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7 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
8 BILLINGS DIVISION

9 UNITED STATES OF AMERICA,)
)
10 Plaintiff,)
vs.) Case No: CR-22-113-BLG-SPW
11)
) Sentencing
12 NATHAN NEPHI ZITO,)
)
13 Defendant.)

14
15 TRANSCRIPT OF PROCEEDINGS
Wednesday, March 29, 2023
16 3:30 p.m. to 4:22 p.m.

17
18 BEFORE THE HONORABLE SUSAN P. WATTERS
UNITED STATES DISTRICT COURT JUDGE
19 FOR THE DISTRICT OF MONTANA - BILLINGS DIVISION

20 James F. Battin Federal Courthouse
Snowy Mountains Courtroom
21 2601 2nd Avenue North
Billings, Montana 59101
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24 Proceedings recorded by machine shorthand
25 Transcript produced by computer-aided transcription

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APPEARANCES

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CONTENTS

	PAGE
Proceedings	3
Certificate of Reporter	38

1 AFTERNOON SESSION, WEDNESDAY, MARCH 29, 2023

2 (Whereupon, the court convened at 3:30 p.m., with
3 Defendant present, and the following proceedings were had:)

4 THE CLERK: All rise. The United States District
5 Court for the District of Montana is now in session. The
6 Honorable Susan P. Watters presiding.

7 THE COURT: Amanda, would you please call the matter
8 on the calendar.

9 THE CLERK: Yes, Your Honor.

10 The Court has set aside this time to hear the matter
11 of CR-22-113-BLG-SPW, USA vs. Nathan Nephi Zito. This is the
12 time set for a sentencing.

13 For the record, Bryan Dake appears on behalf of the
14 government; Peter Lacny appears on behalf of the defendant;
15 and the defendant is present. I have received and reviewed
16 the presentence report, the sentencing memoranda filed by
17 counsel, the letters of support, and exhibits that were
18 filed.

19 And, Mr. Dake, did you receive and review the
20 presentence report?

21 MR. DAKE: I have, Your Honor. And one point of
22 clarification, Your Honor, I just wanted to introduce the
23 Court to Jeremy Goldstein, he is an attorney with our
24 antitrust division for the Department of Justice.

25 THE COURT: Nice to meet you, Mr. Goldstein.

1 MR. GOLDSTEIN: Nice to meet you as well.

2 MR. DAKE: I'll be handling our preliminary portion,
3 Your Honor, and then Mr. Goldstein will be making the
4 argument on behalf of the United States.

5 THE COURT: Okay.

6 MR. DAKE: And to the Court's question, I have
7 reviewed a copy of the presentence report.

8 THE COURT: And do you have any objections to that
9 report?

10 MR. DAKE: No, Your Honor.

11 THE COURT: Okay. Thank you. Oh, I'll ask you one
12 more question before you sit down. Are you recommending that
13 the defendant's offense level be decreased by two levels for
14 acceptance of responsibility?

15 MR. DAKE: The government makes that recommendation,
16 Your Honor.

17 THE COURT: And that recommendation is granted.

18 Mr. Lacny, did you receive at that review the
19 presentence report?

20 MR. LACNY: I have, Your Honor.

21 THE COURT: And did you have an opportunity to go
22 through that report in its entirety with Mr. Zito?

23 MR. LACNY: We have, Your Honor.

24 THE COURT: Do you have any objections to that
25 report?

1 MR. LACNY: We have no objections to the PSR, Your
2 Honor.

3 THE COURT: Okay. Thank you.

4 Am I pronouncing your name correctly, sir, Zito?

5 THE DEFENDANT: Zito.

6 MR. LACNY: Zito, Your Honor.

7 THE COURT: Thank you.

8 MR. LACNY: No problem.

9 THE COURT: So I will rely on the presentence
10 investigation report for purposes of calculating the advisory
11 sentencing guidelines. I will accept the plea agreement that
12 has been filed in this case, which includes a full appeal
13 waiver and an agreed-upon fine of \$27,000, which I understand
14 that Mr. Zito will be paying today; correct?

15 MR. LACNY: That's correct, Your Honor.

16 THE COURT: Okay. So now I will summarize the
17 applicable punishments for the offense under both the United
18 States Sentencing Guidelines and the applicable statute.

19 With regard to the guidelines, the adjusted offense
20 level is 12. We arrive at that by beginning with a base
21 offense level of 12, subtracting -- or adding one level for
22 the reason that there was an agreement to submit
23 noncompetitive bids, adding two more levels for the reason
24 that the volume of commerce attributable to the defendant was
25 2,700,000, and then subtracting three levels for the reason

1 that this is attempted monopolization, and it was not fully
2 completed. Then, subtracting two levels for acceptance of
3 responsibility, we arrive at a total offense level of 10.

4 Mr. Zito has zero criminal history points so his
5 criminal history category is I. The resulting advisory
6 guideline range is 6 to 12 months' imprisonment. Under the
7 guidelines, Mr. Zito is eligible for probation for a period
8 of one to five years. He is subject to one to three years of
9 supervised release, a fine of 4,000 to \$1 million, and a
10 special assessment of \$100, and restitution is not applicable
11 under the guidelines.

