IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 1: 08cr0079 (JCC)
	)	
KYLE DUSTIN FOGGO,	)	
aka “DUSTY” FOGGO,	)	
	)	
Defendant.	)	
	)	

GOVERNMENT’S REPLY TO DEFENDANT’S SENTENCING MEMORANDUM

I.

INTRODUCTION

Defendant Foggo's Sentencing Memorandum, and accompanying letters, attempt to narrow the scope of his criminal conduct. It also bears correcting as to several facts that directly affect the calculation of Foggo's offense level under the United States Sentencing Guidelines. In addition, Foggo cites a number of cases in support of his requests for downward departures and variances that are readily distinguished and do not support his argument. The Government submits this memorandum in order to correct the record in advance of Foggo's sentencing hearing.

II.

ARGUMENT

A. Defendants Must Accept Responsibility for All Criminal Conduct

1. Defendants Bear the Burden of Proof

Pursuant to the Sentencing Guidelines, a defendant is entitled to a reduction for acceptance of responsibility only if he "clearly demonstrates acceptance of responsibility for his offense. . . ." USSG §3E1.1. This includes "truthfully admitting the conduct comprising the offense(s) of conviction . . . ." USSG §3E1.1, comment. (n.1). Moreover, "a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility." *Id*. It is a defendant's burden to prove, by a preponderance of the evidence, that he has "clearly recognized and affirmatively accepted personal responsibility for his criminal conduct." *United States v. May*, 359 F.3d 683, 693 (4th Cir. 2004) (citation omitted). The Fourth Circuit has taken a firm position on the scope of the acceptance required for a defendant to earn this adjustment. Joining with the Second and Fifth Circuits, and rejecting the more lenient standard in the First Circuit, the Fourth Circuit has established that "in order for section 3E1.1 of the guidelines to apply, a defendant must first accept responsibility for

all of his criminal conduct." *United States v. Gordon*, 895 F. 2d 932, 936 (4th Cir. 1990) (citations omitted) (emphasis added).

A defendant may prove that he has manifested this broad acceptance in a variety of ways. *See* USSG § 3E1.1, comment.(n.1) (a)-(h). As an initial matter, however, simply pleading guilty is insufficient. *May*, 359 F.3d at 639 (reversing district court's grant of Acceptance of Responsibility adjustment where the only ground cited was that the defendant had pled guilty); *United States v. Harris*, 882 F.2d 902, 905-906 (4th Cir. 1989) (a guilty plea is insufficient to demonstrate acceptance because a plea "may be motivated by factors other than contrition," such as the opportunity to take advantage of a favorable plea agreement or because a defendant "may simply recognize that the evidence guilt is overwhelming");USSG § 3E1.1, comment. (n.3) ("A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.").

Consistent with the requirements that a defendant demonstrate more than a mere willingness to plead guilty and actually accept responsibility for "all of his criminal conduct," acceptance is properly denied where a defendant fails to admit established conduct in charges that the government has dismissed – even if those other charges are not "relevant conduct" for the offense. *United States v. Choate*, 12 F.3d 1318, 1319-20 (4th Cir. 1993) (adjustment was properly denied where defendant pled guilty to counts 1 and 2, but failed to admit conduct charged in count 3, which had been dismissed by the government). *See also United States v. Putney*, 260 Fed. Appx. 579, 580 (4th Cir. 2008) (unpublished) (denying acceptance where court found that defendant had engaged in crimes for which he had not yet been convicted). The Fourth Circuit's bottom line is that, "Our own approach has been to require defendant to accept responsibility for criminal conduct beyond the offense of conviction." *Choate*, 12 F.3d at 1320 (emphasis added).

2. Deference Afforded Sentencing Court's Assessment of Defendant's Contrition

A judge's determination as to whether a defendant has adequately accepted responsibility for "all of his criminal conduct" is subject to clearly erroneous review, because the sentencing judge is in the unique position to assess the defendant's credibility and demeanor, and evaluate whether he is genuinely contrite. *Harris*, 882 F.2d at 905. The court is not obligated to grant an acceptance adjustment to "an unrepentant criminal" for "grudgingly cooperating with authorities or merely going through the motions of contrition." *Id.*, 882 F.2d at 905-906; *see also May*, 359 F.3d at 394 ("Admitting to criminal activity while attempting to justify or explain it away does not indicate acceptance of responsibility."); *United States v. White*, 875 F.2d 427, 432 (4th Cir. 1989) (adjustment was properly denied where court found that defendant "was trying to be conniving and try[ing] to get himself out of the situation"). *See also United States v. Morales*, 260 Fed. Appx. 585, 588 (4th Cir. 2008) (unpublished) (rejecting departure where defendant "minimized his participation in the conspiracy").

