

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	No. 18 Cr. 35 (Tharp, J.)
	)	
JAMES VORLEY,	)	
	)	
Defendant.	)	
	)	

**JAMES VORLEY’S MEMORANDUM IN AID OF SENTENCING**

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## **INTRODUCTION**

When the Department of Justice brought criminal charges against James Vorley in early 2018, he promptly offered to waive extradition and appear voluntarily in the United States, even though he knew that the government would be seeking his detention. He spent two harrowing days at the Metropolitan Correctional Center in Chicago before being released on bond and allowed to return home to his family in London to await trial. Having lost his cherished career, James became the primary caretaker for his two young sons, now aged three and five, while their mother, James' life partner Lizzie, went back to work to support the family.

Eager to clear his name, James sought an early trial, even though he knew that there could be serious disadvantages to a trial during the Covid-19 pandemic, including the inability for James and the jurors to see each other's faces. At the trial's end, James was acquitted of the majority of the charges against him, including the conspiracy charge and five substantive counts of wire fraud affecting a financial institution. He was convicted of three counts of wire fraud affecting a financial institution based on three short sequences of trading activity on three dates in 2010 and 2011—all over a decade ago and all before the July 16, 2011 effective date of the Dodd-Frank anti-spoofing rule.

We respectfully submit that the Court should sentence James to a non-prison sentence on each of the three counts of conviction. For the past three years, James has complied with all conditions of his release and reported regularly to his probation officer. He has no prior criminal history, and he has already suffered serious consequences that make it inconceivable that he would ever reoffend. Imprisonment at this late date, thousands of miles from his home, would not only serve no good purpose but would result in extraordinary collateral consequences for James and his family, particularly his two small children and Lizzie, as James must take care of their boys full

time while she works. A term of supervised release with conditions, by contrast, would be sufficient but not greater than necessary to fulfill the aims of sentencing based on a consideration of the relevant statutory factors. 18 U.S.C. § 3553(a).<sup>1</sup>

Assuming for purposes of sentencing (as the Court has ruled) that the government's evidence of "spoofing"—placing a bid or offer on an exchange with the intent to deceive other market participants in order to facilitate the execution of an opposite-side iceberg order—was sufficient to establish wire fraud even before Dodd-Frank, James should not be punished based on current standards of market conduct. His trading should instead be considered in the context in which it occurred over a decade ago. James never hid his trading from his supervisors on the desk, and he was never told that he was trading improperly. He did not personally profit from his trading. If he stepped over the line by showing, real at-risk bids or offers that he was willing to honor but did not subjectively wish another trader to execute before he cancelled, it never occurred to him until he was first trained on Dodd-Frank in late September 2012 that he could lose his job for doing so, much less go to prison.

Trading this way was viewed as a part of the job—a "tool" in the words of the government's cooperating witness, David Liew. Tr. 706:19-25, 867:11-13, 868:6-8. The traders at Deutsche Bank did not hide the way they were trading, and James never dreamed that their placing real, at-risk orders could be deemed criminal market manipulation. Indeed, the conduct for which James was convicted was so widespread in the precious metals markets that multiple large banks—including Deutsche Bank, Bank of America/Merrill Lynch, JP Morgan, and Bank of Nova

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<sup>1</sup> The Probation Department has recommended a sentence of "one day imprisonment with time considered served" and a fine of \$30,000. Sentencing Recommendation 7. While we concur with the recommendation of a noncustodial sentence, James does not object to a term of supervised release with conditions. See p. 33 n.19, *infra* (citing precedent for a supervisory sentence where the defendant resided in a foreign country).

Scotia—have entered into deferred prosecution agreements involving penalties totaling well over \$1 billion based on similar conduct. These banks have also admitted that they failed to properly train and supervise their employees. James played a relatively minor role in this sprawling global market, and he should not be sentenced to set an example for an industry that has long since adjusted its behavior to the new rules that placed spoofing out of bounds—and now provides extensive training and supervision to traders that James never had.

James has spent the past seven years of his life living with the consequences of trading that occurred ten years ago, on behalf of Deutsche Bank, with the full support and knowledge of his supervisors, and which did not result in any personal financial gain to him. He has already paid a terrible price: the destruction of a treasured career, the loss of his deferred compensation, the financial and psychological toll associated with criminal prosecution, and public humiliation. He still faces an enforcement action by the CFTC. In these circumstances, a non-prison sentence, with conditions that could include home confinement, would be appropriate and would not denigrate the seriousness of the offense.

#### **I. JAMES VORLEY'S PERSONAL HISTORY**

The letters that James and his family, friends, and former colleagues wrote Your Honor provide a consistent, detailed, and coherent picture of the man before you for sentencing. They depict a life carefully and conservatively lived—hallmarked by loyalty, stability, hard work, and far-sighted choices. It is a life shaped by and dedicated to family, demonstrated most vividly by James' reaction to the investigation and prosecution of this case. Crushed by the loss of the life he worked from the age of 19 to create, James applied the same energy and focus that drove his professional success to becoming an exceptional primary caregiver to his two boys, making him

the rock upon which their young lives are built. Both who James Vorley is and the severe impact incarceration will have on his family argue strongly in favor of leniency.

**A. Childhood**

James grew up in the near-in suburbs of London. His mother left him and his father when he was five. Their divorce was highly unusual in their community at the time—James knew no one else who came from a broken home. His father, John, took custody of James, with his mother seeing him Saturdays. But with John working from early until late in IT at a global investment bank, James’ grandmother, and later his aunt and uncle, played major roles in his upbringing.

James’ grandmother cared for him from early morning drop-offs through late pickups with meals, school runs, games, and affectionate cuddling under a blanket in front of the TV. Multiple letters recount her turning their ride to school on the public bus into a calculation game for her grandson with the quick wit and aptitude for numbers. Following her husband’s early death, she raised James’ father and his siblings in a public housing project (a “council house”) working multiple jobs. She passed onto James her exceptional care with money, teaching the lesson in part by opening a bank account for him that came with the ability to progressively acquire a family of piggy bank pigs via saving. It worked:

I washed cars, cut grass, anything that got me pocket money. She would give me a pound here and there suggesting I could go to the sweet shop or save it for my pigs, with the emphasis heavily on the pigs. I always saved it. Needless to say I got all the pigs, they are still on a shelf in my father’s house to this day, but I also got the lesson, work hard, save and you can get what you want, and it was my Nan who taught me this at a young age.

(James Vorley Letter to Judge Tharp<sup>2</sup> at 2 (“James Vorley Letter”).)

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<sup>2</sup> James’ letter was submitted to the Probation Department.

When caring for James became too much for his grandmother, his aunt and uncle assumed her duties. They added James to their nuclear family weekdays from early morning till night, providing their own life lessons and love, as well as three cousins who served as James' siblings. James' warm, loving uncle Russell Sheen was a particularly big influence. He struggled to support his own family doing maintenance work at pubs in London. But he recognized what he called "the smarts" in James, and pushed him to build a better career than his own. Well after James needed to be looked after, he continued to travel to their council house in a "rough area" after school. Ex. A (Letters of Support) at 8 (Laura Sheen, James' cousin).

Bookending James' daily care by these family members was the metronome-steady example his father John set. He worked hard during the week, and often on the weekends, leaving early and getting home late. He explained to James that they were a team of two, that there would be no handouts, and that to keep their household going James had to do his part, cooking and ironing for a weekly allowance. John reinforced his own mother's ideas about the lessons of hard work and the value of money, teaching James to work for what he wanted.

Though less of a presence, James' mother remained part of his life as a child. She moved into a council house in an "undeveloped and rough around the edges" neighborhood following the divorce, but eventually saved enough to buy the house from the local government authority. (James Vorley Letter at 2.) She and James spent Saturdays together, often while John worked.

Adding to the stability created by his extended family, James forged a self-made second family of his own. Early in primary school, James formed a small, tight-knit friend group that—35 years later—remain his small, tight-knit friend group. Now in different walks of life—they are a black taxi driver, a lawyer, an electrician, and a clerk at a law firm—the men remain as close as

they were in school, standing up in each other's weddings, sharing births and deaths, raising their children together, and counseling each other through hard times and important decisions.

The community that raised James succeeded. (*Id.*: "I was a very confident child and put it all down to my family. I knew I was loved and that there was always someone there to care for me long before I knew anything else.") But James also longed to create something different: "I worked tirelessly to avoid [not being present for my own children]. I come from a broken home, I know better than anyone the effects it has." (*Id.* at 18.)

## **B. Career**

Despite his intelligence, James did not do well enough on his A-levels (high school exams) to go to university, so by age 18 he set about finding work to support himself. Pursuing his longstanding fascination with markets formed following his football (soccer) team's publicly traded shares in the broadsheets as a boy, James sent letters and resumes to more than 50 firms he found in the local library's copy of *The Banker's Almanac*. After a year of temporary work, he finally got a letter alerting him of a clerk position on a base metals trading team in the London Mercantile Exchange ("LME"). He prepped hard and after a successful interview got the job.

James immediately took to the LME, loving everything about it despite his low-level duties—e.g., mastering the morning "bun run." (James Vorley Letter at 4.) But by perfectly executing breakfast orders, meticulously taking care of his administrative duties and, most importantly, successfully running market orders and messages back and forth between the trader in the pit and the salesperson outside it, James excelled.

He also learned about the market. From the very start, the main lesson was the same: hide what you were doing; try to make your competitor think you were doing the opposite. When 19-year-old James received a big, exciting order to pass to the trader in the pit, he learned to take his

time and carry himself as if nothing was afoot, preventing a pit alive with eyes and ears from perceiving—and trading ahead of and thus pushing the market away from—his firm’s client’s order. As time passed and James made a series of steps up the ladder—after 18 months to desk assistant; after several more to junior spot trader (where he began trading a small inactive silver book); and after four more years into the shoes of the departed gold trader—this lesson stayed the same. While his peers attended classes at university or hit the pubs at five, James worked from 7 a.m. to 6:30 p.m., acquiring an intensive education in trading. His friends called him “mad,” but he couldn’t get enough of it. (James Vorley Letter at 17.)

In his letter to the Court, James expounds in some detail on what he saw and learned during these years, as well as the years that followed as the precious metals market moved from trading pits to computer screens. Even now, despite all, his love of and excitement about trading jumps off the page, as does a bone-deep, learned-by-living-it understanding of his trade. The boy who excelled at sums with his grandmother, obsessively tracked the movements of his team’s shares, and eagerly put into practice the lessons of the three adults who raised him, had far exceeded all reasonable expectations. Eight years after his high school graduation, James Vorley had become Deutsche Bank’s precious metals spot trader.

Letters from James’ former colleagues, including two supervisors and his compliance officer during his time at Deutsche Bank, underline that hard work, integrity, stability, and a team- and client-first attitude defined James’ career. Raymond Key, the head of Deutsche Bank’s precious metals desk in London until 2012, explained that as the precious metals spot trader, James “worked hard to help those around him,” performing the “challenging role” of providing prices to customers or internal traders in fast moving markets. Ex. A at 34 (Raymond Key, James’



supervisor). In doing so, he noted that “James demonstrated real character, helping the team around him . . . sometimes to his own detriment as he considered it the right thing to do.” (*Id.*)

James’ other Deutsche Bank supervisor, Eric Parker, who headed the precious metals desk after Key and is now the Head of Global Metals Trading at ICBC Standard Bank in London, makes the same point with respect to customers:

I had never met Jimmy prior to his interview . . . and when I did I recall . . . advocating for making him an immediate offer. His demeanor and the way he answered my questions regarding integrity set him apart. I generally use some leading questions regarding taking advantage of various opportunities that present themselves in the financial markets and trading to attempt to ascertain a trader’s mix of aggression and prudence. What made this particular interview distinct was Jimmy’s reply. Long story short, he threw me a curve ball and essentially gave me nothing about his aggression/prudence but instead focused on what was best for the customer. It would turn out to be one of his defining qualities as our new spot trader. . . .

I’ve been around this market for all my professional life and there are plenty of people out there who don’t have a problem with making money at the expense of the franchise. Not only was Jimmy not like that, but he consistently put the good of the customer above that of his own books.

Ex. A at 38 (Eric Parker, James’ supervisor).

James was also one of his compliance officer’s “regular customers, for the right reasons.”

