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

v.

05 CR 518 (SAS)

FREDERIC BOURKE, JR.,

Defendant.

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New York, N.Y.  
November 10, 2009  
3:49 p.m.

Before:

HON. SHIRA A. SCHEINDLIN,

District Judge

APPEARANCES

LEV L. DASSIN  
Acting United States Attorney for the  
Southern District of New York

HARRY A. CHERNOFF  
IRIS LAN  
ROBERTSON PARK  
Assistant United States Attorneys

HADDON FOREMAN  
Attorneys for Defendant

HAROLD A. HADDON  
SASKIA A. JORDAN

-and -

JONES DAY  
BY: JOHN CLINE  
JONES WAY

Also Present: Thomas Rosato, FBI

1 THE COURT: All right. Please be seated.

2 Good afternoon, Mr. Chernoff. Good afternoon, Ms.  
3 Lan, Mr. Park, and Agent Rosato.

4 Good afternoon, Mr. Haddon, Ms. Jordan, Mr. Cline, and  
5 Mr. Bourke.

6 I have reviewed the revised presentence report dated  
7 October 1, 2009, together with the sentencing recommendation  
8 and the addendum of the same date.

9 I have also reviewed defendant's corrections and  
10 objections to the PSR, that's the title of the document, dated  
11 October 5, 2009, a declaration of counsel Paolella, in support  
12 of those corrections and objections, dated October 5, 2009  
13 attaching a number of exhibits. Defendant's sentencing  
14 memorandum and request for a nonguidelines sentence dated  
15 October 5, 2009. The Paolella declaration in support of  
16 defendant's sentencing memorandum, attaching several exhibits  
17 dated October 5, 2009. And 80 letters from family, friends and  
18 acquaintances of the defendant, submitted in a group of 77 on  
19 October 2nd, 2009. And then three had come separately. And  
20 then a recent letter from a Mr. Scott Armstrong which was  
21 received by fax on November 6th, 2009.

22 I have also reviewed the government's sentencing  
23 memorandum, dated November 4th, 2009. Finally, I have,  
24 generally, reviewed all of the pretrial submissions, the trial  
25 records, the post-trial motions and, basically, all of

1 the other papers submitted in connection with this case.

2 Now, who is handling the sentence, Mr. Haddon?

3 MR. HADDON: I'm going to speak to the 3553 issues,  
4 and Mr. Cline will speak to the guidelines issues, so.

5 THE COURT: Well, have you reviewed the report, the  
6 recommendation, the addendum, and the government's sentencing  
7 submissions?

8 MR. HADDON: Yes, we have.

9 THE COURT: And other than the many objections and  
10 arguments you have made in writing, do you have any additional  
11 objections?

12 MR. HADDON: We do not.

13 THE COURT: Good.

14 Have you gone over the many submissions I have just  
15 listed out, with your client?

16 MR. HADDON: In great detail, yes, we have.

17 THE COURT: Does he have any additional objections,  
18 other than the many issues you have raised in your written  
19 submissions?

20 MR. HADDON: No, your Honor.

21 THE COURT: Okay.

22 Now, Mr. Chernoff, have you reviewed the report,  
23 recommendation, the addendum, and the many defense counsels'  
24 submissions that I have listed?

25 MR. CHERNOFF: Yes, your Honor.

1 THE COURT: And you have seen all of those letters,  
2 including the Armstrong letter?

3 MR. CHERNOFF: I'm sorry, not the Armstrong letter.

4 THE COURT: I was worried about that. I didn't think  
5 to check on the cc, whether he forwarded it to you.

6 MR. CHERNOFF: Unless your Honor finds something in  
7 the letter that the government should comment on, we'll waive  
8 reading it.

9 THE COURT: Well's, I don't know that I'm going to say  
10 the government needs to comment on it, but it's something the  
11 government surely should read, I'll put it that way.

12 No, it wasn't copied to you. In fact, it wasn't  
13 copied to counsel for the defendant.

14 MR. HADDON: I have not seen it, and I don't know what  
15 its contents are.

16 THE COURT: Oh, dear. None of the defense counsel  
17 have seen it, nor has the government. But it's 19 pages,  
18 single-spaced, makes it a 40-page double-spaced submission.

19 I think it's fair to summarize it for you a little  
20 bit. Essentially, this man worked with something called the  
21 Government Accountability Project which, for short, he calls  
22 GAP. And they investigated government corruption, including  
23 the use of special purpose entities. And he was asked at one  
24 point to undertake an investigation, and he did. And he writes  
25 in great detail about his investigation. He did this

1 investigation, not as an employee of Mr. Bourke, but  
2 independent of Mr. Bourke. In fact, at one point, they parted  
3 company, on not such good terms. But he continued his  
4 investigation. He reaches his own conclusions as to the merits  
5 of this case in great detail. He reaches his own conclusions.  
6 He reaches conclusions on Mr. Burke's accusations against  
7 others and so-called options fraud. He talks about who he  
8 thinks should have been prosecuted.

9 He, I would think in summary, comes to the conclusion  
10 that Mr. Bourke was wrongfully prosecuted, and is probably  
11 innocent of these charges. So, in short, there is a lot about  
12 the merits.

13 He also talks about what he believes were conflicts  
14 that prior counsel had. And that Mr. Bourke was victimized by  
15 the conflicts that certain prior counsel had. He criticizes  
16 the government's discovery production in this case, says the  
17 government was not forthcoming and didn't turn over all of the  
18 things it had, and hid information, or turned it over so late  
19 in the game that it couldn't be used, was too late to be used.  
20 Let's see. This is a very long letter, so I'm trying to  
21 summarize it, maybe hit the high points already. Let's see.

22 Well, and he definitely thinks that Mr. Bourke was a  
23 whistle blower who should be rewarded for his whistle blowing.  
24 And then, at the very end of the letter, he does submit the  
25 kind of letter that the other 79 people did, essentially saying

1 is's his view that Mr. Bourke should not be incarcerated. So  
2 that's the smaller part of the letter. The bulk of the letter  
3 is his views as to the merits of the prosecution and the  
4 behavior of both certain defense lawyers and the government.

5 Obviously, I will make copies for the government and  
6 the defense. But, I would have to say, I don't think it  
7 impacted anything that I plan to do with this sentence.

8 However, if somebody wants an hour adjournment to read the 19  
9 page single-spaced letter, you could have it, since you should  
10 know everything I have considered, but I think I've summarized.

11 I'll start with you, Mr. Haddon or Mr. Cline, do you  
12 want to have an adjournment to read this entire letter?

13 MR. HADDON: No, your Honor.

14 THE COURT: Mr. Chernoff.

15 MR. CHERNOFF: No, your Honor.

16 I would like to say, however, we actually -- this was  
17 a long time ago, but your Honor may recall we had mentioned the  
18 government accountability project as working for Mr. Bourke in  
19 this case because they filed --

20 THE COURT: At one time.

21 MR. CHERNOFF: Yes, they filed numerous FOIA requests.  
22 I actually brought along a report they prepared on this case.  
23 It's 34 single-spaced typed pages called privatization and  
24 corruption of the World Bank in Azerbaijan. They published this  
25 in August of 2008. I don't know who Mr. Armstrong is, whether

1 he is an attorney. Attorneys for GAP have been, in the past,  
2 described themselves as counsel to Mr. Bourke.

