

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

United States of America

v.

Aticha Jittaphol

No. 21-CR-10270-MLW

DEFENDANT’S MEMORANDUM IN SUPPORT OF PLEA AGREEMENT

Aticha Jittaphol submits this memorandum, urging the Court to accept the parties’ plea agreement.

The Spa was not a Brothel; There was no Sexual Servitude or Trafficking.

This is not a case where a scheme was hatched, or a fake business created, solely for the purpose of engaging in fraud. Nor was the spa operating as a brothel. Most of the massage services performed were legitimate. There were no advertisements or paid listings with any of the many websites that promote massage parlors offering sexual services.

Provided at Attachment 1 are eight reviews of the spa that customers posted to Yelp. All were posted prior to the criminal investigation. Four of the reviews were from women. Most of the individuals had left many other Yelp reviews; a sign of a phony review posted by the business itself is when the reviewer has not left prior reviews. There would be no purpose for a massage parlor operating exclusively, or even primarily, as a sexual services provider to post reviews about legitimate massage. Men seeking sexual services would be less likely to go to the spa if they saw reviews suggesting that it was a wholly legitimate massage parlor.

The government interviewed four women who worked at the spa. They

acknowledged providing “happy ending” massages, the only sexual activity they described. There was no disrobing. No oral sex. No intercourse. They stated that they were not coerced to work at the spa. Immigration papers were not held.

Employees were not working off debt. There was no trafficking and no coercion.

The Government’s Agreement to a Sentence at the Low-End of the Guideline does not Suggest Unusually Lenient Treatment.

Counsel has handled about six or seven cases resolved by pleas to an information. In each case, the government recommended a sentence at the low-end of the guidelines or less. With post-indictment plea agreements, the government routinely makes low-end recommendation for defendants that plead guilty right away. The Court’s far greater experience with pleas to an information likely is comparable. Ms. Jittaphol’s guideline range is 0-6 months. She agreed to plead guilty immediately. The information was filed with the plea agreement. There is nothing unusual in her getting the benefit of a plea agreement at the low-end.

In *United States v. Savath*, 21-cr-10269-RGS, a Similar Pending Case, Involving More Money, More Serious Sexual Conduct, and a Higher Guideline Range, Judge Stearns Accepted a Guilty Plea with a Comparable “C” Plea Agreement.

The defendant owned a massage parlor in Franklin. The government found evidence that sexual services were provided, including intercourse. She applied for COVID-related business loans and received \$29,646. Her total offense level under the Guidelines is 9, in contrast to Jittaphal’s level 6. Her guideline range is 4-10 months, in contrast to Jittaphal’s 0-6 months. The parties entered a “C” plea providing for no incarceration and 3 years of probation. Ms. Wan represents the government. On January 20, 2022, Judge Stearns accepted the defendant’s Waiver

of Indictment and Plea to Information. While Judge Stearns did not explicitly state that he intended to accept the agreement, he did not express any reservations.

Sentencing is set for May 19th.

If this Court rejects Ms. Jittaphol's plea agreement, and Ms. Savath's is accepted, it would constitute an unwarranted disparity among defendants with similar records, guilty of similar offenses. Indeed, Ms. Savath's offense is more serious, and her agreement provides for a sentence below her guideline range.

The Loss Amount was Minimal in Contrast to Other COVID Fraud Cases, and a Low-End Guideline Sentence with no Incarceration is Consistent with These Cases.

The pandemic has made a prison term more dangerous and a more severe punishment. Perhaps because of this, sentences in PPP/EIDL cases tend to be below the guidelines, including cases with loss amounts that dwarf the \$7,067 received by Ms. Jittaphol, which is every case counsel found.

In *United States v. Adepoju*, 21-cr-10207-PBS (D.Mass.), a sophisticated fraud organized in Nigeria involving identity theft, seeking COVID unemployment benefits and loans, the parties agreed that the loss amount was between \$250,000-\$500,000. The defendant entered into a plea agreement; the government recommending a sentence at the low-end of the guidelines. Sentencing is pending.

