supporting documentation as to the business's payroll expenses. The supporting documentation requirement was minimal and could be satisfied with one year's worth of the company's tax records. If a PPP loan application was approved, the participating financial institution funded the PPP loan using its own monies, which were 100% guaranteed by the Small Business Administration ("SBA").

B. Overview of the Defendant's Conduct

A more detailed recitation of the facts relating to the scheme are detailed in the Information (ECF No. 21), the Defendant's factual proffer statement (ECF No. 39), and the PSR (ECF No. 40).

Beginning in May 2020 through in or around at least June 2020, the Defendant conspired with James Stote and others to obtain by fraud a PPP loan on behalf of Top Choice, a Florida limited liability company that the Defendant founded.

In furtherance of the conspiracy, the Defendant caused the submission of a PPP loan application on behalf of Top Choice that the Defendant knew contained materially false and fraudulent representations, including both the number of employees that Top Choice had during each quarter of 2019 and the amount of wages paid by Top Choice during each quarter of 2019.

Specifically, on May 17, 2020, at the Defendant's direction, Stote electronically submitted a PPP loan application form on behalf of Top Choice, which falsely represented that Top Choice had 25 employees and an average monthly payroll of \$195,426. In addition, the Defendant visited a bank and opened accounts in the name of Top Choice on May 19, 2020. He presented a falsified document to the bank and misrepresented to the bank the number of employees and gross annual revenue for Top Choice.

Bank Processor 1 approved and funded a PPP loan for Top Choice in the amount of \$488,565. On May 26, 2020, the Top Choice bank accounts were frozen, so the Defendant was never able to access the loan funds.

In addition to obtaining a fraudulent PPP loan for his own company, the Defendant recruited a number of friends and associates, whom he referred to Stote for the purpose of submitting additional fraudulent PPP loan applications, sometimes in exchange for kickback payments. The Defendant is directly responsible for approximately 15 fraudulent loans seeking approximately \$6,774,999 that came from his referrals. The Defendant is therefore responsible for a total loss of \$7,263,564, which includes the \$488,565 Top Choice loan and the \$6,774,999 in fraudulent loans obtained through his referrals.

II. PROCEDURAL HISTORY

On August 3, 2020, the Defendant was charged by complaint with conspiracy to commit wire fraud and bank fraud, in violation of Title 18, United States Code, Section 1349, wire fraud, in violation of Title 18, United States Code, Section 1343, and bank fraud, in violation of Title 18, United States Code, Section 1344 (ECF No. 1). Following waiver of indictment, on January 25, 2021, the Defendant was charged in an Information with conspiracy to commit wire fraud, in

violation of Title 18, United States Code, Section 371 (ECF No. 21). The Defendant pleaded guilty before this Court to the Information pursuant to a written plea agreement on May 14, 2021 (ECF No. 36). Sentencing is presently scheduled for July 30, 2021.

III. SENTENCING GUIDELINES CALCULATIONS

As explained below, the United States submits that the Defendant's Total Offense Level is 21. At Criminal History Category II, this produces an advisory Guidelines range of 41-51 months of imprisonment pursuant to the Sentencing Table in Chapter 5, Part A of the Guidelines.

A. The PSR Correctly Computes the Offense Level

As set forth in the PSR, Probation computes the Total Offense Level at 21 (PSR ¶¶ 27-36). The United States concurs with the Offense Level computation in the PSR, which is as follows:

Base Offense Level, § 2B1.1(a)(2)	6
Loss greater than \$3,500,000 but less than \$9,500,000, § 2B1.1(b)(1)(J)	18
Acceptance of Responsibility and Timely Notification § 3E1.1(a) and (b)	(3)
Total Offense Level	21

The Defendant does not dispute that these Guidelines provisions are applicable to him. The only component of the Guidelines computation in the PSR to which the Defendant objects is that Probation does not recommend a minimal role adjustment under Section 3B1.2. In his written objections to the PSR, filed July 8, 2021 (ECF No. 41), the Defendant argues that he is entitled to 4-level reduction pursuant to Section 3B1.2(a) or, in the alternative, a 2-level reduction pursuant to Section 3B1.2(b). As explained below, the Defendant is not entitled to any mitigating role adjustment.

