

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

<b>UNITED STATES OF AMERICA</b>	:	
	:	
v.	:	<b>CRIMINAL NO.: 1:16-CR-00096 (RBW)</b>
	:	
<b>SHARAFAT ALI KHAN,</b>	:	
<b>a/k/a “DR. NAKIB”</b>	:	
	:	
<b>Defendant.</b>	:	

**GOVERNMENT’S MEMORANDUM IN AID OF SENTENCING**

The United States of America, by and through its undersigned attorneys, respectfully submits this memorandum in aid of sentencing. Based on the arguments set forth below, and those that may be stated at the sentencing hearing, the government respectfully requests that the Court sentence the defendant to **37 months’** imprisonment.

**I. BACKGROUND**

**a. Factual Summary**

Defendant Sharafat Ali Khan (the “defendant” or “Khan”) is a Pakistani national who, at all relevant times, was living in Brasilia, Brazil as a permanent legal resident.

In March of 2014, Special Agents from the United States Department of Homeland Security, Immigration and Customs Enforcement (“ICE”) learned of an alien smuggling organization operating in South and Central America focusing on the movement of undocumented aliens (“UAs”) from Pakistan, Bangladesh, and Afghanistan through South and Central America en route to the United States. In July of 2015, agents from ICE’s Homeland Security Investigations unit (“HSI”) were assigned to investigate this matter and conduct interviews of UAs who had identified defendant Khan as a Brazil-based facilitator of such alien smuggling activities.

**i. Interviews With Undocumented Aliens and Overview of the Investigation**

Through the interviews of the UA's and other information obtained by the agents, HSI learned that defendant Khan received undocumented aliens in Brazil from Pakistan and Afghanistan and facilitated their illicit movement to the United States. From around March 2014 through around May 2016, defendant Khan conspired with a network of human smuggling agents to get UAs to enter and reside in the United States for defendant Khan's private financial gain.

Most of the UAs were from Pakistan. None of the UAs had received prior official authorization to come to, enter, and reside in the United States; and Khan knew that the UAs' entry into the United States was illegal. Defendant Khan facilitated the travel of up to 99 different aliens<sup>1</sup> for illegal entry into the United States for his private financial gain, including but not limited to individuals identified in the Indictment in this case.

Defendant Khan and his coconspirators facilitated the travel of foreign nationals from Pakistan and other countries to Brazil by way of airline flights through various countries. From Brazil, the defendant would arrange for the UAs to travel by land, air or sea through Venezuela, Peru, Ecuador, Colombia, Panama, Costa Rica, Nicaragua, Honduras, El Salvador, Guatemala, Mexico, and eventually into the United States through various border points in Mexico.

Defendant Khan's smuggling activities included communicating with, meeting, and arranging for transport and/or safe houses for, the aliens during their transit toward the United States, or arranging for various smuggling associates to serve as escorts for the same purposes during different legs of the smuggling route.

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<sup>1</sup> Over 80 such smuggled aliens associated with Khan were identified at the time the case was charged, with numerous additional individuals identified thereafter.

Aliens paid defendant Khan and coconspirators various amounts – from around \$3,000 USD to up to \$15,000 USD – to travel from Pakistan to Brazil, through South and Central America, and eventually into the United States. Defendant Khan and his coconspirators would each keep a variable percentage of the total smuggling fee paid as profit.

The average traveler took approximately nine months to get from Brazil all the way to the United States. During the voyage from Brazil through South and Central America, aliens were subjected to harsh conditions that caused a substantial risk of serious bodily injury or death. For example, many aliens traveled to Turbo, Colombia, and from there into Panama's eastern border where travelers then had to hike through the Darien Gap. The Darien Gap is a dangerous,<sup>2</sup> wild tropical forest area that stretches approximately 100 miles from the north to the south coast of Panama, and from the Atlantic to the Pacific oceans. The area is not traversable by vehicle. Aliens received little food and/or water for a trip on foot into Panama City that lasted anywhere from three to ten days.

As a member of the conspiracy to illegally move aliens into the United States, Khan was responsible for managing the movement of these aliens through various countries via a network of individuals and transportation facilities who worked with Khan in getting aliens from Pakistan (and other countries) to Brazil, through South and Central America, into Mexico, and through the Mexican border into the United States.