3 THE COURT: No, he most certainly doesn't.

4 MR. CHERNOFF: I don't know whether --

5 THE COURT: Well, partly he is an investigative  
6 reporter. He actually says he was co-author of The Brethren,  
7 Inside the Supreme Court. I didn't remember him as the  
8 co-author, but I remember the book. It was written by Bob  
9 Woodward. He said he co-authored it. But, be that as it may,  
10 he claims that he was not working for Mr. Bourke. He may have  
11 gone that way, but their relationship terminated and he  
12 continued the project.

13 There was something called the GAMMA project. I  
14 forgot what that stands for. Maybe you know.

15 MR. CHERNOFF: I guess I'm not clear whether Mr.  
16 Armstrong separated from GAP --

17 THE COURT: He did separate. He says, he writes in  
18 the letter, for example, that Mr. Bourke has no idea what is in  
19 this letter, and he did not show it to him first, and he has no  
20 idea what is in it, and they have not been in touch. The man  
21 was very ill, had to stop working for a while, then he  
22 continued on his own. And he says no way is he working for or  
23 with Mr. Bourke.

24 MR. CHERNOFF: I just wanted to point out that I,  
25 apparently, if he is not an attorney, he was working for

1 attorneys who had been -- who had described attorneys for Mr.  
2 Bourke, and then we believe Mr. Bourke had made -- described in  
3 his report that Mr. Bourke had -- let me try to -- it says in  
4 the first footnote at the beginning of the report: At Mr.  
5 Bourke's request, GAP is conducting a broad public interest  
6 investigation of --

7 THE COURT: Right.

8 MR. CHERNOFF: -- these Azeri privatizational  
9 program.

10 THE COURT: Right. But then GAP then came to him and  
11 asked him to work on it. He says that he was a former  
12 Congressional investigator, an investigative reporter for the  
13 Washington Post and the author of the book. And at one time  
14 was a former member and, at one point chairman, of the board of  
15 GAP. But that had ended, and he was independent, and they came  
16 to him and asked him to do this investigation. And then he  
17 became ill, didn't do it, and then he was back on it. And  
18 that's what I can tell from this letter. Anyway, do you want  
19 an adjournment?

20 MR. CHERNOFF: No, your Honor. I wanted to point out  
21 those facts to the Court and ask that your Honor disregard the  
22 letter, given the strange circumstances by which it was written  
23 and come to the Court.

24 THE COURT: Well, I have to -- when you say disregard  
25 it, 15 or 16 pages really related to the merits. I'm no longer



1 making decisions on the merits today. So, to that extent, I  
2 read it, I know what it says. I can't tell you what affect it  
3 has on the subconscious, but it doesn't really address the  
4 sentencing issues very much.

5 MR. CHERNOFF: Thank you, your Honor.

6 THE COURT: But I'll make sure that copies are made  
7 and given to both the government and the defense.

8 Now, I think I have finished the question, but if I  
9 didn't, Mr. Chernoff, I might have stopped in the middle. I  
10 probably said have you reviewed all of the materials I have  
11 just described, and you said yes, what about the Armstrong  
12 letter, you said no.

13 All of the other materials I have described you have  
14 seen?

15 MR. CHERNOFF: Your Honor, I guess -- I think I saw  
16 the package of 77 letters, and I guess 78 and 79 may not have  
17 come to me, either. But I'm willing to waive those.

18 THE COURT: Maybe. They had come earlier. I know  
19 which ones were separate. But they were more of the same.  
20 They were typical letters of family and friends.

21 MR. CHERNOFF: Yes, your Honor.

22 THE COURT: I should also add, I guess I missed one.  
23 Today, November -- well, it is dated November 9th, but it  
24 arrived on November 10th -- I receive a letter from Mr.  
25 Bourke's treating physician, a Dr. Ruch.

1 You didn't get a copy of that either, did you, Mr. --

2 MR. CHERNOFF: I did, your Honor.

3 THE COURT: Oh, you did?

4 MR. CHERNOFF: Yes.

5 THE COURT: Oh, good, okay. That's one thing I should  
6 add to all of the rest of the material I considered.

7 All right. Now, does either side think that there are  
8 factors, issues in dispute here, that would require a fatico  
9 hearing?

10 MR. CHERNOFF: No, your Honor.

11 MR. HADDON: No, your Honor.

12 THE COURT: All right.

13 Let me begin then with what I'll call a high-level  
14 summary of the defense submissions.

15 The defense argues that the guidelines calculation  
16 urged by the government is inappropriate in many ways.

17 First, the use of the 2008 manual in effect at the  
18 time of sentencing, according to defense, would violate the ex  
19 post facto clause.

20 Second, the amount of loss the government seeks to use  
21 to enhance the base offense level, is simply unsupportable and  
22 requires speculation, rather than any attempt at reasonable  
23 certainty.

24 And third, the government's guideline calculation  
25 leads to an absurdly high guideline offense level, to wit, 52,

1 which is generally reserved for murderers facing life  
2 imprisonment or the death penalty or terrorists causing the  
3 deaths of one or more Americans.

4 So, the defense submissions also stress that whatever  
5 guidelines the Court adopts, the Court should impose a  
6 nonguidelines sentence, based on the somewhat ambiguous record  
7 with respect to the offense of conviction, Mr. Bourke's role in  
8 the offense, and on his long and unusual record of contributing  
9 to the community at large.

10 Finally, the defense places heavy reliance on the  
11 recent Second Circuit Decision in United States v. Dhafir,  
12 which was issued on August 18th, 2009.

13 And I think, for the record, rather than summarize  
14 that decision I'm going to spend a moment quoting from that  
15 decision, at least what I consider the relevant portion.

16 The relevant portions are, "Precise calculation of the  
17 applicable guidelines range may not be necessary in making a  
18 sentencing determination. Situations may arise where either of  
19 two guideline ranges, whether or not adjacent, is applicable,  
20 but the sentencing judge, having complied with Section 3553(a)  
21 makes a decision to impose a nonguidelines sentence, regardless  
22 of which of the two ranges applies.

23 This leeway should be useful to sentencing judges, in  
24 some cases, to avoid the need to resolve all of the factual  
25 issues necessary to make precise determinations of some

1 complicated matters, for example determination of monetary  
2 loss."

3 And, at that point, the decision is quoting, United  
4 States v. Crosby, 397 F3d. 103 at 112.

5 The Dhafir court also cited United States v. Cavera,  
6 550 F3d. 180 and 190 for the Second Circuit, Sovereign Bank in  
7 2008, and essentially stated that omission of the guidelines  
8 calculation may sometimes be justified.

9 The Dhafir court then stated, and I quote again, "The  
10 factual ambiguity in this case presents just these  
11 circumstances. There is no need for the District Court to  
12 choose between the two guidelines calculations at all. We  
13 reiterate here that the District Court is not bound in  
14 ambiguous circumstances such as these, to choose one guidelines  
15 range in particular, and is free to take a more flexible and  
16 often more direct approach of arriving at a more appropriate  
17 sentence outside of the guidelines.