B. Foggo Pled Guilty to the First Execution of a Years-Long Unitary Scheme

Months prior to Foggo's guilty plea, he moved to dismiss the Second Superseding Indictment ("SSI") on duplicity grounds, contending that the SSI improperly combined into one overall scheme what were in fact multiple separate schemes. (*See* Foggo's June 12, 2008 Mot. to Dismiss.) After full briefing and argument, the Court rejected Foggo's motion in a written opinion. As the following excerpt from that opinion demonstrates, the Court expressly held that the SSI charged a "unitary scheme," not multiple separate schemes as Foggo had contended:

> Despite Defendant's argument, the Court finds that the SSI alleges a unitary scheme. It is undisputed that Defendant himself is the epicenter of the purportedly separate schemes. Because Defendant's abuse of office while working for the CIA is the heart of all of these allegations, the public generally – and the CIA particularly – are the common victims. Moreover, the nature and goals of the purportedly separate schemes are not as disparate as Defendant claims. In each case, the

> Government contends that Defendant misused his position to obtain money and opportunities for others who were close to him, and achieved those ends by concealing his close connection with those individuals and misrepresenting their qualifications. The Government further contends that Defendant also received immediate benefits for his favors: from Wilkes, he received expensive meals and trips, along with the promise of future benefits as Wilkes's executive officer; from E.R., he received extra-marital sexual companionship and the promise of future benefits as E.R.'s husband. All of these factors combine to form one unitary scheme.

See Memorandum Opinion, dated July 14, 2008, pp. 18-19.

With the benefit of this clear holding, two months later Foggo pled guilty to Count 1 of the SSI. Because the Court had expressly held that there were no separate schemes charged in the SSI, there is no room for reasonable debate as to whether Foggo pled guilty to the charged unitary scheme versus something else. In other words, Foggo pled guilty to everything charged in the SSI *through* Count 1. This scheme spanned several years, and included many acts of misconduct based on Foggo's abuse of two high-ranking positions within the Central Intelligence Agency: Chief of Support Operations at an Overseas Location, and Executive Director ("ExDir") of the CIA. *See* SSI, pp. 2-20. Consistent with this scope, the Statement of Facts to Foggo's Plea Agreement includes the following broad and inclusive language:

> Beginning in or about December 2002, and continuing through in or about September 2006 . . . FOGGO devised . . .a scheme to defraud . . . the United States and its citizens of their right to [his] honest services . . . to be performed free of deceit, undue influence, conflict of interest, self-enrichment, self-dealing, concealment, fraud, and corruption . . . . [T]hrough direct and indirect instructions, FOGGO abused <u>his supervisory positions</u> with the CIA in order to cause the CIA to hire <u>companies or individuals</u> with whom FOGGO had a personal relationship.

See Statement of Facts, p. 2 (emphases added). Accordingly, in his Statement of Facts, Foggo has acknowledged carrying out his scheme from 2002 to 2006, and abusing both of the supervisory positions he held during that time to hire multiple "companies" or "individuals."

The Plea Agreement confirmed the breadth of Foggo's plea by conditioning his receipt of an adjustment for acceptance upon the following: "provided that he continues to manifest acceptance

of responsibility as required under the guidelines for the charged acts as indicated in Count 1." *See* Plea Agreement, p. 3; *Cf., May*, 359 F.3d at 694 (reversing district court's grant of acceptance adjustment where defendant pled guilty to conspiracy, but disputed most of the alleged overt acts); *United States v. Strandquist*, 993 F.2d 395, 401 (4th Cir. 1993) (affirming denial of acceptance where defendant, convicted of discharging pollutants into a storm grate, admitted responsibility for dumping sewage into the grate but disputed whether the sewage actually flowed into navigable waters and denied that he knew where the sewage would flow). *See also United States v. Viar*, 277 Fed. Appx. 266 (4th Cir. 2008) (unpublished) (affirming denial of acceptance adjustment where defendant was convicted of conspiracy to distribute 500 grams or more of methamphetamine, defendant acknowledged he was a drug dealer and involved with 538 grams of methamphetamine, but court concluded that defendant was involved in a greater quantity); *Morales,* 260 Fed. Appx. at 588 (affirming denial of acceptance adjustment where defendant pled guilty to conspiracy to possess methamphetamine with intent to distribute, but admitted only that he had purchased small quantities for personal use and denied selling any).