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<sup>2</sup> For further information concerning the myriad dangers posed by the Darien Gap traverse, *see, e.g.*, Jason Motlagh, [A Terrifying Journey Through the World's Most Dangerous Jungle](https://www.outsideonline.com/2098801/skull-stake-darien-gap), Outside Online (July 19, 2016), available at <https://www.outsideonline.com/2098801/skull-stake-darien-gap>.

**ii. The Particular Example of Undocumented Alien #1**

As an example, Special Agents interviewed one UA (“UA#1”) on November 12, 2015. UA#1 had illegally entered the United States on or about May 25, 2015 at the Pharr, Texas Port of Entry. He agreed to speak voluntarily with HSI agents.

UA#1 told law enforcement that he and/or his family paid an unknown smuggler to facilitate his travel from Pakistan to Brazil. In Brazil, UA#1 traveled to the defendant’s home in Brasilia, Brazil as directed by his Pakistani smuggler. Defendant Khan identified himself to UA#1 as “Sharafat” and told UA#1 that UA#1 would be staying at defendant Khan’s home. The defendant told UA#1 that UA#1 would have to pay defendant Khan \$6,000 USD for Khan to bring UA#1 to the United States. The defendant told UA#1 that as long as he continued to pay the defendant, UA#1 would continue his travel to the United States. Defendant Khan also said that Khan had other associates along the travel route, and that those associates would refer to the defendant as “Khan” or as “Dr. Nakib.” Defendant Khan told UA#1 that the associates would assist UA#1 in his travel.

UA#1 paid defendant Khan via money deposit into a bank account in Pakistan provided by Khan. Following an initial payment of \$2,000 USD, Khan kept UA#1 in Khan’s home in Brasilia for several months. Khan took UA#1’s Pakistani passport.

After approximately five months staying at Khan’s home (and after UA#1 complained to Khan about the length of time UA#1 was being kept in Brasilia), defendant Khan finally told UA#1 that he would begin traveling towards the United States. Khan gave UA#1 a bus ticket to Rio Branco, Brazil.<sup>3</sup> Khan told UA#1 to take a taxi from the bus station to a specific hotel, Hotel #1.

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<sup>3</sup> Rio Branco is in the far western portion of Brazil, near the Brazilian/Peruvian/Bolivian border.

Throughout the next several months Khan facilitated UA#1's travel to the United States. UA#1 went across the border into Peru, then into Ecuador; through to Columbia, and taken by bus to Turbo, Colombia.<sup>4</sup> From Turbo, UA#1 was taken on an 8-hour boat ride. UA#1 then was forced to walk through a swamp for three hours. After that, UA#1 had to walk for three days through the dense Colombian jungle before crossing into Panama. UA#1 was arrested in Panama and held for several days at three different military camps before being released into Panama City.

UA#1 took a bus to Costa Rica; another agent took UA#1 to Nicaragua, through El Salvador, and into Guatemala. UA#1 was then taken to Tapachula, Mexico, up to Mexico City, and to Reynosa where he illegally crossed over the U.S./Mexico border at Pharr, Texas. UA#1 was arrested by U.S. Customs and Border Patrol agents there.

During the interview with law enforcement, UA#1 was shown a 6-person photo array and positively identified defendant Sharafat Khan in photo #1, stating, "Sharafat is the agent that help [sic] me get to the USA."

## **b. Procedural History**

### **i. The Search Warrant on Khan's Home in Brasilia and Khan's Subsequent Flight From Brazil**

On June 1, 2016, Brazilian Federal Police (Departamento de Policia Federal, or "DPF") conducted a search warrant on defendant Khan's home in Brasilia as a result of an unrelated investigation. Agents seized a number of items from the home, including: cell phones, a ledger documenting payments made and received from UA's for travel; Western Union receipts for

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<sup>4</sup> Turbo, Colombia is in the far northwest corner of the country, near the Panamanian border, and sits on the Gulf of Uraba. Turbo marks the southwestern edge of the Darien Gap, discussed below.

payments made or received, as well as receipts from other banks; and identification cards and passports of Pakistani nationals.

On June 3, 2016, defendant Khan fled Brazil, departing Sao Paulo on a 3:15am flight to Pakistan, traveling through Doha, Qatar. Defendant Khan used his Ecuadorian passport for travel. Khan landed in Doha around 10:15 p.m. local time (or 3:15 p.m. EDT).

