United States District Court
District of Connecticut

United States of America	:	**Crim. No. 3:14-cr-00065-JBA**
Plaintiff	:	
	:	
v.	:	
	:	
Brian Foley,	:	
Defendant	:	**December 29, 2014**

Redacted Memorandum In Aid Of Sentencing

I. INTRODUCTION

The Defendant, **Brian Foley,** in accordance with Rule 32(o) of the Local Rules of Criminal Procedure, submits this memorandum in aid of sentencing scheduled for January 9, 2015 at 10:00 a.m.

On March 31, 2014, Mr. Foley pleaded guilty to a one-count Information charging him with conspiracy to make illegal campaign contributions in violation of 2 U.S.C. § 437g(d)(I)(A)(ii) and 18 U.S.C. § 371. The parties entered into a Plea Agreement Letter dated March 31, 2014 as well as a Cooperation Agreement. The Plea Agreement Letter, however, neither sets forth a stipulation of offense conduct nor an agreement concerning Mr. Foley's anticipated *advisory* Guidelines calculation. However, Probation has calculated the *advisory* Guidelines range as follows. A base offense level of eight is recommended pursuant to U.S.S.G. § 2C1.8. Probation then recommends a six-level enhancement under U.S.S.G. § 2B1.1(b)(1)(D) because the illegal contribution totaled $35,000.00. Probation next suggests a two-level increase

for obstruction of justice pursuant to U.S.S.G. § 3C1.1.[1] Finally, Probation indicated that Mr. Foley clearly demonstrated an acceptance of responsibility and therefore recommended a three-level decrease in the adjusted offense level pursuant to U.S.S.G. § 3E1.1. The result is a total offense level of thirteen, which calls for a sentence within the advisory Guidelines range of 12-18 months. However, because Mr. Foley pleaded guilty to a misdemeanor, his maximum sentence cannot exceed twelve months.

In spite of a recommended Guidelines range of 12-18 months (or 10-16 under the Defendant's calculations), Mr. Foley respectfully represents that a sentence of incarceration is not warranted in this case, in light of the various sentencing factors this Court is required to consider, as outlined below. In short, a sentence of probation and community service would satisfy the Second Circuit's recognition of imposing "individualized justice," United States v. Crosby, 397 F.3d 103, 114 (2d Cir. 2005), abrogated on other grounds, United States v. Fagans, 406 F.3d 138, 142 (2d Cir. 2005), as well as the statutory mandate that a sentence be sufficient, but not greater than necessary to comply with the purposes of sentencing.

[1] Mr. Foley disputes the application of the obstruction of justice enhancement in this case, which will be addressed more fully below. Based upon the undersigned's calculation, without the obstruction enhancement, Mr. Foley's adjusted offense level is fourteen. Subtracting two additional levels pursuant to U.S.S.G. § 3E1.1 results in a total offense level of twelve and an advisory Guidelines range of 10-16 months.

II. OBJECTIONS TO THE ADVISORY GUIDELINES RANGE

Mr. Foley objects to the obstruction of justice enhancement recommended by Probation in the PSR because (1) Application Note 4(G) of U.S.S.G. § 3C1.1 does not apply in the context of this case; and (2) the statements were made in the course of plea negotiations and are therefore inadmissible as against Mr. Foley pursuant to Fed. R. Evid. 410.

In Paragraphs 30 and 41 to the PSR, Probation has recommended that an obstruction of justice enhancement be applied to Mr. Foley as a result of his allowing his counsel to issue a series of letters to the Government attorneys which were "designed to mislead the prosecution into believing that the relationship between Apple Rehab and Mr. Rowland was really a legitimate consulting arrangement." See PRS at ¶ 30. Under the Sentencing Guidelines, a materially false statement to a law enforcement official constitutes an obstruction of justice when it "significantly obstructed or impeded the official investigation or prosecution of the instant offense." U.S.S.G. § 3C1.1, Application Note 4(G).

It is not clear the Government's case was actually impeded by these letters, which were authored by counsel, not under oath, based upon information from a number of sources and forwarded to the Government during the course of the investigation into Mr. Foley's conduct.[2] [3] Indeed, the Government did not even raise

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However, the maximum sentence in this case cannot exceed twelve months.

[2] The vast majority of the information contained within the referenced letters came from Brian Bedard, who spoke with and met with the undersigned counsel on

this issue with Probation let alone meet its burden of proof that the enhancement applies.

Notwithstanding the foregoing, Mr. Foley obviously testified at trial that the letters were designed to mislead the Government so that he would not ultimately be charged. What makes this case somewhat unique, and why the enhancement ought not apply, is that Mr. Foley ultimately told the truth about his conduct at a meaningful point in the Government's investigation. He submitted to a proffer with the Government several months before Mr. Rowland's indictment and his own guilty plea to an Information wherein he gave a truthful account of his conduct; he testified before the grand jury which indicted Mr. Rowland, wherein he acknowledged that the

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multiple occasions leading up to the forwarding of the letters to the Government. Additionally, aside from one letter (concerning the dates on which Mr. Rowland participated in various meetings with Apple representatives), Mr. Foley did not review or approve of the content before it was sent to the Government attorneys. Further, relative to the "meeting dates" letter, which Mr. Foley did approve before it was sent, the information in that letter came from a written summary prepared by Brian Bedard at the commencement of the Government's investigation, which he provided to the undersigned counsel.

[3] See United States v. Bliss, 430 F.3d 640, 649 (2d Cir. 2005) (emphasis supplied) ("[the Application Notes] indicate that neither 'providing a false name or identification document at arrest' nor 'making false statements, not under oath, to law enforcement officers 'would ordinarily warrant application of the obstruction-of-justice enhancement ***unless such conduct actually hindered or impeded the investigation or prosecution of the offense***. U.S.S.G. § 3C1.1, App. Notes 5(a) & (b) (emphasis added). If misrepresentations made directly to law enforcement officers in the course of the investigation cannot be the basis for an obstruction-of-justice enhancement ***without a showing of actual prejudice*** then, a fortiori, the use of an alias in mundane affairs ordinarily should not be deemed obstructive without such a showing."); see also United States v. Williams, 79 F.3d 334, 337 (2d Cir. 1996) (defendant's false statements to law enforcement were insufficient to invoke the obstruction enhancement where law enforcement authorities already possessed

letters were misleading; and he testified at Mr. Rowland's criminal trial, at length, that while the letters contained truthful information, they did not present the entire picture and were designed to mislead the prosecutors. Indeed, Mr. Foley's cooperation with the Government and his trial testimony were critical in securing a conviction of Mr. Rowland, as the Government conceded in its Memorandum in Aid of Sentencing as to John Rowland ("The contract's veneer of legitimacy presented significant challenges to the investigation and might have thwarted the investigation entirely had the Government not discovered draft versions of the contract and secured Brian Foley's cooperation."). Government Memorandum, Case3:14-cr-00079-JBA, Doc. No. 182, p. 8.

Under these circumstances, an obstruction of justice enhancement is not appropriate. In fact, in a separate Application Note of U.S.S.G. § 3C1.1, the same conduct as described in Application Note 4(G) is also listed with examples of types of conduct which ordinarily do not warrant an adjustment under this guideline. See Application Note 5(B) ("making false statements, not under oath, to law enforcement officers…"). The double-listing of the same conduct, in contradictory application notes, implies that under the circumstances of a particular case, like this one, "false statements" to law enforcement may not warrant the enhancement.

In addition, Mr. Foley also objects to the obstruction enhancement pursuant to Fed. R. Evid. 410 because such statements as those made in the letters would

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contrary incriminating information.)

ordinarily not be admissible against Mr. Foley at a trial, if he had not pleaded guilty or withdrew his guilty plea. Consequently, they cannot be the basis of an obstruction enhancement. By way of background, the letters were drafted by counsel for two purposes: (1) to convince the Government not to charge Mr. Foley; and (2) in the alternative, if the Government decided to charge Mr. Foley, to charge him more leniently. Consequently, the letters were sent in the course of continuing plea negotiations. This practice routinely occurs between the defense bar and Government attorneys, although the statements made by counsel are customarily made orally rather than in writing. If an obstruction enhancement were applied under these circumstances, it would chill future discussions like these and almost certainly would need to be applied in every case in this federal system. The obstruction enhancement, quite simply, was not meant to apply to this scenario.

III. THE SENTENCING FRAMEWORK: FACTORS TO BE CONSIDERED IN IMPOSING A "REASONABLE" AND "INDIVIDUALIZED" SENTENCE PURSUANT TO 18 U.S.C. § 3553(A)

Title 18, United States Code § 3553(a) provides the framework within which a sentencing judge must determine the appropriate sentence for a defendant:

> Factors to be considered in imposing sentence. The Court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider:
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> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

A. to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

B. to afford adequate deterrence to criminal conduct;

C. to protect the public from further crimes of the defendant; and

D. to provide the defendant with needed education or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentence available;

(4) the kinds of sentence and the sentencing range established for—

A. the applicable category of offense committed by the applicable category of defendant as set forth in the Guidelines

. . .