B. Defendant is Not Entitled to a Mitigating Role Adjustment.

The Defendant's role in the offense to which he has accepted responsibility and pleaded guilty does not warrant any mitigating role adjustment. The Defendant is being sentenced for participating in a conspiracy to defraud the PPP program in which the Defendant caused the submission of a fraudulent PPP loan application for his own company and in which the Defendant referred multiple other conspirators to the scheme in order to receive kickbacks on their fraudulent loans. His role in that offense is not minor. Rather, the Defendant was an important participant in the relevant conduct for which he is being held accountable. The Defendant was the one who sought the proceeds of the fraudulent loan for his company. While Stote and others working with him orchestrated and carried out the scheme, the Defendant ultimately is the person who said yes to the fraud that his co-conspirators were offering. And the Defendant is the one who took several important further steps by recruiting other conspirators to the scheme in the expectation of receiving kickbacks on their fraudulent loans. Without the Defendant and others like him bringing additional conspirators to the table in rapid succession, this scheme could not have ballooned into over 90 fraudulent applications and over \$34 million in loans in just a few weeks' time. Put differently, but for the Defendant's role in the offense, the Defendant's fraudulent PPP loan would not have existed, and it is highly unlikely that any of the fraudulent loans that he referred to the scheme would have existed. It is those loans for which he is being held responsible, and not the larger total of more than approximately \$34 million in intended loss based on the entire scheme.

The Defendant argues that his role should be viewed relative to the overall conspiracy and the roles of the supervisors of the scheme (ECF No. 41). This is legally incorrect for at least two reasons. First, the Defendant is not being held responsible for the entire loss resulting from the

overall conspiracy. This conspiracy involved over 90 fraudulent PPP loans and caused an intended loss in the tens of millions of dollars. However, the Defendant is being held accountable only for the role that he played as to his own loan and the fraudulent loans that he specifically referred to the scheme and the resulting loss he directly caused therefrom. As the Eleventh Circuit has explained, a defendant “cannot show that she is entitled to a role adjustment by pointing to the broader scheme for which she was not held accountable. We only consider that she played an essential role in the relevant conduct that was attributed to her.” *United States v. Milton-Browner*, 496 F. App’x 979, 981 (11th Cir. 2012). Second, the fact that the Defendant had a less significant role than the other participants does not entitle him to a mitigating role adjustment. In other words, the fact that the Defendant did not have an aggravating role in the offense is not grounds for a mitigating role. *See id.* at 982 (“the fact that [defendant] had a less significant role than the other participants does not entitle her to a role adjustment.”) Based on the facts of this case, Probation correctly determined that no upward or downward role adjustment is warranted for the Defendant.

Finally, as the Guidelines note, determining whether to apply a mitigating role is heavily dependent upon the facts of the particular case, and the Court should consider a list of non-exhaustive factors set forth in Application Note 3(C) to § 3B1.2. Several of those factors weigh *against* a reduction for a mitigating role, most notably that (1) the Defendant directly performed several acts in the criminal activity, including opening bank accounts for the purpose of obtaining the fraudulent loan for his own company and making misrepresentations to the bank to achieve that purpose; and (2) communicated frequently with Stote in order to facilitate several additional fraudulent loan applications.

In sum, there is no legal or factual basis to apply a mitigating role adjustment under §

3B1.2. Accordingly, the Court should adopt the Guidelines computation recommended by United States and Probation as set forth in the PSR.

IV. CONSIDERATION OF SENTENCING FACTORS UNDER 18 U.S.C. § 3553(A)

Title 18, United States Code, Section 3553(a), enumerates several factors that the Court shall consider in sentencing a defendant. As addressed in turn below, the 3553(a) factors relevant to the Defendant support the sentence recommended by the United States.