**ii. The Government's Efforts to Secure a Red Notice and Request for Extradition**

Meanwhile, the government secured a complaint and arrest warrant (as well as an order to seal), signed by the Honorable Magistrate Judge G. Michael Harvey on June 3, 2016 at around 2:30 p.m. The complaint charged Khan with violating 18 U.S.C. § 371 (Conspiracy) and 8 U.S.C. § 1324(a)(1)(A)(iv) and (a)(1)(B)(i) (Alien Smuggling). The government immediately issued an Interpol Red Notice for the provisional arrest of defendant Khan.

Once in receipt of the Interpol Red Notice, Qatari law enforcement authorities detained the defendant in the Doha airport while Khan waited there for his connecting flight to Pakistan. On June 4, 2016, Khan was formally arrested and turned over to Qatar Interpol, pending a request from the United States to extradite Khan.

On Tuesday, June 7, 2016, Khan was indicted in the U.S. District Court for the District of Columbia for conspiracy to commit alien smuggling for private financial gain on seven counts, including forfeiture allegations. On Friday, June 10, 2016, the United States government sent a formal request to the State of Qatar for the extradition of defendant Khan to the United States for prosecution.

**iii. Khan's Extradition to the United States and Appearance in the U.S. District Court for the District of Columbia**

On June 30, 2016, the U.S. Department of Justice ("DOJ") received notice that the State of Qatar ordered defendant Khan's extradition to the United States. DOJ immediately began coordinating arrangements to get custody of defendant Khan and fly him to the United States.

On Thursday, July 14, 2016, defendant Khan appeared before the Honorable Magistrate Judge Deborah Robinson for arraignment on the indictment and agreed to waive his right to a detention hearing.

**iv. Efforts to Resolve the Case and Eventual Plea Hearing**

After the defendant's arraignment, counsel for the government and defendant Khan had several discussions regarding a potential resolution of the case. The parties appeared before the Court on October 25, 2016.<sup>5</sup> The parties advised the Court that the parties were discussing a disposition and requested a two-month continuance in order to continue plea negotiations and potentially finalize an agreement.

The government provided the defendant plea paperwork on November 4, 2016, along with a proposed statement of offense. The parties appeared again before the Court on December 18, 2016. The defendant requested more time to review the plea. The parties agreed to another continuance and waived the Speedy Trial clock through the following hearing.

On February 1, 2017, counsel advised that defendant Khan intended to reject the plea offer. On February 3, 2017, counsel indicated that Khan had changed his mind, remained open to pleading guilty, and requested additional changes to the plea agreement. On February 21, 2017,

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<sup>5</sup> The parties first appeared before this Court on August 18, 2016. At that time, the parties advised the Court on the status of the proceedings – namely, that plea discussions were anticipated – and agreed to waive the Speedy Trial clock through the following status date.

the government provided revised plea paperwork which reflected the government's agreement to limit its allocution to 37 months' incarceration.

At the status hearing on February 21, 2017, the defendant formally rejected the government's plea offer. The government indicated on the record that, as a result of the defendant's position, the government was requesting a trial date along with a discovery and motions schedule. The government also indicated that the plea offer was withdrawn, and that no further plea offer would be extended.

Immediately after the February 21st hearing, counsel called the government to indicate that the defendant had changed his mind, and requested that the government re-extend the plea offer. The government agreed to do so on the condition that the plea hearing be immediately rescheduled and that the Speedy Trial time be tolled. Because of complications involving translating the plea agreement for the defendant, the parties were not able to reschedule until April 6, 2017.

On April 6, 2017, the parties appeared before the Court. The Court began the plea colloquy with the defendant. However, the Court interrupted the colloquy as the Court was reviewing the contents of the plea agreement with the defendant. The Court requested the parties clarify the parties' understanding of the agreement as to sentencing allocution (paragraph number 5) under the plea agreement.

On April 12, 2017, the Court continued the plea hearing. The parties presented a slightly modified version of the plea agreement to address the Court's request with regard to the agreement as to sentencing allocution in paragraph number 5 of the agreement. The contents of the plea agreement remained otherwise intact and identical to the agreement presented to the Court on April 6.

At the April 12th hearing, the defendant accepted responsibility for his conduct and pled guilty to Count One in the Indictment, charging him with Conspiracy to Defraud the United States and Conspiracy to Encourage and Induce Unauthorized Aliens to Come to the United States for Commercial Advantage and Private Financial Gain, in violation of 18 U.S.C. § 371.