(5) any pertinent policy statement—

A. issued by the Sentencing Commission . . .

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

As the Court is well aware, it has been established since 2005 that the mandatory nature of the Guidelines was unconstitutional, and that the Guidelines' binding authority violated a defendant's Sixth Amendment right to trial by jury. See United States v. Booker, 543 U.S. 220 (2005). While a sentencing court is now still

required to consider the Guideline range, it also must consider, equally, the other factors enumerated under § 3553(a) when imposing a sentence. This concept was upheld in Gall v. United States, 552 U.S. 38 (2007), and Kimbrough v. United States, 552 U.S. 85 (2007), where the United States Supreme Court ruled that the District Court is held to no special standard when it departs from the advisory Guidelines, and that such sentences on appeal, no matter how far above or below the Guidelines range, are only reviewed under the highly deferential abuse-of-discretion standard.

Gall's significant limitation on the reach of Appellate Courts to overturn the sentencing decisions of the district court in particular confirms that district courts are once again free to impose "individualized justice" as articulated by the Second Circuit. United States v. Crosby, supra, at 114. Thus, while a sentencing court must consider the applicable Guidelines range, there is no presumption that a sentence within that range satisfies all the objectives of § 3553(a). In fact, neither § 3553(a) nor the majority opinions in Booker or more recently in Gall and Kimbrough suggest that the sentencing court should give the Guidelines any priority over the other factors listed in § 3553(a).[4] To this end, the Second Circuit has stated that "[i]t is now … emphatically clear that the Guidelines are guidelines - that is, they are truly advisory. A district court may not presume that a Guidelines sentence is reasonable; it must instead conduct its own independent review of the sentencing factors, aided

[4] It is noteworthy that the majority in Gall declined to adopt Justice Alito's suggestion, in dissent, that the Guidelines should hold "significant" weight to a judge's sentencing decision as compared to the other factors. See Gall, 552 U.S. at 5.

by the arguments of the prosecution and defense." United States v. Cavera, 550 F.3d 180, 189 (2d Cir. 2008). Indeed, giving the Guidelines any sort of presumptive correctness or weighted consideration would in effect resurrect them to the level of de facto mandatory, which obviously runs afoul of Booker. See United States v. Dorvee, 604 F.3d 84, 93 (2d Cir. 2010) (citing United States v. Fernandez, 443 F.3d 19, 27 (2d Cir. 2006)) (declining to establish "any presumption, rebuttable or otherwise, that a Guidelines sentence is reasonable").

Guideline § 1B1.1 sets forth a three-step process for the sentencing court to follow in determining a "reasonable" sentence. The first step requires the sentencing court to determine the correct Guideline range for the case. In the second step, the sentencing court must determine whether a departure from the Guideline range is warranted due to the presence of extraordinary circumstances "of a kind" or "to a degree" that were not adequately considered by the Commission. These two steps will produce a sentence that is "under the framework set out in the Guidelines."

The third step requires the sentencing court to consider the factors under 18 U.S.C. § 3553(a) taken as a whole in determining an appropriate sentence. In this third step, the court must determine whether to impose a "variance" sentence, which is a sentence outside of the Guideline range (many courts have called this "a non-Guidelines sentence") by considering the factors set forth in Section 3553(a).

In the present case, while the Sentencing Guidelines have advised a period of 12-18 months imprisonment (or 10-16 under the Defendant's calculations), full

consideration of the other Section 3553(a) factors do not justify such a sentence. For the reasons articulated below, Mr. Foley respectfully requests that the Court downwardly depart from the advisory Guideline range or impose a non-Guidelines sentence (i.e., a "variance") based on his cooperation with the Government concerning his own prosecution as well as that of former Governor John Rowland as well as his personal characteristics and/or a combination of factors, which under these circumstances would fulfill Judge Newman's recognition of imposing "individualized justice," United States v. Crosby, supra, at 114, as well the statutory mandate that "**a sentence be sufficient, but not greater than necessary**" to comply with the purposes of sentencing. 18 U.S.C. § 3553(a).

III. A SENTENCE OF PROBATION WOULD BE REASONABLE AND APPROPRIATE IN THIS CASE, WHETHER A DOWNWARD DEPARTURE IS GRANTED OR A NON-GUIDELINES SENTENCED IS ISSUED

This Court should not regard the recommended Guidelines range of 12-18 months as reasonable, and, whether by way of variance or downward departure, should instead sentence Mr. Foley to probation.

A. Mr. Foley's Substantial Assistance to the Government Warrants Special Consideration by the Court

Mr. Foley anticipates that the Government will file a motion pursuant to U.S.S.G. § 5K1.1 requesting that the Court impose a non-guideline sentence below the advisory Guideline range and to depart downward from that range based upon Mr. Foley's substantial assistance in the investigation and prosecution of others, namely John Rowland.

Although a lengthy investigation was pursued by the Government, which Mr. Foley initially contested, he ultimately came to terms with his criminal behavior at a critical time in the Government's investigation, pleaded guilty to a federal elections offense and fully cooperated with the Government, not only providing the Government attorneys and federal agents with valuable information about his conduct, but also that of several others, including former Governor John Rowland, who appeared before this Court in September to answer for his second federal offense in ten years. His guilty plea and cooperation also lead to the guilty plea of Mrs. Wilson-Foley.

Brian Foley initially met with the Government on four occasions between January and April of 2014 to provide information concerning his offenses as well as that of John Rowland and to prepare for his grand jury testimony, which was given on April 10, 2014. He then met with the Government trial team on six additional occasions for lengthy trial preparation sessions, taking the Government through his anticipated testimony and explanation of the proposed exhibits. His cooperation culminated in his trial testimony, which took place over the course of three days. His cooperation and testimony was critical in securing a conviction of Mr. Rowland. Based upon this cooperation, information and assistance to the Government, Mr. Foley respectfully requests that this Court take due notice of his efforts and issue him a sentencing below the applicable Guidelines range. Indeed, consistent with the Government and Court's position in United States v. Soucy, a sentence of probation

would adequately take into account all of the sentencing factors set forth in 18 U.S.C. § 3553(a) as well as send a message to the public that cooperation in public corruption cases is critical, and cooperators will receive a benefit for their efforts. See United States v. Soucy, 12-cr-167 (JBA) Transcript, p. 20 ("particularly in public corruption cases, cooperating witnesses are essential to revealing and providing testimony from the participants as to what was actually occurring"), p. 21 ("there are defenses that are important to overcome through a cooperating witness. So cooperating witnesses are essential to combatting public corruption, and people in this state and elsewhere need to understand that cooperation does provide a benefit"), p. 48 ("I trust that the term in a halfway house and the term of probation furthers that message, namely if you have gotten deep into the weeds of public corruption, there is a way out, which can be by extraordinary cooperation and assistance to the government, in this case one whose timing was critically important.")

B. The Loss Guidelines Employed in Determining the Advisory Guidelines Range Are Arbitrary and Not Based Upon Empirical Data[5]

In the present matter, although Mr. Foley's recommended base offense level of 8 comes from U.S.S.G. § 2C1.8, a 6 level increase is recommended under U.S.S.G. § 2B1.1 because the total illegal contribution in this case was $35,000.00. However, there is a recognition in the federal system that the Guidelines for economic crimes, such as U.S.S.G. § 2B1.1, are not based upon any empirical analysis and are therefore wholly arbitrary in their application. See Rita v. United States, 551 U.S. 338, 350 (2007) (The fraud Guideline, which is not based on empirical evidence, does not "reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives."); United States v. Corsey, 723 F.3d 366, 380 (2d Cir. 2013) (Underhill, J. concurring) ("The three sets of amendments to the loss table

[5] Preliminarily, it is curious why the loss table under U.S.S.G. § 2B1.1 is employed in this case because no "loss" actually occurred here. Rather, there was an illegal contribution to a campaign which was not properly reported to the Federal Elections Commission. U.S.S.G. § 2B1.1 was meant to apply to cases involving "Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States". This case does not fall within any of those categories. However, since there was a "value [to] the illegal transaction which exceeded $5,000" the Guidelines refer the parties to the loss table in § 2B1.1. See U.S.S.G. § 2C1.8. That § 2B1.1 is a catchall for a multitude of offenses having nothing whatsoever to do with theft or fraud makes its application in this case completely unreliable. In short, a Guideline that treats a dollar of campaign contributions as the equivalent of a dollar of fraud loss, even though the two types of harms are completely different, results in a calculation that has no relationship to the underlying conduct. Stated differently, a loss-driven approach to calculating the Guidelines range in this case does not fairly measure the severity of Mr. Foley's offense, which did not involve a financial loss.

of the fraud guideline alone have effectively multiplied several times the recommended sentence applicable in 1987 for large-loss frauds, which itself was set higher than historic sentences. Each of the three increases in the recommended Guideline ranges for fraud crimes was directed by Congress, without the benefit of empirical study of actual fraud sentences by the Sentencing Commission."); United States v. Gupta, 904 F. Supp. 2d 349, 351 (S.D.N.Y. 2012) (citations omitted) ("[T]he…Commission chose to focus largely on a single factor as the basis for enhanced punishment: the amount of monetary loss…occasioned by the offense. By making a Guidelines sentence turn, for all practical purposes, on this single factor, the…Commission effectively ignored the statutory requirement that federal sentencing take many factors into account, and by contrast, effectively guaranteed that many such sentences would be irrational on their face.") Because the six-level enhancement in this case is based solely upon a monetary figure, with no empirical evidence to support its application, the *advisory* Guidelines calculation fails to take into account the various mitigating factors which lead to the commission of a particular offense as well as the personal characteristics of each defendant standing before the court.

