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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 18 CR 333(JGK)

AKSHAY AIYER,

Defendant.

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New York, N.Y.
September 17, 2020
11:30 a.m.

Before:

HON. JOHN G. KOELTL,

District Judge

APPEARANCES

AUDREY STRAUSS
Acting United States Attorney for the
Southern District of New York
KEVIN HART
Assistant United States Attorney

Willkie Farr & Gallagher, LLP
Attorneys for Defendant Ayier
BY: MARTIN B. KLOTZ
JOSEPH T. BAIO
JOCELYN M. SHER

Also present: Alexandra Kislvitz

(Case called; videoconference)

THE DEPUTY CLERK: Will all parties please state who never for the record.

MR. HART: Kevin Hart representing the United States, your Honor.

MR. KLOTZ: Martin Klotz representing Mr. Aiyer, your Honor. I am here with Joseph Baio and Jocelyn Sher of my office, Mr. Aiyer, the defendant, and Alex Kislvitz.

THE COURT: The court reporter is on the phone; is that correct?

COURT REPORTER: I am, your Honor.

THE COURT: A couple of preliminary matters. We're doing this sentence by Skype video today because there is a national emergency caused by the pandemic. Our chief judge has also declared an emergency. The defendant has consented to doing this proceeding by videoconference. It is necessary to hold the proceeding remotely rather than in person because holding the proceeding in person would seriously jeopardize public health and safety by the presence of so many people in the courtroom.

This proceeding cannot be further delayed without serious harm to the interests of justice because the defendant is entitled to a speedy sentence, which has already been delayed. I offered to put the sentence over further to a time where everyone could be present in court and where we could

make the necessary arrangements, for example, for an additional courtroom to accommodate people; but it was the defendant's preference to go forward today understandably and the defendant is entitled to a speedy sentence. So we're proceeding by videoconference today.

One other preliminary matter. One of my new clerks who started in August worked at a law firm before starting here and had contact with some of the documents related to this case while he was in private practice. Therefore, he has not worked on the sentence at all. Although, he may have been involved in setting up this Skype conference. Nothing about that affects anything that I do in the case. I always bring these issues to the parties' attention and so I have.

I have received the presentence report prepared February 13, 2020, revised March 17, 2020, together with the sentencing recommendation and the addendum. I have received the defendant's sentencing memo dated April 7th, 2020, and supporting documents. I received the government's sentencing memo dated April 17, 2020, and the attachments. I have received the defendant's response dated May 5, 2020. I have received the defense letter dated August 28, 2020, and the government's letter dated September 11th, 2020, which was an amendment of a previous letter.

Let me begin with the calculation of the sentencing guideline range.

By the way, I should pause at the outset. Does anyone want me to make any other findings with respect to sentence or comment on anything that I said so far.

MR. HART: No comment from the government, your Honor.

MR. KLOTZ: No, your Honor.

THE COURT: Okay. Let me begin with the calculation of the sentencing guideline range based on the parties' submissions. I think that that would be the most efficient and fair way to deal with the issues so that I can explain to you based upon all of the papers submitted how I have calculated the guidelines sentencing range. I would then call on each of the parties to find out if there are any other objections to the presentence report and anything that the lawyers and the defendant wants to say with respect to sentence, including anything that they would like to say with respect to a discussion of the 3553(a) factors.

Let me begin with the calculation of the sentencing guidelines range based upon the submissions of the parties. First, there is an error in the presentence report as the government points out. Under the guidelines, the fine range is $20,000 to $1 million and so I will make that change on page 24 of the presentence report.

Do the parties agree with that?

MR. HART: The government agrees, your Honor.

MR. KLOTZ: Yes, your Honor.

THE COURT: Now, the presentence report calculates the total offense level as 21, the criminal history category as one, and a guidelines sentencing range of 37 to 46 months. The Probation Office reached this calculation by reaching Section 2R1.1 of the guidelines, the guideline for bid-rigging, price-fixing or market allocation agreements among competitors, which has a base level of 12. The Probation Office added eight levels under 2R1.1(b)(2)(D) based on the volume of commerce attributable to the defendant being more than $100 million. The Probation Office also added one level under 2R1.(b)(1) because the conduct involved participation in an agreement to submit noncompetitive bids. The Probation Office recommends a downward variance to 24 months' imprisonment.

The defendant raises three objections to the guidelines calculations. First, the defendant contends that there is no evidence of any volume of commerce attributable to the defendant because there is no evidence that the alleged conspiracy actually affected the price of any of the transactions at issue and therefore the 12-level enhancement should be eliminated. Moreover, the defendant argues that if the enhancement were applied, the defendant should be entitled to a downward departure under Section 5K2.0 of the guidelines because the application of the enhancement in this case would be a circumstance not adequately taken into account by the drafters of the guidelines. Second, the defendant contends

that there is no evidence that the defendant participated in an agreement to submit noncompetitive bids. Third, the defendant contends that he is entitled to a two-level decrease in the offense level for a minor-role adjustment under Section 3B1.2(b) of the guidelines.

I will take the objections in order. First, with respect to volume of commerce adjustment, I note that the objection is somewhat academic. The Probation Office recommended a downward variance to 24 months. Based on all of the submissions and a consideration of all of the 3553(a) factors, I would not impose a sentence in excess of 24 months. I am not saying I would even impose a sentence of 24 months. I am saying that I would not impose a sentence in excess of 24 months.

The lowest offense level that includes 24 months is offense level 17. All other calculations being the same, that would mean an enhancement for commerce of four rather than eight levels. A four-level enhancement applies if the volume of commerce attributable to the defendant was more than $10 million. There is no reasonable interpretation of the evidence in this case that does not include a volume of commerce attributable to the defendant in excess of $10 million. Indeed, individual episodes that were plainly in furtherance of the conspiracy included volumes of commerce done by the defendant in excess of $10 million; but the Court has an

obligation to calculate the guidelines as a starting point in the sentencing process and therefore the Court will do so.

The Court begins with the guidelines. The guideline provides that the various enhancement levels apply if "The volume of commerce attributable to the defendant was more" than the various benchmarks. The guideline provides: "For purposes of this guideline, the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation." However, the guideline does not provide any definition of "the volume of commerce done by him or his principal in goods or services that were affected by the violation."

The background commentary provides some insight. It makes clear that volume of commerce is not the same as profits or actual damages. The background states: "The agreements among competitors covered by this section are almost invariably covert conspiracies that are intended to and serve no purpose other than to restrict output and raise prices and that are so plainly anticompetitive that they have been recognized as illegal per se, i.e., without any inquiry in individual cases as to their actual competitive affect. The offense levels are not based directly on the damage caused or profit made by the defendant because damages are difficult and time-consuming to establish. The volume of commerce is an acceptable and more

readily measurable substitute."

The parties agree that the most relevant case to interpret the meaning of a volume of commerce affected by the violation is *United States v. SKW Metals & Alloys Inc.*, 195 F.3d 83 (2d Cir. 1999). In that case, the conspiracy involved an agreement among competitors to set a floor price for ferrosilicon. The Court of Appeals concluded that it was error for the district Court to limit the volume of commerce affected to simply sales that were made at or above the floor price. *Id.* 90. The Court explained: "While the price-fixing conspiracy is operating and has any influence on sales, it is reasonable to conclude that all sales made by defendants during that period are 'affected by the conspiracy.' Here, once it was found that the price-fixing conspiracy was successful during two periods, it was error to calculate the affect on commerce solely in terms of sales that were made at or above the target price without considering as well the sales prices that were influenced without hitting or exceeding the target price or sales that were affected in other ways." *Id.*

The Court of Appeals also rejected the government's argument in *SKW* that all sales during the period of the conspiracy should be included because it was possible that there could be a conspiracy with an overt act that "fails to influence market transactions." *Id.* 91.