## **II. ARGUMENT**

### **A. Summary of the Government's Position on Sentencing**

Because of all the factors set forth herein, and those that may be stated at the sentencing hearing, the government respectfully requests that the Court sentence defendant Khan to **37 months** of incarceration.

### **B. The Government's Position on Khan's Sentencing Guidelines**

The government agrees with the probation officer's calculation of the applicable sentencing guidelines pursuant to the United States Sentencing Guidelines, *Guidelines Manual* (2016) ("Sentencing Guidelines," "Guidelines" or "U.S.S.G.") in this case that the Total Offense Level is 21.

The government agrees that the defendant's base offense level is 12 pursuant to U.S.S.G. § 2X1.1(a) and § 2L1.1(a)(3); is increased by 6 points pursuant to U.S.S.G. § 2L1.1(b)(2)(B) because of the number of aliens involved; is increased by 2 points pursuant to U.S.S.G. § 2L1.1(b)(6) because the offense involved substantial risk of death or serious bodily injury to another person; and is increased an additional 4 points pursuant to U.S.S.G. § 3B1.1(a) pursuant to an adjustment for the defendant's aggravating role as an organizer or leader of the criminal activity. The government also agrees that a 3-level reduction should be applied for defendant Khan's acceptance of responsibility.

The Total Offense Level, therefore, should be 21 as calculated by the probation officer.

**C. The Parties' Dispute Regarding the Aggravating Role Adjustment**

Defendant Khan objects to the adjustment for an aggravating role and argues that U.S.S.G. § 3B1.1(a) should not apply in this case.<sup>6</sup> The government submits that defendant Khan was an organizer or leader in the criminal activity in this case and, therefore, the adjustment should apply.

**1. U.S.S.G. § 3B1.1(a) and Applicable Case Law**

Applying the aggravating role enhancement under U.S.S.G. § 3B1.1(a) would result in a 4-point increase in Khan's Offense Level. Section 3B1.1 of the U.S. Sentencing Guidelines provides the following:

Based on the defendant's role in the offense, increase the offense level as follows:

- (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.
- (b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.
- (c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

U.S.S.G. § 3B1.1. The Application Notes provide the following additional guidance:

Background: This section provides a range of adjustments to increase the offense level based upon the size of a criminal organization (i.e., the number of participants in the offense) and the degree to which the defendant was responsible for committing the offense. This adjustment is included primarily because of concerns about relative responsibility. However, it is also likely that persons who exercise a supervisory or managerial role in the commission of an offense tend to profit more from it and present a greater danger to the public and/or are more likely to recidivate. The Commission's intent is that this adjustment should increase with both the size of the organization and the degree of the defendant's responsibility.

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<sup>6</sup> The parties noted the dispute on the aggravating role adjustment in the plea agreement.

In relatively small criminal enterprises that are not otherwise to be considered as extensive in scope or in planning or preparation, the distinction between organization and leadership, and that of management or supervision, is of less significance than in larger enterprises that tend to have clearly defined delineated divisions of responsibility. This is reflected in the inclusiveness of §3B1.1(c).

U.S.S.G. § 3B1.1 Commentary.

With respect to the 4-level leader/organizer enhancement contemplated by § 3B1.1(a),

Application Note 4 of the Commentary further provides, in pertinent part:

Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy.

U.S.S.G. § 3B1.1 Application Note 4.

In the lone case before the U.S. Court of Appeals for the District of Columbia Circuit<sup>7</sup> considering the application of the role enhancement guidelines to a § 1324 alien smuggling prosecution, the Circuit Court found it significant that a) the defendant functioned as the criminal outfit's principal liaison, b) that he possessed the authority to "act on behalf" of the smuggled aliens, c) that "all the other [conspirators]... looked to [him] before they made any move at all," and d) that the aliens "would not have made it to America" but for the defendant's involvement. *United States v. Yeh*, 278 F.3d 9, 14-15 (D.C. Cir. 2002). Other circuit courts have upheld § 3B1.1(a) enhancements in similar circumstances when the defendant played a decision-making role in the "when, where, or how" of the alien smuggling operation, and was not necessarily *the*

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<sup>7</sup> The government researched, but was unable to find, any decisions from the D.C. Circuit analyzing § 3B1.1(a) in the context of an alien smuggling case other than *Yeh*.