C. Cause for Concern Regarding Foggo's Acceptance of Responsibility

1. Foggo is Trying Parse the Unitary Scheme to Which He Pled

Despite this Court's clear holding that the SSI charges a unitary scheme, in his Sentencing Memorandum, Foggo attempts to parse the charged scheme into several different ones, and he asserts that: "By including a lobbying contract to which the government was not a party, the procurement contract, and the allegations concerning E.R., the PSR deprives Mr. Foggo of the benefit of his plea agreement . . . ." *See* Foggo's Sent. Mem., p. 10. In essence, Foggo appears to be trying to split the SSI into multiple schemes so as to restrict his plea and thus his misconduct to a scheme involving only an isolated water contract which was completed in early 2004. It is

apparent that Foggo has also conveyed this perspective to the individuals from whom he has solicited letters of support. In doing so, Foggo attempts to rewrite not only his plea, but also this Court's prior written opinion.

Beyond parsing his unitary scheme, Foggo fails to acknowledge and accept responsibility for any of his misconduct post-dating the March 2004 water contract. Likewise, he fails to acknowledge and accept responsibility for his misconduct while serving as the CIA's Executive Director, despite the express acknowledgment in his Statement of Facts that he "abused his supervisory positions with the CIA." Similarly, he fails to accept responsibility for any contract other than the single water contract, despite the acknowledgment in his Statement of Facts that he concealed "Wilkes's connection to CIA contracts." In addition, Foggo's above-referenced criticism of the PSR as "depriv[ing him] of the benefit of his plea agreement" by "including a lobbying contract to which the government was not a party, the procurement contract, and the allegations concerning E.R.," seems to dispute, rather than accept, responsibility for these transactions that were part of the unitary scheme to which he pled guilty. In fact, this Court's July 14, 2008 Order expressly mentioned the ER-related conduct while explaining its conclusion that the SSI charged a unitary scheme.

Given the unitary nature of Foggo's scheme, and his broad admissions in his Statement of Facts, it is apparent that Foggo did not plead to a subset of the unitary scheme charged in the SSI. Nevertheless, even if the SSI's multiple counts did correspond to separate schemes, an argument this Court has already rejected, the Government's agreement to dismiss the remaining counts of the SSI still would not alter the scope of the criminal conduct for which Foggo must accept responsibility in order to earn the adjustment. In fact, even where a defendant is acquitted of certain criminal conduct by a jury, if that criminal conduct has been proved by a preponderance of evidence to the

sentencing court, a defendant must accept responsibility for such conduct. *See United States v. Watts*, 519 U.S. 148, 157 (1997) ("[A] jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.") Here, the evidence submitted to the Court with the Government's Sentencing Memorandum demonstrates by more than a preponderance Foggo's involvement in criminal conduct far beyond the 2004 water contract.[1/]

2. Foggo's Statement of Acceptance of Responsibility

The indications that Foggo has not clearly accepted responsibility for "all of his criminal conduct" did not begin with his Sentencing Memorandum, however. Even Foggo's Statement of Acceptance of Responsibility to the Court (appended to the PSR) manifests a desire to minimize both his criminal conduct and his culpability for that conduct. Despite having pled guilty to a scheme lasting nearly four years, in his Statement of Acceptance, Foggo characterizes his conduct as a "lapse in judgment . . . ." *See* Foggo's Statement of Acceptance of Responsibility (emphasis added). Similarly, and in direct conflict with his Statement of Facts, Foggo admits abuse of only a singular "supervisory position." *Id.* Foggo also tries to minimize his culpability by attributing

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[1/]The PSR also confirms the breadth of Foggo's criminal conduct. As is true for all of his substantive factual objections to the PSR, the burden is on Foggo to show "to show inaccuracy or unreliability of factual information in PSR; thus, when a defendant merely objects to the accuracy or reliability of certain factual information in the PSR without affirmatively showing the factual information at issue in the PSR is inaccurate, the district court is free to adopt the findings of the PSR without more specific inquiry or explanation." *United States v. Aramony*, 166 F.3d 655, 662 (4th Cir. 1999) (summarizing holding of *United States v. Terry*, 916 F.2d 157, 162 (4th Cir. 1990) (internal quotations omitted). Foggo has not met his burden as to any of his substantive objections. Therefore, the "[C]ourt is free to adopt the findings of the PSR without more specific inquiry or explanation."

Similarly, Foggo has claimed that his name was "cleared" of an incident involving his alleged assault of a cyclist. Contrary to this claim, however, Foggo was never exonerated. In fact, the local authorities who had investigated that incident felt they had clear evidence of Foggo's commission of this crime, and the only reason they did not pursue charges against Foggo was because they were precluded from doing so due to diplomatic considerations. *See* attached Declaration of John Doe #2, ¶¶ 2-4.

his crime to having "allowed myself to be improperly influenced by my long-standing friendship with Brent Wilkes." *Id.* As demonstrated throughout the Government's Sentencing Memorandum, however, it was Foggo, not Wilkes, who initiated the pursuit of every corrupt transaction that was a part of his unitary scheme. In fact, several aspects of Foggo's scheme did not even involve Wilkes (*e.g.*, the submission of false SF-278s, false statements about ER's importance to the Overseas Location, etc.). As this Court observed, "It is undisputed that Defendant himself is the epicenter of the purportedly separate schemes."