The government in this case does not commit the error

that the Court of appeals pointed out the government had committed in this case because it does not seek to include the total volume of transactions that the defendant engaged in in the Forex market for CEEMEA currencies during the period of the conspiracy. Rather, the government has focused on 14 transactions, the total volume of commerce for the defendant of $231,426,386. The government's calculation is based on the trial exhibits and the expert summary and is reasonable. It includes the volume of the transactions as reflected in the trial exhibits based on the volume from the beginning of the conversations among the conspirators about a transaction in furtherance of the conspiracy to the end of the transaction. The defendant contends in each case that there was not in fact any affect on price and that the defendant did not intend to violate the law.

In analyzing those transactions, the touchstone is the guidance of the Court of appeals in the *SKW* case that the issue is whether the sales prices were influenced or the sales were affected in other ways. The Court of Appeals further explained: "A conspirator profits from an agreement to fix prices when the conspiracy is incrementally successful at impacting the terms of trade or at elevating the price above the punitive market price regardless of whether the target price is achieved. A finding as to the volume of affected commerce does not require a sale-by-sale accounting or an

econometric analysis or expert testimony. The Court may consider the goals of the conspiracy and the steps taken to implement it, the market share of the conspirators, and the persons with whom they transacted business and may otherwise deduce the affect on commerce from the pressures brought to bear on it." *Id.* 91.

The Court has already exhaustively examined the evidence in this case and found that there was more than sufficient evidence to find that the government proved beyond a reasonable doubt that the defendant was a member of a conspiracy to fix prices and rig bids in the market for CEEMEA currencies. The defendant and his co-conspirators worked for four of the largest banks in the market and dealt with large sophisticated customers who expected that the banks would compete to offer them the best prices when in fact the conspirators did not compete but conspired to fix prices and rig bids.

In its lengthy submission, the defendant repeats the arguments that the Court rejected in denying the motion for acquittal or a new trial. It is unnecessary to repeat all of the arguments here, particularly in view of the Court of Appeals' admonition that a finding of the volume affected does not require a sale-by-sale accounting. However, it is useful to illustrate several of the transactions to justify an enhancement for a volume of more than $100 million of commerce

done by the defendant that was affected by the conspiracy. In doing this summary, I have relied on some of the transactions used by the government in its calculation and which were discussed at length in the Court's prior opinion.

In the October 14, 2010, transaction that the Court analyzed in its prior opinion, the Court explained how the defendant and Katz worked together to move the price of a dollar-ruble pair higher to their benefit and to the disadvantage of a customer. This transaction involved $5,493,960 for the defendant. On November 4, 2010, the defendant and Katz coordinated their bids to a customer for a dollar-ruble transaction so that Katz would show a slightly lower price and the defendant would get the transaction. By showing a slightly lower price, Katz was also able to show that he was giving a competitive bid or apparently to the customer giving a competitive bid. It was after this transaction that Katz commented to the defendant, "Conspiracies are nice," and defendant said, "Ha, ha, ha. Probably shouldn't put on Perma chat." The volume of commerce involved for the defendant was $29,617,619.

The defendant claims that no volume of commerce was involved because the defendant did not change the bid that he had originally quoted to Katz. That ignores the admonition of the Court of appeals that sales may be affected in ways other than price. The *SKW* court did not deal directly with a

bid-rigging conspiracy, but if conspirators agree that one conspirator will get the sale and another conspirator is to bid in a way to appear to be competitive, a deliberately loose bid, the terms of the sale are plainly affected, namely, who gets the bid. This amount should also be included in the volume of commerce affected for the defendant.

On December 21, 2001, both the defendant and Katz were short dollars against the Turkish lira, which meant that they would both profit if the price of dollars fell to essentially buy dollars against the Turkish lira at a lower price. The defendant and Katz agreed that Katz would hide the defendant's buying interest in the dollars against lira in order to prevent pushing the price of dollars higher. After a customer transacted with Katz, Katz then sold $3 million to the defendant, which meant as Katz testified the plan worked. The volume of commerce involved in this transaction for the defendant was $10 million.

On January 18, 2012, the defendant together with Cummins and Katz pushed the price of the dollar-rand pair lower so that the defendant would trigger a stop-loss order that he had from Putnam Investments. The stop-loss order was in fact triggered. At the end of the day, the defendant told Cummins and Katz on the Bloomberg Chat: "BTW"-- by the way- "salute to the first coordinated czar effort," to which Katz responded, "Yep. Many more to come."

The defendant attempts to discount this transaction by arguing that he acted prudently in selling in view of market conditions and that the stop-loss would have been triggered in any event. None of these arguments eliminate the volume of commerce that the defendant engaged in in a successful coordinated effort with his co-conspirators to drive the price down and thereby trigger the stop-loss order for his client. The volume of commerce attributable to the defendant from this effort is $46,325,807.

On February 28th, 2012, the defendant, Williams and cummins had each received a request from the same customer to sell dollars in exchange for rubles in a forward transaction. Williams was showing a price of 29.05, Cummins was showing 29.06 and the defendant was showing 29.10, the best price for the customer. Based on the information, the defendant moved his price to 29.08 -- better for him and worse for the customer; but the defendant knew he could win the bid, which he did, because he knew the prices of his competitors. After the defendant won the bid, he shared the information with the others. Plainly the price of the transaction was affected by the conspiracy. The volume of commerce affected was $5 million.

There were two transactions on May 20, 2013, that were discussed in the Court's prior opinion. In one transaction the defendant was short Euros against the Czech koruna and sought

to buy Euros. Katz had been buying Euros and the defendant told Katz to "stop running this Euro-Czech in my face." Katz responded by canceling his trade in order to keep the price lower for the defendant. The volume of commerce from this transaction was $2,690,500.

In a second transaction that day, the defendant and Katz needed to buy Turkish lira in exchange for dollars. After they realized that the defendant needed the larger amount, Katz told the defendant to go ahead of him and the defendant then traded in the market. The total amount of commerce involved in this transaction was $3 million for the defendant. The combined total of these transactions was $5,569,500.

The combined total of the volume of commerce for the defendant involved in these transactions was $102,006,886 which supports the Probation Office adjustment of eight levels for a volume of commerce done by the defendant that were affected by the violation. I have relied on the transactions that were discussed at length in this Court's prior opinion denying the motion for a judgment of acquittal and for a new trial and that the government included in its calculation in its sentencing memorandum and the attached exhibits. My descriptions were in turn based on the trial record.

I appreciate that the government relied on additional transactions and concluded that the volume of commerce was in excess of $230 million. However, it is unnecessary to discuss

and analyze the additional transactions because an enhancement of eight levels is triggered by a volume of commerce attributable to the defendant of more than $100 million. Moreover, it is useful to note that an adjustment of four levels applies for a volume of commerce in excess of $10 million and an adjustment of six levels is triggered by a volume of commerce in excess of $50 million. To analyze further transactions would truly be academic at this point.

The defendant seeks a downward departure under Section 5K2.0.

I should say not only academic but would not affect the Court's sentence in any way.

