

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v.

ATICHA JITTAPHOL,

Defendant

CRIMINAL No. 21-cr-10270-MLW

GOVERNMENT'S MOTION TO ACCEPT DEFENDANT'S GUILTY PLEA AND IN
SUPPORT OF THE PLEA AGREEMENT

The government submits this brief in response to the Court's inquiries at the hearing of January 20, 2022 and the Court's order requesting briefing on (1) why the Court should proceed to accept the defendant's guilty plea and defer its decision as to whether to accept the Rule 11(c)(1)(C) plea agreement until sentencing and (2) why the agreed-upon sentence is sufficient under 18 U.S.C. § 3553(a).

In short, the Court should accept the defendant's guilty plea and defer its decision on the plea agreement until after it has reviewed the presentence report, which will assist the Court in deciding whether to accept the parties' low-end guideline recommendation in the Rule 11(c)(1)(C) plea agreement. At the same time, the government believes that the Rule 11(c)(1)(C) plea agreement's 36-month probationary period is sufficient, but not greater than necessary under the § 3553(a) factors, including providing adequate deterrence to criminal conduct, the nature and circumstances of the offense, the defendant's history and circumstances, the kinds of sentences available, and the seriousness of the offense.

I. THE COURT SHOULD ACCEPT THE DEFENDANT’S GUILTY PLEA AND DEFER ACCEPTANCE OF THE PLEA AGREEMENT TO SENTENCING.

As a procedural matter, the Court should accept the defendant’s waiver of indictment, allow the defendant to enter a plea of guilty, and defer until sentencing its decision as to whether to accept the Rule 11(c)(1)(C) plea agreement. Fed. R. Crim. P. 11(c)(3)(A) (“To the extent the plea agreement is of the type specified in [Rule 11(c)(1)(C)], the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.”). This approach would allow time for probation to prepare and the Court and parties to review the presentence report. The presentence report will incorporate probation’s investigation of the relevant conduct and probation’s interview with the defendant. It is specifically intended to shed light on the § 3553(a) factors including the defendant’s history. Fed. R. Crim. P. 32(d)(2). With the assistance of the presentence report, the Court will have a more comprehensive assessment of the nature and circumstances of the offense and the history and characteristics of the defendant.

Allowing the defendant to plead guilty and deferring a decision on the Rule 11(c)(1)(C) plea agreement will not prejudice the defendant. If the Court rejects the plea agreement, Rule 11(c)(5) states that the Court must give the defendant an opportunity to withdraw her guilty plea. Fed. R. Crim. P. 11(c)(5); *see also* Rule 11(d). In fact, if the Court rejects the Rule 11(c)(1)(C) plea, the Court must advise the defendant that it is not required to follow the plea agreement and that the Court may dispose of the case less favorably toward the defendant than the plea agreement contemplated. Fed. R. Crim. P. 11(c)(5). In doing so, the Court can ensure that the defendant’s guilty plea is knowing, intelligent, voluntary, and not bound by the plea agreement. In *Lopez*, for example, the court rejected the co-defendant, Mateo’s, Rule 11(c)(1)(C) plea agreement that contained a promise to dismiss charges against Lopez. *United States v. Lopez*, 944 F.2d 33, 37 (1st Cir. 1991). Mateo then entered an unconditional guilty plea after court

rejected the guilty plea, and the First Circuit commended the district court for being “careful to make absolutely certain that Mateo’s entry of a guilty plea was in no manner contingent upon any provision in the unapproved plea agreement.” *Id.*

II. THE PLEA AGREEMENT IS SUFFICIENT UNDER 18 U.S.C. § 3553(A)

When the Court evaluates the Rule 11(c)(1)(C) plea agreement, it should find it sufficient in light of the Federal Sentencing Guidelines and other § 3553(a) factors. In every case the district judge must impose a sentence sufficient, but not greater than necessary, to comply with the purposes of federal sentencing. 18 U.S.C. § 3553(a). A plea agreement under Rule 11(c)(1)(C) does not discharge the “district court’s independent obligation to exercise its discretion.” *Freeman v. United States*, 564 U.S. 522, 529, holding modified by *Hughes v. United States*, 138 S. Ct. 1765 (2018). The district court must evaluate the defendant’s applicable sentencing range and the § 3553(a) factors and only accept a Rule 11(c)(1)(C) plea agreement if the court is satisfied that such sentence is an appropriate sentence within the applicable guideline range. *Freeman*, 564 U.S. at 529.

First, the plea agreement correctly sets for the guideline calculation, which provides an offense level of 6 and a guideline range of 0-6 months. The defendant is charged with making false statements in violation of 18 U.S.C. § 1001, which caused a loss amount of \$7,066.67. The defendant’s guideline calculation is below.