12 Pursuant to the statute for the charge of attempted
13 monopolization in violation of 15 United States Code Section
14 2, the maximum punishment is ten years imprisonment, the
15 maximum fine is \$1 million, no more than three years of
16 supervised release, and the \$100 special assessment.

17 Under the statute, Mr. Zito is eligible for
18 probation for a period of one to five years, and again
19 restitution is not applicable.

20 And, Mr. Dake, are you going to answer this
21 question?

22 MR. DAKE: Yes, Your Honor.

23 THE COURT: Do you agree that's an accurate
24 statement of the statutory and guideline provisions?

25 MR. DAKE: It is, yes, Your Honor.

1 THE COURT: And do you agree, Mr. Lacny?

2 MR. LACNY: I agree, Your Honor.

3 THE COURT: Okay. And we have got a lot of people
4 in the courtroom here today, and there were lots of letters.
5 I didn't see that you indicated you had anyone that wished to
6 testify or make a statement today.

7 MR. LACNY: I have no testimony, Your Honor. I'd
8 stand on the letters as submitted.

9 THE COURT: Okay. Thank you.

10 MR. LACNY: Thank you.

11 THE COURT: So, Mr. Goldstein, you may be heard as
12 to sentencing.

13 MR. GOLDSTEIN: Thank you, Your Honor.

14 And, again, Jeremy Goldstein from the antitrust
15 division for the United States. I want to begin by
16 discussing Mr. Zito's conduct in this case. I'll then turn
17 to the Section 3553 factors, why the government believes that
18 a nine-month term of imprisonment is appropriate.

19 Mr. Zito is in court today because he tried to
20 cheat. For years he has competed for publicly funded highway
21 projects, and his company has won dozens of those projects
22 over time. But Mr. Zito was not content to compete for those
23 projects fairly. He was not content to compete on the basis
24 of price or on the basis of work quality.

25 Instead, he spent nine months, nine months doggedly

1 pursuing a deal to illegally divide crack sealing markets
2 with a competitor all for the purpose of eliminating
3 competition and ultimately increasing his company's profit
4 margins.

5 The conduct here is fairly straightforward.
6 Mr. Zito proposed that his competitor abandon the Montana and
7 Wyoming markets. In return, Mr. Zito promised to cede the
8 South Dakota and Nebraska markets. Mr. Zito then offered
9 \$100,000 to sweeten the deal. That conduct alone is illegal
10 and warrants a stiff jail sentence, but several things here
11 make Mr. Zito's conduct substantially worse.

12 First, Mr. Zito went to great lengths to disguise
13 his conduct from law enforcement. He proposed a sham
14 transaction to make the \$100,000 payment that he was going to
15 pay to his competitor appear legitimate.

16 Under his proposal the \$100,000 would be documented
17 as a payment for construction equipment, even though the
18 specific equipment included in the deal was going to be junk.
19 There was no question that Mr. Zito knew it was junk. It was
20 his idea. He suggested the equipment be, quote, a broken
21 down kettle in the yard or something that is going to waste,
22 end quote. It didn't matter because the equipment was just
23 cover for a payment that he had negotiated for a very
24 different purpose.

25 Second, Mr. Zito has reached or attempted to reach

1 similar agreements with other competitors. He's a repeat
2 player. In two other cases Mr. Zito deployed an identical
3 playbook. He approached a competitor for highway crack
4 sealing projects unsolicited. He proposed that the
5 competitor exit the market in Montana and Wyoming and in
6 return he committed to a substantial payment as compensation.

7 In one of those two cases, Mr. Zito appears to have
8 been successful. The company entered an agreement and exited
9 the market, leaving Mr. Zito and his company in a stronger
10 position to monopolize what was left.

11 Third, Mr. Zito did not need to cheat. Paragraph 51
12 of the PSR makes clear this is not the case of a failing firm
13 or a desperate man. Mr. Zito and his company were
14 successful. Mr. Zito just wanted to be more successful.
15 Mr. Zito was rich. Mr. Zito just wanted to be richer.

16 At the end of the day, Mr. Zito's conduct is exactly
17 the type of conduct that federal antitrust laws are designed
18 to prevent. Had Mr. Zito succeeded here, he would have faced
19 less competition or in some cases no competition in Montana
20 and Wyoming.

21 With few or no other bidders for these projects,
22 states' departments of transportation, and ultimately
23 taxpayers, would have little choice but to work with Mr. Zito
24 and his company leaving him better able to raise prices for
25 his services.

1 The harm that could have occurred here is
2 substantial. That is why even a failed attempt to achieve
3 monopolization is prohibited by the Sherman Act and treated
4 as a felony.

5 Let me turn now to the 3553(a) factors. My -- the
6 government believes they support a nine-month term of
7 imprisonment. The first factor is the seriousness of
8 Mr. Zito's offense. Antitrust offenses are, by their nature,
9 serious. For over a century, federal law has prohibited
10 competitors from agreeing to fix prices, rig bids, or
11 allocate markets.

12 As the guidelines recognize, those agreements,
13 quote, cause serious economic harm, and they, quote, serve no
14 purposes other than to restrict output and raise prices. And
15 it's not just the guidelines that recognize the seriousness
16 of what Mr. Zito did here. Within the industry these types
17 of agreements are widely known to be illegal and harmful.