Although there is a movement to reform the present economic Guidelines, the proposed amendments suffer from the same issues as the current Guidelines – the "structural framework…is not ideal because it can be unduly rigid and lead to the arbitrary assignment of values and the overemphasis of considerations that are more

easily quantified to the detriment of equally relevant considerations that are less easily quantified. There is also a risk under the current structural framework that a guideline will appear to carry more empirical or scientific basis than is present." See "A Report on Behalf of The American Bar Association Task Force on The Reform of Federal Sentencing for Economic Crimes" (hereafter "Report"), attached hereto as Exhibit A; see also United States v. Corsey, supra, at 377, 379. Indeed, "the [economic] guidelines are now divorced both from the objectives of Section 3553(a) and, frankly, from common sense. Accordingly, the guidelines calculations in such cases are of diminished value to sentencing judges." Id. at 380 (quoting Frank O. Bowman, III, *Sentencing High–Loss Corporate Insider Frauds After* Booker, 20 FED. SENT'G REP. 167, 168 (2008)).[6]

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[6] Even the Sentencing Commission has recognized the severe effect that the loss amount can have on the applicable Guidelines range, and that undue emphasis on this single factor may in some cases inappropriately distort the Guidelines calculation. For example, application note 20(C) to U.S.S.G. §2B1.1 states that "[t]here may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted." As the Second Circuit has noted, this commentary by the Commission "is simply a recognition that when an aggravating factor is translated to a sliding scale of offense levels, the assumptions underlying that translation cannot fairly reflect every possible case." United States v. Restrepo, 936 F.2d 661, 667 (2d Cir. 1991); accord United States v. Koczuk, 166 F. Supp. 2d 757, 763 (E.D.N.Y. 2001) ("where the monetary table bears little or no relationship to the defendant's role in the offense and greatly magnifies the sentence, the district court should have the discretion to depart downward"). In addition, a downward departure on this basis is available even if the sentencing court determines that the defendant did not play a minor or minimal role in the scheme. See United States v. Stuart, 22 F.3d 76, 83-84 (3rd Cir. 1994) ("the district court was unable to apply the full four-level downward adjustment for minimal participation because of [defendant's] knowledge, but it has the power to depart if it considers [defendant's] role in the

Even though the proposed amended economic Guidelines suffer from the same imperfections as the present Guidelines, overall, in typical fraud cases, they appear to provide better guidance in assessing a defendant's culpability and ultimate Guidelines calculation. What makes its application difficult in this case is that this case does not involve a "typical fraud" whereby an identifiable victim was bilked out of a certain sum of money. Nevertheless, one of the reforms proposed by the task force is an offense level cap for non-serious offenses perpetrated by first-time offenders: "If the defendant has zero criminal history points under Chapter 4 and the offense was not 'otherwise serious' within the meaning of 28 U.S.C. § 994(j), the

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offense such that the monetary loss enhancement overstated his criminal culpability and inaccurately skewed the sentencing calculus.")

In light of Booker and the other factors that a court now must consider under §3553(a), it is increasingly questionable whether the loss amount continues to deserve the priority it received under the old Guidelines system:

> The Guidelines place undue weight on the amount of loss involved in the fraud. This is certainly a relevant sentencing factor: All else being equal, large thefts damage society more than small ones . . . But the Guidelines provisions for theft and fraud place excessive weight on this single factor, attempting – no doubt in an effort to fit the infinite variations on the theme of greed into a limited set of narrow sentencing boxes – to assign precise weights to the theft of different dollar amounts. In many cases . . . the amount stolen is a relatively weak indicator of the moral seriousness of the offense or the need for deterrence.

United States v. Emmenegger, 329 F. Supp. 2d. 416 (S.D.N.Y. 2004); see also United States v. Pimental, Crim No. 99-1031-NG, 2005 WL 958245, at *3 (D. Mass. Apr. 21, 2005) ("Even if the loss were as the government described, I would conclude that that figure dramatically overstated [defendant's] culpability, whether considered under the Guidelines or in the light of the 18 U.S.C. § 3553(a) factors.").

offense level shall be no greater than 10 and a sentence ***other than imprisonment*** is generally appropriate." See Report at p. 1 (emphasis supplied).

In the revision's proposed "Application Notes", the task force explains what it means by offenses that are not "otherwise serious".

> The Sentencing Reform Act provides as follows: 'The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense….' 28 U.S.C. § 994(j). **Many of the offenses falling within this guideline are not 'otherwise serious**.'
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> In determining whether an offense is not "otherwise serious," the court should consider (1) the offense as a whole, and (2) the defendant's individual contribution to the offense. For example, a low level employee who is peripherally involved in what would be an "otherwise serious" offense as to other defendants may nevertheless qualify for this offense level cap.
>
> Factors to be considered in determining whether the offense is one for which a sentence of probation is appropriate include the following: the amount of the loss; whether loss was intended at the outset of the offense conduct; whether the defendant's gain from the offense is less than the loss; whether the defendant's offense conduct lacked sophistication (including whether it was committed in a routine manner or without the involvement of a large number of participants); whether the defendant acted under duress or coercion; the duration of the offense conduct; whether the defendant voluntarily ceased the offense conduct before it was detected; and the nature of the victim impact caused by the offense. Where the defendant has no criminal history points, and where the circumstances of the offense support a finding that the offense was not 'otherwise serious,' the offense level under this guideline shall be no greater than 10, and a sentence other than imprisonment is generally appropriate.

See Exhibit I for unreported decisions referenced throughout this memorandum.

See Report at p. 6-7 (emphasis supplied).

Again, the difficulty in applying all of these factors to the present case is that they pertain to the "typical" fraud case. Nevertheless, under these proposed revisions to the Guidelines, there is little doubt that Mr. Foley's offense was not 'otherwise serious', within the meaning set forth in the proposed Application Notes.[7] His was not a crime of violence, and no one was placed in danger as a result of his actions. Further, under a Guideline which calculates losses up to $50,000,000.00, the amount of the "loss" (or illegal contribution) in this case is not particularly remarkable. Although the public was denied information which it was entitled to, that information, in essence, pertained to a surreptitious $35,000.00 contribution made by Brian Foley to pay for the services that John Rowland rendered to Lisa Wilson-Foley's Congressional campaign. Other than the public's intangible right to be informed, there is no identifiable victim in this case that was defrauded out of $35,000.00.

In sum, although it is difficult to apply the factors set forth in the Application Notes to the proposed revision to § 2B1.1 to this case, it is equally impractical and arbitrary to apply the current version of § 2B1.1 to this matter. If the 6-level enhancement recommended under § 2B1.1 is eliminated altogether, which is just as arbitrary as applying the enhancement, then Mr. Foley's total offense level would be

[7] In so stating, Mr. Foley is not suggesting that his crime was not a serious crime, as all criminal offenses are serious. Indeed, his crime carries a maximum term of prison of 12 months. In comparison to other offenses, and the underlying circumstances of

8 under Probation's calculation, resulting in a Guidelines range of 0-6 months.[8] Under the Defendant's calculations, the total offense level would be 6, also resulting in a Guidelines range of 0-6 months.[9] If the cap provision in the proposed amendment is applied, then Mr. Foley's offense level would not be greater than 10. Under any of these scenarios, a sentence of probation is warranted and authorized.

C. A Sentence Probation Is Appropriate Given The History And Characteristics Of Mr. Foley

In fashioning an "individualized" and just sentence, 18 U.S.C. § 3553(a) directs the Court to consider "***the history and characteristics of the defendant***." (emphasis supplied). In this case, there are a number of factors relative to Mr. Foley's life which this Court should consider including (1) his personal history and familial background; (2) his charitable and community contributions; (3) his excellent employment history; (4) the impact incarceration would have on his business; and (5) his age combined with the lack of any likelihood of recidivism. These factors, considered separately or together as a combination of factors,[10] warrant a sentence

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each offense, however, Mr. Foley's crime was "not 'otherwise serious'".

[8]

Base offense level	8
Obstruction enhancement	+2
Acceptance of Responsibility	-2
TOTAL	8

[9]

Base offense level	8
Acceptance of Responsibility	-2
TOTAL	6

[10] See U.S.S.G. § 5K2.0; see, e.g., United States v. Rioux, 97 F.3d 648, 663 (2d Cir. 1996) ("In extraordinary cases,...the district court may downwardly depart when a number of factors that, when considered individually, would not permit a downward

of probation, which would be sufficient to meet to the goals of sentencing in this case.

1. Mr. Foley's Background and Family History Warrants Consideration by this Court in Fashioning a Just Sentence

Brian Foley's intriguing and unique background is what makes him the creative, kind and compassionate man that he is today.[11] Everyone is shaped by their experiences growing up, but in Mr. Foley's case, it would seem that he was destined to walk the path he took.

Mr. Foley was born in 1951 and was raised in Hartford; he is the eighth of eleven children. Although Mr. Foley's parents are deceased, Mr. Foley remains close with all of his remaining siblings, who all reside in Connecticut, and many of whom either worked for Apple Rehab or continue to do so.[12]

As a young boy, Mr. Foley's father earned his income by owning and renting out multifamily homes in Hartford. Mr. Foley's large family lived in each of his

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departure, combine to create a situation that differs significantly from the 'heartland' cases covered by the Guidelines."); United States v. Cook, 938 F.2d 149, 153 (9th Cir. 1991) ("There is no reason to be so literal-minded as to hold that a combination of factors cannot together constitute a mitigating circumstance. [A] unique combination of factors may constitute the 'circumstance' that mitigates."); United States v. Jagmohan, 909 F.2d at 65 (2d Cir. 1990); United States v. Broderson, 67 F.3d 452, 458 (2d Cir. 1995).