18 In light of Booker, the judge could simply look at all  
19 of the facts, take both suggestions into account, consider the  
20 Section 3553(a) factors, and come up with a hybrid approach if  
21 she so chooses."

22 The Dhafir court then remanded to the District Court  
23 to permit the Court to consider whether a different sentence  
24 would result from the application of the so-called flexible  
25 approach.

1           So that's the summary of the defense's submissions. I  
2 said it was a high level summary, because it was many, many,  
3 many pages. But that's the broad, boiled down version.

4           On the same vein, in its submission, the government  
5 argued in support of its position that the Court should use the  
6 2008 manual in effect at the time of sentencing, arguing there  
7 is no longer an ex post facto problem, that the guidelines are  
8 now advisory and no longer mandatory.

9           Using this guideline analysis, the government then  
10 asks for the longest possible sentence, the statutory maximum  
11 sentence of ten years in custody.

12           Now, my usual practice is to rule on these disputed  
13 issues now, to then set the guidelines range, and then to hear  
14 from the parties as to what the sentence should be within that  
15 range. But if you feel that after all of the submissions I  
16 reviewed, which were many inches high, if there is anything  
17 more you have to say before I rule on the disputed issues, I'll  
18 hear you, but not on the what the sentence should be. In other  
19 words, if you heard from me and you knew the ranges I was  
20 considering and the decision I made on these disputed issues,  
21 then you would be able to target your final comments, so to  
22 speak. But if you want to make legal arguments, I won't stop  
23 you.

24           MR. CHERNOFF: Your Honor, we will rest on our  
25 submissions on the question of which book should be used and

1 which enhancement should apply. I do want to amend our  
2 position, because I forgot when I was writing that, that we  
3 would be in November 1 of 2009. There is a new guidelines, so  
4 if I could amend our submissions, because the guidelines are  
5 exactly the same.

6 THE COURT: I didn't receive the new one.

7 MR. CHERNOFF: I have checked on them. They are  
8 exactly the same.

9 THE COURT: 2008 and 2009 nine are the same?

10 MR. CHERNOFF: Yes, your Honor.

11 THE COURT: Okay.

12 MR. CHERNOFF: I think that -- I think the only  
13 guidelines matter where we took a different -- we conceded that  
14 the obstruction enhancement that probation had applied was  
15 inapplicable, but asserted that it did apply, based on the  
16 defendant's state grand jury perjury. I have not heard whether  
17 the defense opposes that particular enhancement, but that's one  
18 that I don't believe the defense has been heard on. In other  
19 words, they didn't object to probation enhancement, but they  
20 also didn't object to our alternative rationale for that  
21 enhancement.

22 Otherwise, I think the positions have been certainly  
23 fully briefed, and we would rest on our submissions.

24 SKWRAO: We, too, rest on our submissions on the  
25 guidelines issues. I think they have been fully briefed.

1           On the last point Mr. Chernoff just raised, I think  
2 the probation -- the PSR is correct. I think the way these two  
3 counts work together, is there is a two level upward adjustment  
4 in count one, as a result of count three. We don't agree with  
5 Mr. Chernoff's alternative rationale, but it doesn't really  
6 matter, because I think we end up in the same place. I think  
7 it was a two-level upward adjustment.

8           THE COURT: Okay. So here are my rulings, and then I  
9 will, as I said, set the guidelines. And then I'll hear from  
10 you, obviously, before imposing sentence.

11           Based on the analysis in Dhafir, relying on Crosby  
12 because I intend to impose a nonguidelines sentence, regardless  
13 of which manual is used and which guideline range is selected,  
14 I'm going to use the manual in effect at the time of the  
15 offense, namely, the 1998, manual to set the guidelines range.  
16 This avoids any issue as to the possible ex post facto  
17 application of the manual in effect at the time of sentencing,  
18 which would result in a significantly higher guideline.

19           For the same reason, I decline to use the 2001 manual,  
20 which was in effect at the time of defendant's actions with  
21 respect to the false statement count, but not with respect to  
22 the conspiracy charge, which the indictment alleges ended in  
23 1999.

24           With respect to the loss amount and the adjustment it  
25 causes to the base offense level, I will use the lowest

1 reasonable figure, namely 11 million dollars, the amount of the  
2 bribes that were allegedly paid by the co-conspirators to these  
3 area officials.

4 Section 2X1.1A of the guidelines applies to a  
5 conspiracy and states that, "The base offense levels taken from  
6 the substantive offense, plus any adjustment from such  
7 guidelines for any intended offense conduct that can be  
8 established with reasonable certainty." Application note 2,  
9 goes on to state, "the only specific offense characteristics  
10 that apply are those that are determined to have been  
11 specifically intended or actually occurred. Speculative  
12 specific offense characteristics will not be applied."

13 I am applying Section 2B4.1 to the guidelines  
14 calculation, rather than Section 2C1.1. Prior to 2001, this  
15 was the second used to imposes sentences under the Foreign  
16 Corrupt Practices Act. The 2002 amendment makes clear that  
17 foreign governments were not excluded under that section until  
18 that time, otherwise there wouldn't have been any need for an  
19 amendment.

20 In any event, because it resulted in the lowest  
21 guidelines sentence, I will use this guideline and then explain  
22 why I will, nonetheless, impose a nonguidelines sentence.

23 So, for the guideline calculation purposes, defendant  
24 was convicted, after a trial, of two counts; conspiracy to  
25 violate Foreign Corrupt Practices Act and the Travel Act, and



1 making false statements.

2 Because the offense level is determined on the basis  
3 of the total amount of loss, and because the offense conduct of  
4 count three is a specific offense characteristic to the  
5 guidelines governing count one, the two counts are grouped  
6 pursuant to Section 3D1.2(c). The base offense level for this  
7 crime is eight, pursuant to Section 2B4.1. The base offense  
8 level is then increased by 15 levels to 23, based on a loss  
9 figure of \$11 million.

10 In using this figure, I am rejecting the government's  
11 argument regarding the projected intended gain of \$400 million  
12 or more to the participants, but I'm also rejecting the  
13 defendant's argument that the amount of the bribe cannot be  
14 calculated with reasonable certainty. The 11 million-dollars  
15 represents a reasonable estimate, or fair summary, of the  
16 actual bribes paid.

17 An additional two levels are added to level 25,  
18 pursuant to Section 2B1.1(b)(2)(B) because the false statement  
19 conviction is a specific offense characteristic.

20 Because the defendant has no criminal history points,  
21 he falls in criminal history category I. His guideline range  
22 at offense level 25 criminal, history category I, is 57 to  
23 71 months in custody and a fine range of \$10,000 to \$100,000  
24 under the guidelines. Statutory fine, however, ranges from  
25 \$10,000, the lowest range in the guidelines, up to twice the

1 gross gain or loss which, for the reasons I set forth earlier,  
2 is \$22 million.

3 Having said that, I'm ready to hear from defense  
4 counsel. I no longer know whether it was Mr. Haddon or Mr.  
5 Cline, but I'm ready to hear from whoever is ready to speak.