18 The Montana and Wyoming Departments of
19 Transportation both include anti-collusion statements in
20 every one of their bid packages. Consistent with federal
21 law, those statements require each and every bidder to attest
22 that they are not parties to restrictive agreements, and
23 their bids are not the product of collusion.

24 Look, too, at the actions of Mr. Zito's competitor,
25 that is the gentleman who cooperated in this case. Compare

1 their actions. Recall that Mr. Zito approached him to
2 propose a strategic partnership, and the competitor
3 immediately turned and reported his outreach to federal
4 authorities. There was no ambiguity for him because as the
5 competitor knew, and as Mr. Zito knew, the agreement that was
6 being proposed was collusive and it was illegal. His conduct
7 here is serious, and it warrants a term of imprisonment.

8 The second factor supporting a term of imprisonment
9 is Mr. Zito's history and characteristics. As I said at the
10 outset, Mr. Zito has been a successful contractor for several
11 years. As the PSR makes clear, he has a comfortable life
12 with a good deal of wealth, and he is recognized within the
13 community as a successful businessman.

14 That's important here because he -- it means that
15 Mr. Zito did not need to cheat. He did not need to engage in
16 this misconduct. He was already successful. He was already
17 rich. This is about him trying to make more money with less
18 work.

19 Listen to defendant's own words. Mr. Zito was asked
20 by his competitor on a recorded call if he was, quote,
21 looking for certain territories or certain areas so it limits
22 competition, end quote. Mr. Zito responded, quote, if we
23 weren't fighting over Wyoming the margins would go up to a
24 much more livable wage, end quote. "The margins would go up
25 to a much more livable wage."

1 He admits this is about profit margins. This is
2 about making even more money. And, again, take a look at
3 paragraph 51 of the PSR, Mr. Zito appears to have a very
4 different definition of a livable wage than most people that
5 I know.

6 Similarly, Mr. Zito later said on a different call,
7 quote, I feel really like you guys are the only ones that can
8 compete with us. So I guess I would much rather get along
9 with you guys in particular and come to some sort of
10 agreement than butt heads. I'd much rather get along and
11 come to some sort of agreement than butt heads. In his own
12 words, this is about avoiding competition and making more
13 money predictably and easily.

14 I want to take a moment to quickly respond to some
15 of the points that Mr. Zito raised in his sentencing memo.
16 First, Mr. Zito said that his behavior here was, quote,
17 completely out of character. Respectfully, I disagree. This
18 offense, I believe, tells you exactly who Mr. Zito is.

19 In public, Mr. Zito is a devoted father and son. He
20 is active in the community, but there is a different side to
21 Mr. Zito. One that behind closed doors, when no one is
22 looking, is eager to cut corners and cheat for his own
23 material gain. That side of Mr. Zito is one to lie and
24 deceive to hide his conduct, just so that he can make money
25 with less effort.

1 I read through the letters submitted on Mr. Zito's
2 behalf. One said that Mr. Zito, quote, has never been
3 motivated for his personal gain. How does that square with
4 Mr. Zito's actions in this case? Because on those calls,
5 those recorded calls, when no one else was supposed to be
6 listening, Mr. Zito seemed plenty motivated by material gain.

7 Another letter said that Mr. Zito has, quote, great
8 respect for the law. Again, how does that comport with
9 Mr. Zito's actions here? Behind closed doors he showed a
10 disrespect for federal law, and by trying to hide his
11 actions, a disregard for law enforcement.

12 Another letter said that Mr. Zito is honest and
13 always transparent, but then how do you explain the sham
14 transaction at issue in this case? Mr. Zito has shown
15 himself willing to lie and to deceive to hide a crime.

16 Second, Mr. Zito says in a sentencing memo that this
17 offense was a complete aberration. Again, I respectfully
18 disagree. This is not a one-time act. Mr. Zito cold-called
19 his competitor and then called again and again and again to
20 try to negotiate this deal. They had over a dozen reported
21 calls over the course of nine months.

22 Mr. Zito fought for this, and he was not willing to
23 take no for an answer. This is not an aberration, and of
24 course this is not an aberration because Mr. Zito has engaged
25 in this conduct before on three occasions with three

1 different competitors. He tried to divide markets and on two
2 occasions he tried to cover his tracks with some sort of sham
3 transaction. This offense tells you exactly who he is.

4 The third factor supporting a term of imprisonment
5 is the need to adequately deter criminal conduct. This is a
6 white collar case, and with white collar criminals, the
7 single best deterrent is a jail sentence. Let me raise two
8 important points that I believe are unique to this situation.

9 First, the need to general deterrence in this case
10 is substantial. Bid-rigging in market allocations schemes
11 are difficult to detect, and they are difficult to prosecute,
12 especially in consolidated markets like the ones at issue
13 here. These crimes tend to involve secret agreements between
14 individuals who are very motivated to conceal their actions.
15 They can happen entirely behind closed doors, and they can be
16 very easy to hide.

17 Look at the facts of this case. With so few
18 competitors, all Mr. Zito had to do to effectively monopolize
19 the Wyoming market was convince one competitor to exit the
20 market; and then to hide his conduct, all he had to do was
21 draft a single sham agreement.

22 Efforts like those to evade law enforcement make
23 identifying and cracking down on these agreements even more
24 difficult. A prison term for Mr. Zito would deter him and
25 others from engaging in this conduct again.