[12] Two of Mr. Foley's siblings, Joanne and Lorne Foohey, passed away in 2012 and

father's properties at one time or another. Mr. Foley, however, was primarily raised by his mother, a remarkable woman that was employed as a nurse at Hartford Hospital in addition to raising eleven children, almost all on her own.

When Mr. Foley was in the seventh grade, his mother, on her own, purchased a nursing home named "The Pines" in South Glastonbury. The facility itself had 24 beds and was situated on a 20-acre lot on which also stood a single family home. When Mr. Foley's mother purchased the property, she also moved her family into the home on the lot, which, although sizeable, was much too small for her eleven children.[13] As a freshman in high school, in search of more space and freedom, Mr. Foley moved himself into the nursing home, which primarily housed former patients of Norwich State Hospital, an institution for mentally ill and criminally insane individuals which closed down in 1996. When Mr. Foley initially moved into the facility, he served as the night watchman. Eventually, he held almost every position within the home, including cook, maintenance worker, personal caregiver to the patients and accountant. He also had a roommate,

2013, respectively.

In 1974, Mr. Foley graduated from the University of Connecticut School of Business, already with a vast amount of work experience under his belt in the nursing home industry. He immediately went to work as an unpaid volunteer at a non-profit nursing home in Hartford called Avery Heights, which experience he needed in order to become a nursing home administrator.

Tragically, although she got to see her son follow in her footsteps, in 1975, Mr. Foley's mother, who he describes as his "rock", "business mentor" and the person he "most admired and loved in life" passed away. See letter from Brian Foley, attached

to the initial Pre-sentence report disclosure. Although greatly affected by this loss, Mr. Foley trudged on, honoring his mother's memory with a whole host of accomplishments to follow. In that year, Mr. Foley took his first paid job as an administrator at the Pioneer Valley Nursing Home in North Hampton, Massachusetts. He also married his first wife and high school sweetheart, Linda, and moved out of The Pines Nursing Home.

In July of 1976, with $5,000.00 that he had saved from a settlement he received after a car accident in 1967, Mr. Foley set out to purchase his first nursing home in Sandisfield, Massachusetts. He was turned down for financing by twenty-four separate banks until one provided partial financing. As Attorney Lou Pepe notes in his letter to the Court, "[t]hat persistence and commitment marked the beginning of what was to become an extraordinary career in the health care industry from which many more than just he and his family members have benefitted." See letter of Louis R. Pepe, attached hereto as Exhibit B-1.

While operating the Sandisfield facility, Mr. Foley attended the Yale University School of Public Health, graduating with his Masters Degree in 1981. In that same year, the energetic young entrepreneur started his family with the birth of his eldest child, Meghan, and shortly thereafter, in 1982, Mr. Foley started acquiring nursing home facilities at a remarkable rate.[14] [15]

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[14] Mr. Foley acquired 1 nursing home in 1982, 2 in 1983, 2 in 1984, 1 in 1985, 6 in 1986, 2 in 1987, 2 in 1988, 3 in 1993, 1 in 1994, 3 in 2004, 1 in 2008 and 1 in 2009.

[15] In addition to Meghan, Brendan (30) and Conor Foley (26) were also born issue to

While juggling a young family and an impressive rapidly growing business, Mr. Foley also guest lectured at Yale University for a course on Long Term Care. It was during this time that Mr. Foley first met his current wife, Lisa, who was a student in the program.

Mr. Foley knew from the start that Lisa was someone special, and they had much in common with one another. They nevertheless remained friends, and Mr. Foley assisted Lisa with starting her career. While she studied at Yale, Lisa interned with Mr. Foley's company and subsequently took a job at one of his nursing homes. She also acquired her nursing home administrator's license. After she graduated from Yale, Mr. Foley offered Lisa a position with Apple Healthcare, but she declined and took a position with Athena Healthcare as the Director of marketing

In 1992, Mr. Foley and Linda divorced, and later that year, he married Lisa, who brought with her one child, Cory. The couple purchased a farm in Simsbury, situated on over 7 acres of land, where they remain today. Within a few years, Mr. Foley and Lisa were blessed with the addition of three girls to the family: Briana (now 21 years old), Kayla (now 19)

Mr. Foley is a proud father of seven active, bright, successful children (never considering Cory to be a "step"-child). Indeed, despite all of Mr. Foley's tremendous

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this marriage.

business ventures and successes, he states that "[i]t is our seven children that give Lisa and I our greatest joy and pride", a sentiment which is not merely lip-service. See Brian Foley letter, attached to the initial Pre-sentence report disclosure. Despite all of the time and energy required in establishing his empire, his children never wanted for his love and attention.

See letter from Sharon Healy, attached hereto as Exhibit B-7. In this day and age, though it should be the norm, few parents devote this much time and energy in fostering their children's educational development like Brian Foley did for each of his children, and his efforts weren't for naught: Meghan Foley Vess owns and operates Harvest Healthcare, a behavioral healthcare provider, whose office is located in the same building as Apple Rehab's central office; Brendan Foley is the owner and

operator of four nursing homes in Wyoming and Montana; Conor Foley manages and leases 37 apartment units owned by Mr. Foley; Cory Cheyne is a civil engineer who lives in a house adjacent to the Foley's home in Simsbury; Briana and Kayla Foley are college students; [redacted]. It is a testament to Mr. Foley's character, and his love and support as a father, that his children have chosen to follow in his path in the healthcare industry, in managing real estate and staying close to home. This says more about Brian Foley as a human being than anything that has been published about him in the press or testified about during the trial.

The sentiments expressed by Meghan and others illustrate the type of man Brian Foley really is. He does not come from a background of privilege; there was no silver spoon in his mouth at birth. He has worked hard for his successes and provides his children with the support needed for them to earn their own achievements.

See letter of Sharon Healy, attached hereto as Exhibit B-7; see also letter from Albert J. Quinn, Jr., attached hereto as Exhibit B-9 (referencing how Brian instilled in his

children the same values he possesses and that he wanted to make sure his kids were responsible adults). In short, Mr. Foley's family is his priority, and he would do, and has done, anything in his power to nurture its development.

2. Mr. Foley's Significant History of Charitable Contributions and Community Involvement is a Factor This Court Must Consider

While being inducted to the UConn School of Business Hall of Fame as a result of his business success in Connecticut and his mentoring of multiple UConn business students, Mr. Foley was quoted as saying "For me, the 'American Dream' has been the Connecticut Dream. Connecticut has been good to my family and me. We have a lot to be grateful for, a lot to give back." See UConn Hall of Fame bio, attached hereto as Exhibit D. Mr. Foley meant those words and has worked to strengthen his Connecticut community in large ways and small ways for years.

Between 1998 and 2014, Mr. Foley has contributed over $1.5 million to local charities and causes which were important to him, his family members and even his employees. The bulk of his efforts (aside from the sums he expended to reinvigorate Connecticut's minor league basketball team, discussed below), were spent on an educational institution which instructed all of his children over the years.

i. The Renbrook School

During the 1990's, while demand for the Beginning School (pre-school through full-day Kindergarten) at Renbrook was increasing, access to the building became a major source of complaints. Parents and their children were forced to park and walk over 500 feet from the school entrance on a steep incline without the benefit of

sidewalks. This became a dangerous course especially with icy roads during high traffic hours. The building of a new parking lot adjacent to the school became a major initiative.

The Foleys not only funded the construction of the parking lot, which is used by the Beginning School students and older students (1st through 5th graders), but Mr. Foley also spent a large amount of personal time on his equipment helping to build it.[16] Mr. Foley owns and operates his own bulldozers and excavators.[17] He personally used that equipment in assisting to build the parking lot. The now-named Foley Family Parking Lot was just one part of his impact on the school. He was also helpful in bringing back to "life" the ice-skating pond on the school grounds. He personally spent months assisting with the dredging of the pond, which was necessary because, over the years, the pond had filled with sand runoff from Route 44 during the Spring melt. After dredging the pond and re-routing the run-off, Mr. Foley and others were able to provide the Science department with a new study venue and the gym department with an improved outdoor adventure area.

In addition to supporting the school itself, the Foleys also saw a need to show their appreciation to the teachers who so skillfully molded the minds of their children, all seven of whom attended Renbrook. Over the years, the Foley children likely had every teacher in the school. Consequently, for over fifteen years, the Foleys have provided all expense paid trips to a few lucky teachers and their families. At the end

[16] The Foleys donated $1 million to this project.

of the school year, all teachers had a chance to win the trips by entering their names into a hat, followed by an annual drawing. Destinations included all expense-paid trips to the Florida Keys, Newport and the inns owned by Mrs. Wilson-Foley, dinners at the Newport Blues Cafe and free rounds of golf.