The kind of minimizing, blame-shifting remarks Foggo made in his Statement are similar to those made by the defendant in *May*, where the Fourth Circuit reversed as clearly erroneous the district court's grant of an adjustment for acceptance of responsibility. *See May*, 359 F.3d at 694. May wrote in his statement to the probation officer that he "fully accepts responsibility for his conduct reflected in Counts One and Two of the Indictment," but went on to describe "certain circumstances" that he said "contributed to the commission of the offense," ultimately denying one of the overt acts and "plac[ing] the blame squarely on" the victim. *Id.* In a conclusion that would be equally apt in Foggo's case, the Fourth Circuit held that "[Defendant]'s statement to the probation officer belies his acceptance of responsibility for all of the conduct to which he pleaded guilty," since "[a]dmitting to criminal activity while attempting to justify or explain it away does not indicate acceptance of responsibility." Foggo's attempt to shift blame to Wilkes and to narrow significantly the scope of his criminal conduct does not reflect acceptance of responsibility, despite his ostensible acknowledgment of the Statement of Facts.

3. What Foggo Must Do Now

Under the circumstances here, the Government cannot recommend a reduction for acceptance of responsibility unless Foggo (1) admits his misconduct spanning the full duration of the scheme – December 2002 through September 2006 – including his abuses of both supervisory positions he held during that period (Chief of Support Operations and Executive Director) and acknowledging that such abuses related to multiple CIA contracts; (2) withdraws any statements to the contrary (including any explicit or implicit attempts to limit to his criminal conduct to the water contract); and (3) withdraws his erroneous characterization of the price disparity between the Archer procurement contracts and the contract that succeeded them (as described next).

D. Disparity Between Archer Procurement Contracts and Replacement Contract

The PSR accurately describes the price disparity between the procurement contracts (the original 12-month and a 6-month extension) into which Foggo corruptly caused the CIA to enter with Archer (collectively referred to as the "Archer contract") and the replacement contract that Foggo did not influence. Foggo criticizes the probation officer's figures and claims that "classified documents" reveal the error in these figures. Foggo's criticism is misguided, and his claim demonstrates again his resort to the specter of "classified information" to support a defense for which there is no factual or legal basis. There is no doubt that the probation officer's figures are correct, and that Foggo is falsely denying the disparity in the prices of these contracts. Both the Archer contract and the replacement contract were firm-fixed-price contracts for procurement services only. *See* attached Declaration of William B. Mitchell, ¶¶ 2-3. All purchasing and shipping costs associated with both contracts were to be reimbursed by the CIA. *Id.* The upshot of this is that the CIA agreed to pay Archer and the replacement contractor a set amount of money for providing procurement services over a set period of time. The costs of the goods procured and the shipping

costs did not affect the price of the contract because these costs were fully reimbursed by the CIA. *Id*. at ¶ 4. Therefore, an apples-to-apples comparison of these contracts would compare only the service components of these contracts, which is precisely what the PSR does, yielding the following disparity:

Archer Contract	Replacement Contract
$2,440,204 ($1,699,904 + $740,300) for 18 months of procurement services. Monthly cost = $135,556	$382,223 for 12 months of procurement services. Monthly cost = $31,852

See Mitchell Decl., ¶¶ 2-4. Accordingly, comparing just the gross service fees, the Archer contract was 425% more expensive than the replacement contract.

A comparison of the costs of each contract relative to the volume of procurement activity (as measured by the total reimbursed costs of goods and shipping) yields the following disparity:

Archer Contract	Replacement Contract
$2,440,204 to procure $1,577,082 worth of goods and shipping. Cost per dollar of goods/shipping = $1.55	$382,223 to procure $845,188 worth of goods and shipping. Cost per dollar of goods/shipping = $0.45

See Mitchell Decl. ¶¶ 2-4. What this comparison means is that under the Archer contract, the CIA paid $1.55 for every $1.00 worth of goods and shipping it obtained (again, this payment to Archer is *in addition to* reimbursing it for the costs of goods and shipping). In contrast, under the replacement contract, the CIA paid $0.45 for every $1.00 worth of goods and shipping it (likewise, this payment is *in addition to* reimbursing for the costs of goods and shipping). Thus, comparing the cost relative to the actual volume of goods ordered under each contract, the Archer contract was nearly 350% more expensive than the replacement contract – for the same procurement services.