6 MR. HADDON: To sentencing, your Honor?

7 THE COURT: Yes, of course. We're up to that point.  
8 I have set the guideline range and explained why I chose it.

9 MR. HADDON: Your Honor, I'll be brief, because our  
10 submissions have been extensive. We thank you for reviewing  
11 them, but --

12 THE COURT: You should thank me. It cost days.

13 MR. HADDON: I understand.

14 THE COURT: And days.

15 MR. HADDON: And I don't wish that to be  
16 condescending, because we really appreciate the time and effort  
17 you have put into the case, as does Mr. Bourke.

18 I simply want to say this. In the heat of a  
19 proceeding like this, you don't get to know Mr. Bourke, the  
20 person. I hope that our submissions have cast some light on  
21 Mr. Bourke that --

22 THE COURT: I don't know, the 80 letters sure did. I  
23 don't know whether you folks did, you have argued about which  
24 guideline manual applies, and what is retroactive, and what the  
25 amendment means and this and that, but the 80 letters told me a

1 lot about Mr. Bourke.

2 MR. HADDON: And I hope that they have given your  
3 Honor a perspective, not only of what he is doing with his life  
4 now, but what he has done with his life.

5 THE COURT: Right, the 80 letters did that.

6 MR. HADDON: And he -- as your Honor knows, he is not  
7 simply a financier. He has devoted his life to extraordinary  
8 good works. And in the face of, really, a ten-year overhang,  
9 the cloud of this prosecution, he has done something I consider  
10 exceptional, and I hope your Honor does, and gives it the  
11 weight that I think humanity will give it. And that is, that  
12 he is not just a financier, but inventor of an extraordinary  
13 cancer-curing technique that he is actively involved in, and  
14 human trials have begun with. I don't want to dwell on all of  
15 the issues we have discussed about deterrence, general  
16 deterrence, specific deterrence, your Honor well knows those  
17 factors. I will simply say that the fact of this prosecution  
18 and the length that it has taken, some of that falls on Mr.  
19 Bourke, some on the government, I'm not casting blame. But  
20 it's been an eight year to ten year cloud. And he has done  
21 extraordinary things, even with that cloud. And, in terms of  
22 deterrence, I submit that, both to Mr. Bourke and to those who  
23 read about this prosecution, it's had an extraordinary impact.  
24 The general business public now knows that if you are an  
25 investor in a venture abroad, just an investor, not an active

1 participant, you, too, are subject to the full sanctions of the  
2 foreign corrupt practices act. And I think a very strong  
3 message has been sent. I submit that every other factor that  
4 your Honor must consider under the statute argues, and argues  
5 overwhelmingly, for a sentence of probation for Mr. Bourke,  
6 because he has not only contributed very much for the overhang  
7 of this prosecution, he has much to contribute. And he is  
8 actively doing that. It is an extraordinary case, he is an  
9 extraordinary person. This is an aberration in his life. And  
10 I ask your Honor to impose a sentence of probation that  
11 recognizes not just what he has done, with respect to this  
12 case, but what he has done in life. And what he has done in  
13 life, I submit, with the stain of this prosecution as an  
14 exception, has been extraordinary by any measure. So we ask  
15 you to impose a sentence of probation. And not, I don't mean  
16 to be condescending, we really appreciate all of the effort you  
17 have put into this case.

18 THE COURT: Thank you. Are you also speaking Mr.  
19 Cline, or no?

20 SKWRAO: No, your Honor, thank you.

21 THE COURT: Mr. Bourke, would you like to say anything  
22 before the sentence is imposed.

23 THE DEFENDANT: Well, your Honor, thank you for your  
24 time and your patience. And I know this has been a long  
25 ordeal. And I think I'll stand with what the attorneys have

1 said, if that's all right.

2 THE COURT: That's fine.

3 THE DEFENDANT: Thank you, your Honor.

4 THE COURT: Mr. Chernoff.

5 MR. CHERNOFF: Thank you, your Honor.

6 Your Honor, I wanted to begin by saying that I, too,  
7 was very impressed and could not ignore the impact that Mr.  
8 Bourke's friends and family's letters made on me, reading them.  
9 I know your Honor has seen a lot of presentations like that. I  
10 have seen a few less, but have seen a lot. And this impressed  
11 me a lot.

12 But what I guess puzzled me even more, was that  
13 someone who is as intelligent, as talented, and as capable as  
14 Mr. Bourke, was unable, at any point in the process, to accept  
15 responsibility for his conduct in this case. Even when given  
16 the opportunity to cooperate with the investigation and to  
17 proffer with the FBI, even when given the opportunity to  
18 cooperate with the State investigation of Mr. Kozeny,  
19 Mr. Bourke lied to both authorities, lied in the Grand Jury,  
20 and took a position, throughout this case, that even continues  
21 today. I mean when Mr. Haddon says that the business community  
22 says that it understands that now, just an investor, can be  
23 convicted of this conduct. It's true that the conviction has  
24 been read that way in the press, and that's largely because of  
25 the spin that Mr. Bourke has put on this conduct from the

1     outset. I can't imagine how Mr. Bourke can be considered just  
2     an investor, when I actually have lost count of the number of  
3     times he took his private plane to Azerbaijan to meet  
4     personally with the Azerbaijani officials, without Mr. Kozeny  
5     present on numerous occasions, when he went and met with  
6     Mr. Nuriyev in London, privately. When he brought Senator  
7     Mitchell to meet Ilham Aliyev without Mr. Kozeny present. All  
8     of the steps that Mr. Bourke took to make this investment  
9     succeed. Recruiting George Mitchell, hiring lobbyists.

10           Mr. Bourke was president of the Oily Rock Investment  
11     Corporation. He was on the board of two other related  
12     entities. I don't know how he could possibly characterize  
13     himself as a passive investor. I also think the notion that he  
14     didn't know what was going on, that he just looked the other  
15     way, is not at all in accord with Mr. Bourke's character, with  
16     his intelligence. He is someone who drills down on a problem.  
17     He has been able to come up with tremendous inventions, and  
18     finance, and oversee them without any scientific or medical  
19     training. And, yet, he would have the Court and the jury  
20     believe that he couldn't figure out what was going on in this  
21     investment in Azerbaijan.

22           And I did bring along this Privatization and  
23     Corruption Report that the Government Accountability Project  
24     prepared with his support. And even it says, I'm quoting from  
25     page 11: By 1995, the Aliyev government had consolidated power

1 and was well known for its secrecy with respect to oil  
2 dealings, its suppression of opposition of political parties  
3 and trade unions. In contrast to the bank appraisals" -- here,  
4 it's discussing the World Bank's assessment, "more impartial  
5 and candid assessments portrayed the Aliyev government in  
6 Azerbaijan about this time as one of the most corrupt in the  
7 world."

8 This, again, is a report that was actually prepared  
9 to, I guess, highlight Mr. Bourke's purported role as whistle  
10 blower in this case. And it goes on to describe all of the  
11 assessments that the World Bank representatives made, because  
12 the report is intended to criticize the World Bank in not  
13 somehow stopping this scheme, but all the criticisms that the  
14 World Bank made of the Aliyev regime in assessing this  
15 particular deal, and assessing what Victor Kozeny was doing to  
16 vouchers in the Czech Republic and in Azerbaijan. And this is  
17 what attracted Mr. Bourke to the investment. To complain now  
18 that Mr. Kozeny cheated him, when we know that Mr. Kozeny  
19 cheated poor Czech citizens out of hundreds of millions of  
20 dollars through his own voucher shenanigans there. To say that  
21 he didn't get the kind of information we all expect that he got  
22 directly from Mr. Kozeny about the investment in Azerbaijan, is  
23 sort of just utterly contradictory of the presentation he has  
24 made in the sentencing and everything else we know about him.