1 Second, general deterrence in this market at this
2 time is especially important. Under recent legislation
3 billions of federal dollars are being allocated to the states
4 for infrastructure projects. Billions of dollars. That sum
5 of money is going to be a gigantic target for bad actors
6 looking to make a quick buck very easily.

7 A significant prison term for Mr. Zito will send a
8 message that collusive and illegal practices will not be
9 tolerated and will be punished appropriately. Make no
10 mistake, this case is being monitored within the industry.
11 Other potential competitors are reading the papers, and they
12 will note what punishment Mr. Zito receives.

13 The fourth and final factor supporting term of
14 imprisonment is the need to avoid sentencing disparities. As
15 the government explained in its sentencing memo, individuals
16 like Mr. Zito routinely receive prison sentences for
17 violating federal antitrust laws. We'll return to that in a
18 minute.

19 Mr. Zito says in his sentencing memo that white
20 collar defendants in this district routinely receive
21 probation, even when their guideline range was higher than
22 what the guidelines suggest for Mr. Zito here. But those
23 were different crimes, and they involve different defendants.
24 Mr. Zito's conduct here reached well beyond the district
25 affecting bids in four states.

1 Mr. Zito also notes that he does not have a criminal
2 background, but that's true of almost every person who
3 violates the federal antitrust laws. These are not crimes
4 committed by people who have lengthy criminal records.

5 Finally, Mr. Zito suggests there are no identifiable
6 victims, no one actually suffered a pecuniary loss. But the
7 guidelines already account for that. Mr. Zito received a
8 three-point reduction because his attempt to monopolize was
9 not successful. He is not entitled to additional
10 compensation.

11 In sum, the guidelines here get things right. The
12 guidelines start with a base offense level using volume of
13 effective commerce. The guidelines then give Mr. Zito a
14 one-point enhancement because his offense involved an attempt
15 to rig bids.

16 It then reduces his offense level by three points
17 because he attempted but did not succeed in monopolizing his
18 markets. And after all that, the guidelines still landed at
19 a guideline range of 6 to 12 months.

20 Let me end with a quote from the guidelines on this
21 topic. Quote, under the guidelines, prison terms for these
22 offenders should be much more common and usually somewhat
23 longer than typical under pre-guidelines practice. Absent
24 adjustments, the guidelines require some period of
25 confinement in the great majority of cases that are

1 prosecuted, including all bid-ridden cases. Again, in this
2 instance the guidelines got it right.

3 In sum, Mr. Zito's conduct in this case is
4 substantial, and we respectfully ask this Court to punish him
5 appropriately by imposing a nine-month term of imprisonment,
6 a \$27,000 fine, and three years supervised release.

7 Thank you.

8 THE COURT: Thank you.

9 Mr. Lacny.

10 MR. LACNY: Good afternoon, Your Honor.

11 THE COURT: Good afternoon.

12 MR. LACNY: I ran across a quote from Senator
13 Cory Booker earlier this year, and he said that "Each of us
14 is more than the worse thing that we have done." That
15 concept is recognized by the 3553(a) factors.

16 And with all due respect to the government's
17 argument, they basically stood up here and talked about only
18 one factor, the nature and circumstances of the offense. And
19 we don't dispute that this is serious. We never have.

20 We understand the policy behind the antitrust laws,
21 why the rules exist. We admitted our violation of them.
22 We've never hid that. We've never said it's not serious. It
23 is significant that there is no pecuniary loss here to any
24 individual.

25 There's been no allegation whatsoever in these

1 crimes that the work from Z & Z Contracting was not done or
2 that it wasn't done on time or wasn't done appropriately;
3 nothing like that that is aggravating.

4 Furthermore, Mr. Zito did everything in his power to
5 make his violations of the antitrust laws right. Early on
6 when case agents came to interview him, he cooperated right
7 away without an attorney. He spoke to them. He cooperated
8 in a grand jury investigation, which lasted years. We turned
9 over thousands of documents, emails, text messages. We did
10 that cooperatively with the government.

11 We entered into pre-indictment plea discussions with
12 the government and ultimately a plea agreement where Mr. Zito
13 accepted responsibility. We do not diminish the seriousness
14 of this offense. We've done everything we can to make it
15 right, including agreeing to a fine that we're going to pay
16 in full today.

17 So, again, with all respect to the Department of
18 Justice's impassioned argument about the circumstances of the
19 offense, we understand they're serious, but that is but one
20 factor. All the other factors, Your Honor, point to a
21 probationary sentence being correct in this case.

22 Going back to Senator Booker's quote that "We're all
23 more than the worse thing we have done," you've seen by the
24 letters I've submitted on Nathan's behalf, you see about the
25 rows filled up with supporters here supporting Nate, you've

1 seen by the comments in my sentencing memo, and the articles
2 I submitted as exhibits to that memo that Nathan Zito is way
3 more than this offense.

4 And if the good way this man has lived his life the
5 entire time up until this crime means anything, it needs to
6 mean something today. He is 44 years old. He grew up here
7 in Montana in the Bitterroot Valley in a very poor family,
8 kind of Horatio Alger story of starting a business and
9 growing that business through hard work.

10 Many, many loyal employees he employed through the
11 years. And like I say, grew that business on his own with
12 the help of his brother. Eventually moved to Billings where
13 the business really took off. Nate's married with five kids,
14 who I can tell you are his absolute world. I've spent a lot
15 of time with Nate over the last year and a half, and his
16 dedication to his family, and in particular those five kids,
17 is probably the hardest part for him in going through this
18 process.