The defendant seeks a downward departure under Section 5K2.0 of the guidelines on the grounds that using the volume of commerce results in a circumstance not adequately taken into account by the guidelines for substantially in excess of that taking into account by the guidelines particularly because the defendant's profits were so much less than the volume of commerce. There is no basis for such a departure. The volume of commerce was plainly a carefully crafted adjustment.

The background commentary explains that "tying the offense level to the scale or scope of the offense is important in order to ensure that there is an incentive to desist from a violation once it has begun. The offense levels are not based directly on the damages caused or profit made by the defendant

because damages are difficult and time-consuming to establish. The volume of commerce is an acceptable and more readily measurable substitute." Nor is the defendant correct that the scope of the adjustment is a circumstance not adequately taken into account by the guidelines.

The scope of the defendant's conspiracy was vast and it compromised the integrity of an important marketplace and harmed customers who mistakenly thought that they were dealing with honest competitors. The scope of the enhancement should not be reduced simply because the defendant dealt in transactions involving millions of dollars. Therefor, the defendant's objection to the eight-level adjustment is overruled.

The defendant objects to the one-level adjustment for "conduct that involved participation in an agreement to submit noncompetitive bids" pursuant to 2R1.(b)(1). Initially the defendant argued that this enhancement should only apply to schemes involving bid rotation. The application notes to the guidelines did refer to bid rotation as one example where if the defendant did not in turn win a bid, there would be no volume of commerce for the defendant although the defendant contributed to the harm from the scheme and the Court should consider a sentence near the top of the guideline range in such a case *(n. 6)*. However, the guidelines do not suggest that that is the only example of an agreement to submit

noncompetitive bids. The background commentary goes onto state: "The commission believes that the volume of commerce is liable to be an understated measure of seriousness in some bid-rigging cases. For this reason and consistent with the pre-guideline practice, the Commission has applied a one-level increase for bid-rigging."

The defendant contends that there was no evidence of bid-rigging. However, the Court already rejected that argument when it denied the defendant's motion for a judgment of acquittal. The Court found that there was ample evidence from which a reasonable jury could conclude that the defendant participated in a conspiracy to fix prices and rig bids. The Court also pointed out that the defendant did not object to the Court's instructions on the definition of bid-rigging. There is no basis to reconsider those rulings as objections to the one-level upward adjustment for bid-rigging.

The defendant also relies on *United States v. Sturdivant*, 244 F.3d 71 -- although, I may not have that cite correct in my notes-- (2d Cir. 2001). That case has nothing to do with the guideline enhancement for bid-rigging. *Sturdivant* was a case about a duplicitous narcotics indictment. The court already rejected the argument that the indictment in this case was duplicitas and there is no basis to reconsider that conclusion. Therefore, the objection to the one-level adjustment for bid-rigging is overruled.

The defendant contends that he should be afforded a two-level downward adjustment pursuant to 3B1.2(d) for allegedly being a minor participant in the criminal activity. The argument is completely without merit. The commentary to 2R1.1 stresses that a mitigating adjustment will be rare. Application Note 1 points out that "an individual defendant should be considered for a mitigating role adjustment only if he were responsible in some minor way for his firm's participation in the conspiracy." In this case, of course, the evidence indicates that the defendant was the primary person at his employer bank who participated in this particular conspiracy. The background commentary also points out that the mitigating role in the offense will apply "in rare circumstances."

There is no reasonable argument that the defendant qualifies for a minor-role adjustment. A minor-role adjustment applies to a participant who plays a part in committing the offense that makes him substantially less culpable than the average participate in the criminal activity. A minor participant is less culpable than most other participants in the criminal activity, but his role could not be described as minimal. The application notes instruct the Court to consider the following non-exhaustive factors:

A, the degree to which the defendant understood the scope and structure the criminal activity;

B, the degree to which the defendant participated in planning or organizing the criminal activity;

C, the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;

D, the nature and extent of the defendant's participation in the commission of the criminal activity; and

E, the degree to which the defendant stood to benefit.

All of these factors demonstrate that the defendant was a full participant in the conspiracy along with Katz, Cummins and Williams. He understood the scope of the conspiracy and was an eager participant in the numerous transactions outlined in the opinion denying the motion for judgment of acquittal or a new trial. He participated in planning and organizing individual trading events or refraining from trading and he stood to profit from the transactions in the same way as other participants. The only real argument the defendant raises is that others participated in a prior conspiracy before the defendant joined this conspiracy, but that in no way minimizes the defendant's participation in the conspiracy that was proven at trial. Therefore, the defendant's argument for a minor-role adjustment is denied.

Therefore, the Court concludes that the Probation Office correctly calculated that the total offense level is 21,

namely, 12, pursuant to 2R1.1, plus one for bid-rigging scheme under 2R1.1(b)(1), plus eight for the volume of commerce adjustment excess of $100 million under 2R1.1(b)(2)(D) for a total of 21. The criminal history category is one and the guidelines sentencing range is 37 to 46 months.

I will now call on the lawyers and the defendant to hear if they have reviewed the presentence report, the recommendation and addendum, whether they have any additional objections and I will listen to them if for anything else they would like to tell me in connection with sentence, any statement that they would like to make, anything that they would like to tell me in connection with the 3553(a) factors or otherwise any statement at all they would like to make.

I ask those two questions -- are there any other objections and anything else that the parties would like to tell me -- because under the rules if there are objections to the presentence report, I have to rule on them and determine them or determine that they wouldn't affect the sentence. So that's why I call on the parties with two questions. Any other objections that I haven't dealt with and then I listen to anything that the parties want to tell me in connection with sentence.

So, first of all, for the defendant. Mr. Klotz, have you reviewed the presentence report, the recommendation, and the addendum and have you it discussed them with the defendant?

MR. KLOTZ: Yes, your Honor.

THE COURT: You are welcome to say anything about those objections, too, if you want; but do you have any other objections to the presentence report?

MR. KLOTZ: Your Honor, we made a series of objections to some of the factual background description in the presentence investigation report that we communicated to the Probation Department. They have accepted some of our factual proposed corrections and rejected a number of others; but I don't believe that they have any impact on the calculation of the sentencing guidelines and I don't ask your Honor to resolve them because I think they are just different ways that we would describe the conduct.

There is one which may seem very minor that I think we would ask for it to be corrected, and that is in the section of the presentence investigation report entitled Identifying Data. The presentence investigation report indicates that Mr. Aiyer has an alias, which is identified as Ashkay as opposed to Akshay. As I said this is a relatively minor matter but I understand an alias to be a different name that somebody goes by often with the implication that they are trying to conceal their identity. Mr. Aiyer does not go by Ashkay. It is a mistaken pronunciation of his name or writing of his name, and I think that is appropriately deleted.

THE COURT: What page of the presentence report?

MR. KLOTZ: One minute, your Honor.

The alias identified is Ashkay, A-s-h-k-a-y.

This is at -- of the presentence investigation report.

THE COURT: Right. What page.

MR. KLOTZ: Page 3.

THE COURT: I am sorry. I didn't hear you.

What paragraph?

MR. KLOTZ: It's the very bottom of that page. The top of the page says, Identifying Data. The last entry is aliases and it indicates "Aiyer, Ashkay" and I would ask that that be amended to read "none."

THE COURT: All right. Does the government want to be heard?

MR. HART: No, your Honor. The government does not have an objection to that.

THE COURT: I will change on page 3 the aliases. I will strike what is there now and write in "none."