25 I also just want to talk briefly about general

1 deterrence. Because it is the case that that is an incredibly  
2 important consideration in convictions and sentences like this  
3 one. Mr. Bourke contends -- as I argued in our sentencing  
4 memo -- I think, wrongly, that when there is certainty of  
5 punishment, the severity of punishment is less important. And  
6 here, in the FCPA arena, there is very little certainty of  
7 punishment. And we can't possibly think that Mr. Bourke, with  
8 all of the advantages that he has enjoyed in life, thought that  
9 he was engaged in conduct that would result in any kind of  
10 punishment. Rather, he thought, given the people he has  
11 assembled, given the lawyers' work that had been done for him,  
12 that he would cover any tracks that would be left that would  
13 expose him to civil or criminal liability for his actions. And  
14 that comes through on the reported phone call that was in  
15 evidence at trial.

16 I was doing a little bit of reading of a new Law  
17 Review article that came out, called International Bribery, The  
18 Moral Imperialism Critiques. This is from 18 Minnesota Journal  
19 of International Law 155 that was just published this month --  
20 last month, rather. And in one of the footnotes, this is  
21 footnote 6, the author points out that, "The World Bank  
22 estimates the annual costs of corruption is more than  
23 \$80 billion, while the International Monetary Fund estimates  
24 that a country's growth rate can reduce 5.5 percent a year due  
25 to corruption."



1           Now, that's an awful lot of corruption and an awful  
2 lot of it, the majority of it, I submit, goes undetected.

3           The cases that the government has cited in its  
4 sentencing memo concern far more modest conduct. We don't know  
5 whether those sentences would have been different in the  
6 advisory guidelines regime than they came out. Maybe they  
7 would have been a little lower. May they would not have been.  
8 It could have been a little higher. But I think it is fair to  
9 say that when the Sentencing Commission came up with this  
10 guidelines range which does, I submit by the government's  
11 calculation, provide a very high level for the defendant. It  
12 is also, I think, the case that no one could have imagined that  
13 a scheme this audacious would be hatched, would come to light,  
14 would be successfully prosecuted as it has been. And I'm not  
15 saying that Mr. Bourke, as an individual appearing before your  
16 Honor for sentencing, has to answer for all of that. But, this  
17 was a scheme in which Mr. Bourke and his co-conspirators  
18 thought that they could purchase the entire oil well, that a  
19 sovereign nation with several million individuals who were  
20 supposed to benefit, citizens were supposed to benefit from the  
21 privatization of their resources, their assets, following the  
22 fall of Communism. And it doesn't matter what Mr. Bourke  
23 intended to do, what good he intended to do with the vast  
24 riches he expected to make of this. And his own friend, Harry  
25 Demetriou testified that Mr. Bourke thought it was in the range

1 of \$15 billion. Even if it is a half or 10 percent of that, it  
2 is an outrageous sum. And the cynicism that Mr. Bourke  
3 displayed in entering into a corrupt conspiracy, with the  
4 Azerbaijani officials who we heard about in this case,  
5 depriving the poor, impoverished, the citizens of Azerbaijan,  
6 who don't have a voice in their government, who don't have the  
7 kind of civil rights that we would hope they would have in the  
8 post-Communist era. This is exactly what the Foreign Corrupt  
9 Practices Act is about. It is intended to stop corruptors like  
10 Mr. Bourke, like Mr. Kozeny, like anyone else who participated  
11 in this conspiracy from going to places like Azerbaijan and  
12 victimizing the people there. And that was why it was so  
13 important for the United States to enact this legislation and  
14 why, after decades, other countries around the world have  
15 followed us in doing so.

16 The last thing I would say on that note is a quote  
17 from, again, this same report, the Government Accountability  
18 Project Report, where they begin by quoting James Wilkinson,  
19 the president of World Bank in a speech he made to the Bankers  
20 Club -- I don't really know what that is, but it's in London,  
21 February 1997. "Corruption is not just an issue of developing  
22 countries. There are corruptions and there are the corruptors.  
23 And many corruptors come from the developed countries, and many  
24 corruptors are clients of all of us. If we don't want the  
25 cancer of corruption to spread in the world we, ourselves, must

1 stand up to it."

2 Your Honor, I think that Mr. Bourke's request for  
3 leniency would have more merit if he had been able to accept  
4 responsibility and admit that, in this case, he made a very bad  
5 mistake in conduct that occurred for more than a year. And in  
6 conduct that continued when he lied to the FBI.

7 But I would also say that the case is bigger than Mr.  
8 Bourke. It is about the offense conduct itself. There are  
9 people in Azerbaijan, there are companies around the world,  
10 because the FCPA does have that kind of reach now that it has  
11 been amended to apply to foreign persons in some circumstances.  
12 And there is certainly countries all around America who are  
13 watching this courtroom to see what sentence is imposed in this  
14 case. And, therefore, we submit that a sentence within the  
15 range, as your Honor has calculated it, or a sentence above  
16 that range, would be an appropriate sentence.

17 I also want to speak briefly to the fine, which is  
18 addressed in our papers. I think in the case, given the  
19 statutory goals of assessing fines as the statute lays out,  
20 that the guidelines range for this defendant understates what  
21 fine should be imposed, obviously given the tremendous  
22 financial value of the offense conduct, as well as the assets  
23 that Mr. Bourke has. And in terms of the fine being a punitive  
24 measure as it should be.

25 Unless your Honor has any questions, I think that's

1 all for the government.

2 THE COURT: I don't. But if the defense wishes to  
3 respond to any of the points that you made, I would be happy to  
4 hear that. If not, I'll proceed.

5 MR. HADDON: I have no further response.

6 THE COURT: Okay.

7 In every case, the Court has an obligation to  
8 determine the reasonable sentence, and a particular sentence  
9 that is sufficient but not greater than necessary to serve the  
10 required purposes of sentencing.

11 Based on all of the sentencing factors set forth in 18  
12 United States Code Section 3553, I conclude that a  
13 nonguidelines sentence is appropriate here, and intend to  
14 impose a sentence of year and a day in custody to be followed  
15 by 3 years of supervised release, a mandatory assessment of  
16 \$200, and a fine of one million dollars.

17 For the record, I will now go through each factor in  
18 some detail. I begin with the nature and circumstances of the  
19 offense, and the history and characteristics of the defendant.

20 This defendant participated in a scheme to make  
21 corrupt payments to officials in Azerbaijan, in order to get  
22 their approval for the privatization of a state owned oil  
23 company in Azerbaijan.

24 This defendant was an investor in the venture and  
25 caused many friends and acquaintances to invest in the venture.

1 He knew that the moving force behind the project was Victor  
2 Kozeny. He further knew of Kozeny's experience in a similar  
3 privatization effort in the Czech Republic. He also had a  
4 reason to know that Kozeny was willing to bribe officials in  
5 order to achieve the desired privatization.