leader, but merely exercised some leadership responsibility over other persons, *see United States v. Tejada-Beltran*, 50 F.3d 55, 63 (1st Cir. 1995) (emphasis supplied), “planned and organized each [alien’s] travels to the United States,” *United States v. Botsvynyuk*, 552 Fed. App’x 178, 185 (3d Cir. 2014), recruited and instructed aliens and smugglers, *United States v. Caraballo*, 595 F.3d 1214, 1232-33 (11th Cir. 2010), or “controlled the transfer of the ‘smuggling fees’” and “ensured that his ‘contacts’ were in place at originating airports.” *United States v. Varma*, 295 Fed App’x 686, 688 (5th Cir. 2008).

The D.C. Court of Appeals has upheld several instances where our courts have applied the 3B1.1 Aggravating Role enhancement in different settings. *See, e.g., United States v. (Arnett) Smith*, 374 F.3d 1240, 1249-1250 (D.C. Cir. 2004); *United States v. Olejiya*, 754 F.3d 986, 989-992 (D.C. Cir. 2014); *United States v. Clark*, 747 F.3d 890, 896-97 (D.C. Cir. 2014).

The D.C. Circuit has recognized that section 3B1.1 “represents a policy judgment that the more control (that is, responsibility) the offender exercises over the conspirators, the more culpable that offender is, and the greater sentence she deserves.” *United States v. Quigley*, 373 F.3d 133, 139 (D.C. Cir. 2004). To the extent that control is considered, the D.C. Circuit understands it to “connote some sort of hierarchical relationship.” *United States v. Quigley*, 373 F.3d 133, 140 (D.C. Cir. 2004). Notably, for purposes of contrasting the record evidence of the defendant’s role in *Quigley* to the instant case, *Quigley* involved a factually inapposite D.C.-based FHA loan fraud scheme. The reviewing court in *Quigley* found that no evidence whatsoever was presented showing that the defendant exercised control over or had any sort of hierarchically superior relationship to any other participants in the financial fraud scheme.

Nevertheless, control is only one of several factors that the Court should review pursuant to the guidance provided under the Sentencing Guidelines. *See* U.S.S.G. § 3B1.1 Application Note

4. Moreover, the evidence in this case shows that Khan did, in fact, maintain a superior relationship over several subordinates and exercised control over those individuals, as explained more fully below.

**2. The Government's Anticipated Evidence Relating to U.S.S.G. § 3B1.1(a)**

As the government alerted the Court during the April 12, 2017 plea hearing, the government intends on calling a witness to support its argument – and the probation officer's conclusion – that the 4-point adjustment for Khan's role as an organizer/leader should apply in this case.

Among the evidence to be presented at the hearing, the government anticipates the following:

**i. Khan Was the Primary Point of Contact Responsible for Organizing and Executing the International Smuggling Scheme.**

The overwhelming majority of UAs whom HSI agents interviewed identified Khan as their "agent." That meant, in the minds of the UAs, Khan was primarily (if not singularly) responsible for getting them to the United States.

In almost every case, the UAs (or their families) made payments directly to Khan. Most, but not all, UAs directly interacted with Khan. Many of those who did were able to identify Khan via photo arrays. Those who did not still identified "Sharafat Khan" or "Dr. Nakib" as the individual who was responsible for taking their money and ensuring their travel to the United States.

When UAs arrived in Brasilia, Khan would typically arrange for an agent of his to meet them at the airport and escort or direct them to a "safe house" managed by Khan, where they would often stay for a period of months. Khan took their passports once in Brazil. The UAs were not

allowed to begin their journey from Khan's safe house to the United States until Khan told them he was ready to send them along. Khan coordinated their travel arrangements and carefully orchestrated their movements throughout the various legs of the travel route onwards towards the United States.

**ii. Khan Directly Organized and Managed a Vast Network of Facilitators Along the Travel Route.**

As UAs moved through South and Central American towards the United States, Khan was responsible for paying other "agents" for their services to Khan and his clients along the travel route.<sup>8</sup> UAs who were traveling were instructed to refer to themselves as belonging to "Khan" or "Sharafat" or "Dr. Nakib." When UAs identified themselves as such, the various agents in different countries immediately assisted in furthering their travel. When problems arose, Khan's lower-ranking accomplices turned to him for direction.