MR. KLOTZ: Finally, your Honor, with respect to calculation of the volume of commerce and the overall offense level, I don't want to repeat things that are in our papers; but in preparing for today's session, I did come across a point that goes in my judgment directly to our argument that Mr. Aiyer is entitled to a downward departure because the volume of commerce overstates the significance of the activity. What I would want to bring to your Honor's attention is that in

discussing the relevant fine for an antitrust offense, the sentencing guidelines while indicating that profits are difficult to calculate and volume of commerce is an easier and more ready way of calculating something that indicates the profit to the defendant or the impact on commerce, in a note to Section 2R1.1 -- it's n. 3, the guidelines state that it is estimated that the increase in price when transactions are affected by an illegal antitrust conspiracy is 10 percent of the gross volume of the transaction. I am not giving a verbatim quote, but that is the substance of it.

In other words, it indicates that the Sentencing Commission had in mind that typically the benefit to the defendant would be in the range of 10 percent of the total volume of commerce. In this case, it is demonstrable that the benefits of the defendant -- and by benefits of the defendant, I am now talking about the benefit of the bank -- is nowhere even remotely close to 10 percent of the volume of commerce. The best illustration of that is the transaction on February 28th, 2012, where there is an adjustment in the price quoted to the client from 29.10 rubles to 29.08.

As our papers said if you do that calculation, the benefit to J P Morgan Bank is $3,300. To Mr. Aiyer it is about $165. The sentencing guideline rule of thumb would indicate that a transaction of that size should have a benefit to the defendant bank of $500,000, which is 150 times greater than the

actual benefit amount, which is readily calculable. I simply put that out there not just for the calculation of the sentencing guidelines but because under 3553 addressing the overall significance of the behavior here, I think it puts it in a different context that relatively minimal amounts are involved both for the bank and for sure for Mr. Aiyer.

THE COURT: Mr. Hart, do you want to comment?

MR. HART: Yes, your Honor.

What the defendant is referring to is something separate as it relates to the overall calculation of the volume of commerce. So his points can be contributed to 3553, but there shouldn't be attached much weight to it.

THE COURT: All right. What defense counsel raises is not in my view a reason for a downward departure from the volume of commerce adjustment in the guidelines. I have gone through a lengthy consideration of that particular enhancement both from the standpoint of the commentary to the guidelines and the Court of Appeals decision. It is a measure -- one measure -- of the significance of the conspiracy to determine the volume of commerce affected irrespective of what the ultimate profit is to the bank or to the individual employee. What is involved are transactions worth millions of dollars in which sophisticated customers go to huge banks as the only institutions capable of dealing with these types of transactions. So a measure of the affect of the conspiracy is

volume of commerce.

The volume of commerce is carefully thought out in the guideline and it's also carefully limited because it doesn't as in some other context involve the total volume of commerce involved in the conspiracy for example. It doesn't include what is happening with the other conspirators and their institutions. It involves only the defendant personally. So it's not I think a good argument in favor of a downward departure.

On the other hand, surely the profit to the defendant is one aspect that can be taken into account under the 3553(a) factors. The Court has broad discretion in considering the 3553(a) factors in arriving at a sentence that is sufficient but no greater than necessary to accomplish the relevant goals of sentencing. So I agree it is something that the Court can take into account for the 3553(a) factors, and you are welcome to expand on that in a moment.

MR. KLOTZ: Would you like me to --

THE COURT: Hold on. Hold on. I want to make sure that I have finished with whether you have any other objections to the presentence report.

MR. KLOTZ: We are finished, your Honor.

THE COURT: Okay. So now I will listen to you for anything that you would like to tell me in connection with sentence, anything you would like to tell me, anything you

would like to discuss, anything at all.

MR. KLOTZ: Thank you, your Honor.

Let me start with the amount of money at stake from the defendant's point of view since that was what we were just discussing. It goes, your Honor, both to an appropriate sentence and to the amount of the fine, which under the sentencing guidelines is teed off of the volume of commerce but intended to penalize the defendant for the benefit that he got from the illegal conduct.

My point in both regards is simply the one I already made. I think it is fairly ascertainable that the actual benefit to the defendant in this case of all of the conduct proven at trial is in maybe the thousands of dollars and the benefit to his bank is certainly under a million dollars and probably quite a bit under that. I ask your Honor to take that into account in assessing the seriousness of the offense and the appropriate level of a fine in the case.

THE COURT: The benefit to the bank was millions of dollars?

MR. KLOTZ: I think less. I think the benefit to the bank in the February 28 transaction, for instance, was $3,300. That transaction is about 150th of the total volume of commerce that was argued by the government. And if you multiply $5300 by 50 you get about $150,000. I think that is a fair estimate of the benefit to the bank of all of the conduct at issue here.

As we put in our papers, rough calculation, Mr. Aiyer was compensated about 5 percent of the profits that he generated for the bank. So if the benefits of the bank was about $150,000 give or take, the benefit to Mr. Aiyer was in the range of five or $10,000.

Now, you can quarrel with that number I suggest to some degree, but I think that's the order of magnitude that we are talking about and I think it's important. Now, I understand that a large volume of commerce was involved and that is a different measure and maybe appropriately taken into consideration as well; but it seems to me it is also appropriate to look at what the defendant personally had at stake here in assessing the conduct at issue.

Then without repeating matters that we've discussed at some length in our submissions, I just want to highlight for your Honor various different considerations that I think the case law allows your Honor to take into consideration in reaching a just and fair sentence in this case. First and foremost, I think your Honor is entitled to and should consider the fundamental decency as a human being that Mr. Aiyer has shown throughout his life. I don't want to repeat all that was written by his friends and family on his behalf; but it is clear that Mr. Aiyer from a very young age connected with people and cared for other people very much. He is portrayed in the letters as an incredibly kind, caring and compassionate

person. I has never had any trouble with the law before. He not a danger to the community.

Just some of the letters that talk about those features of Mr. Aiyer as a person really stand out. To me one of them was a friend who was on his way to the emergency room I think when his spouse was out of town and was experiencing a medical emergency and the person to whom he turned was Mr. Aiyer. Mr. Aiyer came to his assistance and went to the hospital. I believe had the person come home with him. But that is illustrative of what you see in the letters on Mr. Aiyer's behalf. Over and over and over again of people talking about instances where he reached out in order to do something to benefit them without any regard for his personal interests.

He has also made concerted efforts to give back to his community at large. For example, until the pandemic shut down normal school function, Mr. Aiyer served for six months as a volunteer math tutor in a program called Top Honors. He spent three hours every Wednesday with a seventh grade student with skills that translate to roughly a fourth-grade level. The friend that introduced Mr. Aiyer to the program explains that because of Mr. Aiyer's phenomenal tutoring and mentoring capacity, this student has been thriving. That program was suspended; but when it picks up again later in the school year, Mr. Aiyer will continue to participate in it.

Next, we have cited cases, and I don't think there is an argument that your Honor may consider in fashioning an appropriate sentence the collateral consequences to Mr. Aiyer independent of the sentence that your Honor imposes. I would like to highlight two of those collateral consequences specifically. One is that as a result of is this investigation, trial and conviction Mr. Aiyer has lost his job and will clearly not work in financial services ever again in his life. That's relevant because it goes to the need for specific deterrence. Mr. Aiyer is not going to be in a position to commit this kind of crime again. It is also a very serious penalty that is imposed on him over and above anything that your Honor can do in fashioning a sentence.