A. Nature and Circumstances of the Offense

This was a serious offense. In 2020, as the COVID-19 pandemic spread across the country causing illness, death and economic distress, the government created PPP loans to help small business owners and their employees whose livelihoods were jeopardized. The Defendant took advantage of the program by submitting a false application claiming to have employees and payroll that did not exist. His application was supported by false tax forms and a fictitious bank statement. So too were the multiple fraudulent loan applications that were submitted after the Defendant referred other conspirators to the scheme. The Defendant's willful participation in this serious criminal conduct warrants a sentence of imprisonment within the advisory Guidelines range. The United States' recommended sentence of 41 months' imprisonment, which is at the bottom of the Guidelines range, is sufficient but not greater than necessary to accomplish this goal.

B. History and Characteristics of the Defendant

The Defendant is a 48-year-old man who was the president and registered agent of Top Choice (ECF No. 40 (PSR) ¶ 16). He has an extensive criminal history that began with a grand larceny conviction when he just 17 years' old. Since then, the Defendant has had convictions for: (1) assault in the second degree with intent to cause serious physical injury (in 1991); (2) criminal

possession of a weapon (in 1994); (3) criminal possession of a controlled substance (in 1997); (4) uttering forged currency and possession of firearms (in 2001); (5) possession with intent to distribute (in 2008); and (6) trafficking in heroin (in 2009), for which the Defendant was sentenced to 25-39 months' imprisonment. (*Id.* ¶¶ 38-44). Despite this significant criminal history, the Defendant has (because of the dates of his convictions and the lengths of the sentences he received) only three criminal history points and is thus a criminal history category II. But what is clear is that the Defendant has been continuously committing criminal acts throughout his adult life.

The Defendant agreed to plead guilty before being indicted, and thus deserves credit for accepting responsibility early and saving the government considerable resources in preparing for trial. The sentence recommended by the United States reflects such acceptance because it is within the Guidelines produced by the Offense Level that has been adjusted downward by three levels for acceptance of responsibility pursuant to Section 3E1.1(a) and (b). The Defendant's prior criminal history demonstrates that his conduct is not an aberration.

C. Need for the Sentence to Afford Adequate Deterrence to Criminal Conduct and Protect the Public from Further Crimes of the Defendant

The sentence in this case should address a need for both general and specific deterrence. As to general deterrence, the Eleventh Circuit has explicitly stated that “general deterrence is an important factor in white-collar cases, where the motivation is greed.” *United States v. Hayes*, 762 F.3d 1300, 1308 (11th Cir. 2014). As explained above, this case was motivated by greed at a time when millions of Americans were suffering from the economic impact of a global pandemic. As the pandemic spread, so too did fraud related to the PPP program and other programs designed to provide critical economic assistance—especially in the Southern District of Florida. The government's recommended sentence of imprisonment in this case is thus appropriate to provide

both specific and general deterrence. Such a sentence will send a clear message to the Defendant and other offenders that there are serious consequences for defrauding government pandemic relief programs. Indeed, as the pandemic continues to impact small businesses, the PPP loan program remains ongoing. Actors like the Defendant who seek to defraud these programs not only drain the program of limited funding, they make it more difficult for administrators of government and other relief programs to get aid to individuals that qualify for and need it. The Defendant's sentence will serve as a warning and deterrent to others inclined to exploit pandemic relief programs.

Furthermore, a sentence within the Guidelines range is sufficient to protect the public from future crimes of this Defendant. As stated above, the Defendant has an extensive criminal history, which includes a drug trafficking offense for which he received a sentence of 25-39 months. As his involvement in the fraud scheme in this case indicates, he has yet to be deterred from committing criminal acts. The government thus believes there is a real risk of recidivism, and a significant sentence within the advisory Guidelines range will provide specific deterrence to the Defendant.