Ex. A at 36 (Matthew Scott, James’ compliance officer). “He proactively sought my advice on the interpretation of external regulation and internal policy. More important, Jim was one of a minority of traders who pushed for greater clarity on such interpretation to assist in determining

activity commensurate with the risk appetite of the firm.” (*Id.* at 36-37.)<sup>3</sup> Raymond Key agreed, summing up his view of James based on his seven years as his boss as follows:

James is one of the most loyal, moral, stable and grounded people I have met in my time in not only banking, but in the not-for-profit sector. Whilst I have seen the full range of characters in banking over 20 years, I know that James is one of the most decent and caring individuals I have come across in the industry. . . .

James is also very sensible and stable. Whilst many bankers I have met have inflated egos, James does not have these failings. He worked for the team. I never observed a time where James illustrated arrogance, he is grounded and works hard. He understood his key role in the business and worked hard to help those around him. This was true whether it was a senior executive at Deutsche, a graduate trainee, a compliance officer or a member of our back-office staff. . . .

James was also very trustworthy. I felt comfortable with James running his part of the business because of all the traits I’ve outlined above. Of all the people I know across my previous career in banking, my various roles in a number of charitable organizations and business James would easily be in the top 5% of moral integrity, honesty and stability.

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<sup>3</sup> James’ compliance officer continued:

- It was clear to me from the outset of my interactions with Jim that appropriate conduct in the market by him, his peers at Deutsche bank and the wider market mattered. On more than one occasion he raised concerns to me about third-party activity he had observed and considered detrimental to market function. I recall at the time his frustration that the regulatory reporting mechanism for such suspicious activity did not appear to be influencing a change in certain market behaviour.

In my view, as Jim’s compliance officer at the time, these examples are evidence of Jim’s integrity and his commitment to do the right thing. He challenged me as his Compliance Officer on rule interpretation, appropriate behavior, and the reasonable steps necessary to achieve this. Significantly, considering my interaction with Jim over those 7 years, I saw this challenge as establishing where the line is drawn on appropriate conduct, not how it could be surpassed. I saw Jim as risk averse and in challenging Compliance he sought to better understand the rules in place at that time and the firm’s expectations as regards adherence to them, in an environment subject to recent significant regulatory change following the implementation of MiFID I.

Ex. A at 37 (Matthew Scott).

Ex. A at 34-35 (Raymond Key).<sup>4</sup>

James' maturity and far-sighted approach is evidenced another way. Landing that first job, 19-year-old James not only started paying his dad room and board, but he also began to put 20%

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<sup>4</sup> Other letter writers also discuss James' exceptional character:

- I felt proud and happy for him when he landed his first job in a bank, even more so when after receiving his first payslip he set up a monthly standing order donating to the British Red Cross charity. Ex. A at 8 (Laura Sheen, James' cousin).
- He is diligent, hardworking, honest, trustworthy, principled, generous, caring and, above all, dependable in every sense of the word. . . . For example, James refuses to touch even a drop of alcohol if he has to drive his family anywhere. Ex. A at 30 (Alessio Sbraga, James' lifelong friend).
- I was to say the least, shocked and surprised to hear of the case brought against James. He has always been someone I've looked up to. Someone I've known to be a good man with integrity, never one to bend or break the rules, refuses to get ahead in a queue, or park in a spot that may not be allowed! Always cautious, a responsible character and a real pleasure to be around. Ex. A at 11-12 (Joey Edler, James' cousin's partner).
- James isn't someone who tells people that he does the right thing, acts with honesty and integrity or shows kindness to others. He simply does those things. Ex. A at 46 (James Raymond, James' colleague and friend).
- James always behaved in an honourable, restrained and temperate manner in any setting, seemingly always fully aware of his responsibilities as a father to his much loved wife and children. Ex. A at 5 (Brendan Downes, James' colleague and friend).
- He is loyal, steadfast and honest. He has never been afraid to tell me the truth - whether I wanted to hear it or not! (on a couple of occasions, the truth I received was about boyfriends I had – although in hindsight many of his points were valid). I always feel that you know exactly where you stand with James, what you see is what you get. There is no pretending to be someone he isn't and he is always straight down the line. Ex. A at 15 (Claire Eades, James' cousin).
- In conclusion, I would say that in my opinion James is a hard working, honest and loving and considerate person, who has surrounded himself with people of a similar nature, who appreciate him as such. Ex. A at 25 (John Vorley, James' father).

of his income to savings and send another portion to the Red Cross. These habits stuck. He continues to give monthly to the Red Cross, donates weekend time to his local Catholic Church assisting after Mass, and has been giving to and organizing donations to a local food bank during the pandemic. He also donated platelets every Saturday for years after his beloved uncle's death from cancer. And, since that very first pay check, James continued to put a portion of his earnings—and all of every bonus—to savings.<sup>5</sup> Extraordinarily, James not only started saving at age 19, but he did so to support the future family that already was his goal.

In service of that goal, and following the example set by his grandmother, James lived frugally. A recurring theme emerges in his letters of support. Even after starting to earn a significant income as a trader, James showed no outward signs of wealth. He lived in the same two-bedroom row house in a stable, but far from wealthy London borough, driving an old car, and staying true to the people and values he grew up with.<sup>6</sup>

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<sup>5</sup> James' dedication to saving is backed up by his financial disclosures. *See* PSR ¶ 107.

<sup>6</sup> Below are a selection of excerpts on this point:

- James isn't materialistic, nor about affluence or social status, he places importance elsewhere. A perfect example of this is would be when James and Lizzie asked myself, and my partner Joe to be legal guardians of their children, should anything happen to them. Within James and Lizzie's family and close friends there are many people they could have entrusted with their children, people who hold well respected jobs, earn far higher salaries than us, and live in nicer homes. Yet he asked us, myself, a PA and my partner Joe who works in the construction/scaffolding industry. When I asked "why us"? James told me he and Lizzie felt strongly that with us is where they felt their children would be best placed. That they felt we held the same values as them, that like them we would support yet push them, keep them humble, to teach them morals and what is important in life. To help them become the well-rounded adults they hope for them to grow up to be. Ex. A at 9 (Laura Sheen, James' cousin).
- My husband [James' uncle] always remembered a day when he was sent to a repair job in a busy city bar and he heard somebody call out to him, when he turned James threw his arms around him and gave him a huge hug in front of his colleagues and

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friends, it brought tears to his uncles' eyes. Ex. A at 17 (Barbara Sheen, James' aunt).

Something that has always surprised me is that despite his obvious love of numbers from an early age, his natural progression to a career in finance and his strong work ethic, he has only ever been concerned with providing the essentials for his family. As an adult he has never been materialistic, he always makes it very difficult for any of us to give him gifts as he much prefers to spend some quality time with everyone and I know that this is ultimately how he would like his sons to be. (*Id.* at 18.)

- [James] has never been obsessed with money or a particular way of life. He doesn't own an expensive watch or a flashy car. We live in a two-bed house and while we wanted something bigger we never planned to overhouse ourselves. Our faith has always lead us to believe in the saying "the meek shall inherit the earth" and while James did have a high paying job it was never intended to fund a lifestyle. It was a job he loved doing, and one he did for the future of our family. Ex. A at 6 (Lizzie Goode, James' life partner).
- You would never have guessed from the outside that he had such a successful career, he has always been modest. The cars he drives are testament to that, he always run them into the ground before buying another! Ex. A at 12 (Joey Edler, James' cousin's partner).
- Despite a good salary for his age my brother's head was not turned by this. Instead he continue to drive his old Volkswagen car and only invested in good suits to ensure he was well dressed to represent his company. James has kept his feet firmly planted on the ground throughout his career, investing in his home and living within his means to ensure his future and that of his family was secure. His home reflects his values, it is a small terrace near a good school in a good area. It is quiet, unassuming and focused on providing a warm, comfortable and safe family space. My nephews are thriving because of the base and the love they receive with in it. Ex. A at 13 (Michaela McGorty, James' half-sister).
- Financial safeguards for his family have always been very important to James; he is a thrifty person who is wary of spending money in an unconsidered or profligate way. He is not a risk taker he considers things carefully taking into account how any decision may affect his family's future. James family live in a two bedroom house in South London, the area is pleasant and family friendly but in no way can it be called extravagant or up-market. The family is a one car family which they feel is sufficient for their needs. Ex. A at 23-24 (John Vorley, James' father).
- James is not a materialistic person, he lives in a modest two bed house in an ordinary street. His focus has always been to work hard, provide for the family and save for the boys education. You would not know what James did as a career unless

James was not chasing a lifestyle – the people who made up his world didn’t value that and neither did he—he was saving for his future family, and to give his future children opportunities he lacked.<sup>7</sup>

**C. Community**

As with his career, in forming his family, James played a long game. He met his partner Lizzie as a teenager, fell in love with her in his early 20’s when she returned to the town they grew up in after university, and waited for her as she traveled the world and later hesitated about settling down. By age 33, Lizzie was ready, and two years later, their first boy, [REDACTED] was born. Two-and-a-half years after that, [REDACTED] followed. James and Lizzie originally planned to marry upon moving in together in 2014, but when Deutsche Bank began its investigation, they decided to wait until there was less uncertainty about James’ career to start planning their wedding. It never occurred to either that they’d be in the same spot seven years later.

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you sat and had a conversation with him. Ex. A at 26 (Lynda Lovell, James’ mother).

- [James] has never been one to take risks or be ostentatious in life. His main focus has been to provide a safe and steady home for his children and family to feel safe and loved in. Ex. A at 47-48 (Steven Parsons, James’ lifelong friend).

<sup>7</sup> First and foremost was a private school education. From interacting with colleagues at Deutsche Bank, James came to realize they had all attended private school and to understand the benefits it provided. Sacrificing that ambition due to his new earning potential has been a loss. (James Vorley Letter at 17: “One of my biggest regrets in life was my failure to really achieve at school, to push on and go to university. Part of my thoughts around saving my money was so that my children would have an opportunity not to make my mistake. I worked with so many wonderful people who were fortunate enough to be sent to fee paying schools when they were young and all recommend it. It had long been my dream that I would provide my children with this opportunity. The reality now is that we can’t and we may never be able to.”).

James' steady focus on what's most important arises time and again in the letters from his friends and family. His tight knit world is apparent. There are many letter writers, but they nearly all fall into just three categories: family; the small group of friends formed in childhood; and former colleagues. In each group, James is the rock—the person friends and family turn to in times of need; the colleague who is as reliable as his father. Letter after letter emphasizes that James was the person who provided critical support at life's most difficult moments, such as the death of a loved one or a serious illness. Time and time again, of all the people in their life, it is James who appeared when times were hardest to lend an ear, offer a room, give a ride or simply call on the anniversary of a loved one's death.<sup>8</sup>

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<sup>8</sup> A selection of excerpts:

- [James] is very close to my son and a few years ago my sons marriage broke down. The only person he would confide in was James. James was our go between because my son did not want to worry us, so James kept us informed of what was happening. His actions were a great help to us and also helped my son mentally. He offered [my son] the use of his spare room for as long as he needed it, I know my son found his help invaluable at the time with helping to sort out any problems that arose from the situation. He said afterwards that he does not know what he would have done without James at that time. Ex. A at 49 (Mrs. C. Whiteland, James' aunt).
- James displayed his true compassionate side about 15 years ago when my slide into alcoholism was becoming more apparent to almost everyone other than myself. His support and encouragement to me to seek professional help was instrumental in me going into rehabilitation at the priory in England for a month and I have been sober since then, which has kept my marriage and family life together despite the traumas involved in struggling with that condition. James's understanding was invaluable. Ex. A at 51 (Brendan Downs, James' colleague and friend).
- Me and James are part of a lifelong friendship group and James is almost always the first one to be contacted for advice, or to be informed of a piece of news. Throughout my life has helped me, from studying for exams and relationship advice, to being so soundboard for career ideas and job interviews. Such is his level-headed way, in our early 20s when my focus was on spending money, James encouraged me to think in the long-term and open a savings account and start a



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pension plan. More recently, he coached me through the application I was completing for a new job role, helping me to feel prepared and confident for the process. He is held in such high regard it has meant he has been the best man at the weddings for two in this friendship group and will be asked to be my own best man when the time comes. Ex. A at 19 (James Riggs, James' lifelong friend).