For those who retained the use of their cell phones during the journey, Khan continued to communicate with those UAs through WhatsApp or Viber. Khan provided direct instructions for these UAs directly by voice over the phone or by text through these communications applications.

One UA said that particular smugglers worked for Khan. Khan referred to at least one agent as "his guy."

The UAs identified similar hotels, bus stations, and towns where they made contacts with various agents who facilitated their travels. Most of the UAs remembered few details of the individual agents they met along the travel route, including those agents' names. Khan was the individual they remembered, and whose name each of the agents along the travel route

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<sup>8</sup> Khan has made admissions to this effect.

immediately recognized. Khan's name carried obvious currency for each of the UAs. Without reference to Khan, their movement would have been suspended, or terminated altogether.

**iii. Khan Directly Organized and Managed Men in Brasilia and Elsewhere Who Worked For Him.**

Several witnesses said that Khan had men working for him in Brasilia.

One UA indicated that he stayed at Khan's house for four months. The UA told investigators that during that time, two individuals were working in the house directly for Khan. The UA said that the workers referred to and treated Khan as their boss. The workers would hand off the electricity and water bills for Khan to pay.

Another UA who stayed at Khan's house for approximately three months said that Khan had at least one person working for him at the home. The UA told investigators that the individual working for Khan was responsible for providing people in the house waiting to travel with food, drink, and a cellular telephone so that they could call home.

Additional UAs told investigators that they were often picked up at the airport in Sao Paolo, or the bus station in Brasilia. The individuals who picked them up were working for Khan.

Additionally, at least one UA identified Pakistani smugglers as people who worked for Khan. An individual in Dubai identified Khan as his boss when he told the UA to contact Khan directly upon the UA's arrival in Brazil.

In addition, Khan has admitted that individuals in Pakistan helped him find clients to smuggle and also helped facilitate payments to Khan from the UA's for his smuggling services.

Khan further identified over a dozen individuals who were involved as participants in the criminal smuggling enterprise and assisted Khan and his clients in countries spanning the entire smuggling route.

In short, Khan's activities exhibit nearly all of the characteristic traits of an organizer or leader for the purposes of § 3B1.1(a), obtaining the hierarchical standing and operational mastery to qualify for a 4-level role adjustment. Khan was the Brazil-based regional leader and logistical mastermind of the smuggling conspiracy, responsible for organizing, coordinating and controlling a vast network of smugglers and lower-level associates in service of the illicit movement of his clients towards and into the United States. Khan controlled the payment of smuggling fees, planned the route taken by the undocumented aliens, coordinated with and directed the activities of both the aliens and his international network of contacts to that end, while making decisions on the manner, means, and circumstances of the journey of his smuggling clients along the way. In total, he is responsible for the illicit entry of more than 80 individuals who "would not have made it to America" without him. *Yeh*, 278 F.3d at 14.

**3. The Probation Office Recommends That the 4-Level Adjustment Be Applied.**

The United States Probation Office ("Probation") concluded in the Presentence Investigation Report ("PSR") that the 4-point adjustment for an organizer/leader role should apply in this case based on the facts. The Court has the authority to adopt Probation's findings in a PSR, including Probation's assessment of a defendant's aggravated role under U.S.S.G. § 3B1.1(a). *See, e.g., United States v. Rhodes*, 894 F.Supp.1, 3-4 (D.D.C. 1995) (adopting Probation's recommendation in the PSR for 4-level adjustment for defendant's role as organizer/leader of criminal activity).

**D. Anticipated Request for Departure Under *Smith v. United States***

As provided in the plea agreement, the parties agreed that a downward departure of up to six months may be warranted based on the defendant's status as a removable alien, pursuant to *United States v. Smith*, 307 U.S. App. D.C. 199, 27 F.3d 649 (194), and U.S.S.G. § 5K2.0(2)(B).