D. Need for the Sentence to Avoid Unwarranted Sentencing Disparities

The sentence recommended by the United States will not create an unwarranted sentencing disparity. There are two relevant points of comparison to avoid unwarranted sentencing disparities: sentences associated with others convicted of PPP related fraud, and the sentences of co-conspirators in this case. While a relatively small number of defendants have been sentenced to date for offenses related to PPP fraud, judges of this Court and of other Districts have imposed sentences with significant terms of imprisonment. *See, e.g., United States v. Ioannis Kralievits*, Case No. 21-20157-CR-Altonaga (S.D. Fla. June 30, 2021) (sentencing cooperating defendant to

19-month term of imprisonment (following reduction pursuant to 5K1.1) in connection with two fraudulent PPP loans totaling approximately \$824,750); *United States v. David Hines*, Case No. 21-20011-CR-Cooke (S.D. Fla. May 12, 2021) (imposing 78-month term of imprisonment for defendant responsible for a loss of \$3.9 million resulting from multiple fraudulent PPP loans); *United States v. Ganell Tubbs*, 20-00193-CR-Miller (E.D. Ark.) (imposing 41-month term of imprisonment for defendant responsible for loss of \$1.9 million resulting from two fraudulent PPP loans).

The Defendant will be the third of the conspirators in this scheme to be sentenced. On July 13, 2021, the court sentenced co-conspirator Tiara Walker to one year and one day, three years of supervised release, and ordered her to pay restitution and forfeiture. *United States v. Walker*, Case No. 20-cr-60159-RAR (S.D. Fla., July 13, 2021). On July 27, 2021, co-conspirator Tonye Johnson is scheduled to be sentenced. *United States v. Johnson*, Case No. 21-CR-60017-RKA (S.D. Fla.). Both defendants Walker and Johnson only sought fraudulent PPP loans for their own companies and did not refer others to the scheme. Both defendants Walker and Johnson had no criminal history points. Defendant Clark, by contrast, sought his own fraudulent PPP loan and also referred multiple other conspirators to the scheme, and he did so with a significant criminal history that establishes his conduct was not a one-time mistake.

The intended loss amount of \$7,263,564 attributable to the Defendant is an important measure of his relative culpability as compared to co-conspirators in a scheme involving over 90 fraudulent loan applications and over \$34 million in intended losses. That is, the co-conspirators who led and organized the scheme and were involved in preparing or submitting even more fraudulent loan applications will be responsible for a greater intended loss amounts, and a

correspondingly higher advisory Guidelines range under Section 2B1.1. A sentence of 41 months for this Defendant, who is being held responsible only for the loss associated with his fraudulent loan and those he directly referred to the scheme, will provide a consistent framework for future sentences of co-conspirators in this conspiracy whose Guidelines correlate to the losses for which they are directly responsible.

V. RESTITUTION & FORFEITURE

Restitution is mandatory in this case pursuant to 18 U.S.C. § 3663A(a)(1). As set forth in the Plea Agreement (ECF No. 38 ¶ 17), the United States and the Defendant have agreed that the Defendant owes restitution. The United States is seeking restitution in the amount of \$2,975,086. Restitution is owed joint and severally with the Defendant's co-conspirators charged in at least the following related case: 20-4215-MJ-Greenberg (N.D. Oh.).

Furthermore, pursuant to the Plea Agreement, the Defendant agreed to forfeiture. The United States is seeking a money judgment in the amount of \$488,565.

* * *

CONCLUSION

For the forgoing reasons, the United States respectfully recommends that the Court sentence the Defendant to a term of imprisonment of forty-one (41) months, to be followed by a term of supervised release of three (3) years. The United States also requests that the Court order restitution, forfeiture, and a special assessment, consistent with the Plea Agreement (ECF No. 38) and the points and authorities discussed herein.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 22, 2021, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

/s/ David S. Turken
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