Finally, Mr. Foley also sat on the Renbrook School Board for approximately ten years and was Treasurer for four years. Although his children were students at the school for much of this time and were directly impacted by his assistance, Mr. Foley's contributions to the school continue to be appreciated by the faculty, students and their parents. The former Head of the school, Jane Shipp recalls that "Brian and [Lisa] were the kind of 'angels' that every non-profit yearns for. They were constantly looking for concrete and useful ways to support teachers and students." See letter of Jane Shipp, attached hereto as Exhibit B-12. She also noted that she knew Brian and Lisa "as devoted parents, parents engaged to a greater extent than most in the life of the school, in ways that were practical and hands-on." Id.

ii. University of Vermont

In 2007, Mr. Foley donated $100,000.00 to the University of Vermont ("UVM") in order to help establish a newly created Health Care Management Program. At the time, his son Brendan was a student at UVM in the business school. As a result, the development office at UVM contacted Mr. Foley about the new program the school wished to establish. Based in part on Mr. Foley's donation, along with several

[17] As a side note, Mr. Foley also has his commercial pilot's license.

others, the program continues to thrive and has been a successful venture for the School.

iii. <u>Elton John Aids Foundation</u>

The Foleys owned a professional tennis team in the 1990's that played for 7 years in Hartford and Avon. The league was founded by Billie Jean King who was also on the Board of Directors of Elton John's Aids Foundation. Through the Foleys' connection with the league, they learned a great deal about the Foundation's Mission, and they believed it was a worthy cause to support. The Foundation's efforts touched the Foleys and also tied into their studies of Aids while involved with the Public Health program at Yale. As a result, they donated $75,000.00 to the Foundation over the course of approximately three years.

iv. <u>Yale University</u>

Mr. Foley was on the Advisory Board for Yale's School of Public Health for many years, until he resigned from the board last year. In addition to smaller donations that he has made to the school over the years, he was contacted by the school about donating to a Yale scholarship fund so that two students could attend Yale's Public Health School who otherwise would not have been able to attend for financial reasons. The students also were able to get matching University funds. In total, he contributed $32,500.00 towards the scholarships.

v. <u>Farmington Valley Academy</u>

Mr. Foley's first daughter, Meghan, attended a Montessori School when she

was three years old. Her teacher was Sharon Healy. Sharon later started her own Montessori School, called the Farmington Academy. Mr. Foley made an initial donation in order to assist Sharon in starting the school. [REDACTED] In total, Mr. Foley contributed $19,000.00 [REDACTED]

As Sharon recalls, however, money was not Mr. Foley's only contribution to her new school.

> He generously provided the labor necessary to install a playground fence and gardening boxes in which the children could grow vegetables and flowers…In addition to financial support, Brian also donated his time and expertise to help the school find [its] permanent home. There were many times that we called upon Brian for his advice and [he] always made himself available and was willing to lend a hand.

See letter from Sharon Healy, attached hereto as Exhibit B-7.

Mr. Foley did not just provide support for academic institutions in which his children attended. He was also a member of the Irish American Scholarship fund board for three years, which raised money to send promising Irish students to universities in the United States. Likewise, Mr. Foley mentored students from the UConn School of Business and gave numerous students internships. Several of the students in the nursing home administrator intern program eventually became administrators for Apple Rehab.

vi. The Connecticut Pride

In 1995, Mr. Foley learned of the failing minor league basketball team, the Hartford Hellcats, and was immediately determined to save it, for the residents of Hartford. Over the course of many months, and with the persistence he had shown previously in starting Apple Rehab, Mr. Foley finally won the approval of the other team owners in the league, which was required for him to purchase the Hellcats. Upon his acquisition of the team in May of 1995, Mr. Foley renamed the club The Connecticut Pride. Under Brian's ownership, the team had seven enjoyable years, but Mr. Foley lost money every year, totaling over $3,000,000. While it lasted, it was, however, a good place for inner city kids and their families to go for entertainment. Mr. Foley gave away thousands of tickets over the seven years. The team also gave many UConn basketball players who were not ready for the NBA a place to improve their skills. Kevin Ollie, the current head coach of UConn, played for The Connecticut Pride for four years before landing a place in the NBA. See Hartford Business Journal article, attached hereto as Exhibit E.

Tyler Jones, who Mr. Foley originally hired as the Director of Operations for the team, but who eventually ended up as the head coach, recalls the impact Brian Foley had on the team, and the community of Hartford in general:

> The Pride organization would not have been as successful as it was without Brian's vision. He built the fan base by donating thousands of dollars in tickets to schools and communities that embraced what Brian was about. I remember countless times when Brian went on speaking engagements and talked to people about building community spirit and giving Hartford a chance to

> experience some affordable family entertainment. Brian also cared about the UCONN basketball community and encouraged drafting former UCONN players to build our program around. He was responsible for hundreds of jobs between his ownership of the professional basketball and tennis teams that he sponsored.

See letter of Tyler Jones, attached hereto as Exhibit B-13. Ultimately, former NBA star Isaiah Thomas purchased the entire league, including the Pride, and bankrupted it within the year. Heartbroken for the players, Mr. Foley inserted himself back with the team and paid the players' salaries for the remainder of the year so that they could finish out their season and be scouted by NBA teams.

For his efforts in saving the team and helping to revitalize Hartford, Mr. Foley earned the Business Person of the Year Award from the Hartford Business Journal in 1995 as well as the Hartford Sports Renaissance Award in 1996. He was also given the Junior Achievement Award in 2003 for giving some local youths exposure to the operation of a sports franchise, either as volunteers or through paid positions.

vii. The Hartford Foxforce

Mr. and Mrs. Foley also started a professional tennis team named the Hartford Foxforce, which was part of Billie Jean King's summer time World Team Tennis promotion, in another effort to bring affordable family entertainment to Hartford. The team played in Hartford and Avon from 2000-2006, and featured players such as Boris Becker, James Blake and Monica Seles. Jimmy Connors, Anna Kournikova, John McEnroe, Martina Navratilova and Pete Sampras were among the stars that came to Connecticut on opposing teams. The team, which played at the State

Armory in Hartford and at the Blue Fox Run Golf Course in Avon, had a loyal fan base for many years until the Foleys had to shut down the team following the 2006 season. Mr. and Mrs. Foley lost over $2,000,000.00 in this venture.

viii. <u>Employees</u>

Perhaps most remarkable, however, are the ways in which Mr. Foley has touched the lives of several of his employees. Although he has over 3,500 employees throughout his many business ventures, he never hesitates to lend his aid to those in need. Friend and attorney, Lou Pepe, writes of how Brian has impacted the lives of many

> …beyond Brian Foley's very visible community involvement is what he does on an ongoing basis to help people less fortunate than he. Given the vast size of Apple Rehab, he is in a position to provide employment for those who may be unemployed or otherwise encountering temporary difficulties, and Brian does exactly that. Those who know him have often said that Brian has a job for everyone who wants one – provided they are willing to work. Of course, he has provided positions for his many siblings and those of his wife, but it goes beyond that to include friends and their children.
>
> He does this with no fanfare and certainly no recognition, but the impact he has on the people he helps in this manner cannot be overstated. Brian gives these individuals a sense of purpose and self-worth that they otherwise might never know.

<u>See</u> letter of Louis Pepe, attached hereto as Exhibit B-1. Mr. Foley's efforts go well beyond providing employment to those in need, however. Jack Boynton, the Director of Human Resources at Apple Rehab wrote to the Court of two examples in the recent past where Mr. Foley has demonstrated his compassion for members of his

Apple team:

See letter of Jack Boynton, attached hereto as Exhibit B-15.

Mr. Foley also developed a sense of community in Newport, Rhode Island, his home away from home, and with his employees at the Newport Blues Café. As the current lessee of the Café, Albert Quinn, writes, Brian "directed [his managers] to take care of the community. Brian truly wanted to be part of the fabric of the city he now belonged. Brian not only donated monetarily but also offered to host fundraisers for whatever community cause" was in need. See letter of Albert J. Quinn, Jr., attached hereto as Exhibit B-9.

What these anecdotes illustrate is a man very much invested in his community. He not only wants those close to him to thrive, but also the community in which he lives. He has shared not only his good fortune, but also his blood, sweat and tears to countless organizations and individuals over the years because he is grateful for the successes he has experienced and believes that it is his obligation to give back. These attributes are appropriate factors for this Court's consideration in fashioning a just sentence for Mr. Foley. Perhaps Judge Rakoff said it best in United States v. Adelson, "surely if a man is to receive credit for the good he has done, and his immediate misconduct assessed in the context of his overall life hitherto, it should be at the moment of sentencing, when his very future hangs in the balance." 441 F. Supp. 2d 506, 513-14 (S.D.N.Y. 2006); see, e.g., United States v. Rioux, 97 F.3d 648, 663 (2d Cir. 1996) ("It was not an abuse of discretion for the district court to conclude that, in combination, Rioux's medical condition and charitable and civic good deeds [in raising money for the Kidney foundation] warranted a downward departure."); United States v. Canova, 412 F.3d 331, 358-59 (2d Cir. 2005) (affirming

downward departure based on defendant's volunteer service with the Marine Corps and as a volunteer firefighter as well as his recent acts of good samaritanism); United States v. Peterson, 11 Cr. 665 (RPP) (S.D.N.Y. 2012) (district court imposed sentence of probation, finding significant that the defendant "had engaged in a number of civic activities not as a figurehead, but as a participant, a person who gave of himself, not just of his wallet, and engaged in community activities to help his community")[18]; United States v. Greene, 249 F. Supp. 2d 262 (S.D.N.Y. 2003) (defendant was entitled to seven-level downward departure based on combination of his charitable work/community service and extraordinary family circumstances); United States v. Acosta, 846 F. Supp. 278, 280 (S.D.N.Y. 1994) (Defendant's rescue of a baby from burning building together with his mild retardation justify departure. "Acosta's life saving, heroic act in itself justifies such a departure but certainly does so when considered in combination with his retarded mental condition."); United States v. Woods, 159 F.3d 1132 (8th Cir. 1998) (District court did not abuse its discretion when it granted one level downward departure, finding that defendant's case fell outside the "heartland" of cases due to exceptional charitable conduct in bringing two troubled young women into her home, caring for them and seeing to their education, and exceptional assistance to an elderly friend, enabling him to live out his remaining years with greater independence.); United States v. Paradies, 14 F. Supp. 2d 1315, 1320, 1322 (N.D. Ga. 1998) (the Court granted a downward

[18] See Transcript excerpt from sentencing in United States v. H. Clayton Peterson, p.

departure where the defendant's participation in *community charitable activities and causes*, in combination with other factors, such as military service, physical and mental health and age, presented a situation not adequately considered by the Sentencing Commission when formulating the Guidelines.)