I will be eternally grateful in particular for the support and compassion [James] showed to me following the death of my father when I was 25 years old. It was a sudden and unexpected passing, and I and my family were devastated by the loss. The death of my father caused me to experience a sharp period of depression that found me in a very dark place, however, James was a constant support to me during this time. He would call, message or visit every day or as much as possible, always making it clear that he was around whenever or however I needed him. James would often take me out for dinner and offered to take me on holiday, without expense to me, and has never expected anything in return. James' compassion extended beyond our friendship to my mother and brother also, regularly offering support and practical assistance if he was needed. (*Id.* at 19.)

- During his uncle's illness James gave his support to his aunt and three cousins as well as to his uncle. He made himself available for any tasks which needed doing, he was a taxi if one was needed to run errands or visit the hospital. He spent time when his uncle was in the hospice just chatting and doing anything he could to keep his spirits up. He was always the shoulder to cry on if his aunt or cousins needed any support. James was at the hospice when his uncle passed away. It was during these times that I truly came to understand the tremendous bond which James felt for both his grandmother and uncle and I know the same bond exists with all in our extended family. Ex. A at 22 (John Vorley, James' father).
- My mother died in 2011 of a brain tumor after being ill for only 6 months. It was horrendous. James again was there for me. He is incredibly loyal and he helped me through this terrible time in my life. He came to her funeral, he listened to me and did not judge or expect me to be "fine" when I was struggling with severe anxiety and overwhelming grief. He would take me to doctors' appointments and help motivate me when I didn't have the energy or capacity to do this myself. He saved me from complete depression. This was all before we lived together and before we had our beloved children. He did not have to be that person for me but he is such an empathic person he would never have just abandoned me. He wouldn't have seen this as hard work or expected anything in return. He did it out of the goodness of his heart as it is a strong personal characteristic of his, one that I am grateful for. Ex. A at 2 (Lizzie Goode, James' life partner).
- Put simply, he is a natural guardian with a smile who asks for nothing in return, and quite often the support he provides is understated. One stand out example for me, personally, was the unwavering support he gave me one a close friend and



James' reaction to his investigation and prosecution also speaks volumes about his character. Faced with no longer being able to care for and protect his family in the manner he'd been preparing to since he was barely an adult himself, James immediately found a way to contribute more. He pushed through the loss of his job and significant internal struggles about what was happening to him to provide his boys what he wanted for them—the stable foundation an always-present, loving parent provides.

Letter after letter gush about James' care of his two boys. For [REDACTED] entire three years, and three of [REDACTED] five, James has woken the boys up, put them to bed, cooked every meal, put them down for every nap, consoled every fall, shared every small joy, and taught nearly every lesson. He has been as devoted, attentive, and caring a parent as the two boys could have; he is the center of their worlds. And it has paid off. By all accounts, both boys are happy, well-adjusted, inquisitive, friendly, polite and stable. All the letters touch on James' extraordinary care of his boys, their devotion to each other, and the wonderful job he does with them.<sup>9</sup>

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colleague of mine unexpectedly took his own life on Christmas Eve. This was a particularly difficult period for me, and is one which, to be frank, is hard to talk about. However, what I can say is that he was there for me through thick and thin. He counseled me when I was at my lowest and his only motive was to make sure I was ok. It is something I will never forget and is testament to the kind of selfless person he truly is. Ex. A at 31 (Alessio Sbraga, James' lifelong friend).

- During my divorce he did not get involved in the day to day but stayed close and quiet. He will stay true to his beliefs and for this reason I have made him executor of my will. I needed a safe pair of hands who could be trusted to keep my wishes upheld and my children protected if anything should happen to me. Ex. A at 14 (Michaela McGorty, James' half-sister).

<sup>9</sup> A few excerpts follow:

- James is an amazing father. He is, from a legal and practical sense the Primary Caregiver in the house. He makes all of the meals, takes the children to school, does the cleaning and tidying, arranges appointments and, when we were able to have them, playdates which he attends. Throughout the pandemic (and before) he

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has been the main educator/homeschooler of our boys, he has taught our boys an abundance of life skills. [REDACTED] is able to read, write and do simple maths due to James' teachings. Our youngest [REDACTED], loved going to the supermarket with James where he would name all the fruits and vegetables. Before [REDACTED] went to nursery (at aged 1.5 years) he had been learning his colours and shapes. James regularly takes [REDACTED] on playdates with his nursery friends (all in line with the current restrictions we have in the UK).

[REDACTED] adores his dad. He wants to watch and play football with James constantly. James takes [REDACTED] to his Saturday morning football classes. I love overhearing their chats about the world and all the funny stories [REDACTED] tells James. [REDACTED] is full of life and confident but deep down he is a very sensitive boy. His dad is his anchor in the world and [REDACTED] has tied himself very firmly to him.

[REDACTED] was a quiet child at first but now is a very determined little boy whose confidence grows by the day. He questions everything. [REDACTED] is extremely close to James. If he is injured, he turns to James for comfort. He is close to him as James has always been his primary carer since I returned to work after my maternity leave. [REDACTED] has a wonderful laugh, he giggles uncontrollably when his daddy tickles him. It is the most beautiful sound to my ears. The look of delight on [REDACTED] face is magical. They are very lucky little boys to have such a marvelous father. Ex. A at 4-5 (Lizzie Goode, James' life partner).

- Over the last few years James has been primary caregiver to both sons. He has a gentle and "old-school" approach. The children have a structured daily routine which I believe has given them a real sense of security. They are also incredibly polite, although typical boisterous children they will hold your hand when asked, chat openly and follow instructions when out and about. This is due to James instilling good manners into them, reflecting his own value of these. Because of his approach it has allowed his partner to continue working and for the boys to spend the majority of their time with family rather than at nursery. James cooks the children fresh food daily, encourages outside time, team games and quiet time with books. They have a firm bedtime routine which involves story time and is loved by all. Ex. A at 13 (Michaela McGorty, James' half-sister).
- [James] takes care of all matters relating to the boys. He deals with them in the morning, getting them up from bed, preparing breakfast, he gets them to school and he picks them up. He prepares and administers lunch and dinner for the whole family. He looks after the boys recreation i.e. Visits to parks, bike rides, and play dates etc etc. James also sees to it that the boys maintain church attendance and get involved with church activities to help develop their character. Very often Elizabeth has to work late into the evening so James parenting duties last from dawn to dusk. It's fair to say that this suits [REDACTED] and [REDACTED] because they both love their father to an extraordinary degree and can't spend too much time with him.

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You would have to see them all together to understand the closeness and love that exist between the family group. Ex. A at 22-23 (John Vorley, James' father).

James ensures that [REDACTED] completes one of his regular reading books just before he leaves for school in the morning. It's not part of the school requirements but it is one of James' requirements. James has also made himself familiar with teaching methods relevant to children in both his son's age group to enable him to provide them with sensible exercises which he mostly does with them at weekends to ensure that they lose as little academic momentum as possible. (*Id.* at 23.)

- James has a very close relationship with his own father, it was just the two of them at home while James was growing up and the bond they shared has only grown stronger over the years and I see their relationship reflected when watching James with his own children. He is their primary caregiver whilst his partner is at work and their love for James shows through in every interaction. It is beautiful watching James with his children. His eldest, [REDACTED], barely leaves James's side, he is constantly chatting, laughing and hugging him, and his younger son [REDACTED] isn't much different. Ex. A at 16 (Claire Eades, James' cousin).
- James is a wonderful father, sole carer for his sons [REDACTED] and [REDACTED] aged just 5 and 2. He's following the footsteps and close bond he shared with his own father growing up, the boys are his number one priority, and in return they idolise him. . . . It is James who is responsible for shopping, cooking, cleaning and laundry for the family, as well as running the children to and from various clubs, doing schoolwork with [REDACTED] and keeping them entertained. James regularly keeps in contact with parents of children they have made friends with along the way organising playdates, and spending quality time doing outdoorsy activities. I often think, after being raised by his dad alone James was bound to have taken a fully active role in the upbringing of his children. But he became their main carer, a role usually taken by the mother within a family. Ex. A at 9 (Laura Sheen, James' cousin).
- The bond between all Fathers and sons is unique and special but because of all the time they've spent together, this is more evident in the relationship between James and his children. When one of them falls over, scrapes a knee, or they fall out over toys, it is James they instinctively seek out to comfort and console them. A constant and reassuring presence in [REDACTED] & [REDACTED] lives, removing James from the family home for any length of time will only have a negative impact on their young lives. Ex. A at 29 (Christopher Goode, Lizzie's brother).
- His family depend on him completely. Being a stay at home father, the relationship between James and his sons is remarkable, together they form a perfect family unit, I can't imagine what life would be like for his Son's, and Lizzie, or indeed his Father if James were not there. Ex. A at 11 (Joey Edler, James' cousin's partner).

James and Lizzie's life plan included a stay-at-home parent raising their children, but the role was to be Lizzie's. With great sadness, she has given up this dream. What weighs heaviest on her now is the choice she must make if James is incarcerated. With his future ability to find work destroyed by his conviction, supporting the family falls to her. The savings help, but well

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- As mentioned we both have young families and seeing James with his young sons makes me proud to know him. He instills the same values that he has and is guiding them on the path to becoming respected citizens and valued members of the community with all the love and patience that only a parent can show to their children. Ex. A at 47 (Steven Parsons, James' lifelong friend).
  - It is clear the boys idolise their dad and likewise he idolises them. Ex. A at 42 (Matthew Smith, James' lifelong friend).
  - James has embraced his role as a parent and primary caregiver with both arms. He is a doting father with a can do attitude. From cooking and cleaning up after them, to picking them up from school or nursery, to bathing and bed time, to attending children's classes with the boys (baby ballet included) – where all the other parents were mums and being totally unbothered by this — he has been their constant throughout. He puts the needs of his children first without fail and would do nothing to jeopardize the welfare of his family – no matter how remote. Ex. A at 30 (Alessio Sbraga, James' lifelong friend).
  - James is an excellent father who dotes on his children. He has been the primary giver since the boys were born and has raised two kind, caring and sociable children. He has ensured they receive the best possible upbringing. Ex. A at 32 (Louise Cranmer, Lizzie's best friend).
  - He has been the boys main carer proving how adept he was when changing nappies, or preparing food. Sleeping on the floor next to their beds if they couldn't sleep or had nightmares. Reading to them whilst also teaching numbers and letters. Table football was a great source of fun and tantrums as despite being young he wouldn't let them just win. He taught them the positions of each player, the areas they could or could not go into whilst explaining it was a team game. . . . He takes the responsibility of the boy's understanding of the world around them very seriously. Daddy is the person who gets them up each morning, prepares their breakfast, wash, dress then teeth brushing before going to school. He gives them love, support, confidence to try everything whilst always knowing he is there. Life for them would not be the same if James was not around. Ex. A at 26-27 (Lynda Lovell, James' mother).

over 50% are tied up in retirement accounts that cannot be accessed without penalty or pension plans inaccessible until age 65. PSR ¶ 107. Lizzie needs to be able to continue earning to take care of her family. But with the trauma her boys will face from the loss of their father, she will not leave them to be cared for by a stranger while she attends to her hours-intensive job. Ex. A at 17 (Lizzie Goode, James' life partner: "I would not trust anyone else with their care as their lives would be shattered."). Either way she chooses, she cannot protect her children.