Secondly, I submit that the length of time that Mr. Aiyer's life has been disrupted by this investigation and trial is unusually long and is a special circumstance that itself could be considered. Any criminal defendant is inconvenienced by an investigation and trial that puts his life in limbo for some period of time, but the six years that Mr. Aiyer's life has been in limbo is unusually long. This was a very lengthy investigation with charges brought at the end or near the end of any arguably statute of limitation; and then, as your Honor has noted, after that the proceedings have been delayed many months through nobody's fault but as a result of the pandemic. I think your Honor is entitled to take into

consideration that burden that Mr. Aiyer has borne, which has been quite extraordinary.

Third, one of the goals of sentencing is to prevent an unwarranted disparity in sentences. Typically that unwarranted disparity pertains only to persons who have been charged with similar offenses and convicted and the Court looks to what other people who have been convicted of this crime been sentenced and it is of no relevance that there may have been other people who committed the same or similar crime and were not detected, were not prosecuted. We all know that the government has great discretion.

I think Judge McMahon's sentencing decision in the *Connelly* case is highly relevant to this case. Because Judge McMahon found that granting that usually the fact that the government has exercised its discretion to charge some people and not others ought not be a relevant consideration. The calculation changes somewhat when the conduct at issue is endemic to an industry and literally dozens and possibly hundreds people engaged in it but only a small handful are selected as examples. In the *Connelly* and *Black* case, the Judge McMahon decision, the conduct at issue was manipulation of LIBOR. Judge McMahon found that this was an enormously widespread problem in the industry and that it indicated that the defendant in her case ought not be penalized especially because he had the band fortune to be picked as an example to

to send a message to the industry.

The misuse of chat rooms by currency traders is similarly endemic. As the government has repeatedly stated, virtually all of the major banks internationally were involved in these investigations. Dozen and dozens of people have lost their jobs and at the same time very few individuals have been prosecuted and Mr. Aiyer I think is probably the only one of them who is at risk of getting a jail sentence. As Judge McMahon put it in the *Connelly* case that just doesn't seem fair that the one person who has the bad luck to be prosecuted is the person who gets that consequence.

Next, we cited cases that indicate that you can consider the special consequences that flow from Mr. Aiyer's status as a legal noncitizen. These include the risk of deportation proceedings and the added stress that that places on him but also the fact that a 2018 Bureau of Prison memorandum requires that Mr. Aiyer be assigned to a low-quality private prison for noncitizen probably at a great distance from New York, which makes his service of a prison term not certainly but very likely considerably more burdensome than the same sentence would be if it were imposed on a citizen. Again, Judge McMahon in the *Connelly* case felt that this was an appropriate factor to take into consideration and again her conclusion was this is just not fair that this defendant before me would have to suffer much more severe terms of incarceration

than an absolutely equally positioned citizen.

The government hasn't come back with much to suggest that Mr. Aiyer would not be at a very high risk of going to one of these private facilities. They cite a case from 2014, *United States v. Robson*, in which the defendant didn't go to a private facility for noncitizens, but that was before the 2018 policy memorandum of the Bureau of Prisons requiring that noncitizens be sent to such facilities. Additionally as a noncitizen, Mr. Aiyer, whether or not he goes to a private facility, would not in the ordinary course be entitled to assignment to a minimum security camp. He would have to at a minimum go to an actual prison facility and he would be ineligible for release to a halfway house after part of his sentence.

Finally, the Court clearly can consider the current pandemic as a factor that should figure in framing an appropriate sentence. The argument is not that a prison sentence is never appropriate because of the pandemic but that in light of the pandemic that is an additional factor that militates in favor of leniency.

I want to say a couple of things about the government's most recent letter which we have not responded to in writing because we didn't want to burden your Honor with additional paper. Just three very quick points about that. First, we cite a couple of cases where defendants whose

sentencing guidelines range was comparable to Mr. Aiyer received noncustodial sentencings. The government responded, oh, but those cases are different. And the first thing they said about those cases, which I think they repeated and I think they said this in earlier papers distinguishing cases we cited, was that the defendant in those cases pleaded guilty as opposed to the defendant here.

Well, as your Honor knows perfectly well, the sentencing guidelines for a defendant that pleads guilty already incorporate a discount for the fact that they pleaded guilty and there is ample case law that a defendant other than this discount that is built into the guidelines for a guilty plea, a defendant ought not be further penalized for exercising his right to proceed to trial. I submitted that that is particularly important here where it is clear that the potential immigration consequences of a conviction, whether by plea or by trial, made it much more difficult for Mr. Aiyer to contemplate a plea compared to a normal defendant who is a U.S. citizen and would not have that added consequence of a conviction.

THE COURT: The government distinguished one of the cases by saying even though the sentence was "time-served," the defendant had already spent 14 months in custody.

MR. KLOTZ: Yes. That was another distinguishing feature, but that case along with the other one the government

said keep in mind that both of these people pleaded guilty when we said they both were subject to comparable sentencing guidelines ranges.

The government argued in its letter that Mr. Aiyer overstates the certainty of facing adverse consequences for being a noncitizen. It is our understanding that the adverse consequences that he faces from being a noncitizen are current Department of Justice and Bureau of Prison policy. We recognize that that doesn't mean it is a certainty, but that means that any deviation from the policy of the Department of Justice and Bureau of Prison is likely to be rare and/or unintentional.

Finally, the government argues that Mr. Aiyer overstates his personal risk from COVID-19 especially in light in steps taken by the Bureau of Prisons to control the spread of the disease. We all understand the seriousness I think, your Honor, of the COVID pandemic. Mr. Aiyer is not arguing that he is certain to contract COVID-19 if imprisoned or certain to have a severe case if he contracts it, but much is unknown about who is at greatest risk from the disease. Prisons are clearly at-risk institutions. Mr. Aiyer has sufficiently severe asthma to require regular use of an inhaler and his asthma was sufficiently bad this past spring that required a course of steroids as a treatment. His argument is that the prevalent of COVID-19 is an added burden of unknown

significance that attaches to any sentence of imprisonment.

Finally, I want to address the specific significance of a period of incarceration of a year or more as distinct from a sentence of incarceration or home detention of less than a year.

If Mr. Aiyer is given a prison sentence of a year or more, it is again the policy of the immigration authorities, ICE, to lodge a detainer against such a person and take them into custody at the conclusion of their sentence. They also may do that in the case of anyone who gets any sentence of imprisonment, but it is less likely if the sentence of imprisonment is less than a year as distinct from a year or more. Perhaps more importantly if Mr. Aiyer is taken into custody by ICE at any point for any reason to commence removal proceedings if his sentence of incarceration is a year or more, his standard of being released pending the completion of those removal proceedings is much higher and much more difficult to meet. It is not the usual standard for release on bail of not being a danger to the community or risk of flight. He would have to prove in addition at the release-on-bail stage that he was likely to prevail on the merits.

Now, if ICE were to bring removal proceedings against Mr. Aiyer, he would contest them because he does not believe he should be subject to removal, but those proceedings could last a very long time. If he gets a sentence of a year or more

incarceration, he is at a highly elevated risk of serving that entire period while those proceedings are pending, which could be years, in an ICE facility. That we think, your Honor, is a very important consideration to have in mind.

Your Honor, the outpouring of letters from friends, family members, coworkers and other acquaintances show Mr. Aiyer to be a kind, caring, and generous person. I can truthfully say in my more than 20 years as a defense attorney, I have never seen such an extensive and heartfelt show of support ad it is completely consistent with the Akshay I have come to know, a thoroughly decent person who made mistakes not reflective of his general character almost 10 years ago.