3. Mr. Foley's Impressive Employment History, Business Development and Awards and Accomplishments Merit this Court's Consideration

In addition to his family and his community, the other "loves" of Mr. Foley's life are his businesses. Inspired at a young age by the "rock" of his family, his mother, Brian Foley has been working in the nursing home industry since he was fifteen years old. He even lived in his mother's facility and roomed with a patient, all while learning the ropes of the business and attending school full time during the day. Although he came from modest means as a boy, his energy, vision, persistence and fearless attitude made him a remarkable success in a very short period of time. By the age of thirty-one years old, Mr. Foley owned his first nursing home. Now, he owns twenty-six facilities across two states (Connecticut and Rhode Island) which, in total, house 2,139 beds.

In addition to his nursing homes, Mr. Foley also owns and manages numerous rental properties (residential and commercial), including a nineteen-store mini mall in Avon. He also owns one restaurant, the Newport Blues café in Rhode Island.[19]

19, attached hereto as Exhibit F.

Finally, as if he were not busy enough, Mr. Foley is the general contractor for a home he has under construction in Wyoming. In total, Mr. Foley employs more than 3,500 throughout all of his business ventures.

In connection with his work, Mr. Foley was also a member and/or officer of several professional boards. He was a board member of the Connecticut Association of Health Care Facilities for approximately sixteen years and was its President for six years.[20] Mr. Foley also served as a board member on the New England Healthcare Assembly, a healthcare networking organization that enables leaders to share resources and ideas and discuss problems, for four years. See http://www.nehaonline.com/aboutus.shtml. He also served on the Yale School of Public Health Advisory Board for four years.

Finally, Mr. Foley received a number of awards and accolades as a result of his successes in the healthcare industry. In 1988, Mr. Foley's business, Apple

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[20] "…[T]he Connecticut Association of Health Care Facilities, Inc. (CAHCF) is the state's largest not-for-profit member association representing profit and not-for-profit health care facilities providing long-term, subacute, rehabilitative and assisted living services to nearly 20,000 Connecticut citizens; and allied health-care-related businesses and organizations.

CAHCF is the leader in providing services to, and advocating for, the State's providers of long-term, subacute, rehabilitative and assisted living care. Additionally, CAHCF serves as a clearing house for information advancing consumer knowledge about the nursing home and assisted living service providers in Connecticut. CAHCF provides its members with business services including legal, financial, legislative, regulatory, public and community relations, special events and a comprehensive, continuing education program offering seminars in all areas of health care management and delivery of services." http://www.cahcf.org/

Health Care (as it was identified at the time) was named on Inc. Magazine's list of the fastest growing, privately-owned companies in America, and in 1989, Mr. Foley received the Entrepreneur of the Year Award from Inc. Magazine. Indeed, by 1989, Mr. Foley had already acquired seventeen of his twenty-six nursing homes. Perhaps most compelling, however, was Consumer Reports rating of Apple Health Care as the "best for-profit long-term care company in America" in 1995, which was the last time that Consumer Reports rated nursing home facilities in this country. As former Executive Vice President and Chief Operating Officer of Apple Health Care, Ruthanne Sullivan, put it, "[t]his can only be accomplished with a visionary leader who really cares about the people he serves and the staff who work for the company." See letter of Ruthanne Sullivan, attached hereto as Exhibit B-16.

Mr. Foley's remarkable business and employment history, including his service of his community and the values he has instilled in his children are all factors which this Court must consider in determining a proper sentence for Mr. Foley. See United States v. Alba, 933 F.2d 1117, 1122 (2d Cir. 1991) ("[Defendant] had long-standing employment at the time of the events which gave rise to [his] case. He worked two jobs to maintain his family's economic well-being, and was aptly described as a man who works hard to provide for his family."); United States. v. Jagmohan, 909 F.2d 61 (2d Cir. 1990) ("appellee had been gainfully employed for the nine years since he had entered this country. Taken alone, this fact is not especially remarkable. However, once it is coupled with the third factor-the unusual

circumstances of the offense-the district court was justified in considering appellee's case to be sufficiently exceptional to justify departure."); see also United States v. Casiano, 296 Fed. Appx. 175 (2d Cir. 2008) (The court applied a downward departure because the defendant's criminal history category substantially overrepresented the seriousness of his criminal history, but also imposed a sentence that was 117 months below the post-departure Guidelines range of 168-210 months, based in part on the defendant's good behavior while on release, *employment record*, and family ties); United States v. Pena, No. 09 Cr. 1020 (RMB), 2011 WL 1097394 (S.D.N.Y 2011) (the Court imposed a non-Guidelines sentence after considering many factors including the defendant's age, his education, his family circumstances, his prior convictions, his *employment history* and his medical issues); United States v. Caruso, 814 F. Supp. 382 (S.D.N.Y. 1993) (defendant's age, good employment record and likely future compliance with law, taken in combination justified downward departure); United States v. Ramirez, 792 F. Supp. 922, 923 (E.D.N.Y. 1992) (defendant's lack of guidance in combination with "strong efforts to lead a decent life in a poor environment," excellent employment history, and devotion to family justified downward departure).

4. The Impact Incarceration Would Have on Innocent Individuals Related to Mr. Foley's Business is a Significant Matter for this Court to Consider

As the Court is well aware, Mr. Foley owns and is the President of Apple Rehab, which is a health care company that operates twenty six

rehabilitation/nursing home facilities in the area, twenty four of which are in Connecticut. It is the largest privately-owned nursing home company in Connecticut. Apple provides not just a tremendous service to its 2,000 patients, but also an environment that the long-term residents call home; Apple's residents sit on community councils, take part in cooking clubs, gardening groups and music workshops, as well as enjoy visits from entertainers and local dignitaries. They also facilitate and participate in intergenerational programming by sponsoring little league teams and hosting carnivals. Short term rehabilitation patients and long term residents alike enjoy state-of-the art rehabilitation facilities and specialized programs.

Additionally, Apple Rehab employs approximately 3,000 individuals from a variety of professions, including nursing staff and directors to culinary specialists and dieticians to accountants and IT professionals.[21] The company not only provides competitive salaries, but also supplies employees with 401K plans, health and life insurance and other bonuses. See letter of Ken Lewis, attached hereto as Exhibit B-17. It is these fine individuals that have assisted Apple Rehab in achieving its past successes.

[21] A previously provided estimate on the number of employees employed by Apple,

Indeed, it has long been settled in this circuit that a Court may depart from the Guidelines "to reduce the destructive effects that incarceration of a defendant may have on innocent third parties", including, in this case, Apple's employees and its patients. United States v. Milikowsky, 65 F.3d 4, 7 (2d Cir. 1995); see also United States v. Holz, 118 Fed. Appx. 928 (6th Cir. 2004) (departure warranted where defendant's incarceration would result in employee job loss, the potential failure of an ongoing construction project in which the defendant was involved and lack of care to ailing family members); United States v. Olbres, 99 F.3d 28, 36 (1st Cir. 1996)

given during Mr. Foley's testimony, was based upon incorrect information.

("job loss to innocent employees resulting from incarceration of a defendant may not be categorically excluded from consideration.")

In Milikowsky, the district court departed downward from the Guidelines, indicating that the defendant's companies' continuing livelihood depended entirely upon the defendant's continued personal involvement in the day-to-day affairs of the company. Id. at 8.

> The two companies' dependence on Milikowsky is greatly increased by the companies' extremely precarious financial condition. The two companies, as well as the Milikowsky families personally, are indebted for approximately $20 million to an international steel conglomerate, TradeARBED. According to the testimony of Milikowsky's business lawyer, Jordan and Prospect are so deeply indebted that they are unable to obtain credit from anywhere else, and TradeARBED continues to provide credit only so long as the companies remain profitable. The court, crediting the unrebutted testimony on behalf of Milikowsky, was able to conclude that the companies' continuing livelihood depends entirely on Milikowsky's personal involvement, and that, in his absence, TradeARBED might well withdraw its credit, leading to both companies' immediate bankruptcy and the loss of employment for Jordan's employees and Prospect's 150 to 200 employees.

Id. at 8-9.