19 He shared with me and the probation officer during
20 the PSI interview the difficulty of sitting down and having
21 to look his children in the eye and tell them that he had
22 committed an offense, that he was going to have to be held
23 accountable for that. And that that was very difficult for
24 him, and that speaks to his character.

25 He shared with them that he might be facing a prison

1 sentence. And, again, I can't imagine having to have that
2 conversation with your kids, and I think Nate would tell you
3 that's the hardest thing he has had to do in this case.

4 I won't belabor the letters of support. I know you
5 read them. They come from people all around the community,
6 from former employers to business associates, to friends,
7 family, high school friends. And all of them have the
8 central theme that this is a man with core integrity, a man
9 with no criminal history, no violent tendencies, no
10 indication at all that this whole process is not and will not
11 specifically deter him.

12 I frankly can't think of another case where I've
13 submitted and received so many letters on behalf of a
14 defendant; in 16 years it's the most I've had. I told Nate
15 at the beginning of the case that he is going to find out who
16 his friends are, in terms of who sticks with him by this.
17 And by all accounts, Mr. Zito has a lot of loyal friends who
18 recognize him, who are here to support him today and believe
19 in him, and they know about the offense, and that's important
20 too.

21 You know, the government pointed out some quotes in
22 the letters trying to impeach his character, but in every one
23 of those letters, these letter writers noted that Mr. Zito
24 accepted responsibility for what he did. He didn't shirk
25 that or minimize it. That's important and that's significant

1 going forward. It tells you, again, what type of person
2 Mr. Zito is.

3 I talked in my sentencing memo about Mr. Zito's
4 volunteer work through his life, and that is not some type of
5 courthouse conversion, Your Honor. That's been a big part of
6 Mr. Zito for years. He started R4C, which is a youth
7 leadership training program. Hundreds of kids have
8 benefitted from that program that went through it; some of
9 them are in the courtroom here today now supporting Mr. Zito.

10 And that program is talked about at length in the
11 Cliffside Neighbors article that I submitted with my
12 sentencing memo. Nate served on his kids' school board.
13 And, again, according to the principal and other board
14 members, was an ardent advocate for the kids, for the
15 teachers, for the school. I'm sure the Court knows that
16 serving on a school board can be a somewhat thankless job at
17 some times so, again, that speaks to Nate's dedication to
18 doing good, to giving back.

19 One note in one of the letters particularly sticks
20 out to me. It was at the bottom of one of the paragraphs,
21 and I can't remember the writer now, but he noted Mr. Zito
22 has organized a group of friends to go and give blood every
23 two months to the American Red Cross.

24 And that is just, to me, a small point, but it just
25 shows how selfless that Mr. Zito truly is. This is a person

1 that respects the law, that does not need prison or anything
2 like it to further his respect for the rules.

3 I know the government stood up here and in talking
4 about the offense focused on the factors punishment and
5 deterrence, and I understand those are factors that the Court
6 must consider. Mr. Zito has been punished by this process
7 alone, and he will be punished by a probationary sentence.

8 The Supreme Court is clear that probation is not
9 letting someone off easy, that it is real punishment. He is
10 going to suffer the indignities of having his home, his car,
11 his workplace open to random searches by probation office, he
12 won't be able to travel, he will be closely monitored. That
13 is not fun. That is not easy. It is real punishment.

14 Setting aside whatever sentence the Court may hand
15 down, this process alone has significantly punished Mr. Zito.
16 Rightly or wrongly, Your Honor, so much of our identities are
17 caught up in what we do for work, and I think the government
18 attorneys would agree with me that if our bar cards or our
19 ability to practice law were taken from us, that punishment
20 is profound and real.

21 And it takes away your ability to make a livelihood,
22 takes away your sense of worth, and it takes away something
23 you worked towards for years. And as a result of his actions
24 and as a result of this case, Mr. Zito lost his career. He
25 had to extract himself from his company pursuant to

1 requirements from Department of Highways, and he can't go
2 back into the company anytime in the near future and, likely,
3 Your Honor, even if he did, it's not likely he would be
4 successful in the industry just due to this conviction.

5 So, again, that is a huge portion of punishment to
6 process alone. Putting Mr. Zito in prison for nine months to
7 me, Your Honor, seems piling on. The government said the
8 guidelines get this one right, and they go on to quote a 1987
9 guideline note saying that antitrust offenders should go to
10 prison.

11 And it's rare that I do agree with the guidelines in
12 a lot of cases, but here the guidelines specifically allow
13 probation; in fact, they recommend it. Application note
14 5C1.1 says the defendant is a nonviolent first-time offender,
15 and their ranges in Zone A or Zone B of the sentencing table,
16 the Court should consider imposing a sentence other than
17 imprisonment.

18 That's from a 2017 review where the sentencing
19 commission looked at a study that found those people that are
20 nonviolent first-time offenders have essentially zero risk of
21 re-offending. And with guidelines so low, my request here,
22 Your Honor, is one for a very small variance.