Under any fair comparison, therefore, the procurement contracts into which Foggo corruptly caused the CIA to enter cost the CIA many times more money than did the replacement contract into which the CIA entered without Foggo's corrupt influence.

E. Sentencing Guidelines Analysis

Foggo correctly asserts that the Supreme Court recently reversed the previous rule in the Fourth Circuit that a sentence within the Guidelines range is presumptively reasonable at the District Court level. In *Nelson v. United States*, 129 S.Ct. 890, 891 (2009), the Supreme Court held that this presumption is limited to sentencing reviews at the appellate level. Nevertheless, as both parties recognize, the Guidelines must still be calculated accurately and considered under 18 U.S.C. § 3553(a). Foggo's Guidelines calculations are inaccurate.

1. High-Ranking Position

The parties agree that Foggo's base offense level is 14. But the first error in Foggo's Guidelines analysis is his failure to account for the four-level upward adjustment that applies because he was a public official in a "high-level decision-making or sensitive position" throughout his scheme. USSG § 2C1.1((b)(3). Foggo did not object to the PSR's recommendation that this enhancement be applied, and it is amply justified in light of Foggo's positions during the scheme. From July 2001 to November 2004, he was the "senior officer in charge of support operations" at an overseas location of the CIA, and in that position "directed the Overseas Location's daily operations supplying equipment to personnel overseas." Subsequently, Foggo became "the Executive Director (then the third-highest position in the CIA), and as such directed the CIA's daily operations." *See* Statement of Facts, ¶¶ 2, 3. He "abused [these] supervisory positions with the CIA in order to cause the CIA to hire companies or individuals with whom [he] had a personal

relationship." *Id.*, ¶ 11. Accordingly, Foggo's offense level is an 18 before proceeding to any further adjustments.

2. Downward Departure Limited to Two Levels

Foggo's next error is likely a typographical mistake. Foggo asserts that the parties "agree to downward departures totaling 6 points pursuant to U.S.S.G. §3E1.1(a) and (b) and U.S.S.G. §5K2.0(a)(2)." *See* Foggo Sent. Mem., p. 13. The Government has agreed to a two-level downward departure under §5K2.0, but no more. Moreover, even if Foggo clearly accepts responsibility for his offense (which he appears not to have done as of now), that would result in, at most, a three-level reduction under §3E1.1.

3. Intended Loss

The Government maintains that because of the Guidelines' definition of "loss," the total loss to the Government from Foggo's scheme cannot be determined.[2/] Yet, Foggo concedes that he intended to expose the Government to a loss from the 60% markup in the water contract. *See* Foggo Sent. Mem., p. 19. As established in the Government's Sentencing Memorandum, Foggo viewed that contract as a "test bed," and he envisioned expanding it to provide bottled water for other locations, which vision, if realized, could have led to thousands of dollars in monthly orders. *See* Government's Sent. Mem., p. 8; Appx. 9. That was Foggo's vision. That was his intention: thousands of dollars in monthly marked-up orders. At a 60% markup, even a conservative estimate of intended orders of $5,000 per month would amount to intended losses of $36,000 in a year – well within the range to justify a six-level adjustment. It is clear that Foggo envisioned, and intended, at least this much in losses to the Government (and profits to Wilkes) from the water contract(s). The alternative, that he and Wilkes engaged this aspect of the scheme – and Wilkes gave him tens

[2/]Nevertheless, as set forth in the Government's Sentencing Memorandum, the economic harm from the procurement contracts may and should be considered under 18 U.S.C. § 3553(a).

of thousands of dollars in benefits – in exchange for the profits from the lone "test bed" contract totaling less than $1,000 is simply not realistic. This is particularly true in light of Foggo's own description of the contract as a "test bed" for his vision (read: intention) for much bigger orders. Accordingly, the six-level adjustment applies.

4. Value of Anything Obtained by Foggo

Regarding benefits, Foggo does not contest the value of the benefits that he received from Wilkes during this scheme. Nor does he contest that these benefits qualify as "the value of anything obtained by a public official . . . ." under §2C1.1. After all, as explained in more detail in the Government's Sentencing Memorandum, Foggo received these benefits while he was actively pursuing and discussing with Wilkes lucrative contracting opportunities that would enrich Wilkes; Foggo and Wilkes used the trips paid for by Wilkes to plot various aspects of the scheme; and Foggo concealed all of these benefits in his annual disclosure forms. Accordingly, under this alternative basis, a six-level upward adjustment applies.[3/]

[3/] As explained in the Government's Sentencing Memorandum, the value of anything obtained or to be obtained by "others acting with" Foggo (*e.g.*, Wilkes and ER) also qualifies for this upward adjustment.