The government agrees that the Court has discretion to depart downward pursuant to the Court's authority outlined in *Smith*. Nevertheless, the government submits that the rationale underlying the *Smith* decision is faulty and, as a result, the Court should not use its discretion to depart downward in this case. The government intends on admitting evidence at sentencing setting forth the basis for the government's position. A brief preview of that evidence includes the following:

The Federal Bureau of Prisons ("BOP") manages the conditions of confinement for all federal inmates. Under 18 U.S.C. § 3624(c), BOP "shall, to the extent practicable, ensure that a prisoner serving a term of imprisonment spends a portion of the final months of that term (not to exceed 12 months), under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community. Such conditions may include a community correctional facility." 18 U.S.C. § 3624(c)(1). Part 2 of subsection (c) of that same statute provides that the "authority under this subsection may be used to place a prisoner in home confinement for the shorter of 10 percent of the term of imprisonment of that prisoner or 6 months." 18 U.S.C. § 3624(c)(2).

Additionally, 18 U.S.C. § 3621(b) provides that BOP has the authority to designate the "place of the prisoner's imprisonment." In determining place of imprisonment, BOP may consider any of the following: "(1) the resources of the facility contemplated; (2) the nature and circumstances of the offense; (3) the history and characteristics of the prisoner; (4) any statement

by the court that imposed the sentence (A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or (B) recommending a type of penal or correctional facility as appropriate; and (5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.”

The program described in 18 U.S.C. § 3624(c)(2) is commonly referred to as the Residential Reentry Program (“RRP”). A community correctional facility, referred to formally in BOP policy statements as a “community correction center” (or “CCC”) is commonly known as a halfway house. CCCs are now typically referred to by BOP as “Residential Reentry Centers” (or “RRCs”).

Under BOP policy, the purpose and scope of the RRP includes the following considerations:

One reason for referring an inmate to a CCC is to increase public protection by aiding the transition of the offender into the community. Participating in community-based transitional services may reduce the likelihood of an inmate with limited resources from recidivating, whereas an inmate who is released directly from the institution to the community may return to a criminal lifestyle. While clearly dangerous inmates should be separated from the community until completing their sentences, other eligible inmates should generally be referred to CCCs to maximize the chances of successful reintegration into society. A person who has been convicted in the federal criminal justice system and sentenced to a term of imprisonment is committed to the custody of the BOP.

BOP Program Statement 7310.04, dated December 16, 1998, the “Community Corrections Center (CCC) Utilization and Transfer Procedures.”

In other words, the primary focus for BOP is the transfer of offenders back into the community to help maximize successful reintegration into society. That underlying policy goal is simply not present with alien defendants who are subject to deportation immediately after serving a federal sentence. Therefore, to allow a reduction in Khan’s sentence based on *Smith* would be

to account for a program for which Khan is not at all eligible, and which is not fundamentally designed to assist him (or society, under these particular circumstances, for that matter) in any way.

Moreover, the concept of a “benefit” to the inmate is misplaced in the context of the RRP. BOP’s transfer of an inmate to an RRC under the RRP is not necessarily a “benefit” conferred on the inmate in terms of a reduced prison term, as implied by the defense in *Smith* and argued for the benefit of an alien defendant for the very purpose of reducing time spent in jail. Even under the RRP, an inmate remains an inmate under the custody of BOP. BOP maintains the authority to change the inmate’s conditions of confinement until the remainder of the term of incarceration. Allowing entry into the RRP does not equate to reducing an inmate’s term of incarceration.

Because the departure request under *Smith* is wholly inapplicable to a deportable alien like Khan who will not reenter society in the United States after serving his term of incarceration, the government respectfully requests that the Court deny Khan’s anticipated request for a 6-month departure under *Smith*.

**E. Sentencing Factors Under Section 3553(a).**

Under Title 18, United States Code, Section 3553(a), the Court should consider several factors in arriving at an appropriate sentence. These factors include: the nature and circumstances of the offense; defendant Khan’s history and characteristics; the need for the sentence to promote respect for the law and provide just punishment for the offense; the need to afford adequate deterrence; and to protect the public from further crimes by Khan.

## **1. Nature of the Offense**

Defendant Khan was the centerpiece of a massive conspiracy to facilitate the travel of foreign nationals into the United States knowing that those individuals were illegally doing so. Khan profited significantly from his work, often to the detriment of his customers.

Khan effectively held his customers hostage as soon as they arrived in Brazil. These were individuals of little means, who often sold off most, if not all, of their assets to come up with enough money to pay Khan to get into the United States. Once the UAs arrived in Brasilia, Khan took their passports, restricting their ability to move. Once along the travel route, the UAs were unable to progress towards the United States unless Khan paid his associates in other countries.