James' incarceration would be devastating for Lizzie and for the family's financial future, but given his role in his boys' lives, it would upend them. Their father would not only no longer be caring for them minute to minute, but suddenly gone, for reasons they can't begin to comprehend, in a place they can't visit. The long term effect would be life-altering and severe.<sup>10</sup>

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<sup>10</sup> Many of James' family and friends touch on the devastating, destabilizing effect his incarceration would have on his boys:

- I cannot begin to comprehend how James' family will function emotionally and financially should he serve a custodial sentence. Not just his partner and Sons, but his father too. Although he is making memories and spending vast amounts of time with them, these times are tinged with sadness. I know they are trying to cram these things in whilst they can. Its unspoken but the fear is very much evident. The boys have had their Father fully present in every respect of their short lives so far, how will they begin to understand him going away? . . . They will be devastated, when I think of the confusion it will cause them, I am moved to tears. I cannot imagine what it would have been like growing up without my mother. And whilst they have a wonderful Mother in Lizzie, this is too the role James has played in their lives so far. Ex. A at 10 (Laura Sheen, James' cousin).
- Their bond is heartening to see and if he were to be forced to be apart from his family it would undoubtedly have a devastating and unquantifiable impact on them and all those around him. It simply does not bear thinking of. Ex. A at 30-31 (Alessio Sbraga, James' lifelong friend).
- The family would be devastated without his presence as he is the primary caregiver, spending the vast majority of his time dedicated to his partner and his children. His absence from the boys lives would have a massive negative impact on their

James and Lizzie live in a state of anticipatory grief about James potentially disappearing from their family. This worry and the slew of concerns and uncertainty that have attended the four years James spent under investigation and the three since his indictment have taken their toll. James' focus stays on what his absence would mean to Lizzie, the boys and his father. But his family and friends are deeply concerned about him. From an early age James' loved ones describe a playful, boisterous, quick-witted, sociable person. The last seven years have seen him evolve into a quiet man, ruminating about what's happened and what it will mean to his family, withdrawn and ducking social interaction for fear a conversation will turn to his career. The man who worked so hard to succeed and pass along success's benefits to his children now mulls how long his boys may be forced to be without him, when they will learn their father was convicted of a crime,

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childhoods without his love and guidance. Ex. A at 19 (James Riggs, James' lifelong friend).

- [T]he children would be devastated if he was not here. . . .James is the epicenter of our lives, he is the cord that binds us all together. We simply do not function as a home and a family without him. Ex. A at 6-7 (Lizzie Goode, James' life partner).
- I can't imagine what life would be like for his Son's, and Lizzie, or indeed his father if James were not there, especially so far away as they would be unable to visit regularly. How would Lizzie cope with the boys alone without James support whilst working, I don't think she could, losing her income would cause them more change and upheaval. But more so how would the children go from being with him their entire waking moments to not having him there at all, it would be brutal. I fear it would affect them in irreversible ways. Ex. A at 11 (Joey Edler, James' cousin's partner).
- James has raised his boys to be confident, kind and honest. He is a very hands on father and without James being around, the family would suffer enormously. I believe the boys would suffer emotionally and mentally if James were away from the family for any length of time. Ex. A at 32 (Louise Cranmer, Lizzie's best friend).
- I can only imagine the effect it would have on Elizabeth, and [REDACTED] and [REDACTED] if they were to be denied access to James love and support and affection for any time. Ex. A at 23 (John Vorley, James' father).

whether they'll be bullied for it, what this knowledge and the loss of stability and opportunity will mean to their futures, and what it has done and will do to Lizzie.<sup>11</sup>

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<sup>11</sup> James friends and family write powerfully of the change in James since the start of the investigation:

- [T]he situation James finds himself in has already hit him the hardest, as mentioned earlier James has always been very sociable, talkative and engaging but the James we see now is quiet and withdrawn. The fear and the affect this may have on his family has left him a shadow of his former self, it is now harder to draw him into conversation — a complete contrast with the chatty and jokey character we knew so well – and whilst he puts on a brave face around his family, I can't help but wonder how this is affecting his mental health. Ex. A at 16 (Claire Eades, James' cousin).
- It has been incredibly hard to see how the past few years have affected him. He is so much quieter, more serious and not so confident. Although he tries to remain cheery and not let it show the fear is evident, he appears to be carrying the weight of the world upon his shoulders. At family gatherings he tends to hold back a little, not get fully engaged. He won't speak to us about the situation as he doesn't want to cause the family any worry, and is trying to shoulder it alone. Ex. A at 10 (Laura Sheen, James' cousin).
- The toll of the last few years is very obvious to those who know and love him. James had a kind sense of humour, quick off the mark and happy to join in with banter however over the last few years of this case he has become very much quieter. He has become reserved and, I would say cautious, retaining any energy for fun he has solely for his children. During family catch ups where he would be chatty and vocal he is withdrawn and serious. He now does not easily engage in telephone calls or texts. His whole outlook has changed to a much more solemn one. I miss his laugh, I miss him ribbing me about something or other meaningless because he cannot see any lightness in life anymore. I would like to have him back to the kind, fun and charming person he was. Ex. A at 14 (Michaela McGorty, James' half-sister).
- Every year since James was first implicated, I have watched him on Christmas day trying to enjoy himself with our children and I've thought I hope we get to do this all together next year, and the worse thing is that I know he has been thinking it too. . . .

James's strength throughout the last 7 years has been stoical. I do not know how he hasn't shattered into a thousand pieces with the weight of the burden of the decisions on his life that have been made by others. James is a man of principles.



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He would never take a short cut when there is a good and true path. I can sense his loss. The career he worked so hard for, which he attained with no help from family or friends or a university education. The future he planned for us, his family, and the security he wanted to provide. . . . Ex. A at 6 (Lizzie Goode, James' life partner).

James has suffered so much already, so much has been taken away. I do not refer to just the tangible items but his sense of self, reputation, his dignity, his honour, our future and to be potentially being taken away from the children who make his heart beat would impose on him cruelty beyond measure. (*Id.* at 7.)

- For as long as I have known James he has been confident, caring and joyful but after the last few years during this experience has become quiet, withdrawn and anxious and I worry about his physical and mental health. Ex. A at 19-20 (James Riggs, James' lifelong friend).
- James always used to be a talkative, joyful, boisterous person, and while he tries hard to make a show of being OK in front of his partner and his boys, since this started he's become more and more withdrawn, barely speaking and with none of the light in his eyes that I used to love so much. Ex. A at 25 (John Vorley, James' father).
- The past 7 years has taken a huge toll on James and his own mental health and wellbeing. James has always been bubbly, chatty and confident. However, he has become more withdrawn and distant since the ordeal began. He tries extremely hard to pretend to be ok for the sake of his boys, but for those who know James, it is heartbreaking to see how much he has changed and how much he is clearly struggling. Ex. A at 33 (Louise Cranmer, Lizzie's best friend).
- [I]t really and truly pains me to witness what James has had to live through over the past seven years. And because I know who the real James is, I can tell how soul destroying this whole ordeal has been for him. Whilst he always puts other people first, that, of course, only serves to mask the physical and mental anguish he has had (and continues) to endure to this day. Indeed I've seen a marked change in James: he is, sadly, no longer the sociable and outgoing person I have come to know. He rarely attend social gatherings these days, and when he does, he tries his best to put on a brave face, but he struggles to engage in the same way he used to. Gone is that usual smile. Gone is that request to meet up. Instead, I see him retreating more and more into his shell. Myself and his closest friends, of course, continue to rally around him, but there is little that we can really do other than be there for him. I just hope the James can pick himself up and one day be in a position to move on with his life. Ex. A at 31 (Alessio Sbraga, James' lifelong friend).
- These last 6 or 7 years with this case hanging over the family has been incredibly tough. I can imagine to James and my sister, it already feels like he is serving a



The price James has already paid is permanent. Even if the Seventh Circuit were to find that executable, open market orders canceled after sufficient time for algorithmic traders to assess and act upon them thousands of times over did not make an implied misrepresentation of an intent to trade and thus cannot form the basis of a wire fraud conviction, the punishment James has and will experience will not go away. Loss of career, loss of status, loss of the seven years of the prime of his life to worry and stress are severe and permanent punishments. This case has dominated and shattered James' world in numerous ways that can never be rebuilt. Indeed, a reversal on appeal would perhaps only make the entire ordeal more difficult for James, a man who could not bring himself to cooperate in 2017 because he could not say that he or anyone else thought what they were doing was wrong.

James and Lizzie now await June 21's sentencing before Your Honor. James continues to care for the boys; Lizzie continues to work. Their lives have been governed by a process beyond

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sentence. Unable to make any long term plans, the constant worry about the case, the additional pressure put on their relationship, the potential impact on their children, all have weighed heavily on their minds on a daily basis since this began. Ex. A at 28 (Christopher Goode, Lizzie's brother).

- If there is a God, and I firmly believe there is, James will be able to draw a line under this and move on with his life. It has been heart breaking to watch his family cope with the anxiety of this hanging over them and see him as a shadow of his former self for the past few years while his life has been put on hold. Ex. A at 12 (Joey Edler, James' cousin's partner).
- Throughout the course of this trial I have observed the changes that are taking place in my son. Previously he was always fun to be around, with his mischievous sense of humour, quick wit, kindness and chat. This is no longer the case. He has been replaced with a man who is anxious, withdrawn and difficult to engage with. His only sense of joy comes from his two sons and partner. As the covid restrictions begin to lift we could arrange family gatherings but James shows no interest in socialising, even with his close family. This is not the normal behavior of my son. I miss him, his family miss him. Ex. A at 27 (Lynda Lovell, James' mother).

their control for seven years. Their letters to Your Honor attempt to put into words who they are and what this has meant for the family. The letters of James' other friends and family attempt the same. It is a straightforward story. James Vorley is a good man who worked hard for the life he built. He is the antithesis of a fraudster looking for a shortcut to a fast buck. Taken from the defense's side, who he has been for his forty years serves as powerful evidence that he believed he was permitted to trade as he did—a non-negotiable belief that dictated his decision to head to trial despite the repeat offer of off-ramps that would have created a substantial bulwark against the risk of jail time. Taken from the prosecution perspective, the same life should serve as powerful mitigation for a man who broke the law competing at work for a company that did not properly train and supervise its employees. The traits that make up who James Vorley is and the life he has lived argue strongly in favor of leniency.

## **II. APPLICATION OF THE SECTION 3553(A) SENTENCING FACTORS**

Title 18, Section 3553(a) requires that a sentence be “sufficient, but not greater than necessary” to satisfy the four permissible goals of sentencing: “just punishment, deterrence, the protection of the public, and rehabilitation.” *Dean v. United States*, 137 S. Ct. 1170, 1175 (2017). Known as the “parsimony principle,” the directive to impose no greater punishment than necessary “is an important and binding instruction from Congress.” *United States v. King*, 861 F.3d 692, 696 (7th Cir. 2017); *see also United States v. Jordan*, 991 F.3d 818, 822 (7th Cir. 2021) (“Sentences must always conform to the ‘broad command’ of the parsimony principle, which requires that sentences be ‘sufficient, but not greater than necessary to comply with’ the four identified purposes of sentencing: just punishment, deterrence, protection of the public, and rehabilitation.”) (quoting *Dean*, 137 S. Ct. at 1175).

When fashioning an appropriate sentence, a court must consider “the nature and circumstances of the offense and the history and characteristics of the defendant,” “the need for the sentence imposed” in light of the specified goals, “the kinds of sentences available,” the relevant guidelines and policies promulgated by the United States Sentencing Commission, “the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct,” and “the need to provide restitution to any victims of the offense.” 18 U.S.C. § 3553(a). As the Probation Department has recognized, upon consideration of these factors in Mr. Vorley’s case, sentencing him to incarceration would be both unnecessary and unjust.

**A. Nature and Circumstances of the Offense / History and Character of the Defendant**

Neither the nature and circumstances of the offense in this case, nor James Vorley’s history or character, warrants a prison sentence. 18 U.S.C. § 3553(a)(1).