In United States v. Somerstein, 20 F. Supp. 2d 454 (E.D.N.Y. 1998), the district court granted a departure from an offense level of 13 (and Guidelines range of 12-18 months) to the defendant because her continued leadership role with her

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business was critical to its continued vitality, and the uninterrupted employment of 75 individuals. Id. at 460-62. The court specifically noted the financial vulnerability of the business as a result of the Government's investigation and prosecution of the defendants because customers were uneasy about doing business with the defendants if they faced the possibility of incarceration. Id. at 460-61. The court further noted the defendant's exceptional business acumen, that she was the public face of her business and was the backbone and creator of the company. Id. at 461. In short, customers wanted to deal with the defendant based upon her impeccable reputation in the industry and, without her, the company would likely fail. Id. at 461-62; see also United States v. Patel, 164 F.3d 620 (2d Cir. 1998) (Summary Order) (affirming district court's departure on the basis of the adverse effect any incarceration would have on the defendant's business and its employees, in combination with the unusual level of dependence the defendant's wife had upon him); United States v. Khalid, 2011 WL 6967993, at *2 (E.D.N.Y. 2011) (court sentenced defendant to non-Guidelines sentence of probation rather than sentence within the advisory Guidelines range of 30-37 months due, in part, to his ownership of several businesses which employ over a dozen people); United States v. Romano, 2008 WL 4427759, at *1 (E.D.N.Y. 2008) (defendant was sentenced to probation in the face of a 0-6 month Guidelines range in part because he owned "a small commercial trucking business that employ[ed] four individuals whose jobs would be at risk if he were incarcerated"); United States v. Toback, 2005 WL 992004, at *6

(S.D.N.Y. 2005) (court issued a non-Guidelines sentence of time served (one day), in the face of an advisory Guidelines range of 10-16 months, based upon the need to "avert [an] undue hardship on innocent third parties, namely [the defendant's employees]" because the defendant was "essential" to the successful operations of the business).

5. Mr. Foley's Unlikelihood of Recidivism is a Factor that Warrants Deliberation by this Court

Mr. Foley is sixty-three years old; he is a brother, uncle, husband, father of six step-father of one and soon-to-be grandfather. He is also a prominent local businessman and philanthropist. His record is totally devoid of any prior criminal activity. Indeed, the only reason why he committed the offense in this case was because of his blinding love for his wife and desire to support her ambitions at all costs. The two year investigation of this matter, however, and the resulting consequences to his personal life and business, his guilty plea and that of his wife along with John Rowland's conviction have brought Mr. Foley back down to Earth. In his letter to the Court, Mr. Foley expressed:

> I have continuously been supportive of my wife's business and political endeavors. I was excited for her when she ran for Lt. Governor and later for Congress, and I was committed to help her succeed in any way I could. Regrettably, I went too far, not just with the hiring of John Rowland, but also with the conduit campaign contributions that I funded. I'm not going to rehash my testimony here as Your Honor heard me explain at length during the trial all of the various ways in which I subverted the federal election laws in order to get Lisa elected. What might not be clear from my testimony, however, is that I deeply and sincerely regret doing this. I understand that transparency and fairness are the principles upon which our democratic process relies, and my actions, which were motivated by the personal gain of my wife, directly threatened those principles. My behavior was a complete variance from how I generally conduct business; how I instill values and work ethic in

> my children and employees; how I participate in and contribute to my local community and society in general.
>
> I am also deeply sorry and ashamed of how my actions have impacted others, including my children, my extended family, my friends, my employees and the wider community. They did not deserve the severe stress and media attention inflicted upon them as a consequence of my actions, and for that, too, I sincerely apologize.

In short, there is no question, based upon Mr. Foley's substantial assistance to the Government in this matter and his statement to the Court, that he has quite clearly learned a very hard, painful, humiliating lesson from the investigation and prosecution of this matter, and he will not be back before this Court or any other in the future.

Due to his lack of a criminal history, combined with his age and the unlikelihood that he will recidivate, he should be given more credit for this status. See United States v. Huckin, 529 F.3d 1312, 1318-19 (10th Cir. 2008) ("….a district court may weigh a defendant's lack of criminal record, even when the defendant has been placed into a Criminal History Category I, in its §3553(a) analysis.").

In United States v. Ward, 814 F. Supp. 23, 24 (E.D. Va. 1993), a departure was warranted because the Guidelines failed to consider the length of time a defendant refrains from the commission of his first crime. ("While awarding defendants generally and this defendant individually some credit for leading relatively crime-free lives, the Criminal History Category of the Sentencing Guidelines does not account for the length of time a particular defendant refrains from criminal conduct.");

see also United States v. Greene, 249 F. Supp. 2d 262 (S.D.N.Y. 2003) ("it is highly unlikely that Greene will repeat his criminal conduct given that he is sixty-five year[s] old and previously had no criminal history points. For all of these reasons, *any* period of incarceration would be inappropriate.); see also United States v. Hernandez, No. 03 CR 1257 (RWS), 2005 WL 1242344, at *5 (S.D.N.Y. 2005) (in finding that the defendant was 49 years old and had no prior criminal record and was therefore a lower risk for recidivism, the Court departed from a Guidelines range of 70-87 months down to 50 months); United States v. Carmona-Rogriguez, No. 04 CR 667RWS, 2005 WL 840464, *4 (S.D.N.Y. 2005) (the Court departed downwards 4 levels based on the fact that the defendant was 55 years old, she had no prior criminal record, she was unlikely to recidivate and she suffered from high blood pressure and diabetes); Simon v. United States, 361 F. Supp. 2d 35, 48 (E.D.N.Y. 2005) (District court indicated that Post-Booker, at least one Court has noted that recidivism drops substantially with age. "The Guidelines' failure to account for this phenomenon renders it an imperfect measure of how well a sentence protects the public from further crimes of the defendant."); United States v. Nellum, No. 2:04-CR-30-PS, 2005 WL 300073, at *3 (N.D. Ind. 2005) (the Court departed downwards 4 levels based upon a number of factors, including that the defendant would be 65 years old upon his release, his high blood pressure, blocked prostate, history of a heart attack, and his military service).[23]; U.S. Sentencing Commission, Measuring

[23] Several of these cited cases are unreported opinions. Therefore, they are

Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines, p. 12 (May 2004) ("Recidivism rates decline relatively consistently as age increases."); U.S. Sentencing Commission, Sentencing Options under the Guidelines, Staff Discussion Paper, p. 18 (Nov. 1996) ("About 2.7 percent of probationers were charged with a new offense or absconded while under supervision.") Indeed, the Sentencing Commission has found that the best candidates for crime-free futures are those who have little criminal history, a good recent employment record, are presently employed or attending school, have no history of drug abuse, have no present drug use, and have a stable living arrangement with a spouse. Id. The foregoing applies to Mr. Foley, a sixty-three year old husband, father of six, future grandfather and life-long resident of Connecticut, with no substance abuse issues, who is prominent local businessman devoted to giving back to the community that raised him. In fact, not only has Mr. Foley been steadily employed since he was a teenager, he is the employer of approximately 3,000 individuals who are charged with the care of roughly 2,000 patients. It is safe to say that he will not risk the well-being of these individuals again with future criminal behavior.

D. A Sentence of Probation Is Appropriate Given The Nature and Circumstances of the Offense

Mr. Foley was convicted of making contributions to his wife's Congressional campaign in excess of the limits proscribed by the Election Act for the purpose of

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attached hereto as Exhibit I.

concealing from the FEC and the public that former Governor John Rowland was being paid by his company, Apple Rehab, in exchange for services that Mr. Rowland rendered to Mrs. Wilson-Foley's campaign. While this offense, and offenses which violate the elections process in general, are serious crimes which threaten the transparency of our democratic system, in the grand scheme of all federal offenses, the nature and circumstances of Mr. Foley's particular crime does not warrant a sentence of imprisonment. Without meaning to minimize his conduct in any fashion, as explained above, aside from the public being deprived of information to which it is entitled, there was no victim who was tangibly harmed by Mr. Foley's offense. In order words, he did not defraud a person (or persons) out of $35,000.00. Rather, he paid $35,000.00 to Mr. Rowland through his company so that Mr. Rowland would work on Mrs. Wilson-Foley's campaign, all while avoiding the campaign contribution limits and reporting requirements of the FEC.

Sentences other than incarceration have been ordered for similar violations across the country, and even by this Court. Consequently, a similar sentence in this case would not result in any unwarranted sentencing disparities. See United States v. Harry Raymond Soucy, 3:12-cr-00167-JBA (Defendant, a cooperator like Mr. Foley, who faced an *advisory* Guidelines range of 24-30 months, was placed on probation for 36 months, serving the first six months of probation in a halfway house, for his role in the conspiracy to make illegal campaign contributions by smoke-shop owners to steer legislation that would keep their businesses tax-free; Soucy was the

"architect" of the illegal scheme, orchestrating it and seeing it through all the way until his conduct was detected); see also United States v. Sant Singh Chatwal, 1:14-cr-00143-ILG (with an *advisory* Guidelines range of 57-71 months, the Court sentenced the defendant, a prominent Indian-American hotelier, to three years probation and a $500,000 fine on charges of illegally donating more than $180,000 to political campaigns and witness tampering in part based upon his age and lifetime of contribution to others)[24]; United States v. Dinesh D'Souza, 1:14-cr-00034-RMB (S.D.N.Y. 2014) (defendant, whose *advisory* Guidelines range was 10-16 months, was sentenced to five years probation, with the first eight months to be served in community confinement, weekly community service and a $30,000 fine for making illegal contributions to a United States Senate campaign in the names of others); United States v. Acevedo-Vila, 08-cr-00036 (D.P.R. 2008) (multiple defendants who participated in scheme to make $100,000 of conduit contributions aimed at gaining influence over gubernatorial candidate sentenced to probation and a fine); United States v. LeBlanc, 06-mj-091 (AK) (D.D.C. Mar. 28, 2007) (defendant/former chief executive of private health care company, who pleaded guilty to misdemeanor offense for illegally contributing approximately $50,000 of corporate funds to federal campaigns, received sentence of probation); United States v. Jinnah, 06-cr-00383 (C.D.Cal. 2009) (defendant who intimidated his employees into making $53,000

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[24] In addition to the "loss" amount, Chatwal's Guidelines calculation included enhancements for number of illegal transactions, committing the offense for the purpose of obtaining a specific non-monetary benefit, aggravated role and

worth of conduit contributions and who fled the country after being indicted was sentenced to thirty-six months of probation and twelve months home detention); United States v. Stipe, 03-cr-00128 (D.D.C. Jan. 30, 2004) (defendant who committed perjury and obstruction in connection with the Government's investigation of his $250,000 in conduit contributions was sentenced to five years probation, six months home confinement, 1,000 hours of community service and a fine of $735,567.00).