Jittaphol’s Sentencing Calculation	Offense Level
Base Offense Level (U.S.S.G. § 2B1.1(a)(2))	6
Loss exceeds \$6,500 (U.S.S.G. § 2B1.1(b))	+2
Acceptance of Responsibility (U.S.S.G. § 3E1.1)	-2
Total Offense Level After Plea	6 (0-6 months)

The government has not identified any other applicable enhancements or aggravating factors warranting an upward departure or variance.

Second, a low-end guideline sentence of 36 months of probation is sufficient, but not greater than necessary, to comply with the purposes of sentencing under 18 U.S.C. § 3553(a).

The recommended sentence affords adequate deterrence to criminal conduct. 18 U.S.C. § 3553(a)(2)(B). As the Court recognized, COVID-related fraud is a serious crime. *Jittaphol*, Jan. 20, 2022 Hearing Tr. at 21. The Secret Service, for example, estimates that up to \$100 billion in COVID-relief funds have been distributed to fraudulent applications. *U.S. Secret Service names National Pandemic Fraud Recovery Coordinator*, <https://www.secretservice.gov/newsroom/releases/2021/12/us-secret-service-names-national-pandemic-fraud-recovery-coordinator>, last accessed Jan. 27, 2022. The individuals responsible for this fraud span the spectrum from individuals to organized criminal networks. *See id.* Here, although the loss amount is relatively modest (\$7,066.67), the fact that the fraud is being prosecuted provides general deterrence to other criminals, especially those responsible for relatively small fraud amounts. In terms of specific deterrence, the investigation and the conditions of the defendant's pretrial release has shut down the defendant's illicit business, forced her to attend drug treatment programs, subjected her to drug testing, and may have additional consequences related to her immigration status.

The recommended sentence is also sufficient in view of the nature and circumstances of the offense. 18 U.S.C. § 3553(a)(1). The defendant operated a massage parlor where employees sometimes provided sexual services for a fee with the defendant's knowledge and consent. Customers typically paid \$80 for a one-hour massage session and an added a tip for sexual services. The defendant collected \$40 for each one-hour session—the defendant received this fee *regardless* of whether sexual services were provided. Extensive interviews revealed no

evidence that Jittaphol's employees were being trafficked or subject to fraud, force, or coercion. Instead, the employees were mature, independent adults, many with permanent legal status.

The defendant's history and circumstances also support a low-end guideline sentence. 18 U.S.C. § 3553(a)(1). While the presentence report will likely shed more light on the defendant's history and circumstances, the defendant is part of a vulnerable population as a transgender individual and a longtime sex worker. Historically, individuals from those backgrounds have regularly suffered abuse, violence, and discrimination.

The kinds of sentences available also support the parties' recommended sentence. 18 U.S.C. § 3553(a)(3). The defendant's immigration status does not necessarily indicate that the defendant will be removed from the United States before she serves her 36-month probationary sentence. As reported by probation, the defendant currently has a work authorization that allows her to remain in the United States. ECF No. 33. This work authorization expires on July 13, 2022, but has been renewed several times. (The defendant originally entered the United States on an F1 visa, which has since expired.) Additionally, the defendant has submitted and may submit other immigration applications that could result in legal status. The defendant is not currently subject to a detainer, and the government does not have any information about whether federal immigration authorities will take enforcement action in the future. Based on the available information, the defendant's immigration status does not bar imposition and execution of the recommended probationary sentence.

Finally, the parties believe the proposed sentence reflects the seriousness of the offense and provides just punishment for the offense. 18 U.S.C. § 3553(a)(2)(A). A 36-month probationary sentence is a significant one, especially for an individual with the defendant's drug-

abuse problems. The lengthy probationary period will also allow the Court to craft appropriate conditions and monitor the defendant's behavior and rehabilitation closely.

III. CONCLUSION

For the reasons discussed above, the government respectfully requests that the Court accept the defendant's waiver of indictment, allow the defendant to enter a guilty plea, and defer until sentencing its decision as to whether to accept the plea agreement. Additionally, the government believes that the Rule 11(c)(1)(C) plea agreement provides for a sentence that is sufficient, but not greater than necessary under Federal Sentencing Guidelines and the 18 U.S.C. § 3553(a) factors.

Respectfully submitted,

JOSHUA S. LEVY
First Assistant United States Attorney

By: /s/ Elysa Q. Wan
ELYSA Q. WAN
Assistant United States Attorney

ALYSSA TOCHKA
LUKE GOLDWORM
Special Assistant United States Attorneys

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).

/s/ Elysa Q. Wan
Elysa Q. Wan
Assistant United States Attorney

Date: January 28, 2022