**1. Nature and Circumstances of the Offense**

James, who has no prior criminal history, was convicted of three counts of wire fraud affecting a financial institution, 18 U.S.C. § 1343, based on orders for precious metals futures that James placed on the COMEX exchange on February 12, 2010 (Count 2), November 3, 2010 (Count 8), and May 5, 2011 (Count 10), while working as a precious metals trader for Deutsche Bank in London. The orders at issue, which the government characterized as “spoofing,” were on the exchange for a matter of seconds. The conduct occurred over a decade ago, prior to the July 16, 2011 effective date of the Dodd-Frank anti-spoofing rule, more than a year before Deutsche Bank

trained James on Dodd-Frank in September 2012, and six years before the first criminal prosecution for spoofing.<sup>12</sup>

James was also acquitted of five other substantive wire fraud counts, as well as a conspiracy count charging that he conspired with other Deutsche Bank traders to engage in wire fraud over a five-year period. To disregard the acquittals in fashioning an appropriate sentence would be profoundly unfair. *See, e.g., United States v. Pimental*, 367 F. Supp. 2d 143, 153 (D. Mass. 2005) (“To tout the importance of the jury in deciding facts, even traditional sentencing facts, and then to ignore the fruits of its efforts makes no sense—as a matter of law or logic.”); *see also United States v. Canania*, 532 F.3d 764, 778 (8th Cir. 2008) (Bright, J., concurring) (concluding that consideration of “acquitted conduct” violates due process and “wonder[ing] what the man on the street might say about this practice of allowing a prosecutor and judge to say that a jury verdict of ‘not guilty’ for practical purposes may not mean a thing.”); *United States v. Concepcion*, 983 F.2d 369, 396 (2d Cir. 1992) (Newman, J., dissenting from the denial of rehearing *en banc*) (“A just system of criminal sentencing cannot fail to distinguish between an allegation of conduct resulting in a conviction and an allegation of conduct resulting in an acquittal.”).<sup>13</sup>

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<sup>12</sup> All three counts are also outside of the five-year statute of limitations for wire fraud and spoofing. However, the government charged James with wire fraud that “affect[ed] a financial institution,” which had the effect of extending the statute of limitations to ten years. 18 U.S.C. § 3293(2).

<sup>13</sup> While the Supreme Court has said that a court may consider acquitted conduct at sentencing, numerous eminent judges (including multiple members of the Supreme Court), have disputed the dubious proposition that a court can impose additional punishment based on conduct not proven to a jury beyond a reasonable doubt. *See, e.g., Jones v. United States*, 574 U.S. 948, 135 S. Ct. 8, 9 (2014) (Scalia, J., dissenting from denial of certiorari) (“This has gone on long enough.”); *United States v. Bell*, 808 F.3d 926, 929 (D.C. Cir. 2015) (Millet, J., concurring in the denial of rehearing *en banc*) (“For multiple reasons, the time is ripe for the Supreme Court to resolve the contradictions in Sixth Amendment and sentencing precedent, and to do so in a manner that ensures that a jury’s judgment of acquittal will safeguard liberty as certainly as a jury’s judgment of conviction permits its deprivation.”); *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.) (“It assumes that a district judge may either decrease or increase a defendant’s

As the Court has recognized, James' sentence should reflect that this was a "mixed verdict." Tr. 2316:1-3. In particular, James should not be sentenced as if he had been convicted—not acquitted—of the years-long conspiracy charged in the indictment.

Without minimizing the seriousness of any form of market manipulation, the circumstances of the offense here are not aggravating. James started as a clerk in the old-fashioned London trading "pits" after high school. He never went to college. He learned how to trade by watching other, more experienced traders. Bluffing and misdirection were commonplace tactics in the precious metals markets at the time. As trading moved to electronic platforms, traders (including James) had to adapt their strategies in order to compete. On the electronic exchanges, moreover, they were manual traders competing with the sophisticated high-speed trading computers that were coming to dominate the market.<sup>14</sup>

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sentence (within the statutorily authorized range) based on facts the judge finds without the aid of a jury or the defendant's consent. It is far from certain whether the Constitution allows at least the second half of that equation."); *see also United States v. Johnson*, 658 F.2d 1176, 1179 (7th Cir. 1981) ("The unfairness of [considering uncharged crimes] is self-evident the defendant is essentially being sentenced for offenses for which he was not tried and convicted."). Further, the Prohibiting Punishment of Acquitted Conduct Act of 2021, S.601, 117th Congress (2021), recently introduced with bipartisan support, will likely soon bar consideration of acquitted conduct as an aggravating factor at sentencing in the near future. Fortunately, even in cases where district courts consider acquitted conduct to be "relevant conduct" for purposes of calculating the sentencing guidelines, they retain the "power in individual cases to disclaim reliance on acquitted or uncharged conduct." *Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in the denial of rehearing *en banc*).

<sup>14</sup> The enormous advantages that high-speed algorithmic traders enjoy over their human counterparts can be difficult to comprehend. Suffice it to say, there have been numerous efforts over the past ten years to level the playing field so that manual traders will have a fair chance. *See, e.g., Alexander Osipovich, More Exchanges Add "Speed Bumps," Defying High-Frequency Traders*, WALL ST. J. (July 29, 2019), available at <https://www.wsj.com/articles/more-exchanges-add-speed-bumps-defying-high-frequency-traders-11564401611>. Last year, the SEC approved the use of "D-Limit" orders to counteract "latency arbitrage" strategies used by high-frequency traders to take advantage of slower reaction times by other traders. *See Order Approving a Proposed Rule Change to Allow a New Discretionary Limit Order Type Called D-Limit* (Aug. 26, 2020), available at <https://www.sec.gov/rules/sro/iex/2020/34-89686.pdf>.

James was trading on behalf of a major financial institution, Deutsche Bank, in full view of his supervisors and his colleagues on the precious metals desk. He was the spot trader, primarily a customer service job in which he did not seek to or make outsized profits. *See* Tr. 944:14-17 (noting that option traders were responsible for 90% of the profits). Rather, his job was to service customers and other traders and to provide color to the desk's profit generators on the state of the spot market. David Liew, who worked as a spot trader on the precious metals desk in Singapore between 2009 and 2012, did not think at the time that he was even violating Deutsche Bank's rules by using real, at-risk orders to try to trick an algorithm, much less U.S. law. Tr. 860:2-13, 866:19-867:21. Neither did James. It was not until Deutsche Bank provided trading on the Dodd-Frank rule in late September 2012 that the traders in London were told that the "CFTC had redefined what they consider to be improper market practices." GX 179 at 2.

To be clear, James never thought that "spoofing" was an acceptable trading strategy. He simply did not consider the way he was trading to be "spoofing." Tr. 823:9-11 (Q: "The other traders at Deutsche Bank, they didn't call it spoofing either, right? A (Liew): As far as I'm aware, I don't think so."). At the time, James used the term "spoofing" to refer to a practice on the over-the-counter interbank market whereby one bank would place orders with a broker and then call out to another bank for a two-way price, hoping that the bank giving the price would be fooled by the orders with the broker as to whether the caller bank was a buyer or a seller. *See* Tr. 1926:23-1927:5, 1928:23-1929:7, 1933:17-20. The offers left with the broker would then be pulled before they could be executed, and James frequently complained about this kind of "spoofing" to other traders. *See, e.g.*, GX 80, 81, 82, 83, 84. Likewise, James would have thought that trading with a computer algorithm in a way that was functionally riskless—as in *Coscia*—would have been obviously out of bounds, even before Dodd-Frank.

James simply did not consider placing manual orders that any other trader could easily have executed to be spoofing as long as he was willing and able to execute those orders. Placing and cancelling orders manually in order to facilitate an opposite-side trade may have been deceptive and at times may have influenced another trader to enter into a transaction, but real, at-risk bids and offers also represented actual (not fake) liquidity that could be accessed by any other trader in the market, not orders that misrepresented supply and demand the way that effectively riskless trading did. The fact that his orders were easily tradeable by other market participants was a hugely important distinction for a high-school educated trader like James, who had learned the job on the job.

The Dodd-Frank rule prompted vigorous debate as to how it should be interpreted because there was no consensus about what constituted “spoofing” at the time, and almost all orders on electronic futures exchanges are cancelled, many within milliseconds. In the course of this debate, the CME itself took the position that “bids and offers on the platform do not create an appearance of ‘false market depth’ as all bids and offers represent true and actionable market depth and liquidity until such time as they are withdrawn.” Ex. B (Letter from Craig S. Donohue, Chief Executive Officer of the CME Group, to the CFTC, May 17, 2011, at 7). The CFTC only issued its final guidance on the rule in May 2013. *See Antidisruptive Practice Authority*, 78 Fed. Reg. 31,890, 31,896 (May 28, 2013); *cf.* GX 179 (Deutsche Bank compliance presentation stating that the CFTC had not yet provided “clear rules and definitions”).

The jury has concluded that James placed some orders with the intent to defraud, and the Court has ruled that the evidence when viewed in the light most favorable to the government was sufficient to show that James had the intent to defraud, even before Dodd-Frank, as long as he knew that he was “lying” for the purpose of deceiving his counterparties. Dkt. 371, Mem. 24-36.

But conduct that can be characterized as “deceptive” and even “lying” is not always fraudulent in the context of arms-length business transactions, even when designed to obtain money or property. In the context of an anonymous futures exchange, where no trader owes any other trader a fiduciary duty and some kinds of deception are expressly permitted, the line between allowable deception and criminal fraud was simply not clear, especially to a high school-educated trader, who had worked in the pits, and was never told to trade any differently by his supervisors.<sup>15</sup>

But even assuming for the purposes of sentencing that James had the intent to defraud, this kind of fraud should not be conflated with more serious schemes where the victim is tricked into parting with money or property without receiving anything in return. *See* Sentencing Recommendation 3 (“While not to diminish the wrongfulness or impact of this conduct, the under[signed] officer respectfully suggests that this manner of fraud—intentional market manipulation resulting in an unfair advantage—is distinguishable in terms of direct harm (seriousness) than wire fraud that is tantamount to theft and causes direct, tangible losses to victims.”).

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<sup>15</sup> The Court ruled that deception aimed at affecting prices is of a different character than the deception involved in other orders that misrepresent available supply or demand, such as iceberg orders, which are used to avoid causing price impact. Dkt. 371, Mem. 13. But there is precedent going the other way. *See, e.g., United States v. Radley*, 659 F. Supp. 2d 803, 815 (S.D. Tex. 2009) (defendants’ stacked bids placed for the purpose of increasing prices did not involve any misrepresentation because defendants were always willing and able to follow through), *aff’d*, 632 F.3d 177 (5th Cir. 2011); *cf. United States v. Takhalov*, 827 F.3d 1307, 1313 (11th Cir. 2016) (distinguishing between a scheme to “deceive” and a scheme to “defraud”). As the Court remarked at the end of the trial, this question will surely be litigated further, including on appeal. Tr. 9/25/20 at 1217:11-16. That the point is debatable surely mitigates James’ culpability for failing to discern the line between permissible and impermissible deception.



## **2. James' History and Character**

James has no prior criminal history and—as evidenced by the letters from those who know him best—an exceptional character. Nothing about him suggests that he should be sentenced to a prison term for a first offense based on his conduct at work ten years ago.

Raised by his father, his grandmother, and his aunt and uncle after his mother left him as a small boy, James achieved extraordinary success in life. Professionally, he did it without connections, a college education or advantages of any kind. He sent 50 letters to 50 banks and made his one shot. He grew from errand boy to gold trader for one of the world's largest banks through his talent, hard work and eagerness to learn. And as the letters attest, he succeeded *because* of his good character—he played by the rules, he consulted compliance, he distinguished himself by focusing on what was best for his customers and colleagues rather than his own bottom line.

He succeeded as a human being by staying true to his values and roots. He saved his money for his future family. He fell in love with a girl he met in high school, waited her out and finally won her for good nearly two decades later, moving from their town to a nearby, solid-not-fancy neighborhood and starting a family. He stayed true to his friends from Catholic primary school and loyal to his family. He was the person his community turned to for help or solace when things reached their worst—deaths, illness, alcoholism, depression, divorce. James was the pillar.

And when crisis came his way, James responded with character. He has never doubted his innocence. He knows he did his job as he was taught, with his supervisors watching him trade on their screens and compliance sitting next to him. He never would have risked his job, let alone his freedom, and he knows he didn't take that risk. The one exception is the way he handled himself at his March 2015 disciplinary interview, which he deeply regrets. As he explains in his letter, he had already sat for multiple interviews with the bank's lawyers and was angry with them for asking

him to sit for yet another interview so soon after the death of his beloved uncle. (James Vorley Letter at 14: “I was not ready for this meeting, I should never have attended.”)

The letters submitted by those who know James testify powerfully to his good character. It is a stable one defined by family, community, hard work, integrity, loyalty, generosity and conservative, far-sighted planning. Through the force of this good character, James forged the life he willed for himself. It was a great life, and he is striving to still make it a good one despite all. James has watched his life fall apart, in slow motion, over seven years. When he was finally charged with a crime, a bewildered, destroyed, frequently weeping James Vorley did not falter. He protected his family from the storm that consumed them, becoming such an exceptional full-time father to his two boys that—to this point—it could almost be argued that his bad fortune was to their good.