In *United States v. McIntyre*, 21-cr-10162-DJC (D.Mass.), involving allegations of fraudulent PPP loans and unemployment benefits, the government alleges a loss of approximately \$660,000. No plea agreement has been made.

In *United States v. Bischoff*, 20-cr-20556-PDB (E.D.Mich.), a businessman pled to bank fraud for nine PPP applications, receiving \$600,000. His criminal

history involved multiple financial crimes, including wire fraud; criminal history category III. The guideline range was 41 to 51 months. The government recommended a guideline sentence. *See* Government Sentencing Memorandum, *supra*, ECF 21. The court imposed 32 months of incarceration.

In *United States v. Mohan*, 21-cr-00041-JCC (W.D.Wash.), a tech executive received more than \$1.75 million in PPP money for fictitious companies. The defendant had a net worth over \$5 million and did not need the money. He pled to an information charging wire fraud and money laundering. His guideline was 46-57 months. The government recommended a 36-month sentence, noting that this was “consistent with sentences in other PPP cases.” *See* Government Sentencing Memorandum, *supra*, ECF 55. He was sentenced to 24 months imprisonment.

In *United States v. Jackson*, 20-CR-112-MJN (S.D.Ohio), the defendant pled guilty to two counts of fraud under 18 U.S.C. § 1343 and one count of false statement to a federal agency in violation of 18 U.S.C. § 1001(a)(2). Her loss amount was \$2.3 million. The government calculated the guideline range at 41-51 months. She was sentenced to 24 months imprisonment.

In *United States v. Jaafar*, 20-CR-00185-CMH (E.D.Va.), the defendant pled to one count of conspiracy to defraud financial institutions and the United States in violation of 18 U.S.C. § 371. He created phony shell companies to apply for PPP loans and received \$1.4 million. He was arrested at JFK airport with his family and \$50,000 in cash, attempting to board a flight for Europe. His guideline range was 24-30 months. The government recommended 24 months. *See*

Government Sentencing Memorandum, *supra*, ECF 60. He was sentenced to 12 months imprisonment and 2 years of supervised release.

In *United States v. Hayford*, 20-CR-00088-CVE, (N.D.Ok.), a defendant created a shell corporation and applied for \$4.5 million in PPP loans. The fraud was detected, and he did not receive monies. He pled guilty to bank fraud and making false statements to a bank. His guideline was 41-51 months. *See* Sentencing Transcript, *supra*, ECF 39. He was sentenced to 24 months in prison.

In *United States v. Tubbs*, 20-cr-00193-BSM, (E.D.Ark), a defendant obtained PPP loans of \$1,933,262. The parties entered into a “B” plea agreement, stipulating that the offense level was 22. *See* Plea Agreement, *supra*, ECF 20. The agreement does not describe criminal history, but the lowest possible guideline range was 41-51 months. Tubbs was sentenced to 41 months imprisonment.

All of these cases involve defendants seeking and, with one exception where the fraud was detected, receiving huge sums of money. Defendants with far greater education, wealth, and opportunities than Ms. Jittaphol. Five were sentenced far below the low-end of their guideline range; one was sentenced at the low-end. Sentencing Ms. Jittaphol to anything worse than the low-end of her guideline range cannot be squared with these cases.

Ms. Jittaphol’s Failure to Enter Long-Term InPatient Residential Treatment Does Not Signal Disregard of the Court or Minimization of her Addiction.

The reason that Probation learned of Ms. Jittaphol’s addiction to methamphetamine was because she sought help to beat it. She told counsel that she

could not stop using without going into a detox and asked for help. Counsel contacted Probation in July 2021.

In late November, Probation told her that there was a bed for her in a detox in Plymouth. She was given 4-5 days notice. She unsuccessfully tried to find someone to take her dog and told Probation she could not enter the program until she could find a place for the dog. Probation arranged another start date. She found a friend to take the dog. She left for Plymouth later than she should have and called the facility en route to tell them that she'd be late. She was told that there would not be staff available to admit her. She should have left home earlier, and she acknowledges her error. It is not a reason to reject the plea agreement.