23 As indicated in my sentencing memo, this requested
24 sentence is not disparate at all. I know the Court has read
25 my response to the government's sentencing memo where I noted

1 the substantial differences in conduct between the antitrust
2 cases the department cites, and the facts and the guidelines
3 in Mr. Zito's case. Every one of those defendants had much
4 higher guideline ranges, and not a single one of them, except
5 for one individual in Criminal History Category II, received
6 a guideline sentence.

7 In sum, Your Honor, my request for probation is a
8 very minor request for a variance. It's supported by the
9 3553(a) factors. No question Mr. Zito committed a crime. We
10 understand it's serious. But by losing his career, by
11 harming his reputation forever, he's paid a lot for these
12 crimes already.

13 He has been punished for them and he will continue
14 to be punished if the Court follows my recommendation and
15 puts him on probation. It's the appropriate sentence here,
16 Your Honor, in my view.

17 Thank you.

18 THE COURT: Thank you.

19 And, Mr. Zito, do you have anything you wish to say
20 before I impose sentence?

21 THE DEFENDANT: Your Honor, I'm not a very good
22 public speaker so I tried to put everything that I wanted to
23 tell you in my letter, which I know you've read, and I hope
24 that you will give me a chance to stay in the community.

25 Thank you.

1 THE COURT: The question before the Court today is
2 what is a sufficient but not greater than necessary sentence
3 that will accomplish the purposes of sentencing which include
4 punishment, deterrence, protection of the public, and your
5 rehabilitation. And the sentence needs to reflect the
6 seriousness of the crime and promote a respect for the law.

7 In determining what is a sufficient but not greater
8 than necessary sentence, I consider not only the advisory
9 sentencing guideline range but also the sentence provided for
10 by statute and the sentencing factors that are set forth in
11 18 United States Code Section 3553(a).

12 And I think the biggest question I have for you,
13 Mr. Zito, is why? You were very successful. Why did you
14 come up with this idea? Why did you think this was a good
15 idea?

16 THE DEFENDANT: I just got overaggressive and took
17 it too far. I should have known better. I -- I -- I was
18 looking for an opportunity, and I thought that was a good
19 one, but I was wrong. I...

20 THE COURT: Your business had been successful up to
21 that point, hadn't it?

22 THE DEFENDANT: Yeah. Yeah, it took a long time,
23 Your Honor, but it got there.

24 THE COURT: So do you agree with the government's
25 characterization that really there doesn't seem to be any

1 explanation for your conduct other than wanting to increase
2 your profits illegally? Is there any other explanation?

3 THE DEFENDANT: My thought processes were different
4 at the time, and I wasn't thinking of it in that way. It
5 was -- for me it was more like do we really want to fight
6 with each other? Or can -- and one of us goes out of
7 business -- or can we not? And at the time I didn't -- I was
8 not aware that that would be illegal.

9 THE COURT: Well, you were trying to, basically,
10 divvy up the market with this other company, right?

11 THE DEFENDANT: (Nod of head.)

12 THE COURT: You take Montana and Wyoming, and they
13 take Nebraska and -- was it one of the Dakotas? I can't
14 remember specifically.

15 THE DEFENDANT: South Dakota.

16 THE COURT: South Dakota, yes.

17 Well, I'm looking at the 3553(a) factors. We all
18 agree here in the courtroom that this is a serious offense.
19 I mean, there is certainly, we have, you know, the Sherman
20 Antitrust Act, and there is certainly plenty of public policy
21 that we can all imagine supports making this kind of conduct
22 criminal where businesses would be able to collude with each
23 other and enter into agreements that would squeeze other
24 people out.

25 That's not the situation here, but would amount to

1 having a monopoly and making it so that there was no
2 competition, and that then the consumer was at your mercy as
3 far as what you charge and what they have to spend in order
4 to get the services.

5 I mean, the public certainly benefits from that act
6 and from, you know, the antitrust arm of the government that
7 prosecutes these cases because the public, it is to their
8 detriment when businesses decide that they are going to
9 collude with each other and somehow increase their profits
10 to -- at the expense of the people who consume their
11 services.

12 And it is kind of a head scratcher, Mr. Zito,
13 because looking at the presentence report, as far as your
14 financial situation, that appeared to be -- to be in good
15 shape. I know you wrote in the financial portion of the
16 presentence report, you made a note that a lot of the monies
17 that you earned went back into the family business in order
18 to keep the family business going.

19 But it talks about, you know, the income that you
20 and your wife enjoyed, and so it seems you had a pretty
21 comfortable lifestyle. So it's a conundrum to me to
22 understand why you would have gotten yourself involved in
23 this, and at your initiation. It isn't that you got a phone
24 call from somebody else and you decided to enter into one of
25 these agreements with them.

1 You were the person initiating the call and pursuing
2 the agreement with the other company to divide up these
3 territories to both of your benefit. There is no doubt about
4 that. And the other person, the other guy, immediately
5 recognized that this was not allowed under the law, and that
6 you were -- what you were suggesting was illegal.

7 But then I look at who you are as an individual,
8 Mr. Zito, and your history and characteristics and, again,
9 there's no -- no real explanation for it. I know the
10 government argues that there were other incidences of this
11 occurring. I'm not sure about the timeline of those.

12 I guess I would suspect we're talking kind of about
13 the same timeline and so, again, what was going on then, I
14 don't really think I understand as to what motivated you to
15 do this. But up to this, you've got no criminal history,
16 and -- I mean, not even a traffic ticket is noted.