6 During the time he was an investor, the defendant  
7 agreed to participate in a scheme to make corrupt payments to  
8 officials in Azerbaijan. His sole motive in doing so was to  
9 make a very large return on his investment which, for him, was  
10 a relatively modest six or so million dollars. He expected to  
11 make hundreds of millions of dollars in the event of  
12 privatization.

13 The scheme failed and he lost his money.

14 I turn now to defendant's history and characteristics.

15 This, now, 63 year old defendant is the father of  
16 three grown children. He maintains an amicable relationship  
17 with his ex-wife, and has been involved in the past 13 years in  
18 a stable relationship with his partner. He has both a  
19 masters -- bachelors and a masters in business administration.  
20 He started his own leather goods business, which he built into  
21 a very profitable handbag and accessory business, from which he  
22 made a great deal of money.

23 He has also been a very successful inventor.

24 Actually, I meant to say investor, but also inventor. He has  
25 been involved in medical research, which has led to some

1 successful treatment options and to research into other  
2 potential treatments. His research that he either does himself  
3 or sponsors is mostly in the area of treating various cancers  
4 and auto immune diseases. He is a long time philanthropist,  
5 particularly supporting medical research as national parks.

6 As reflected in the many letters submitted on his  
7 behalf, he has also directed his charitable efforts to  
8 individuals which happen to be in need of assistance.

9 The next factor is the need for the sentence imposed.  
10 And, under that factor, there's several sort of subfactors that  
11 are set forth in the statute.

12 The first of those is to reflect the seriousness of  
13 the offense, and promote respect for the law, and provide just  
14 punishment for the offense. I am convinced that this sentence  
15 achieves all of these goals under the circumstances of this  
16 case. It reflects the seriousness of the offense, it does  
17 promote respect for the law, and it provides a just punishment  
18 for this offense and this offender.

19 The next subfactor, so to speak, is to afford adequate  
20 deterrence to criminal conduct. Deterrence is as important in  
21 white collar fraud cases, as it is with respect to any other  
22 category of criminal conduct. Those who participated in  
23 efforts to corrupt foreign officials so that they may make a  
24 handsome profit on their investment, have violated the law and  
25 deserve to be punished. Had this scheme succeeded, a number of

1 American investors would have made hundredfold returns on their  
2 investments. Officials in Azerbaijan would have become even  
3 richer, while the people of Azerbaijan would have been deprived  
4 of the benefit of the value of their greatest natural resource.  
5 Such conduct cannot be tolerated and must be punished. This is  
6 also the main reason that I concluded that jail sentence is  
7 required and rejected your request for probation.

8           While I really don't think Mr. Bourke needs any  
9 rehabilitation, and along this line I do note Section 994J of  
10 Title 28 which stated at the time the Sentencing Commission was  
11 established, that the Commission was charged with ensuring that  
12 the guidelines reflect the general appropriateness of imposing  
13 a sentence other than imprisonment in cases in which the  
14 defendant is a first offender, who has not been convicted of a  
15 crime of violence or an otherwise serious offense. But I,  
16 nonetheless, conclude here, that a period of time in jail,  
17 albeit brief, is required to effect the goal of general  
18 deterrence. Those who invest in foreign countries must  
19 recognize that bribery of foreign officials is outlawed by the  
20 Foreign Corrupt Practices Act and cannot be undertaken with  
21 impunity. Such bribery must, and will, result in a jail  
22 sentence.

23           The next subfactor is to protect the public from  
24 further crimes of the defendant. While the public doesn't need  
25 any protection from this defendant, quite to the contrary Mr.

1 Bourke is an asset to the public, his incarceration will only  
2 impede his efforts to continue to improve the environment and  
3 the society in which he lives.

4 The next subfactor is to provide the defendant with  
5 needed educational and vocational training, medical care, or  
6 other correctional treatment in the most effective manner.

7 And, again, this defendant does not need any of those  
8 correctional services.

9 The next factor is the kind of sentences available.

10 There is no mandatory minimum term here, under any  
11 guideline calculation. Having decided to give a nonguideline  
12 sentence, I am aware that I could give a term of straight  
13 probation, a term of probation with a period of home  
14 confinement or community service, or a term of imprisonment.

15 However, for the reasons already stated, particularly  
16 general deterrence, I conclude that a jail term is appropriate.

17 The next factor is the guidelines sentence and  
18 applicable policy statements. The guidelines sentence here, as  
19 is always true in fraud cases, is driven primarily by the  
20 amount of loss or intended loss. So you remember, starting  
21 with offense level of 8, it immediately hit 23 because of the  
22 amount of loss. But that is not the beginning and the end of  
23 the purpose of sentencing. There are a number of factors here  
24 favoring a nonguidelines sentence.

25 First -- this is lengthy, I apologize. First, and



1 perhaps most important, this defendant was in no way the  
2 originator of this scheme. There is no doubt in my mind that  
3 his involvement began as an investor hoping to make a good deal  
4 of money. However, I also find, as did the injury, that over  
5 the course of time in which he was an investor, he learned that  
6 in order for this investment to pay off the wheels would need  
7 to be greased by bribing the decisionmakers in Azerbaijan. He  
8 went along with that plan and furthered its goals.

9           On the other hand, there is slim proof as to whether  
10 the bribes were paid, and if so how much was paid, and if so  
11 who got the money. In the end, the intended privatization  
12 never occurred, and this defendant and many others lost the  
13 full value of their investment. Bourke never made a dollar on  
14 this scheme, and it has cost him many years of stress and  
15 anxiety in several ways.

16           First, he tried to be a whistle blower against those  
17 he perceived as the real wrong-doers, Kozeny, Bodmer, and  
18 Farrell, who he believed developed the sophisticated scheme to  
19 defraud the investors and steal their money. He met with the  
20 Manhattan District Attorney's Office to explain his view of the  
21 scheme.

22           Now, as a result in part of his cooperation, which you  
23 said didn't happen, Mr. Chernoff, but a letter from the ADA  
24 disagrees with you. As a result of his efforts, a grand jury  
25 was convened and Mr. Kozeny was indicted.

1           Second, and far worse for Mr. Bourke, has been the  
2 years spent fighting this case. A case he believes is  
3 misguided. He deeply believes that the government has not  
4 treated him fairly. He has raised many challenges to his  
5 conviction, which I will discuss in detail later in these  
6 proceedings. Suffice it to say, for now, that there may yet be  
7 merit to many of his charges.

8           In any event, there is enough uncertainty here to  
9 warrant the imposition of a nonguidelines sentence. After  
10 years of supervising this case, it is still not entirely clear  
11 to me whether Mr. Bourke was a victim, or a crook, or a little  
12 bit of both. Because I believe I should resolve all doubt on  
13 this score in defendant's favor, a nonguidelines sentence is  
14 warranted on this ground alone.

15           In addition, in reviewing the 80 letters that I have  
16 received, I am truly and deeply convinced that this is an  
17 unusual man whose criminal conduct is more than balanced by his  
18 life-long commitment to helping others. I know that the  
19 Probation Department which, in my experience, rarely recommends  
20 a nonguidelines sentence, recommended one here. The Probation  
21 Department found that the guidelines called for sentence of 120  
22 months in custody, yet the Probation Department recommended the  
23 sentence of 24 months or an 80 percent reduction based  
24 primarily on this defendant's good works.