James’ character and history could not more forcefully support probation’s recommendation.

**B. Need for Incarceration**

As the Probation Department has already recognized, a prison sentence is not necessary to ensure just punishment, deterrence, or to protect the public in this case. 18 U.S.C. § 3553(a)(2).

**1. Seriousness of the Offense / Just Punishment**

Wire fraud and market manipulation are of course serious matters that could warrant a prison sentence. But by the same token a prison sentence is not always required upon a conviction for participation in a fraudulent scheme, even where the defendant has been convicted after a trial. *See, e.g., United States v. Musgrave*, 647 F. App’x 529, 538 (6th Cir. 2016) (defendant convicted at trial of wire fraud and bank fraud offenses causing \$1.7 million in losses to the Small Business Administration sentenced to a day in prison and five years of supervised release); *United States v.*

*Prosperi*, 686 F.3d 32, 44, 50 (1st Cir. 2012) (defendants convicted of years long fraudulent scheme sentenced to three years probation); *United States v. Whitehead*, 532 F.3d 991, 993 (9th Cir. 2008) (defendant convicted of selling \$1 million worth of counterfeit digital satellite feed access cards sentenced to five years of supervised release); *United States v. Howe*, 543 F.3d 128, 128-132 (3d Cir. 2008) (defendant convicted at trial of two counts of wire fraud sentenced to a two-year term of probation, with two months home confinement, for what the trial court acknowledged was an “extraordinarily serious” offense).

In the recent LIBOR cases, two defendants were convicted of wire fraud affecting a financial institution after a trial.<sup>16</sup> The trial judge sentenced each to a period of supervised release, including home confinement, remarking that she would not sentence the defendants as “proxy wrongdoers” for the sins of the banking industry. *See* Ex. C at 85:15-16 (Sentencing Transcript, *United States v. Connolly*, No. 16-cr-00370 (S.D.N.Y. Oct. 24, 2019)).

Reasonable minds can of course disagree about what is just punishment in any given case, and no two cases are the same. We submit, however, that just punishment should be determined by the standards at the time of the offense, not ten years later. Today, spoofing—defined as placing a bid or offer not intended to execute—has been specifically outlawed. The DOJ and CFTC have vigorously enforced the law. Multiple major banks and trading firms have been prosecuted. Other precious metals traders are facing trial, including for RICO charges. Banks now provide extensive training and have rigorous compliance regimes. The word is out that using bids and orders to trick counterparties is illegal.

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<sup>16</sup> The Court cited the LIBOR precedent as an example of a scheme to defraud involving implied misrepresentations to a market. *See* Dkt. 371, Mem. 9.

In 2010 and 2011, by contrast, no one had ever been prosecuted. Even if placing orders with the intent to cancel them before execution was always considered against the rules, as Mr. Scheerer testified, the CME did not specifically prohibit it until 2014. As late as September 2012, Deutsche Bank informed its traders in London that the rules had changed and that the CFTC had not provided clear guidance, not that the conduct would have been manipulative or fraudulent even before Dodd-Frank. GX 179 at 2. Before that, placing and cancelling orders quickly for a non-bona fide purpose had on a few occasions been treated by the CME as conduct “detrimental to the interest or welfare of the Exchange,” resulting in the imposition of small fines. *See* GX 179 at 5 (citing CME Rule 432). But there is no evidence that James knew about these cases before September 2012.

Deutsche Bank told its traders that the rules were unclear in September 2012 because what Dodd-Frank defined as “spoofing”—orders that were considered fake based on the trader’s subjective “intent to cancel”—was something new. Before Dodd-Frank, bidding or offering opposite an iceberg order, even as a bluff, was a strategy many manual traders employed as part of the “cat and mouse” game between institutional traders and hedge funds that would try to front run their orders utilizing high-frequency trading algorithms. Tr. 1559:15-18. The Court should be mindful not to assess James’ conduct based on the rules as they developed after Dodd-Frank, and it should also consider the punishment already inflicted on James—including the punitive effect that the “protracted uncertainty about his fate” over the past seven years has already had. Sentencing Recommendation 5. Adding a prison sentence to these punishments would be unnecessarily excessive.

## **2. Adequate Deterrence**

James has already been much more severely punished than necessary to deter him from any further misconduct. His career has been destroyed, he has a criminal record, and he still faces an enforcement action by the CFTC. Trading is his only professional skill, and he will never be able to trade again. No additional punishment in the form of a prison sentence is necessary for a first offender. *See United States v. Presbitero*, 569 F.3d 691, 708 (7th Cir. 2009) (upholding district court finding that first offender was unlikely to recidivate).

James has demonstrated by his actions that he has respect for authority and the law. Upon being charged in this case, he immediately offered to waive extradition and appear in the United States. He eventually flew voluntarily to Chicago knowing that the government would be seeking his detention and spent two days in the MCC pending a decision on his release. In the almost two years since his release on bond in August 2018, he has complied with all of the conditions of his bond and returned to court for his trial.

General deterrence has also been achieved in spades. Markets have changed dramatically over the past ten years, and banks in particular have enhanced their training and surveillance to ensure compliance with the law. The message that spoofing will not be tolerated has been sent and received. *Cf.* Sentencing Recommendation 4 (“Sentencing is taking place nearly eight years following the conclusion of the scheme and approximately a decade following the counts of conviction. It may be reasonably assumed that the importance of the sentence imposed in this specific case in terms of general deterrence is minimized by sentences imposed in similar cases during the interim.”).

Sadly, these changes came too late for James. In its settlement with the CFTC, Deutsche Bank agreed to a finding that it had failed to diligently supervise its employees, even though its

internal systems had alerted the bank to potential instances of spoofing. *See Order, In re Deutsche Bank AG, Deutsche Bank Securities Inc.*, CFTC Dkt. No. 18-06 (Jan. 29, 2018). If it had, James and many others would have steered clear of any potentially unlawful conduct and never risked their careers and freedom for \$10 per tick on a trade.<sup>17</sup>

### **3. The Need to Protect the Public**

There is no conceivable need to impose a prison sentence in order to protect the public. James has no criminal history, and he has been convicted of a non-violent offense. He was made redundant in 2015, after Deutsche Bank decided to close down its precious metals business, and his subsequent prosecution has ensured that he will never work in finance again.

### **4. The Need for Treatment**

Nor does James require court-ordered treatment as part of any sentence. However, James suffers from coeliac disease, an autoimmune condition for which he must follow a strict diet.<sup>18</sup> During his two days in detention at the MCC, his special dietary needs were not accommodated. To the extent that he needs treatment, he would be much better off on supervision than in prison.

### **C. Kinds of Sentences Available**

Consistent with the mandate to impose no greater punishment than necessary, the Court must consider “the kinds of sentences available.” 18 U.S.C. § 3553(a)(3). Here, as an alternative

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<sup>17</sup> On the three counts of conviction the total profits to Deutsche Bank would have been worth \$200 in profit or less. On Count 2, for example, Mr. Liew confirmed that the amount at issue would have been \$40 in profit to Deutsche Bank. Tr. 1009:21-24. For Count 8, it would have been \$60 (six lots of gold at 10 cents above the prevailing market price), and for Count 10 it would have been \$75 (15 lots of silver at five cents above the prevailing market price). *See Vorley Version of the Offense* 9 n.7. The government has not disputed the *de minimis* amounts at issue in any given “episode.”

<sup>18</sup> It is uncertain whether James’ autoimmune condition puts him at an increased risk of complications if he were to contract Covid-19.

to prison, the Court can and should impose a term of supervised release, with any number of conditions up to and including a term of home confinement.<sup>19</sup> Such a sentence would still represent a serious curtailment of James' liberty, *Gall v. United States*, 552 U.S. 38, 48 (2007), while mitigating the harsh collateral consequences to James, who would be imprisoned thousands of miles from home, to his blameless sons who were not even born at the time of the offenses, and to their mother who would have to leave her job in order to care for them in James' absence.

A non-prison sentence would be especially appropriate in light of the ongoing Covid-19 pandemic. *See United States v. Armstrong*, No. 18-CR-5108-BAS-1, 2020 WL 4366015, at \*4 (S.D. Cal. July 30, 2020) ("defendants committing similar offenses now, in the time of COVID-19, are receiving vastly lower sentencing recommendations, because their time in custody is harsher"). The coronavirus spreads rapidly in prisons, jails, and detention centers, where inmates and staff must live and work in close quarters.<sup>20</sup> Sending James to prison would dramatically increase his risk of infection while simultaneously increasing the risk to others.

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<sup>19</sup> Courts have imposed home confinement as a term of supervision on defendants residing outside of the United States. *See, e.g., United States v. Sarao*, No. 15 Cr. 75, Dkt. 119 (N.D. Ill. Jan. 29, 2020) (sentencing UK resident to one year of supervised release with home confinement); *United States v. Cohen*, No. 19 Cr. 741, Dkt. 47 (S.D.N.Y. Jun. 9, 2020) (sentencing French resident to one year home confinement); *United States v. Black*, No. 16 Cr. 370, Dkt. 456 (S.D.N.Y. Nov. 13, 2019) (sentencing UK resident to three years of supervised release, with nine months in home confinement); *United States v. Thorkelson*, No. 14 Cr. 27, Dkt. 189 (D. Mont. Apr. 13, 2018) (sentencing Canadian resident to five years probation with the first six months in home confinement). Given James' track record of compliance with the conditions of his release in the United Kingdom over the past three years, the Court can be confident that he would comply with any conditions of supervised release.

<sup>20</sup> Outbreaks in prisons and jails have been truly harrowing over the past year. *See, e.g., Eddie Burkhalter et al., Incarcerated and Infected: How the Virus Tore Through the U.S. Prison System*, N.Y. Times, Apr. 10, 2021, available at <https://www.nytimes.com/interactive/2021/04/10/us/covid-prison-outbreak.html?referringSource=articleShare> ("America's prisons, jails and detention centers have been among the nation's most dangerous places when it comes to infections from the coronavirus.").

As recognized by courts and the DOJ in the context of compassionate release, any concerns that a supervisory sentence would not adequately reflect the seriousness of the offense can be addressed by ordering a period of home confinement. *See United States v. Shehee*, No. 4:18-CR-06005-SMJ, 2020 WL 5229030, at \*3 (E.D. Wash. Sept. 1, 2020) (“Home confinement reflects the seriousness of the offense and provides a more just punishment, because it is safer for Defendant yet still restricts Defendant’s liberty.”); Mem. for Director of Bureau of Prisons, *Prioritization of Home Confinement As Appropriate in Response to COVID-19 Pandemic* (Mar. 26, 2020), available at <https://www.justice.gov/coronavirus/DOJresponse>. Given the ongoing imperative to reduce the prison population during the Covid-19 pandemic and the availability of a safer alternative, the Court should opt for a term of supervision for a non-violent offender like James.

#### **D. Sentencing Guidelines and Any Relevant Policy Statements**

The Court must also consider the advisory sentencing guidelines and any applicable policy statements. 18 U.S.C. § 3553(a)(4) & (5). The base offense level for wire fraud affecting a financial institution is 7. U.S.S.G. § 2B1.1(a)(1); PSR ¶ 60. Because James has no criminal history, the resulting sentencing guideline range, before applying any enhancements, would be 0-6 months. The government would apply enhancements that increase the base offense level to 25, primarily based on a calculation of losses to alleged victims, with a resulting guidelines range of 57-71 months. But these enhancements should not be applied, for the reasons explained below.

##### **1. Objection to Relevant Conduct**

Considering the counts of conviction alone, the total conceivable losses to other market participants would be well under \$6500, resulting in no enhancement under the loss table. Not satisfied with that result, the government has submitted an affidavit from its expert, Professor



Venkataraman, purporting to calculate losses on 5,902 uncharged “Spoofing Sequences” on the theory that they constitute “part of the same course of conduct or common scheme or plan as the offense of conviction.” U.S.S.G. § 1B1.3(a)(2). But the government cannot show by a preponderance of the evidence that the 5,902 “Spoofing Sequences” represent instances of spoofing or wire fraud.