5. Final Calculations

When computed correctly, Foggo's Guidelines calculations amount to the following:

Base Offense Level [§2C1.1(a)(1)]	14
High-Level Position [§2C1.1(b)(3)	+4
Losses/Benefits [§§2C1.1(b)(2) and 2B1.1(b)(1)(D)]	+6
Downward Departure [§5K2.0]	-2
Total Offense Level (without acceptance)	22
Total Offense Level (with acceptance)	19

Therefore, even if he ultimately qualifies for a reduction for acceptance of responsibility, a probationary sentence is not within Foggo's Guidelines range.

D. Foggo's Employment Record Warrants Neither Departure Nor Variance

Foggo claims that his employment record justifies a substantial departure from the Guidelines. None of the cases he cites support his claim that his record of government service is so extraordinary that it warrants a downward departure. The cited cases are mostly out of circuit and mostly unpublished. More importantly, in *none* of the cases did the defendant's crime consist of abusing the very same service position upon which the claim for downward departure was based.

Controlling case law from this circuit firmly establishes that the record of service Foggo submits to this Court for consideration – even assuming its unvarnished accuracy – is insufficient for any departure or variance from the typical sentence. In *United States v. Rybicki*, 96 F. 3d 754, 758-59 (4th Cir. 1996), the Fourth Circuit reversed as clearly erroneous a district court's grant of downward departure for a defendant who, among other things, was a highly decorated Vietnam War veteran who had saved a civilian's life during the My Lai incident and had an unblemished record of 20 years of service to his country, both in the military and in the Secret Service. The Court flatly

rejected this as grounds for a departure, noting that:

> Rybicki's 20 years of unblemished service to the United States and his responsibilities to his son and wife, both of whom have medical problems, are also factors that the Sentencing Guidelines have expressly addressed, instructing that they are ordinarily not relevant and therefore "discouraged." Because the record does not indicate that the factors are present to an "exceptional" degree, they may not form the basis for a downward departure.

Id. at 759 (citations omitted).

The Fourth Circuit also rejected the district court's finding that the consequences to the defendant's future employment options were sufficient punishment warranting a sentence of probation: "While it is true that Rybicki is a firearms handler and instructor, job loss or disqualification from future employment is a factor that the [Supreme Court], in analogous circumstances, found insufficient to warrant a downward departure." *Id*. at 758-59. *See also Koon v. United States*, 518 U.S. 81, 109-10 (1996) ("not unusual for a public official who is convicted of using his governmental authority to violate a person's rights to lose his or her job and to be barred from future work in that field . . . . many public employees are subject to termination and are prevented from obtaining future government employment following conviction of a serious crime, whether or not the crime relates to their employment"); *United States v. Paradies,* 14 F.Supp.2d 1315, 1320 n.4 (N.D. Ga. 1998) (denying downward departure based on loss of future employment because defendant's "loss is the natural consequence of his own illegal actions."), cited at Foggo's Sent. Mem., p. 15 n.4; *see also*, USSG § 5H1.11 ("Military, civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure is warranted.").[4/]

[4/]Foggo's citations to out-of-circuit, mostly unpublished cases do not support his motion for a downward departure here. In *United States v. Piccolo*, 282 F.3d 41, 43 n.2 (1st Cir. 2002), where the defendant was convicted of false statements in violation of 18 U.S.C. § 1001, the government moved for the downward departure and thus the matter was uncontested. In *United States v. Goodluck*, 1996 WL 700036 *1 (10th Cir. 1996) (unpublished), where the defendant was convicted

E. 3553(a) Factors Do Not Weigh In Favor of Sentence of Probation

1. Foggo's Family Ties Do Not Warrant Probation

Even assuming the Court fully credits Foggo's suspect claim to be a "family man,"[5/] in light of the Guidelines' policy discouraging family circumstances as a basis for sentencing departures, the Fourth Circuit has "narrowly construed" departures based on family ties and responsibilities.

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of arson on an Indian reservation based on his carelessness "in setting open fires within the building to keep warm," the Tenth Circuit noted that it was "not as impressed" as the district court was with the defendant's war record, but held that the sentencing court did not abuse its discretion in determining that the offense there fell outside the heartland of the guidelines ("it is the atypical circumstances of the offense here that underlie the downward departure"). In *Gill v. United States*, 2008 WL 2260080 (E.D.N.C. 2008) (unpublished), the court denied a writ of habeas corpus, and in doing so, noted that the sentencing court had considered his unspecified military service in sentencing within the Guidelines range even though it denied his motion for downward departure. In *United States v. Wheeler*, 1990 WL 183908 *(6th Cir. 1990) (unpublished), the defendant claimed that the district court erred by not granting a greater downward departure for his military record than one that resulted in a 25-year sentence; in an unpublished opinion, the Sixth Circuit rejected the defendant's argument. Piccolo, Goodluck, and Wheeler were not convicted of conduct related to their military service, upon which they based their requests for departures.