25           The presentence report cited, in particular, Mr.

1 Bourke's funding for a school for the deaf, his donations to  
2 national parks, his sponsoring of an annual science symposium  
3 and his active efforts to help develop treatment and cures for  
4 life-threatening cancer. I quote briefly from the presentence  
5 report, "One of his companies invented and developed a  
6 treatment for blood cancer that doctors continue to use today.  
7 Presently, Bourke in conjunction with research experts at Duke  
8 University is working on a novel new cancer treatment."

9 The conclusion reached by the Probation Department are  
10 more than supported by the 80 letters that I have read, and by  
11 some of the exhibits submitted by defense counsel. In addition  
12 to these institutional good works, Mr. Bourke has been  
13 exceedingly generous and helpful to individuals in need who  
14 somehow crossed his path. His specific acts of kindness and  
15 generosity are recounted in the letters. This lifetime of good  
16 works was not undertaken in the last few years to avoid a  
17 potential jail sentence. These acts attest to a lifetime of  
18 good works that deserve a significant and substantial reward.

19 The last factor is the need to avoid unwarranted  
20 sentencing disparities. And that's a laudable goal. It was the  
21 overwhelming purpose behind the Sentencing Reform Act of 1984  
22 and does survive the Booker analysis. The guidelines systems  
23 was promulgated set forth a national norm for certain criminal  
24 conduct. However, each offender must be sentenced based on his  
25 or her own conduct. For all of the many reasons I have already

1 set forth, the sentence here, a nonguidelines sentence, does  
2 not create unwarranted sentencing disparities. Unwarranted  
3 being the key word. I therefore conclude that, considering the  
4 goals of sentencing and the individual I'm sentencing, that a  
5 sentence of a year and a day in custody to be followed by three  
6 years of supervised release is sufficient but not greater than  
7 necessary to serve the goals of sentencing.

8 In addition, the required special assessment of \$200  
9 must be paid immediately, and the fine of \$1 million need to be  
10 paid, but I don't suppose immediately. That can be done at the  
11 end of the jail term.

12 Defendant is to be supervised in the district of his  
13 residence. The standard conditions of probation, as  
14 recommended by the Probation Department shall apply.

15 In addition the following mandatory conditions always  
16 apply. First, defendant shall not commit another federal,  
17 state, or local crime; second, defendant shall not illegally  
18 possess a controlled substance; and, third, defendant shall not  
19 possess a firearm or other destructive device.

20 The mandatory drug testing condition is suspended  
21 based on this Court's conclusion that this defendant poses no  
22 risk of any drug or alcohol abuse. The only special condition  
23 is that defendant shall report to the nearest probation office  
24 within 72 hours of his release from custody.

25 Are there any legal objections, which is not a request

1 to reargue, but if I made a legal error. Any legal objections  
2 before I actually impose the sentence.

3 SKWRAO: No, your Honor.

4 THE COURT: Mr. Chernoff?

5 MR. CHERNOFF: Your Honor, just with respect to the  
6 defendant's objections to the PSR which were numerous, I would  
7 submit that none of them are a factor in your Honor's sentence,  
8 that they probably don't need to be ruled on.

9 THE COURT: To some extent, I have made certain  
10 decisions on the guideline calculations. Much of that  
11 memorandum involved the arguments about what the appropriate  
12 guidelines are. And I set the guidelines.

13 MR. CHERNOFF: I was just referring to his factual  
14 actions on the narrative of the offense conduct.

15 THE COURT: Well, you know, I think that's rearguing  
16 the case. I thought those objections was their view of the  
17 case, which is the government's view of the case, and that's  
18 for another court on another day.

19 MR. CHERNOFF: I agree, your Honor. I was just asking  
20 that the Court rule that those objections need not be resolved.

21 THE COURT: That's right. I'm not going to resolve  
22 those factual objections, it's for another court for another  
23 day. And I needn't do it to impose the sentence. Thank you.

24 MR. CHERNOFF: And we did take the position that Mr.  
25 Bourke should receive an aggravating role enhancement, which I

1 gather --

2 THE COURT: Yes, I'm denying that. Yes. Thank you.  
3 I'm denying the request for an aggravating role enhancement.  
4 If anything, I gave thought to the request for minimal role.  
5 But I denied that, too. I don't think it was minimal. Think I  
6 share the -- I think the government's view here, that he was  
7 more than a passive investor. Certainly was a participant in  
8 every way. His role was for the success of the adventure. But  
9 I don't think it warrants an enhancement, either.

10 Any other legal objections? No.

11 Pursuant to the Sentencing Reform Act of 1984, it is  
12 the judgement of this Court that the defendant, Frederick  
13 Bourke is sentenced to a year and a day in custody, to be  
14 followed by 3 years of supervised release.

15 Defendant shall be supervised in the district of his  
16 residence, and be required to adhere to the standard and  
17 mandatory conditions of Probation and the special conditions  
18 set forth earlier. He is further required to pay the mandatory  
19 assessment of \$200, and a fine of \$1 million due at the end of  
20 the period of incarceration.

21 I order this sentence imposed as stated.

22 Mr. Bourke, you have the right to take an appeal of  
23 your conviction and sentence within ten days. I guess I have  
24 to have say this. If you cannot pay the costs of the appeal,  
25 you have the right to apply for leave to appeal in forma

1 pauperis.

2 Now, the next issue is bail, pending appeal. I am  
3 prepared to rule on that motion. I have considered the  
4 submissions, but once again if anybody wants to be heard  
5 further other that issue, I'm happy to hear you. Otherwise I'm  
6 prepared to rule.

7 SKWRAO: We rely on our papers.

8 MR. CHERNOFF: Same, your Honor.

9 THE COURT: In order to succeed on motion for bail  
10 pending appeal, a defendant must prove by clear and convincing  
11 evidence that he is not likely to flee, or pose a danger to the  
12 community; that his appeal is not for the purpose of delay;  
13 and, that his appeal raises a substantial question of law or  
14 fact, likely to result in reversal, an order for new trial, a  
15 sentence that does not include a term of imprisonment, or  
16 reduced sentence less than the total of the time already  
17 served, plus the expected duration of the appeal process.

18 That standard is set forth in 18 United States Code  
19 Section 3143B, but also can be found, recently, in the case of  
20 United States versus Zillgitt, 286 F3d 128, second circuit  
21 2002.

22 Bourke has argued that he satisfies all three  
23 requirements for bail pending appeal. First, he poses no risk  
24 of flight. His passport has been surrendered, and he has  
25 agreed to travel only within the United States.

1           In addition, he has not missed a court date and has  
2 complied with the terms of the release. He has substantial  
3 family ties in the United States, including children and  
4 grandchildren who live in Connecticut.

5           Finally, he has been involved in development, I have  
6 already discussed, of noninvasive treatment for cancer and  
7 other autoimmune diseases, which was about to enter the human  
8 testing stage and, therefore, he has no reason to flee.

9           Additionally, Bourke possesses no danger to the  
10 community. His crimes are not violent, and he has led -- and  
11 I'm quoting from his submission, led an exemplary life before  
12 and after the conduct at issue.