Mr. Aiyer has been in a terrible personal and professional limbo for six long years now, far longer than the typical defendant in a criminal case, and I ask your Honor to take this into consideration in passing sentence. He is terrified at the prospect of being removed from the United States and never being permitted to return, and I ask you to take this into consideration as well. Most of all I ask you to take into consideration his fundamental decency, the trait that everyone who has had the good fortune of getting to know him recognizes immediately.

Thank you.

THE COURT: Thank you, Mr. Klotz.

Mr. Aiyer, have you reviewed the presentence report,

the recommendation, and the addendum and discussed them with your lawyer?

THE DEFENDANT: I have, your Honor.

THE COURT: I've already said and other than what your lawyer has already said, do you have any objections?

THE DEFENDANT: No, your Honor.

THE COURT: Okay. I will listen to you now for anything that you would like to tell me in connection with sentence, any statement that you would like to make, anything at all that you would like to tell me.

THE DEFENDANT: Yes, your Honor. I just want to say I suffered a lot the last six years. It's been the worse experience of my like. I've always tried to conduct myself professionally with integrity and concern for others. I always prided myself for putting my clients' interests first. It was a profound shock to me to be investigated as a criminal, tried as one and convicted as one.

I recognize that I have no one to blame but myself. I did things that were thoughtful, careless and unprofessional. And when I saw others behaving similarly, I did not stand up an object. I did not use my best judgment and live up to my own standards and for this I am very sorry.

My friends and family, my coworkers and the court system and I know you yourself spent a lot of time on this case and I thank you for that.

Worst of all, I regret the pain I caused Alex, who stood by me and been my strongest supporter. About my family, I was unable to be there when my grandmother and grandfather passed away a couple months ago. I lost my job and ruined my career. And I suffered from anxiety and stress and tried to undergo counseling to cope with it the best I can. More than anything else, I may have to leave what I call home and built as my home for the last 18 years.

I accept that you will pass sentence on me, I only ask that you do so with compassion.

Thank you.

THE COURT: Mr. Hart, has the government reviewed the presentence report, the recommendation, and the addendum?

MR. HART: Yes, it has, your Honor.

THE COURT: Other than --

MR. HART: I don't have any objections.

THE COURT: Hold on. Let me ask the question first.

MR. HART: Okay.

THE COURT: Other than all of the objections that I have already dealt with, does the government have any objections?

MR. HART: No, your Honor.

THE COURT: I will listen to you now for anything that you would like to tell me in connection with sentence, any statement that the government wishes to make.

MR. HART: Yes, your Honor. Thank you.

First, I would like to address a couple points that Mr. Klotz raised with respect to the fine and the profits of the bank. The government would like to note to the Court that profit does not equal gain from the offense because we don't know what would have happened if in fact there was competition.

COURT REPORTER: Counsel, you are breaking up.

MR. HART: The point I was making was that profit does not equal gain from the offense because we don't know what would have happened if there was in fact competition. That is why that is not a good measurement and that is why the guidelines and one of the driving forces for you to use the methodology to determine the volume of commerce.

Another issue I would like to raise, your Honor, is something that the defendant's counsel talked about, others not being prosecuted. It is impermissible for the Court to consider individuals or entities that were never prosecuted. Section 3553(a)(6) is clear that a court must consider what the need is to avoid unwarranted sentence disparities among similar defendants with similar records who have been found guilty of similar conduct. There is no statutory nor Second Circuit authority for considering similarly situated uncharged offenders. We direct the Court to *U.S. v. Douglas*, which states: "Assuming without deciding that a district court may take patterns of prosecutorial discretion into account in

determining an equitable sentence that avoids unwarranted disparities among similarly situated offenders an appellate court is ill placed to assess whether a defendant is in fact similarly situated to others whose circumstances, because they Were never prosecuted, are unknown to us."

It is the government's position that that also is true for trial judges. To do so would improperly intrude on the Executive Branch as acknowledge by the Supreme Court in *U.S. v. Goodwin,* which --

COURT REPORTER: Counsel, you have to repeat your last sentence.

THE COURT: And, counsel, please get closer to you microphone because you are breaking up.

MR. HART: I apologize, your Honor.

The sentence was: To do so would intrude on the Executive Branch as acknowledged by the Supreme Court in the *United States v. Goodwin* where it held, In our criminal system, the government retains raw discretion as to whom to prosecute.

The area I would like to touch on is the collateral consequences from the defendant's alienage. The Bureau of Prisons and ICE policies related to the treatment of an alien inmate are at least disfavored factors at sentencing.

COURT REPORTER: Counsel, repeat the last sentence.

MR. HART: BOP and ICE policies related to the treatment of alien inmates are at least disfavored factors at

sentencing and in this case are not extraordinary enough to warrant a variance down to a noncustodial sentence. Varying downwards based on the conditions of confinement inappropriately intrudes on the Bureau of Prisons' discretion over the place and conditions of confinement of the inmate in its charge. ICE policies on detention of an immigrant prior to removal are also not generally matters that a sentencing court should consider.

THE COURT: You are not coming through. I see you on the screen that you are talking, but I don't hear you.

MR. HART: Can you hear me?

THE COURT: Barely.

MR. HART: Your Honor, may a take a moment to address the situation?

THE COURT: Absolutely.

(Pause)

MR. HART: Your Honor, is that better?

THE COURT: I can hear you.

Now I can't.

MR. HART: Your Honor, perhaps it would be better if I phoned in.

THE COURT: Mr. Fletcher should be on the feed from Skype.

Mr. Fletcher, you may want to call Mr. Griffincantz for some assistance to see what can be done.

THE DEPUTY CLERK: I will. Let me email him.

THE COURT: Thank you.

Mr. Griffincrantz is one of our court tech people.

MR. HART: Your Honor, should I attempt to call in by phone.

THE COURT: Okay.

(Pause)

MR. HART: Your Honor, can you hear me?

THE COURT: Yes. You are a little low.

MR. HART: How about now, your Honor?

Appreciate everyone's patience.

To further address whether or not the defendant would be ineligible or rather directed to a private facility, the 2018 policy that the defendant cites says only that such prisoners should be identified or considered for consideration for transfer to a private facility. Also, the Bureau of Prisons give weight to the initial recommendation in making designation recommendations.

I also want to talk about the pandemic, COVID-19. The Bureau of Prisons has and continues to take affirmative measures to ensure the health and safety of the inmates in its charge. For example, the Bureau of Prison has enhanced screening techniques for staff and visitors; better isolating and quarantine protocols, including the need to test negative on multiple tests prior to reintegration; issue face coverings

to inmates and staff; limit large groups and require face coverings when social distancing is not possible; as well as enacting better screening and control of prisoner transfers to prevent commingling of both symptomatic and asymptomatic inmates within the general inmate population.

Moreover, the defendant is 37 years old and healthy. He does not have any chronic illnesses and has not been hospitalized. The only risk factor the defendant has identified to the Court is his having slight trace of asthmatic symptoms due to seasonal allergies to tree pollen. Simply put, he does not have severe or moderate asthma. Even if he did, the data suggests that a moderate to severe asthma condition does not place a person as a higher risk of a serious outcome from COVID. The CDC has taken asthma off its risk factor list. In fact, the government is unaware of the defendant having any health condition that places him at a greater risk of a serious outcome from the virus.

In addition, what could happen while the defendant is incarcerated is too speculative at this point to bear any significant weight. To the extent the defendant is vying for some sort of compassionate-release type consideration, it simply is inappropriate to consider that at sentencing. That issue is not before the Court.

THE COURT: Mr. Hart, could you hold on just a moment. I hear you, but we don't have your video. Have you decided not

to continue with the video?