She entered the Carlson Recovery Center detox on December 6th. A copy of her treatment record is provided at Attachment 2. Her clinical supervisor, Debi Dennis, wrote, "Aticha was polite, cooperative and participatory as reflected through her verbiage and demeanor." After completing the one-week detox, she was told that she was to be transferred to an affiliated inpatient facility, The Hope Center. Ms. Jittaphol did not feel that she needed the placement to remain sober. As stated by Ms. Dennis, she agreed to the placement, "even though she would rather not but she wanted to cooperate with her **mandate**." (emphasis added).

Ms. Dennis's choice of words was no accident. There was no clinical finding that further inpatient treatment was warranted. Carlson Recovery understood that Probation had issued a "mandate" for additional inpatient care. Carlson Recovery, and then The Hope Center, misinterpreted Probation's request for services, as

stated in a Probation Form 45, Treatment Services Contract Program Plan, as a directive that did not depend upon any clinical findings or assessment of Ms. Jittaphol's needs. A copy of the form is provided at Attachment 3.

A copy of the record from The Hope Center is provided at Attachment 4. Upon initial assessment, Ms. Jittaphol is described as "engaged, understanding, open and motivated." Consultation notes repeatedly state that her goal is to "get back home and do an outpatient program," and she expressed interest in "checking out some AA/NA meetings." The record provides no indication that this conflicted with a clinical treatment plan assessment. She repeatedly is described as acknowledging addiction and wanting to "stop smoking meth." (e.g., "I need to stop smoking meth and take better care of myself.") She underwent a urine screen on December 13th and was negative. The record contains no assessment and no recommendation for additional inpatient care. This, too, was no accident.

Provided at Attachment 5 is a letter from one of Ms. Jittaphol's clinicians, Erin Hall. Ms. Hall states that, "According to Ms. Jittaphol's P45 form, **services ordered to complete** were 7 days inpatient, 14 days short-term residential and 31 days (monthly) of long-term residential programing." (emphasis added). Instead of interpreting the P45 form as allowing for long-term residential care upon a clinical determination that it was warranted, The Hope Center treated the P45 as a contract to provide mandated services independent of any evaluation of need.

This misunderstanding is illustrated in the treatment records. The Discharge Summary states, "Ms. Jittaphol would like to return home however **probation**

requires further treatment.” (emphasis added). There is no assessment finding that inpatient residential treatment is appropriate; there is no treatment plan assessment at all. There is just a mistaken belief that the decision already had been made by Probation, and that further inpatient residential treatment was required regardless of any clinical assessment.

This error was further cemented in conversations between counsel, Probation and The Hope Center after Ms. Jittaphol successfully completed her program at The Hope Center and went home.

Ms. Curran contacted counsel and stated that Ms. Jittaphol had declined to enter residential treatment in violation of a condition of release. When counsel attempted to question the necessity of this condition, Ms. Curran stated that Probation would not second-guess the clinical assessment made by The Hope Center -- the provider had determined that inpatient care was warranted, and Probation’s condition was based on that determination.

Counsel then spoke to one of Ms. Jittaphol’s primary counselors at The Hope Center, Hilary Moody. Ms. Moody stated that The Hope Center had never assessed whether Ms. Jittaphol should enter inpatient residential care. She said that no clinical assessment was conducted because the treatment plan had been dictated by the P45 form, which she described as a “contract” that required long-term residential care. Ms. Moody further acknowledged that Ms. Jittaphol did not meet the criteria routinely applied to determine whether inpatient care is warranted.

In sum, the condition of inpatient residential care resulted from a wholly circuitous misunderstanding. Probation established the condition because The Hope Center made a referral for it. The Hope Center made the referral because it interpreted the P45 form as mandating it, absent any assessment. No one made a clinical finding that this was appropriate care, and it wasn't.

Provided at Attachment 5 is a report prepared by Stuart Gitlow, M.D. Dr. Gitlow's curriculum vitae is provided at Attachment 6. He is a specialist in addiction medicine. Dr. Gitlow states that the "applicable standard of care in the evaluation of appropriate drug treatment placement relies upon two major criteria sets: InterQual and ASAM [American Society of Addiction Medicine]." He states that the determination of a proper level of care should be based on clinical findings involving these criteria, and that "it is inappropriate, a breach of the standard of care, to determine that a level of care (e.g., inpatient residential vs. ambulatory) is actually warranted in advance, and without consideration of the patient's individualized progress and needs."