The remaining cases upon which Foggo relies are no more availing. In *United States v. Robinson*, 516 F.3d 716, 718 (8th Cir. 2008), the Eighth Circuit affirmed the district court's rejection of the defendant's motion for a downward departure based on his "age and health, public and military service, and the jury's split verdict." *See also United States v. Benjamin*, 2006 WL 3227881 (3d Cir. 2006) (unpublished) (rejecting defendant's challenge to two-level upward departure for obstruction of justice, which happened to be offset by two-level downward departure for unspecified "extraordinary non-military, civic and community contributions," which the government did not challenge); *Paradies*, 14 F.Supp.2d at 1322 (district court departure downward from 33 months to 18 months justified where 76-year-old defendant was a WWII veteran with a combination of ailments that could have transformed a 33-month sentence into a life sentence); *United States v. Caruso*, 814 F. Supp. 382, 284 (S.D.N.Y. 1993) (departing downward from 12-18 months to six months of home confinement for 66-year-old defendant presenting a combination of military service, medical problems requiring hospitalization, good employment record, and likely future compliance with the law). Again, none of these cases reflect that the defendant was convicted for crimes committed in the very public service touted as the basis for the departure, as does Foggo.

[5/]The Government disputes this claim and can submit supporting documents to the Court *in camera* should Foggo continue to press this point in urging the Court to exercise leniency. Suffice it to say that Foggo's apparent failure to acknowledge to his supporters the full scope of his criminal conduct parallels his apparent failure to apprise them of the extent of his infidelities, which far transcend ER. This again demonstrates Foggo's ability and inclination to present one face to his supporters and to the Court, all the while hiding his true character.

See United States v. Colp, 249 F. Supp. 2d 740, 742 (E.D. Va. 2003); USSG § 5H1.6 ("[F]amily ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted. . . . Family responsibilities that are complied with may be relevant to the determination of the amount of restitution or fine."). For example, the economic hardship that a family will encounter as a result of the sole provider's incarceration, standing alone, is insufficient to justify a downward departure. *Colp*, 249 F. Supp. 2d at 742. Here, Foggo's family will continue to enjoy the benefits of his pension while he is in prison. Although they will be deprived of his earnings, at $420 per month (PSR 19), Foggo likely earns less than is than necessary for his own support. From an economic perspective, therefore, Foggo's imprisonment will not harm his family at all.

Likewise, the deprivation of emotional and economic support of a parent is a typical consequence of criminal conduct that does not lie outside of the heartland of cases so as to warrant a departure. *See, e.g., United States v. Brand*, 907 F. 2d 31, 33 (4th Cir. 1990) (reversing district court's grant of departure where defendant was sole custodian of two minor children, who would be sent to foster care if defendant were incarcerated); *United States v. Bell*, 974 F.2d 537, 539 (4th Cir. 1992) (reversing district court's grant of departure where defendant was father in a "traditional, two-parent family," finding that defendant had "'shown nothing more than that which innumerable defendants could not doubt establish: namely, that the imposition of prison sentences normally disrupts spousal and parental relationships,' and that simply is not a sufficient basis for a departure.") (citation omitted).

2. Employment Consequences Do Not Replace Incarceration as Just Punishment

The controlling case law cited above confirms that consequences to Foggo's future employment prospects are not sufficient to substitute for a term of incarceration. He claims that "had he retired without incident," he would "have had the option to obtain a high-level, lucrative

position in the private sector." Foggo's Sentencing Memo, p. 21. Unlike the defendant in *Rybicki*, Foggo's disqualifying "incident" was itself employment-related: his abuse of high-ranking government positions to perpetrate a years-long criminal scheme against the public generally and his employer specifically. It is the exposure of these years of misconduct directed at the public and his employer that have dimmed Foggo's employment prospects far more than has the fact of his conviction. To give Foggo a break in his sentence due to this consequence would be tantamount to giving him credit for having been a bad and disloyal employee. Therefore, if a departure was inappropriate in *Rybicki*, it would be doubly so here.