MR. HART: No, your Honor. I can see you and I see the gentleman over your right shoulder.

THE COURT: That gentleman is here to give some advice on how to get your video on because we're not seeing you.

MR. HART: Okay.

MR. KLOTZ: We are in fact seeing Mr. Hart, your Honor.

(Pause)

THE COURT: We have you back on the screen.

You can proceed.

MR. HART: Thank you, your Honor.

We ask the Court to sentence the defendant to a guideline sentence because it is sufficient but not greater than necessary to combine with the purposes of sentencing, namely, that a sentence would reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense and to afford adequate deterrence to criminal conduct.

Moreover, a sentence with a significant period of imprisonment would avoid unwarranted sentencing disparities among defendants convicted of the same crime. Here, this is a very serious offense. The guidelines are instructive in that there is near universal agreement that restrictive agreements can cause serious economic harm and that is exactly what

happened here, your Honor. In this case the defendant was one of the most active and sophisticated traders in this market. He conspired to rig bids in a number of emerging market currencies over a period of several years.

The defendant and his coconspirators agreed to submit specific prices when dealing with customers directly and on the inner bank platform, and the defendant and his coconspirators intended to affect the price of currency by manipulating the forces of supply and demand. His actions, and those of his co-conspirators, not only violated important competitive principles it undermined the integrity of the largest financial market in the world, but also in some instances cheated these customers who invested on behalf of pension funds and retirement funds.

It is important to note that the defendant was aware of the existence of the conspiracy and he actively sought to join it and time and time again he worked with his co-conspirators to further its goals. The defendant was not an unwitting participate of the conspiracy and he played an active role as a director. From the beginning, the defendant knew it was wrong as evidenced by the exchange when his conspirators suggested that his conspiracy to coordinate price quotes and bids to customers are nice, he laughed and responded that they probably shouldn't write such thing in Perma chat rooms.

In addition, the defendant took measures to conceal

his conduct to avoid detection from the bank, including using codewords, communicating on cell phones instead of recorded bank lines, and meeting in person to discuss the conspiracy with his coconspirators. Such evidence demonstrates his consciousness of wrongdoing. In addition, in order to hold the defendant solely accountable for his conduct, the defendant's sentence should also take into account conduct related to fake trades and spoofing. This conduct was not accounted for in the volume of commerce calculation but was intrinsic to the charged conspiracy.

To date despite a jury of his peers finding him guilty he has not expressed any remorse. In short, the defendant and his co-conspirators were greedy and arrogant. The defendant and his co-conspirators routinely exploited a system over which they had some power. A guideline sentence is the appropriate way to hold the defendant accountable for his criminal conduct and for his disregard for the rule of law. In addition, a guideline sentence would also sere to deter other traders driven by greed who may be tempted to cheat the system.

We ask the Court to consider his background. He was well educated, a wealthy man and had a senior position at one the world's largest financial institutions, a man of privilege and a man of substantial means. To be clear this was a crime of opportunity and greed, not one out of necessary.

There cannot be two justice systems -- one for

white-collard criminals and one for everyone else. The need for general deterrence great. A guideline sentence should serve as a reminder to would-be white-collared criminals who may engage the cost-benefit analysis before deciding to engage in elicit activity. Not meting out a guidelines sentence the carries a significant period of incarceration runs the risk of sending the wrong message to criminals that they will not be held accountable and that potential penalties for violating the law is a risk worth taking and is merely a cost of doing business.

THE COURT: All right. Thank you.

I will place the presentence report, the recommendation and the addendum in the record under seal. The parties should place their submissions in the record not under seal -- they may have already done this -- after redacting any personal identifying information.

I adopt the findings of fact in the presentence report except for the two changes that I already noted it the guideline sentencing range for the fine. The guideline sentencing range for fines begins at $20,000, and I have changed page 3 to reflect "none" for aliases.

Therefore, I conclude that under the current guidelines the total offense level is 21, the criminal history category is one, and the guideline sentencing range is 37 to 46 months. I appreciate that the guidelines are only advisory and

that the Court must consider the various sentencing factors in 18, U.S.C., Section 3553(a) and impose a sentence that is sufficient but no greater than necessary to comply with the purposes set forth in Section 3553(a)(2).

The offense is very serious. The defendant participated in a conspiracy to fix prices and rig bids for certain currencies. The conspiracy involved millions of dollars of transactions and involved several major banks and it existed for over two and a half years. The conspiracy threatened the integrity of the market and showed disregard for the legitimate expectations of customers who expected a competitive market.

There is a hint in the defense submissions that the defendant should not be held responsible because given the huge civil settlements in other cases, everyone did it. That plainly is not an excuse nor a reasonable argument in mitigation. The chats indicate that the defendant was aware that what he was doing was not lawful. He suggested, for example, that the comment about conspiracies being "nice" should not be on Perma chat. The defendant also argues that he is somehow being singled out, but that ignores the fact that there are two other co-conspirators who have pleaded guilty.

A substantial sentence is necessary to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense. A substantial

sentence is also necessary for deterrence. There are mitigating circumstances. This is the defendant's first offense and the crime is a nonviolent crime. The defendant has the support of his family and large group of friends and colleagues dating back to his college days. The defendant has suffered collateral consequences, including the loss of his job.

The investigation in this case has hung over the defendant for an unusually long period of time. The defense argues that it is six years. The defendant could have fled the United States during that period of time but chose not to. The existence of the investigation has plainly been a serious toll on the defendant.

The defendant may well be removed from the United States as a result of his conviction. Therefore, the need to deter the defendant individually from future crimes and to protect the public from the defendant are somewhat negated. While it is true that there is a need for general deterrence, the need general deterrence can never justify a sentence for an individual that is greater than a just sentence for that individual.

The defendant also relies on the existence of the COVID-19 pandemic and argues that any sentence of imprisonment should be avoided because the risk of his contracting COVID-19 in prison and the risk of his having serious consequences

should argue against incarceration. However, it does not appear that the defendant is in a particularly high risk category. He is a relatively young person and his physical problems are minimal. Moreover, it is unclear what institution the defendant could be sentenced to and what the conditions of that institution may be. To the extent that circumstances may change, the defendant can always make subsequent applications such as an application for compassionate release; but those hypothetical considerations about future circumstances are insufficient to avoid a sentence that is otherwise called for to accomplish the purposes of Section 3553(a)(2).

The question is what is a sentence that is sufficient but no greater than necessary to accomplish the purposes of Section 3553(a)(2), where to the draw the balance. On balance, the Court intends to impose a sentence of eight months' imprisonment on Count One to be followed by a two-year term of supervised release with the standard conditions of supervised release in this district and those recommended by the Probation Department, except the Court will not include a term of outpatient mental health treatment because there is no indication that such treatment is needed.

I will also not include the conditions of access to financial records and no additional credit charges because those conditions are linked to an installment payment schedule, which will not exist in this case.

The Court will impose fine of $150,000 payable within 30 days. The defendant has the ability to pay that fine based on the presentence report. The Court will not impose restitution because the complex issues of fact related to the amount of individual victims' losses and the calculation of those losses would contemplate and prolong the sentencing process to a degree that the need to provide restitution to pay any victim is outweighed by the burden on the sentencing process.

The Court will impose a $100 special assessment.

The Court will provide for voluntary surrender.

The Court intends to make the recommendation to the Bureau of Prisons of imprisonment at a facility in the New York City area so that the defendant can be close to his family; but if defense counsel has any other recommendation with respect to confinement, the Court is prepared to accept any such recommendation.