17 And you've got all of these letters of support, all
18 of which indicate your long contributions to the community
19 throughout your various -- the volunteering and the various
20 things you have done throughout the community over the years
21 to be a really valuable member of the community, and not just
22 law abiding, but a contributing member to our community.

23 And I think in looking at your history and
24 characteristics, and then this crime, I think that's the very
25 definition of aberration, frankly, Mr. Zito. And it's true,

1 with financial crimes, arguing that you have no criminal
2 history, no one ever does, frankly. And so it's almost a
3 nonstarter because people who get involved in these financial
4 crimes, for the most part, are otherwise law-abiding members
5 of their communities.

6 So how do -- how do we accomplish these purposes of
7 sentencing? I thought your letter of acceptance that's
8 included in the presentence report was very well written,
9 Mr. Zito. You're obviously very well spoken. It indicated
10 some retrospection, I mean, I think not uncommonly.

11 You talk about how the negative impact of this
12 crime, basically, on you and your family. Yes, and it's
13 unfortunate you didn't think about that before you committed
14 the crime. But there's also a level of acceptance of
15 responsibility in here that I think the Court needs to take
16 note of.

17 And in visiting with the presentence author, Officer
18 Arledge, unlike other white collar defendants, her impression
19 is that this has made a big impact on you. You weren't
20 trying to blame anyone else, make excuses for your conduct,
21 you've taken responsibility, and seemed to -- it has seemed
22 to have really humbled you as far as going through the
23 process of being involved with being charged and now
24 convicted of a federal felony offense.

25 And I think that the -- I mean, the guidelines and

1 the comments there, too, have changed over the years, and I
2 think that -- and that are thinking about punishment and what
3 sort of people need to be sent to prison has changed over the
4 years.

5 You know, we have the First Step Act. I remember
6 several years ago there was litigation -- or not litigation
7 but legislation, bipartisan legislation -- about, you know,
8 revamping the guidelines and reconsidering that we send a lot
9 of people to prison, the First Step Act, people got released
10 early from prison, and I think that's more where we are
11 today.

12 With an understanding, first of all, prison costs a
13 lot of money; and second of all, it's not for every one. The
14 primary purposes of sentencing, in my mind, are punishment so
15 that people are deterred from not only committing the same
16 crime but other crimes.

17 Most crimes don't have much of an aspect of general
18 deterrence; drug crimes or homicides or assaults, those kinds
19 of things. I do think there is some level of general
20 deterrence when it comes to white collar crimes because we
21 are dealing with, basically, a different kind of defendant.

22 But punishment for the purposes of deterrence and
23 then rehabilitation and protection of the public, and
24 protection of the public comes somewhat with incarceration,
25 but everybody -- almost everybody -- gets out, and we're not

1 talking about a lot of incarceration here. Rehabilitation is
2 a very important part.

3 But then looking at you, Mr. Zito, there isn't
4 really much in your background that indicates that we have a
5 real strong need of rehabilitation. Does it need to be
6 impressed upon you that what you did was a crime in that it
7 has, particularly if you had gone through with it, very
8 negative consequences in society? Yes.

9 Do we have someone who has significant substance
10 abuse issues, gambling issues, mental health issues, such
11 things like that, that we need to provide some really
12 specific programming to that may be offered in the Bureau of
13 Prisons or through supervision? Not really.

14 You have suffered some negative consequences of your
15 choices here through having to leave your business, having
16 been -- now I guess you're prevented from engaging in any
17 highway bids for the State of Montana for the next three
18 years. I guess you have agreed voluntarily that you would be
19 excluded from federal contracting jobs for at least another
20 five years after sentencing.

21 You have agreed to a pretty hefty fine, and that's
22 another thing that's quite common to these white collar
23 crimes is sometimes the best punishment is to hit them in the
24 pocketbook. But in looking at the 3553(a) factors, other
25 than to punish you, Mr. Zito, in my view there's no

1 justification for a prison term.

2 Is there justification for an extended period --
3 somewhat extended period of probation? Is there
4 justification for a period of home detention? Yes. And I
5 think that is a sentence that is a sufficient but not greater
6 than necessary sentence.

7 Looking at you as an individual, not discounting the
8 seriousness of the offense, but looking at you as an
9 individual, really, what are the chances or what is the
10 probability that you will commit another crime?

11 What do you think that is?

12 THE DEFENDANT: Zero, Your Honor.

13 THE COURT: Frankly, I think that's -- it's zero
14 also. And you'll be monitored while you're on probation.
15 And so it serves a community's purpose to a greater extent
16 that you are allowed to remain in the community under
17 supervision with some conditions of home detention, but so
18 that you can continue to contribute to your family and parent
19 your family and be -- and do the good things that you've done
20 in your life.

21 And I would hate to think that someone who has led a
22 good and decent life and has made some bad choices and
23 committed a crime that the good things that you've done don't
24 come into consideration and, in fact, they absolutely do, and
25 that's why we have the 3553(a) factors.

1 And for those reasons, it is the judgment of the
2 Court that you be sentenced to a term of probation for a
3 period of three years. And on that -- while you're on
4 probation, I am going to then require that a period of home
5 detention, and that is a period of six months, where you are
6 restricted to your residence at all times except for
7 employment, education, religious services, medical, substance
8 abuse or other mental health treatment, attorney visits,
9 court appearances, Court-ordered obligations, or other
10 activities as pre-approved in writing by your probation
11 officer.