3. A Sentence of Probation Will Not Deter Others

Foggo claims that his "very public fall from grace" will suffice to deter other high-ranking officials from committing felonies, and claims that the significant custodial sentence warranted here would "discourage others from cooperating in the future." The Court should understand that Foggo has not cooperated with the Government in any sense. The Government is not recommending a departure for any "cooperation," and objects to this characterization of Foggo's conduct, which appears to be another attempt to minimize his culpability and cast his guilty plea as having been done for the good of the nation. Moreover, the "very public" nature of this case provides an opportunity for the Court to demonstrate that high-level offenders will not escape the same kinds of sentences imposed upon less-powerful members of our society. Foggo pled guilty to reduce his sentencing exposure for his years of misconduct, and for no other reason. By limiting his maximum sentence to 20 years' imprisonment, avoiding the rigors of trial, and receiving the Government's agreed-upon sentencing recommendations, Foggo has realized the benefits of his plea. He is entitled to no more.

4. A Sentence of Probation Would be Disparate from Similarly Situated Defendants

After repeatedly pointing out that his indictment and guilty plea were not related to the criminal conduct involving disgraced Congressman Cunningham, Foggo then argues that this Court should consider the sentences of co-conspirators in the Cunningham case as "similarly situated defendants" pursuant to 18 U.S.C. § 3553(a)(6). Foggo fails to apprise the Court of the circumstances surrounding the sentences imposed in the Cunningham case. For example, Cunningham, who received a 100-month sentence, pled guilty and cooperated prior to indictment, saving the resources of the grand jury and the court and government in pretrial litigation. Mitchell Wade, who received a sentence of 30 months, supplied extraordinary cooperation with the government, including the provision of extensive documentary evidence and hours of testimony at the trial of defendant Wilkes. Wade, too, pled guilty before being indicted. He also began cooperating and agreed to plead guilty almost immediately after suspicions arose regarding his and Cunningham's relationship. The one defendant who neither pled guilty prior to indictment nor cooperated, Wilkes, received a sentence of 144 months.

Foggo is most similar to Cunningham, who was the public official involved in that conspiracy, without whose criminal involvement the crimes could not have occurred and the public would not have been defrauded. Unlike Cunningham, however, prior to pleading, Foggo was indicted. He then tried to convince this Court that (1) the charges against him should be dismissed; and (2) that his defense would require the disclosure of classified information. Only after this Court denied Foggo's motions to dismiss and rejected his graymail efforts did he plead guilty.

Foggo recites a litany of cases that he claims are comparable to his and warrant a sentence of probation. According to Foggo's own descriptions, however, few of these examples involved a conviction for honest services wire fraud, and none involve over $1 million in harm to the

Government.[6/] Many are for perjury or false statement, lesser crimes that carry a maximum penalty of 5 years. *See* Foggo's Sent. Mem., p. 25-26 (Libby convicted of perjury and obstruction of justice; Pointdexter convicted of false statement; Watt convicted of perjury). In contrast, Foggo pled guilty to an offense carrying a 20-year maximum. *See* 18 U.S.C. §§ 1341, 1346. In some cases, Foggo cites the custodial time the defendant served, not the sentences imposed -- which are much closer to the Government's requested sentence than to Foggo's request for probation. For example, former Congressman Robert Ney pled guilty to conspiracy involving honest services fraud and false statement, and was sentenced to 30 months in custody. (http://www.usdoj.gov/opa/pr/2007/January/07_crm?027.html). Former U.S. Associate Attorney General Webb Hubbell was sentenced to 21 months' imprisonment for mail fraud and tax evasion. (http://www.cnn.com/ALLPOLITICS/1997/92/10/time/hubbell/.)

Review of relevant case law indicates that defendants who have been convicted of the same crime Foggo has admitted have received significantly higher sentences than that recommended by the Government here. *See, e.g., United States v. Harvey,* 532 F.3d 326 (4th Cir. 2008) (affirming sentences for defendants convicted of honest services fraud and bribery to 70 and 72 months); *United States v. Vinyard*, 266 F.3d 320, 324 (4th Cir. 2001) (70 months' imprisonment for honest services fraud conviction); *United States v. Geddings*, 278 Fed. Appx. 281 (4th Cir. 2008) (unpublished) (after conviction for honest services mail fraud, where court found no upward enhancement for losses or benefits, but defendant was a public official, defendant's sentencing range was 33-41 months and a 48-month sentence was reasonable).

[6/] Again, the Government maintains that the harm Foggo caused does not qualify as loss under the Guidelines because the specific amount of that harm was not reasonably foreseeable to him. Nonetheless, this measure is important for the Court to consider in analyzing the § 3553(a) factors.

III.

CONCLUSION

As set forth in the Government's Sentencing Memorandum, if Foggo qualifies for acceptance of responsibility, his adjusted offense level would be 19, with a Guidelines range of 30-37 months. If he does not qualify for acceptance of responsibility, his adjusted offense level would be 22, with a Guidelines range of 41-51 months. Under either scenario, the Government continues to respectfully recommend that the Court impose a sentence at the high end of the applicable Guidelines range.

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