Dr. Gitlow then references the criteria deemed essential by both InterQual and ASAM to warrant inpatient residential care:

medical and/or psychiatric acuity; presence of or potential for withdrawal symptoms; whether the patient is functionally intact; whether the patient is a suicide or homicide risk; whether the patient suffers from cognitive dysfunction; whether the patient acknowledges addiction; whether the patient acknowledges a desire to achieve and maintain sobriety; whether the patient has the availability of a safe recovery environment; whether there is evidence establishing a significant risk of relapse in the absence of inpatient treatment.

He notes that Ms. Jittaphol's treatment records do not document any of these criteria. The Carlson Recovery record states that Ms. Jittaphol did not suffer withdrawal symptoms. The records are replete with descriptions of Ms. Jittaphol's recognition of addiction and desire for sobriety. They repeatedly state that there is no indication of any mental illness or psychiatric condition. Dr. Gitlow concludes that, "neither InterQual or ASAM would support a current treatment plan at the level of inpatient residential care."

Counsel has confirmed with Christopher Foster that Probation is not seeking to impose a condition of inpatient treatment at this time. Probation wants to preserve this as a treatment option if Ms. Jittaphol relapses, and Ms. Jittaphol has never objected to inpatient care if she needs it to remain sober.

The question, then, is whether the Court should reject the plea agreement because Ms. Jittaphol declined to enter an inpatient residential program that should never have been made a condition to begin with, violated the applicable standard of care, and became a condition due to a misunderstanding between Probation and The Hope Center.

To the contrary, Ms. Jittaphol should be commended for what she has achieved, and her successful efforts towards sobriety further justify the plea agreement and the avoidance of incarceration. She was discharged from The Hope Center one month ago. There is no evidence of drug use since. That sobriety is what should matter most here; not whether she should have been faster to find a place for her dog, or to get on the road to Plymouth earlier and arrive when she

should have, or to abide by an improper residential treatment directive. She recognized the problem. She sought treatment. She was a model patient at Carlson Recovery and The Hope Center. She's sober and she is committed to stay that way.

Transgender Issues Complicate Incarceration and Any Prison Term Would Result in Excessive Punishment.

Ms. Jittaphol identifies as a woman and looks like a woman. Incarceration in a male facility would cause enormous emotional distress and create serious safety risks. She has not had genital reassignment surgery, so placement in a female facility is problematic.

Michelle Kosilek is serving a life sentence. The mid-point of Ms. Jittaphol's guideline range is 3 months. Genital reconstruction as a predicate to incarceration at a female facility is not an option. There simply is no ready solution and holding her in protective custody or isolation in any facility would entail suffering that is grossly disproportionate to the offense.

Ms. Jittaphol's Character

The quick turn-around between the last Court hearing and this submission made it difficult to obtain letters from family, friends, and others. A letter from a leader of the Boston Buddha Vararam Temple is provided at Attachment 7, describing Ms. Jittaphol's activities in the community and at the temple. Depriving her of these activities would not further the legitimate purposes of sentencing.

Immigration Status

Counsel has not determined Ms. Jittaphol's employment status as regards employment and will assist Ms. Jittaphol in consulting with an immigration

lawyer. However, Ms. Jittaphol's understanding, based on prior communications with immigration lawyers, is not consistent with the letter provided by Mr. Foster. Ms. Jittaphol believes that she is permitted to work. It is unclear to counsel whether that understanding is based on what she was told about her Employment Authorization or her pending asylum case, or both. The asylum case is not referenced by Mr. Foster, and counsel is uncertain what privileges the pending petition grants. The grounds of the petition include the risk of severe discrimination due to being transgender. Immigration status should not impact the Court's assessment of the plea agreement. Counsel will attempt to clarify Ms. Jittaphol's immigration status and employment authorization.

Conclusion

For these reasons, the Court should accept the parties' plea agreement.

ATTICHA JITTAPHOL

By her Attorney,

/s/ Keith Halpern

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CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on January 28, 2022.

/s/ Keith Halpern