The 5,902 trading sequences were identified based on criteria selected not by Professor Venkataraman but by the government. Venkataraman Decl. ¶ 13. Had the government used different criteria, it could have increased or decreased the number of sequences, such that the precise number of sequences is somewhat arbitrary—and the resulting loss calculation and number of alleged victims is also arbitrary and within the government’s power to control. Moreover, using such selection criteria to identify trading sequences that may be consistent with spoofing cannot reliably establish that they in fact reflect criminal conduct.

Before trial, the government used similar selection criteria to identify thousands of possible instances of spoofing. In response to the defendants’ motion to compel disclosure of those initial selection criteria, the government stated that they were “both under- and over-inclusive”—meaning that some spoofing sequences might not meet the criteria and that *the government did not believe that all of the sequences meeting the criteria were criminal*. Dkt. 155 at 8. As explained in the affidavit of Dr. Daphne Chen, a professional economist who has reviewed Professor Venkataraman’s methodology for calculating losses, the selection criteria used to identify “Spoofing Sequences” are in some ways even *broad*er than the government’s initial selection criteria. *See* Chen Aff. ¶ 11 (noting that the criteria for sentencing purposes do not require execution of an opposite-side iceberg order or impose any time limitation on the alleged spoof).

Like the initial selection criteria, the government's criteria for purposes of identifying relevant conduct will necessarily sweep in instances of legitimate trading.

In *United States v. Chube II*, 538 F.3d 693 (7th Cir. 2008), the Seventh Circuit rejected such an attempt to prove relevant conduct based on evidence that risked sweeping in instances of lawful activity. *Chube II* involved physicians convicted of unlawful distribution of a controlled substance after a trial that resulted in a mixed verdict for both defendants. *Id.* at 694-95. At trial, the government's expert, Dr. Parran, had reviewed 98 patient files and testified to his opinion that the defendants' prescriptions for oxycontin lacked a legitimate medical purpose. *Id.* at 697. For purposes of sentencing, the government produced a spreadsheet calculating the weight of every pill prescribed in the 98 files. *Id.* at 701-02. Relying on the spreadsheet and Dr. Parran's testimony, the district court concluded that all of the prescriptions qualified as relevant conduct for purposes of the sentencing guidelines. *Id.* at 702.

On appeal, the Seventh Circuit explained that the testimony and the spreadsheet alone could not establish by a preponderance of the evidence that all of the prescriptions represented an instance of illegal drug pushing. *Id.* at 703. Rather, to show that a prescription should be considered relevant conduct, the government had to present evidence that the particular prescription was unlawful. *Id.* at 705-06. Here, Professor Venkataraman conceded at trial that it was difficult to tell whether any particular trading sequence was unlawful. Tr. 1592:18-24. His trial testimony and the spreadsheet of alleged "Spoofing Sequences" based on the government's selection criteria do not establish by a preponderance of the evidence that each of the 5,902 sequences represented unlawful conduct.<sup>21</sup>

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<sup>21</sup> The Probation Department suggests that the 61 trading episodes presented at trial should be considered relevant conduct and "provides an appropriate basis for loss calculation." PSR ¶ 65. However, the government has not provided any estimate of losses relating to those episodes, *id.*,

## 2. Objection to Loss Calculation

In *Coscia*, the government took the position that it was impractical to calculate losses to other market participants as a result of the defendant's spoofing scheme over a few month period, instead relying on the defendant's trading gains. See *United States v. Coscia*, 866 F.3d 782, 801 (7th Cir. 2017). The gains were easy to measure in that case because they were simply the profits the defendant made using his spoofing algorithm. James' trading profits cannot be used to determine gains because he was trading on behalf of Deutsche Bank, and any profits from the alleged scheme to defraud would have been aggregated with all of the other trading on the desk. Therefore, the government proposes to use Professor Venkataraman's loss calculation or, in the alternative, to treat the supposed losses on transactions involving James as the equivalent of his gain.<sup>22</sup>

Attempting to calculate gains or losses this way piles speculation upon speculation. First, the government's calculations are arbitrary in the sense that the government could have made them higher or lower by broadening or narrowing the selection criteria. For instance, broadening the criteria to consider alleged spoof orders that were not in groups of 10-lot orders would have resulted in a higher loss figure, whereas limiting the criteria to alleged spoof orders of less than five seconds or sequences involving an execution on the iceberg would have yielded a lower one. While gains and losses need not be determined with absolute precision, figures that can be so easily manipulated cannot be considered reliable.

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and many of the 61 do not involve groups of 10-lot orders and would therefore not fall within the larger set of 5,902 sequences on which the government relies.

<sup>22</sup> Professor Venkataraman's "gain" calculation is unreliable for the same reasons as his loss calculations. He simply treats gain as the opposite of loss and looks only at transactions on the defendants' iceberg orders. Chen Aff. ¶ 24. In addition to being an unreliable way to calculate trading profits, unlike in *Coscia*, none of these profits went to James.

Second, Professor Venkataraman’s methodology of comparing the price at which a transaction occurred to the best bid or offer immediately prior to the alleged spoof is not reliable as a way to determine trading profits or losses. The Guidelines define “loss” for purposes of § 2B1.1 as “pecuniary harm.” U.S.S.G. § 2B1.1 Cmt. 3(A). The standard method for calculating trading profits and losses compares a transaction price to the mid-point of the bid-ask spread at some defined time point after the alleged distorting event, as Professor Venkataraman has himself acknowledged. *See* Chen Aff. ¶ 16 (citing Bessembinder & Venkataraman, *Bid-Ask Spreads: Measuring Trade Execution Costs in Financial Markets*, Encycl. Quantitative Fin. 184-90 (2010)). This is comparable to the “modified recissory method” specified by the sentencing guidelines itself in cases involving the fraudulent inflation or deflation of the value of a publicly traded security or commodity. *See* U.S.S.G. § 2B1.1 Cmt. 3(F)(ix) (providing that actual loss may be determined by comparing a transaction price to the *average* price over 90 days following the transaction).

Using the best bid or offer immediately before the alleged spoof, rather than the mid-point between the bid and the ask or an average price over a specified time period, causes multiple problems that render Professor Venkataraman’s calculation an unreasonable way to calculate pecuniary harm. Most importantly, there is no basis for the assumption that any transaction would have occurred at the best bid or offer price absent the alleged spoof. Chen Aff. ¶ 14.<sup>23</sup> Nor is there

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<sup>23</sup> Although Professor Venkataraman purports to make adjustments to account for trades that might have taken place regardless of the alleged spoofs, his adjustments still yield an unreliable and inflated loss estimate. This is because of the way Professor Venkataraman constructs his control period. During the control period, transactions can take place at better or worse prices, whereas during the alleged spoof they cannot take place at better prices until the spoof order itself is executed in full. Chen Aff. ¶ 19. In addition, Professor Venkataraman fails to control for differences in quantity during the control period versus the period of the alleged spoof, again leading to overstatement of losses. *Id.* ¶ 20. Professor Venkataraman’s alternative adjustment reflects a similar selection bias that leads to an inflated loss calculation, in that it fails to account for transactions that would have occurred at the best bid or offer absent the spoof. *Id.* ¶ 21.

any basis to assume that, absent the alleged spoof, there would have been a transaction in the same quantity. *Id.* Additionally, Professor Venkataraman does not account for the possibility that the alleged victim of the spoof may have also *benefitted* from the alleged spoof, thereby offsetting any losses. *Id.* ¶ 15. It is simply impossible to say based on the available evidence that (a) any particular trade occurred *because of* the alleged spoof orders or (b) any alleged “victim” suffered any actual losses. *Cf. United States v. Johns*, 686 F.3d 438, 456 (7th Cir. 2012) (“The record is devoid of any evidence of what each home would have fetched in a forced sale, and thus the government cannot contend that, but for Johns’ scheme, the homeowners would have been in a better financial situation.”); *United States v. Schneider*, 930 F.2d 555, 558 (7th Cir. 1991) (rejecting loss enhancement where the government made no effort to quantify the difference between the contract price and the actual value of the services).

Finally, while Professor Venkataraman claims to have performed an “event study,” this is wrong because he has not attempted to isolate the impact of the alleged spoof. *Id.* ¶ 23. He has done nothing whatsoever to account for other potential causes of losses. His unreliable methodology simply assumes that an artificially depressed or inflated transaction price was caused by a visible order, which is not sufficient to show causation. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 343 (2005) (“Given the tangle of factors affecting price, the most logic alone permits us to say is that the higher purchase price will *sometimes* play a role in bringing about a future loss.”); *United States v. Rutkoske*, 506 F.3d 170, 179 (2d Cir. 2007) (reasonable loss estimate for sentencing purposes must take into account other possible causes); *United States v. Olis*, 429 F.3d 540, 546 (5th Cir. 2005) (losses attributable to other causes must be excluded from calculation).

### 3. Objection to Victim Enhancement

The government has not shown that James' offense "involved 10 or more victims." U.S.S.G. § 2B1.1(b)(2)(A).

To begin, the suggestion that there were hundreds of victims relies on the same flawed relevant conduct argument as the loss calculation. The government has come up with a list of ten supposed victims—a list comprising some of the most sophisticated firms in the financial markets. PSR ¶ 66 (listing Citadel Securities, Quantlab Financial, Susquehanna, GSA Capital, Credit Suisse, D.E. Shaw, Tower Research Capital, Contech, Teza Technologies, and Tanius Technologies). Of those, only two—Citadel and Quantlab—testified at trial. Even with respect to these witnesses, there was no evidence that the allegedly fraudulent conduct actually caused them to enter into any particular transaction. Tr. 1619:8-9, 1761:25-1762:4. There is a vast difference between evidence that a spoof order was *capable* of influencing a trading decision (and therefore material for purposes of a fraud offense) and proof that it did so, much less that it caused any losses.

There is simply no evidence that these firms or any other traders suffered pecuniary harm as a result of trading with James or his codefendant. "Victim" for purposes of this enhancement means "any person who sustained any part of the actual loss determined under subsection (b)(1)." U.S.S.G. § 2B1.1, Cmt. 1. Here, the alleged "victims" may have made money, lost money, or broken even. In a case where each of the victims received real value—either money or futures contracts—on every allegedly fraudulently induced trade, it is simply impossible to know whether they suffered trading losses without knowing their individual positions. *See Schneider*, 930 F.2d at 558; *see also United States v. Skys*, 637 F.3d 146, 154 (2d Cir. 2011) (financial institutions inappropriately included as victims without any determination of actual loss to those institutions).

As noted above, Professor Venkataraman’s analysis ignores the possibility that the very same alleged victims—the most sophisticated algorithmic traders in the world—may also have benefitted from the alleged spoofing.<sup>24</sup> Chen. Aff. ¶ 15. For all we know, a counterparty who bought at a supposedly inflated price as a result of a spoof also sold at an inflated price, or vice versa.

#### **4. Objection to Foreign Scheme / Sophisticated Means Enhancement**

The Court should not apply any enhancement because “a substantial part of a fraudulent scheme was committed from outside of the United States” or “the offense otherwise involved sophisticated means.” U.S.S.G. § 2B1.1(b)(10)(B) & (C).

Even on the government’s theory, the fraudulent scheme involved domestic activity—i.e., trading on the CME in Chicago—and not an extraterritorial application of the wire fraud statute. While James was physically located in London, he could have been anywhere. London is just where he happened to work and had nothing to do with the alleged scheme. There is no evidence that he located himself outside of the United States in order to make it more difficult to investigate. To apply the foreign scheme enhancement here would mean that non-U.S. residents would automatically be treated more harshly than U.S. residents without any logical basis. *See* PSR ¶ 71.

Nor did James use any “sophisticated means.” The comments to § 2B1.1(b)(10)(C) state that sophisticated means involve “especially complex or especially intricate” conduct, including “hiding assets or transactions” through fictitious entities or offshore bank accounts and locating

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<sup>24</sup> One of the alleged victims, Tower Research Capital, has paid a fine of \$67 million to the Department of Justice based on admissions that *its* traders were engaged in spoofing. *See* Dep’t of Justice Office of Public Affairs, *Tower Research Capital LLC Agrees to Pay \$67 Million in Connection With Commodities Fraud Scheme* (Nov. 7, 2019), available at <https://www.justice.gov/opa/pr/tower-research-capital-llc-agrees-pay-67-million-connection-commodities-fraud-scheme>.

different parts of a scheme in different jurisdictions to make it more difficult to detect. While these examples are not exhaustive, the Seventh Circuit has explained that “the adjustment for sophisticated means is warranted only ‘when the conduct shows a greater level of planning or concealment than a typical fraud *of its kind*.’” *United States v. Ghaddar*, 678 F.3d 600, 602 (7th Cir. 2012) (citations omitted; emphasis added). By definition, any fraud involves some level of concealment. *Id.* Even under the government’s theory, that is all that occurred here. *See* PSR ¶ 71 (citing David Liew’s testimony that spoof orders had to be placed in a certain way to make them appear “more real”). But James’ conduct—manually clicking a computer mouse to place and cancel orders on an electronic exchange—was in no way complex, particularly compared to other spoofing cases involving the use of sophisticated high-speed trading algorithms, such as *Coscia*.