These individuals' journeys lasted several months. Although travelers moved by plane, bus, or taxi in some segments, most UAs were forced to spend several days in crowded boats in Colombia, as well as enduring multi-day slogs through the jungle in the Darien Gap with little, if any, food or water at their disposal. The conditions were harsh. Most travelers were not warned by Khan in advance of the great dangers and myriad safety risks that would be involved in their journey.

In addition to taking advantage of UAs with little means and often putting their lives at risk, Khan's criminal activity put the United States' national security at risk. Prolific smugglers like Khan attack the government's attempts to protect its borders from illegal entry of unauthorized individuals. If unenforced, Khan's criminal behavior would have gone on indefinitely to his financial benefit and to the detriment of the United States government. The government spends significant resources to deal with UAs entering the United States via law enforcement measures and immigration proceedings alone, not to mention other downstream effects. The government

also must act quickly and diligently to assess any direct national security threat that any particular UA may pose.

In short, the nature of Khan's criminal offense in this case is broad, serious, and has a significant impact on U.S. government interests.

## **2. Khan's History and Characteristics**

Khan has a criminal history score of zero. However, the breadth and scope of Khan's criminal behavior needs to be taken into account. Khan orchestrated the entry into the United States of many illegal aliens over the course of several years. Khan obviously developed his large networking infrastructure through time. Many co-conspirators along the travel route working with Khan or under his direction and control facilitated the travel for the UAs.

## **3. The Need to Reflect the Seriousness of Khan's Crimes, To Promote Respect for the Law, and to Provide Just Punishment for the Offense**

Khan's crimes are extremely serious ones that involve the protection of our national borders and the security of our country. Khan managed a large, sophisticated human smuggling network that spanned two continents, thirteen different countries, involved dozens of conspirators, and lasted at least two years. Khan profited off individuals desperate to come to the United States. Oftentimes, those individuals spent their families' entire savings in order to make their journey. Despite paying Khan thousands of dollars, they were subjected to months of grueling travel, often enduring wretched conditions that literally put their lives in danger. Moreover, Khan made a significant attempt to evade capture from law enforcement, fleeing Brazil for Pakistan just hours after Brazilian authorities conducted a search warrant on his home.

Khan's continuous criminal conduct over a two-year span, his efforts to flee and find refuge in his home country, and his disdain for the welfare of his customers, shows that Khan has no respect for the law, or the safety and security of the individuals he was paid so handsomely to help.

A sentence of 37 months' incarceration would provide just punishment for Khan's conduct, reflect the seriousness of coordinating an extensive human smuggling network, and yet provide some consideration for the reasons set forth in the government's supplemental memorandum.

#### **4. The Need to Afford Adequate Deterrence to Criminal Conduct, and to Protect the Public from Further Crimes of the Defendant**

Based upon the extent of Khan's conduct, the Court needs to send a clear message to the defendant that his behavior will not be tolerated. A sentence of 37 months would demonstrate to other human smugglers around the world that the United States government takes smuggling human beings illegally into this country very seriously. Such a sentence would send a strong message that individuals who attempt to violate U.S. law by engaging in similar criminal conduct will face serious consequences by doing so.

#### **5. Other Sentencing Factors**

A sentence of incarceration would be consistent with the other Section 3553(a) factors. Because the government's recommendation is within the Sentencing Guideline range,<sup>9</sup> it is in the "heartland" of sentences imposed for this particular offense and therefore accomplishes the goal of avoiding unwarranted sentence disparities. *See* U.S.S.G. ch 1, pt. A, cmnt 4(b). This sentence would adequately address the need to protect the public from future crimes by Khan.

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<sup>9</sup> Although the Sentencing Guidelines range is disputed, even if the Court applies only a 2- or 3-level adjustment under U.S.S.G. § 3B1.1(c) or § 3B1.1(b), a 37-month sentence would still be within the Sentencing Guidelines range at both resulting Offense Levels. At Offense Level 19, the Guidelines range would be 30-37 months; at Offense Level 20, the Guidelines range would be 33-41 months.



**CERTIFICATE OF SERVICE**

I certify that on the 30<sup>th</sup> day of June, 2017, a true and correct copy of the foregoing was filed via the CM/ECF electronic filing system, which will automatically send a copy to **Loui Itoh**, Attorney for Defendant.

\_\_\_\_\_/s/\_\_\_\_\_  
Richard E. DiZinno  
Assistant United States Attorney