E. The Purposes Of Sentencing Under Title 18, United States Code Section 3553(a) Are Met By A Sentence Below the Advisory Guidelines Range

In weighing the factors set forth in Section 3553(a), the Court is directed to impose the minimum sentence necessary to "reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense," while taking into account the need for deterrence and to protect the public, as well as any educational or medical needs of the defendant. If the Court determines that multiple sentences could "equally serve the statutory purpose of § 3553," then Court must "consistent with the parsimony clause," impose the lowest possible sentence. United States v. Ministro-Tapia, 470 F.3d 137, 142 (2d Cir. 2006).

In this case, a sentence of probation would accomplish all of the goals of sentencing delineated in Section 3553(a). Probation is a significant, punitive sentence, particularly depending upon the restrictions ordered by the Court, including

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obstruction of justice.

electronic monitoring, curfews, regular reporting requirements, permitting unannounced visits to one's home, travel and other activity or financial restrictions, community service and the payment of considerable fines and fees, all which must strictly be followed at the risk of further sanctions. In short, although a sentence of incarceration is more severe, a sentence of probation meaningfully curtails the defendant's freedoms, thus adequately punishing the offender for his criminal conduct. It is a sentencing alternative that should be explored more by the Courts in the federal system. See Gall v. United States, 552 U.S. 38, 48, n. 4 (2007) (emphasizing that "[p]robation is not granted out of a spirit of leniency") (quoting Advisory Council of Judges of National Council on Crime and Deliquency, Guides for Sentencing 13-14 (1957)); United States v. Knights, 534 U.S. 112, 119 (2001) (internal citations omitted) ("Probation, like incarceration, is 'a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty.'" Probation is "one point ... on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service." Inherent in the very nature of probation is that probationers "do not enjoy 'the absolute liberty to which every citizen is entitled.'" Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens."); United States v. Trujillo, 404 F.3d 1238, 1242 (10th Cir. 2005) (internal citations omitted) (the court explained that there are

two purposes of the probation system: "effective rehabilitation and insulating communities from the potential harm created by recidivism."); United States v. Brady, 02-cr-1043 (JG), 2004 WL 86414, at *8-9 (E.D.N.Y. Jan. 20, 2004) (imposing sentence of probation with community service and observing that "probation is also a punitive measure and 'may be used as an alternative to incarceration, provided that the terms and conditions of probation can be fashioned so as to meet fully the statutory purposes of sentencing…'" (quoting U.S.S.G. Ch.5, pt. B introductory cmt. (2004))); United States v. Coughlin, No. 06-20005, 2008 WL 313099, at *6 (W.D. Ark. Feb. 1, 2008) (discussing the "severely punitive quality of probation, [which is] capable of deterring corporate executives like [defendant] who cherish their freedom of movement and right of privacy, from engage in conduct similar to [defendant's]"); see also *Court & Community: An Information Series About U.S. Probation & Pretrial Services: Community Service*, Office of Probation and Pretrial Services, Administrative Office of the U.S. Courts (2007), available at http://www.miep.uscourts.gov/PDFFiles/court_community_all.pdf (community service is "a flexible, personalized, and humane sanction, a way for the offender to repay or restore the community. It is practical, cost-effective, and fair – a 'win-win' proposition for everyone involved.")

Indeed, the American Bar Association's Standards on Criminal Justice has suggested that "[a] sentencing court should prefer sanctions not involving total confinement in the absence of affirmative reasons to the contrary." *ABA*

STANDARDS ON CRIMINAL JUSTICE, Sentencing 18-6.4(a), p. 227 (3rd ed. 1994); see also 28 U.S.C. §994(j) ("the guidelines [should] reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense…").

The United States Sentencing Commission has recognized the need to act on this directive, but has never done so. U.S. Sentencing Commission, Recidivism and the "First Offender", Release 2 (May 2004). In fact, far from the state system, the Guidelines offer no option that does not include a term of imprisonment. That is, the Sentencing Table provides no combination of offense level and criminal history category that excludes the possibility of imprisonment. Thus, the advisory Sentencing Table excludes probation as an option in many cases. Consequently, unsurprisingly, one of the most noticeable changes in sentencing patterns since the advent of the Guidelines is the drastic decrease in the use of probation sentences and increase in the length of imprisonment sentences. See Frank O. Bowman III, The Failure of the Federal Sentencing Guidelines: A Structural Analysis, 105 Colum. L. Rev. 1315, 1350 (2005). The percentage of federal defendants (across the country) sentenced to a purely probationary sentence declined from approximately 48% in 1984 to 7.1% in 2013. U.S. Sentencing Commission, The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea

Bargaining, Volume II, Fig. 14 (December 1991); U.S. Sentencing Commission, 2013 Sourcebook to Federal Sentencing Statistics, Fig. D. (2013), attached hereto as Exhibit G. In Connecticut, out of a total of 421 cases in 2013, in only 32 cases (approximately 7.6%) were purely probationary sentences issued (and only 11 in cases involving fraud). Id., at Appendix B to 2013 Sourcebook. See Connecticut statistics from Appendix B, attached hereto as Exhibit H.

Fortunately, however, the Guidelines are now only advisory tools for the Court's consideration. This Court's discretion to order probation in the appropriate case, like this one, is no longer invaded by the Guidelines rigid application. Based upon the totality of the circumstances in Mr. Foley's case and an analysis of the 18 U.S.C. § 3553(a) factors, probation is in fact warranted.

In particular, in considering the need for specific deterrence, this Court should consider the impact that the Government's lengthy and aggressive investigation had on Mr. Foley personally as well as professionally (rightfully so), which culminated in a very public guilty plea to a federal offense and his testimony in an even more public jury trial. The prosecution of the Foleys and Mr. Rowland has resulted in national media attention and public scrutiny. [redacted] There can be little doubt that the consequences of this prosecution, combined with a misdemeanor conviction and a sentence of probation will adequately deter Mr. Foley from future criminal activity. In

fact, the only reason Mr. Foley committed the subject offenses in the first instance was to support his wife's political ambitions; those aspirations no longer exist.

As to general deterrence, the punishment that Mr. Foley will now suffer as a result of his conviction will serve as particularly dramatic general deterrence to potential future criminal conduct. Those tempted to commit similar offenses have now seen that they can and will be brought to justice through the criminal system, and not merely a civil proceeding before the Federal Elections Commission. Far from having to merely pay a civil fine, would-be violators of the elections reporting requirements, having witnessed the quite public humiliation of Mr. Foley as a result of his conviction and being lumped in with the likes of former Governor John Rowland, will certainly think twice before traveling down that path. No doubt in large part because of the heightened media coverage in this case and the nature of the offenses committed against our democratic process, members of the public have come forward calling for a severe punishment of all parties involved. However, Mr. Foley need not be sentenced to a period of incarceration in order for the goal of general deterrence and the need to provide just punishment to be met: this Court has to balance the need for general deterrence against Mr. Foley's entire history and characteristics, not just his bad deeds in this case, to include his cooperation efforts, his remarkable history of charitable contributions and community activities, the impact his incarceration might have on his innocent employees and nursing home patients as well as a complete lack of risk of recidivism. On balance, in this case, a

just sentence does not include imprisonment. A sentence of probation, with strict release conditions and a community service component, would be sufficiently punitive in nature to accomplish the goals of sentencing while also sending a message to the public that cooperators in public corruption cases will be given a benefit for their efforts.

IV. CONCLUSION

As cited above, a fundamental principle of sentencing is that a court ***"shall impose a sentence sufficient, but not greater than necessary"*** to meet specified sentencing goals, including the goal of "just punishment." See 18 U.S.C. § 3553(a). Likewise, "the punishment should fit the offender and not merely the crime." Pepper v. United States, 131 S. Ct. 1229, 1240 (2011) (quoting Williams v. New York, 337 U.S. 241, 247 (1949)). Based upon a complete review of Mr. Foley's background, history and character as fully detailed above, as well as consideration of the circumstances of the offense and the other sentencing factors listed in 18 U.S.C. § 3553(a), a sentence of probation with a component of community service such that Mr. Foley can make amends to the public whose trust he betrayed would be a sufficient and just sentence in this case.

THE DEFENDANT,
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Certification

I hereby certify that on the above date, a copy of the foregoing Document was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be send by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

___/s/___________________________________
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