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Finally, while the sentencing guidelines serve as a “starting point” or “initial benchmark,” the ultimate sentence should be tailored to the specific circumstances of the case. *Pepper v. United States*, 562 U.S. 476, 490 (2011) (citations omitted). A “judge is not required—or indeed permitted—to ‘presume’ that a sentence within the guidelines range is the correct sentence and if he wants to depart give a reason why it’s not correct. All he has to do is consider the guidelines and make sure that the sentence he gives is within the statutory range and consistent with the sentencing factors listed in 18 U.S.C. § 3553(a).” *United States v. McIlrath*, 512 F.3d 421, 426 (7th Cir. 2008) (citations omitted); *see also Kimbrough v. United States*, 552 U.S. 85, 101 (2007) (a decision to issue a non-Guidelines sentence may be “based solely on policy considerations, including disagreements with the Guidelines”).



Where application of the loss enhancement generates a guidelines sentence that does not produce a just result, the Court should impose a non-guidelines sentence based on the other § 3553(a) factors. *See United States v. Algahaim*, 842 F.3d 796, 800 (2d Cir. 2016) (“Where the Commission has assigned a rather low base offense level to a crime and then increased it significantly by a loss enhancement, that combination of circumstances entitles a sentencing judge to consider a non-Guidelines sentence.”); *United States v. Adelson*, 441 F. Supp. 2d 506, 515 (S.D.N.Y. 2006) (where the guidelines calculation produces an overly long sentencing range, “a Court is forced to place greater reliance on the more general considerations set forth in Section 3553(a), as carefully applied to the particular circumstances of the case and of the human being who will bear the consequences”). Here, even taking into account the inflated sentencing range produced by the government’s dubious loss calculation, consideration of the other sentencing factors in light of the parsimony principle would warrant a significant downward departure or variance. *See* Sentencing Recommendation 7 (“It is noted that the probation office would recommend the same sentence if the Court were to determine the guidelines range to be 57 to 71 months as proposed by the government.”).

The Sentencing Commission itself has recognized that loss enhancements of the kind the government seeks here can combine to produce a guidelines range that substantially overstates the seriousness of the offense. *See* PSR ¶¶ 128-30. In the Dodd-Frank law, Congress instructed the Sentencing Commission to “review and, if appropriate amend the Federal Sentencing Guidelines and policy statements applicable to persons convicted of offenses relating to securities fraud or any other similar provision of law, in order to reflect the intent of Congress that penalties for the offenses under the guidelines and policy statements appropriately account for the potential and actual harm to the public and the financial markets from the offenses.” Pub. L. 111-203 §

1079A(a)(1)(A). The Sentencing Commission responded by amending its departure principles to give an “example” of circumstances in which “the offense level determined under [the fraud guideline] substantially overstates the seriousness of the offense”:

For example, a securities fraud involving a fraudulent statement made publicly to the market may produce an aggregate loss amount that is substantial but diffuse, with relatively small loss amounts suffered by a relatively large number of victims. In such a case, the loss table in subsection (b)(1) and the victims table in subsection (b)(2) may combine to produce an offense level that substantially overstates the seriousness of the offense. If so, a downward departure may be warranted.

U.S.S.G. § 2B1.1 Cmt. 21(C). As in this example, the government here claims that James’ orders involved a “fraudulent statement made publicly to the market” that resulted in “relatively small loss amounts suffered by a relatively large number of victims.” These are precisely the circumstances in which the fraud guidelines warrant a downward departure.

Even before the addition of Comment 21(C), courts had repeatedly criticized the use of loss amounts as the most heavily-weighted variable in the Guidelines for fraud sentences. *See, e.g., Adelson*, 441 F. Supp. 2d at 510 (“It represents ... the kind of ‘piling-on’ of points for which the guidelines have frequently been criticized.”); *see also* Frank O. Bowman, III, *Sentencing High-Loss Corporate Frauds After Booker*, 20 Fed. Sent’g Rep. 167, 168 (2008) (for defendants “convicted of fraud offenses associated with very large guidelines loss calculations, the Guidelines now are divorced from both the objectives of Section 3553(a) and, frankly, from common sense”).

More recently, Judge Garaufis of the Eastern District of New York wrote:

As far as this Court can tell, the Sentencing Commission’s loss-enhancement numbers do not result from any reasoned determination of how the punishment can best fit the crime, nor any approximation of the moral seriousness of the crime. . . . Given the feeble underpinnings of the loss enhancement, it is particularly galling that this factor is often more or less *solely* responsible for a white-collar offender’s Guidelines sentence. . . . That this situation continues unabated is a great shame for the many offenders sentenced under this Guideline who do not receive a sentence that makes any sense for the actual crime of conviction.

*United States v. Johnson*, No. 16-CR-547-1 (NGG), 2018 WL 1997975, at \*3-\*4 (E.D.N.Y. Apr. 27, 2018) (emphasis in original); *see also United States v. Corsey*, 723 F.3d 366, 378-79 & 380 (2nd Cir. 2013) (Underhill, J., concurring) (“the loss guideline is fundamentally flawed, especially as loss amounts climb . . . [and] [t]he widespread perception that [it] is broken leaves district judges without meaningful guidance in high-loss cases. . . . The higher the loss amount, the more distorted is the guideline’s advice to sentencing judges”); *United States v. Watt*, 707 F. Supp. 2d 149, 151 (D. Mass. 2010) (undue focus on loss amount renders guidelines of “no help”).

This Court should likewise reject a guidelines range untethered to the actual seriousness of the offense.

**E. Need to Avoid Unwarranted Sentencing Disparities**

A non-prison sentence for James would also be consistent with “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” 18 U.S.C. § 3553(a)(6); *see also United States v. Scott*, 631 F.3d 401, 405 (7th Cir. 2011) (explaining that this factor aims to avoid disparate sentences “among judges or districts”).

To date, no one has ever been convicted and sentenced for a criminal offense based on “spoofing” occurring prior to the effective date of the Dodd-Frank law. In *United States v. Flotron*, No. 17-cr-220 (D. Conn.), the only previous prosecution of a manual trader based on alleged spoofing to go to trial, the defendant was acquitted of the sole charge (conspiracy), and the cooperator was given a non-prosecution agreement. Of those convicted<sup>25</sup> of a crime related to

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<sup>25</sup> While this factor focuses on defendants who have been *convicted* of similar conduct, it should be noted that James, his codefendant, and the cooperating witness in this case are the only Deutsche Bank traders to be prosecuted for trading in a way that the government acknowledges was common across the desk, including by more senior traders than James. No other precious metals traders at the bank, or their supervisors, were charged. One trader entered into a settlement with the CME.

manual “spoofing” under Dodd-Frank, both have pleaded guilty pursuant to cooperation agreements, and neither was sentenced to a prison term. *See, e.g., United States v. Zhao*, No. 18 Cr. 24, Dkt. 78 (N.D. Ill. Feb. 18, 2020) (defendant sentenced to time served); *United States v. Sarao*, No. 15-Cr-75, Dkt. 119 (N.D. Ill. Jan. 29, 2020) (defendant sentenced to time served with one year home confinement).<sup>26</sup> Both were proprietary traders, unlike James who was trading on behalf of a bank.

The crimes in *United States v. Coscia*, No. 14-cr-551 (N.D. Ill.), where the defendant was sentenced to 36 months in prison, involved different conduct. There, the defendant used a computer algorithm specifically designed to pump and deflate the market, creating illusory supply and demand in a way that was essentially riskless. *United States v. Coscia*, 866 F.3d 782, 797 (7th Cir. 2017). He did this between August and October 2011, after the Dodd-Frank law had already taken effect, and his \$1.4 million in profits from spoofing during that brief period went directly into his pocket. *Id.* at 789; *see also* Sentencing Recommendation 6 (noting that in *Coscia*, *Sarao*, and *Zhao* the defendants were proprietary traders who “personally profited”). Even so, he received a sentence of about half of the lower end of his advisory Guidelines range of 70-81 months.

By contrast, James was trading manually, on behalf of his employer, with the knowledge of his supervisors, and in a way that was common across the precious metals market at the time. His primary role was to facilitate customer trading by quoting two-way prices, and he used the futures market to close out the resulting positions at the best possible prices. As the spot trader, he was not expected to generate significant profits for the desk—most of which would have come

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*See* Ex. D, Notice of Disciplinary Action for Himanshu Kalra, COMEX 12-9004-BC (Jun. 1, 2015) (imposing \$35,000 fine plus 30-day suspension).

<sup>26</sup> The defendants in both *Zhao* and *Sarao* received credit for time served in custody overseas pending their extradition to the United States. James, by contrast, did not resist extradition.

from options trading. Tr. 944:8-12. He was of course trying to trade profitably, and his bonus would have been partially determined based on the profits across the desk, but he was not motivated by greed. As the Probation Department has recognized, these facts distinguish this case from *Coscia* and warrant leniency for James.

Not only is a prison sentence unnecessary to avoid disparities with other defendants, but it would also result in disparate punishment for James as compared to United States citizens convicted of similar, non-violent crimes because he would be ineligible for placement in a federal prison camp. Under mandatory BOP policy, a non-citizen must be housed in at least a “low security level” institution. *See* BOP Program Statement 5100.08 at 50 (“A male or female inmate who is not a citizen of the United States ... shall be housed in at least a Low security level institution”), available at [https://www.bop.gov/policy/progstat/5100\\_008.pdf](https://www.bop.gov/policy/progstat/5100_008.pdf). Unlike prison camps where a comparable U.S. citizen would almost certainly be housed, low security prisons have walls, razor wire, guard towers, tightly controlled movements, strip searches, and the increased likelihood of violence inherent in facilities housing large numbers of inmates. On top of these harsher conditions, James would be thousands of miles from home, and therefore denied even the solace of family visits. *See* Sentencing Recommendation 5 (citing the “unique impact that a sentence of imprisonment will have on a non-resident compared to a resident defendant”).

After completing any term of imprisonment, James would also be subject to further detention by U.S. Immigration and Customs Enforcement (“ICE”) pending deportation to the United Kingdom. *See* 8 U.S.C. § 1226(c) (requiring detention of criminal alien upon completion of prison sentence); *see also United States v. Ramirez-Ramirez*, 365 F. Supp. 2d 728, 732-733 (E.D. Va. 2005) (post-sentence immigration detention “mean[s] a further term of detention until his removal has been completed”). Although James would not challenge his removal, deportation

can involve long delays, *see, e.g., Handa v. Clark*, 401 F.3d 1129, 1132 (9th Cir. 2005) (noting that five weeks transpired between arrest by ICE for visa overstay and removal to the U.K.), and the conditions in ICE detention facilities can also be worse than those in prison. Subjecting James to such treatment would be as unnecessary as it is unjust. *See* Ex. C at 91:11-16 (Judge McMahon: “I know that simply because he is a noncitizen—and I use that term advisedly, he is not an illegal alien—but because he is a non-citizen, he will not be eligible to serve his sentence in the same way that any American citizen who stood convicted of this crime would serve. And that’s not right.”).

**F. Need to Provide Restitution**

There is no need for restitution in this case because any restitution has already been paid by Deutsche Bank in connection with its deferred prosecution agreement. 18 U.S.C. § 3553(a)(7); PSR ¶ 123.

**CONCLUSION**

For the foregoing reasons, we respectfully request that the Court impose a sentence of time served and a term of supervised release with conditions.

Dated: May 21, 2021

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that on this 21st day of May 2021, I filed the foregoing document using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s/ Roger A. Burlingame  
Roger A. Burlingame