12 I would note that this is one of the very few
13 instances where the guidelines actually allow for
14 probation -- just an aside.

15 While you're on probation you shall not commit any
16 federal, state, or local crimes and shall not possess a
17 controlled substance. You shall cooperate in the collection
18 of DNA as directed by your probation officer. I would note
19 that this apparently is not an offense, a conviction for
20 which, impacts Mr. Zito's ability to possess firearms.

21 And so I'll address that in the special conditions,
22 and I know while he's been on pretrial release there was a
23 special condition imposed by Judge Cavan related to firearms.

24 So you shall comply with the standard conditions of
25 supervision as recommended by the United States Sentencing

1 Commission and which have been approved by this Court with
2 the exception of Special Condition No. 10 that prohibits
3 possession of firearms, etcetera, because that is not a
4 condition that would apply to this conviction, so Standard
5 Condition No. 10 will be deleted from the judgment.

6 You must comply with the following special
7 conditions of supervision: All employment must be approved
8 in advance in writing by your probation officer. You must
9 consent to third-party disclosure to any employer or
10 potential employer.

11 While on supervision, you must fulfill all tax
12 obligations and adherence to Internal Revenue Service
13 requirements. You must apply all monies received from income
14 tax refunds, lottery winnings, judgments, or any other
15 financial gains to any outstanding Court-ordered financial
16 obligations.

17 I am ordering that you pay a fine in the amount of
18 \$27,000. There is a provision for paying that fine over a
19 period of time, and that rate would be as directed by your
20 probation officer, but it is my understanding that you intend
21 to pay that fine in full today.

22 Is that correct, Mr. Zito?

23 THE DEFENDANT: Yes, Your Honor.

24 THE COURT: Okay. And that fine shall be paid to
25 the clerk of this court.

1 You must submit your person, residence, place of
2 employment, vehicles, and papers to a search, with or without
3 a warrant, by any probation officer based on reasonable
4 suspicion of contraband or evidence in violation of a
5 condition of release.

6 Failure to submit to search may be grounds for
7 revocation. You must warn any other occupants that the
8 premises may be subject to searches pursuant to this
9 condition. You must allow seizure of suspected contraband
10 for further examination.

11 The condition with regard to home detention will
12 also -- will be included as a special condition, and I've
13 read to you the parameters of that condition which, as I
14 said, will be in place for a period of six months.

15 And then with regarding firearms, and this is the
16 special condition language requested by the person who is
17 going to supervise you, Mr. Zito, that special condition
18 shall read as follows: You must not possess firearms or
19 ammunition without the prior approval from your U. S.
20 Probation Officer.

21 In addition to the fine, you are ordered to pay to
22 the United States a special assessment of \$100 which shall be
23 due immediately.

24 And you understand, Mr. Zito, that pursuant to the
25 plea agreement, that you have waived your right to appeal

1 this sentence.

2 THE DEFENDANT: Yes, Your Honor.

3 THE COURT: Any legal objection to the sentence?

4 MR. DAKE: No objection, Your Honor. Just a
5 clarifying point, in that usual condition of home confinement
6 there is the location monitoring. It is the Court's
7 intention to include that? I just want to make sure that
8 that's clear for Mr. Zito on the record.

9 THE COURT: I do not intend to include that.

10 MR. DAKE: Thank you, Your Honor.

11 THE COURT: Thank you.

12 MR. DAKE: No objection. Thank you, Your Honor.

13 THE COURT: Okay. Thank you.

14 Any legal objection, Mr. Lacny?

15 MR. LACNY: No, Your Honor. Thank you.

16 THE COURT: Okay. And do you want Mr. Zito to go
17 with you, Officer Arledge --

18 OFFICER ARLEDGE: Yes.

19 THE COURT: -- or do you have another plan?

20 OFFICER ARLEDGE: I have reporting instructions for
21 him.

22 THE COURT: Once we adjourn, Mr. Zito, you must
23 accompany Officer Arledge, who I'm told will be actually
24 supervising you, because she is moving from writing to
25 supervising, but she will give you instructions with regard

1 to the three-year stint of probation.

2 And we're adjourned.

3 MR. LACNY: Thank you, Your Honor.

4 THE CLERK: All rise.

5 (Whereupon, the proceedings concluded at 4:22 p.m.)

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CERTIFICATE OF REPORTER

1
2 I, Kim Marchwick, a Registered Professional
3 Reporter and Certified Realtime Reporter, do hereby certify
4 that the foregoing 37 pages of transcript is a true and
5 correct record of the proceedings given at the time and
6 place hereinbefore mentioned; that the proceedings were
7 reported by me in machine shorthand and thereafter reduced
8 to typewritten form using Computer-Aided Transcription; that
9 after being reduced to typewritten form, a certified copy of
10 this transcript will be filed electronically with the court.

11 I further certify that I am not an attorney for nor
12 employed by, nor related to any of the parties or attorneys
13 to this action, nor financially interested in this action.

14 Whereupon, this document was signed by me in
15 Billings, Montana, this Tuesday, the 18th day of April,
16 2023.

17
18
19 */s/ Kim Marchwick*

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