13           Second, he argues that his appeal is not for purpose  
14 of delay. He has maintained his innocence throughout the  
15 trial, has ordered and received the transcripts, has every  
16 intention of proceeding promptly with his appeal.

17           Finally, he argues there are substantial questions of  
18 law or fact that could result in reversal of conviction or a  
19 new trial.

20           A substantial question concerning the standard, and I  
21 quote from Second Circuit United States v. Randall, 1985,  
22 Substantial question is "One of more substance that would be  
23 necessary to a finding that it was not frivolous. It is a  
24 close question, or one that could very well be decided the  
25 other way."



1           In Citing from another circuit, the Sixth Circuit in  
2 1985, "The substantial question standard does not require the  
3 district court to find that it committed reversible error."

4           For the reasons I'm about to articulate, Bourke's  
5 motion for bail pending appeal is granted. If first two  
6 factors weigh in his favor. He is not likely to flee, nor does  
7 he pose any danger to the community, and his appeal is not  
8 taken for the purpose of delay.

9           There are also substantial questions of law or fact  
10 here that could lead to reversal or and/or a new trial. In  
11 particular, although I believe the jury was sufficiently and  
12 correctly charged with respect to the mens rea element, that  
13 Bourke must possess, in order to be convicted of the conspiracy  
14 count, the charge could have been cleared. I think the charge  
15 as a whole did instruct the jury that it must find he intended  
16 the element of the substantive offense. However, the Second  
17 Circuit may find that the part of the instructions directing  
18 the jury that the government need not prove every element of  
19 the substantive offenses maybe confusing.

20           The only other issue that could be reversed is my  
21 ruling on whether the jury must unanimously agree on the overt  
22 act that was committed.

23           The Second Circuit could disagree with the Fifth and  
24 Seventh Circuit and decide that unanimity is required.

25           While the Second Circuit decision ruled the other way

1 in either issue will reverse only Bourke's conviction on the  
2 conspiracy count, the sentence for the false statements charge  
3 would likely be shorter than the amount of time it would take  
4 for these issues to be litigated on appeal. There is thus a  
5 danger that Burke could be in prison longer than necessary.

6 For these reasons, bail pending appeal is appropriate.  
7 The current conditions of release can be continued. I don't  
8 see why they need to be increased. I'm sure they are  
9 significant.

10 And so, if there is nothing further from anyone.

11 Anything further?

12 MR. CHERNOFF: Your Honor, I guess I would just ask  
13 the Court to reconsider that ruling in one respect. I don't  
14 think that the sentence on false statements would result in a  
15 different guidelines range. And, in fact, I think the false  
16 statements conviction shows that the jury believed that Mr.  
17 Bourke knew of the bribes and did not merely consciously avoid  
18 them.

19 THE COURT: The problem with that argument is that you  
20 have to see the case in the -- the light most favorable to the  
21 government, meaning that if -- if the reviewing court sees the  
22 case differently, then maybe there was no lie. That's the  
23 problem. He believes it to say I'm sure he was telling the  
24 truth. It depends on what, exactly, a reviewing Court might  
25 think are the factual findings here when they are supported by

1 the evidence.

2 So I'm not going to go into that more. But I am not  
3 going to revisit the ruling. And I'm going to release him on  
4 bail pending appeal.

5 However, I suppose, because I'm not going to be back  
6 doing this, maybe, again, I should probably do the designation  
7 now, assuming for the sake of argument this conviction is  
8 affirmed someday and sentence is affirmed someday.

9 Do you have any requests with respect to designation.

10 MR. HADDON: We do, your Honor. We request that your  
11 Honor consider recommending that he be designated for placement  
12 in Englewood Colorado, FCI. It's a minimum security facility  
13 in Colorado, houses about a thousand male offenders, has a  
14 satellite camp. And it's close to us, his lawyers. It is also  
15 close to the home he has, and his partner.

16 THE COURT: Okay. I see no reason not to make the  
17 recommendation. I'm sure you told Mr. Bourke I don't do the  
18 assignments. The Bureau of Prisons does the assignments. All  
19 the Court can do is make a recommendation. And I always agree  
20 to recommend a place near to family, if possible, so that they  
21 can maintain visits throughout the period of incarceration. So  
22 I am prepared to recommend FCI Englewood and any associated  
23 camp that it may have.

24 Is there anything to dismiss here, Mr. Chernoff?

25 MR. CHERNOFF: Yes, your Honor.

1           The government moves to dismiss the two underlying  
2 indictments. There are also two other small matters, your  
3 Honor.

4           One is that the defense had requested that the  
5 sentencing submissions be sealed. We don't --

6           THE COURT: Some.

7           MR. CHERNOFF: Some of them. We don't believe that is  
8 appropriate. And we would like our sentencing memo to be  
9 docketed.

10          THE COURT: I didn't realize there was a request that  
11 the sentencing memorandum be under seal. There were certain  
12 other submissions that I'm granting, both sides have requested,  
13 but not this. In fact, I'm sure of that, because I have  
14 already released the sentencing submissions to the public.

15          MR. HADDON: We filed it with the suggestion that you  
16 consider keeping it under seal, but you did not seal it, so  
17 it's not under seal.

18          So I'm not granting the motion to seal the sentencing  
19 submission, however certain other issues which parties are well  
20 aware, are being filed under seal.

21          MR. CHERNOFF: And, finally, your Honor, there was  
22 just -- we had prepared, given all of the names in the case,  
23 there was a substantial list of proposed corrections to the  
24 trial transcript. And I showed them to defense counsel. But  
25 it has only been a few days, I have been busy with a bunch of

1 other things. I wonder if we can get that done today, they are  
2 not very controversial, but there are some things we think  
3 should be corrected for the sake of having a clean transcript  
4 on appeal.

5 SKWRAO: We haven't had a chance to review that and  
6 we'll probably have a few of our own and get all that within  
7 the next --

8 THE COURT: What I can't do in the next few days is  
9 revisit a sentencing issue, but I think still would have the  
10 power to make the corrections to the trial transcript appeal  
11 but --

12 MR. CHERNOFF: If there is no objection to extending  
13 the Court's jurisdiction for that purpose, then I think that  
14 will work for us, your Honor.

15 THE COURT: Right. This appeal will be filed within  
16 ten days, but that's within ten days, so it depends when you  
17 get it.

18 SKWRAO: Right, I think your Honor will have  
19 jurisdiction to deal with that issue.

20 THE COURT: Okay. Two questions have arisen.  
21 Count two of the S 2 indictment, is that also dismissed. The  
22 clerk says there was a count two, one and three, but I think  
23 you might have dismissed count two at some other earlier time.

24 MR. CHERNOFF: Mr. Bourke was acquitted on count two.

25 THE COURT: That takes care of that.

1           And the other question was I wanted to be clear on  
2 this designation. Do you want me to recommend FCI Englewood or  
3 FCI Englewood Camp.

4           MR. HADDON: FCI Englewood Camp, your Honor. And I  
5 would request that he be allowed to voluntarily surrender.

6           THE COURT: Voluntary surrender, for sure.

7           Anything further?

8           MR. CHERNOFF: Not from the government, your Honor.

9           MR. CLINE: No, your Honor.

10          THE COURT: All right. Thank you.

11          (Adjourned)

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