The sentence that the Court has explained but not yet imposed is consistent with the factors in Section 3553(a) and is sufficient but no greater than necessary to comply with the purposes of Section 3553(a)(2). I have explained the reasons for the sentence.

Before I actually impose the sentence, I will recognize defense counsel and then the defendant and the government for anything that they wish to say.

Mr. Klotz.

MR. KLOTZ: Thank you, your Honor. I think just for the record I need to object to the sentence, but I won't say anything beyond that.

I appreciate your Honor's recommendation that Mr. Aiyer be assigned to a facility in the New York region. I would ask that you specifically recommend that he be assigned to a minimum security camp in the New York city region. Otisville would be an obvious candidate. I think a facility like that is a facility where he would be assigned were it not for his citizenship status. I am not certain how much weight that recommendation will carry; but to the extent that it carries any weight, I would appreciate your Honor making that recommendation.

I would also ask, but I don't know that this needs to be resolved before you impose sentence, that Mr. Aiyer be continued on bail pending appeal rather than ask to surrender voluntarily at some point down the road. I am not sure if your Honor wants us to address that now.

THE COURT: I never tell parties what to do, but I would suggest to you that it would not be in your interest to make that application now because I plainly have the authority to allow voluntary surrender and to set the date for voluntary surrender. For a stay of surrender pending appeal, there are provisions in the statute that have to be satisfied, including

that I find that an appeal is taken in good faith and that there are meritorious issues on appeal, that those kinds of arguments without any sort of briefing would not lend themselves immediately to a decision.

I intend to impose voluntary surrender by 2:00 p.m. on December 4, 2020, which means that you would have an opportunity to make applications, and if those applications were not successful before me to use any other avenues that might be open to you.

MR. KLOTZ: If that is the way your Honor wishes to proceed, we would like an opportunity to brief this issue. I take it what your Honor is saying is that you will impose sentence now and we can promptly then move, if we elect to do so, for a continuation of bail rather than voluntary surrender and you can decide that issue down the road.

THE COURT: Yes. I already told you that I don't foreclose parties from doing anything that they think that they have a right to do.

I have denied the motion for judgment of acquittal or for a new trial in a lengthy opinion. In order to release the defendant pending appeal, I would have to find not only by clear and convincing evidence that the defendant is not likely to flee or pose a danger to the safety or other persons or the community if released, which I could find, but that the appeal is not for purposes of delay and raises a substantial question

of law or fact likely to result in a reversal, an order for a new trial, or a sentence that does not include a term of imprisonment or a reduced sentence to a term of imprisonment less than the total time already spent.

In view of everything that I said in denying the motion for a judgment of acquittal or for a new trial, it would be difficult now to say that I thought that there were substantial questions. On the other hand, I never decide anything until it's briefed on the facts and the law. So it is up to you. If you want to make that application now, you can.

MR. KLOTZ: No, your Honor. I think our preference would be to make the application promptly after we finish this proceeding. I would point out that the law on the standard is it does not require your Honor to find that you are likely to be reversed. What it requires your Honor to find is that there are serious issues and that if those issues were decided in defendant's favor, which your Honor understandably thinks is not likely.

THE COURT: If anyone has another phone on, stop it.

By the way, if at any time a lawyer begins to talk to me about reversal, I always say that I do what I believe the facts and the law dictate and I welcome parties to take my decisions to any other court. One of the joys of being a district court judge is that we know that nothing we do is ever final and anything we do can be reviewed, and that is a matter

of comfort to us. So when notions such as reversal are put out there, my reaction is: Do whatever you think is appropriate for your client. I do what I think under the facts and the law I should do and I welcome review. So don't feel reluctant.

MR. KLOTZ: Thank you, your Honor. I am not reluctant. I don't intend to press the application now. We'll do it subsequently on papers. My point is I think the standard is one that can be satisfied here without your Honor finding that we're likely to prevail. It doesn't require such a finding.

THE COURT: I understand the distinction. I understand the distinction.

Anything else, Mr. Klotz?

MR. KLOTZ: No, your Honor.

THE COURT: Mr. Aiyer, before --

MR. HART: Your Honor, may I have a moment to speak.

THE COURT: No. Hold on. I am calling the parties in order. Mr. Klotz was first, Mr. Aiyer is second, and you are third.

So, Mr. Aiyer, before I actually impose the sentence, I will recognize you for anything you wish to tell me, anything you would like to say on your behalf, anything at all you would like to say.

THE DEFENDANT: I would just like to apologize one more time to my friends and family and to Alex.

THE COURT: Mr. Hart, I will recognize you for anything the government wants to tell me before I actually impose sentence.

MR. HART: Yes, your Honor. I just want to make the record clear that the government opposes a downward variance and believes that a guidelines sentence should be appropriate here.

THE COURT: Thank you.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of this Court that the defendant, Akshay Aiyer, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of eight months on Count One. I recommend incarceration in the New York City area so that the defendant can be close to his family. I recommend incarceration at a minimal security camp of the Bureau of Prisons in the New York City area.

The defendant will voluntarily surrender to an institution designated by the Bureau of Prisons by 2:00 p.m. on December 4, 2020.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of two years on Count One.

Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the Probation Office in the district to which the defendant is

released. While on supervised release, the defendant shall comply with the standard conditions of supervised release in this district. The defendant shall not commit another federal, state or local crime. The defendant shall not possess a firearm or destructive device as defined in 18, U.S.C., 921. The defendant shall refrain from any unlawful use or possession of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter as directed by the Probation officer.

The defendant shall cooperate with the immigration authorities and comply with all immigration laws.

The defendant must cooperate in the collection of DNA as directed by the Probation officer.

It is further ordered that the defendant shall pay to the United States a special assessment of $100, which shall be due immediately. The defendant shall pay a fine of $150,000, which is payable within 30 days.

I have already explained the reasons for the sentence.

Does either counsel know of any legal reason why this sentence should not be imposed as I have so stated it?

MR. HART: No, your Honor.

MR. KLOTZ: No, your Honor.

THE COURT: I order the sentence to be imposed as I so stated it for all the reason I have explained.

Mr. Aiyer, you have the right to appeal. The notice of appeal must be filed within 14 days after the entry of the judgment of conviction. The judgment of conviction is entered promptly after the judge announces sentence. So you should discuss this issue promptly with your lawyer. If you cannot pay the cost of appeal, you have the right to apply for leave to appeal in forma pauperis. If you request, the clerk will prepare and file a notice of appeal on your behalf immediately.

Do you understand?

THE DEFENDANT: Yes.

THE COURT: All right. Mr. Hart, no open counts?

MR. HART: No, your Honor.

THE COURT: I usually ask as a matter of prudence for the government to move to dismiss any open counts, but there is clearly are no open counts here; is that right?

MR. HART: There's Correct, your Honor.

THE COURT: Mr. Klotz, do you agree?

MR. KLOTZ: Agree, your Honor.

THE COURT: So I will not do what I usually do.

Anything further?

MR. KLOTZ: No, your Honor.

MR. HART: Not from the government.

MR. KLOTZ: Can I put you on mute and confer with my colleagues?

THE COURT: Yes. You can mute yourself.

Mr. Hart, if you have any lawyers on the telephone line, you can consult with them, too.

MR. KLOTZ: We have nothing further, your Honor.

THE COURT: Nothing from the government?

MR. HART: Nothing further, your Honor.

THE COURT: Good-bye, all.

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