

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA)
)
v.) No. 4:15CR00001-1 BSM
)
MICHAEL A. MAGGIO)

**UNITED STATES’ SENTENCING MEMORANDUM
AND RESPONSE TO OBJECTIONS TO PRESENTENCE INVESTIGATION REPORT**

The United States of America, by and through the Attorney for the United States, Acting Under Authority Conferred by Title 28, United States Code, Section 515, for the Eastern District of Arkansas, Patrick Harris, and Julie Peters, Assistant United States Attorney, and Raymond Hulser, Chief, Public Integrity Section, Criminal Division, United States Department of Justice, and Charles R. Walsh and Edward P. Sullivan, Trial Attorneys, for its Sentencing Memorandum and Response to defendant Michael A. Maggio’s Objections to the Presentence Investigation Report (PSR), states as follows.

I. Introduction

This sentencing memorandum in set out in four parts: a discussion of the PSR calculations; the United States’ response to Maggio’s objections to the PSR; the United States’ response to Maggio’s Sentencing Memorandum, and the United States’ application of the 18 U.S.C. § 3553 factors to Maggio’s potential sentence.

II. The PSR Correctly Calculates Maggio’s Sentencing Range as 120 months

On February 11, 2016, the U.S. Probation Office issued a revised PSR. The revised PSR’s guideline calculations reflect the impact of Maggio’s breach of the plea agreement. With the exception the PSR’s proposed reduction under U.S.S.G. § 3E1.1 for acceptance of responsibility, the United States agrees with the calculations in the PSR which establish

Maggio's sentencing guidelines range at 120 months imprisonment. This is based on the following calculations:

- Pursuant to U.S.S.G. § 2C1.1(a), Maggio's base offense level is 14, because he was a public official.
- Pursuant to U.S.S.G. § 2C1.1(b)(2) & Application Note 3, and U.S.S.G. § 2B1.1(b)(1)(J), because the benefit received by Individual B in return for the bribe to Maggio was \$4.2 million (the amount of the remittitur), the offense level is increased by 18 levels.
- Pursuant to U.S.S.G. § 2C1.1(b)(3), the base offense level is increased by four levels because Maggio was an elected public official.
- Pursuant to U.S.S.G. § 3C1.1, the base offense level is increased by two levels because Maggio obstructed or impeded the administration of justice by testifying falsely before the Arkansas Ethics Commission on June 4, 2014, and by deleting pertinent text messages, during the investigation.
- Pursuant to U.S.S.G. § 3E1.1(a), if Maggio clearly demonstrates acceptance of responsibility for his offense, his offense level will be decreased by two levels. This determination will be made at sentencing, in addition to the one-level reduction available under U.S.S.G. § 3E1.1(b). As set forth below, based on Maggio's most recent filings, and on his Objections to the PSR, Maggio has not accepted responsibility for his conduct, and therefore Maggio receives no reduction.

Based on these calculations, Maggio's total offense level is 38. Maggio's criminal history score is zero, resulting in a Criminal History Category of I. The Sentencing Table (TOL 38/CHC I) provides for a guidelines range of 235-293 months imprisonment. The PSR correctly reflects that the guideline term of imprisonment is reduced to 120 months because the statutory maximum penalty for an offense under 18 U.S.C. § 666 is ten years.¹ See U.S.S.G. § 5G1.1(a).

¹ Even if the Court were to award a three-level reduction for timely acceptance of responsibility under U.S.S.G. § 3E1.1 at sentencing, this would still result in a 120 month sentencing guidelines range: TOL 35/CHC I = 168-210 months imprisonment, exceeding ten year statutory maximum of 18 U.S.C. § 666.

III. Maggio's Objections to the PSR

On February 25, 2016, Maggio submitted his Objections to the Presentence Investigation Report (PSR). Maggio's objections, as a whole, have the effect of disclaiming all responsibility for the crime to which he pled guilty. The Government will address each objection, in turn.

A. Maggio's Objection No. 1 – PSR Paragraphs 3 and 16 Breach of Plea Agreement and Polygraph Examination

Maggio objects to PSR Paragraphs 3 and 16 “in their entirety.” *See* Maggio Objections, page 1-2. These paragraphs of the PSR outline Maggio's breach of the plea agreement, and are correctly included as background information in the PSR to place the revised guideline calculations in context. The United States, in good faith, provided numerous opportunities to allow Maggio to comply with his obligations under the Plea Agreement and Addendum. As outlined below, Maggio breached the plea agreement when he failed to truthfully disclose all information and knowledge regarding his, Individual A's, and Individual B's criminal conduct; failed to be available for interview upon reasonable request; and ceased cooperating with the United States. Maggio cannot now justly claim the benefits of the plea agreement while flaunting its terms.

Paragraph 13 of Maggio's Plea Agreement addresses the “Effect of Defendant's Breach of Plea Agreement and Addendum.” Under this provision, if Maggio violates any term of the Agreement and Addendum, the United States may:

proceed with this Agreement and Addendum and (a) deny any and all benefits to which the defendant would otherwise be entitled under the terms of this Agreement and Addendum; and/or (b) advocate for any sentencing enhancement that may be appropriate.

See Plea Agreement, docket no. 4, p. 13, paragraph 13A. In Maggio's Plea Agreement Addendum, Maggio agreed to “fully cooperate with the United States,” as relevant here, as follows:

(1) To truthfully disclose all information and knowledge regarding any other criminal conduct in Arkansas and elsewhere by the defendant and any and all other persons; . . . [and] (3) To be available for interview upon reasonable request

See Plea Addendum, docket no. 5, p. 1, paragraph 1A. The Plea Agreement Addendum also contained a provision requiring Maggio to submit to polygraph examinations if requested by the United States. *See id.* at 13(A)(4).

On January 19, 2016, after four prior debriefings (three pre-plea and one post-plea), Maggio took a polygraph examination at the request of the United States. Maggio, an experienced lawyer and former judge, signed both a consent form and an Advice of Rights form prior to the polygraph examination. During the polygraph, Maggio was asked about direct communications with Individual B. Maggio's results indicated deception, which is commonly known as failing the polygraph. Immediately after the polygraph, Maggio revealed that his communications with Individual B were far more detailed than he had previously disclosed to the United States. The materiality of those details was substantial. Maggio revealed that Individual B told him that Individual A was following the case and would be appreciative of Maggio making the right decision. This is significant because previously Maggio admitted that he and Individual B discussed the case and the campaign, but failed to disclose content of the conversations at this level of detail. Maggio also revealed that Individual B told Maggio that Individual A's contributions to Maggio would have to be handled differently than Individual A's contributions to other candidates. This is significant because the evidence shows that Individual A's money was funneled to Maggio's campaign through the use of PACs orchestrated by Individual B and through straw donations. Maggio further revealed that sometime between November 2013 and January 2014, Maggio approached Individual B to ask where the rest of the promised \$50,000 was, since Maggio had only received \$25,000. This is significant because the

evidence shows that in November and December 2013, Individual B was urgently seeking PAC funds for Maggio, and orchestrated straw donations.

In his objections to the PSR, Maggio gives a litany of excuses as to why he believes he is being “punished” by the use of the higher guideline calculations. For example, Maggio falsely claims, “The Government attempted to have Maggio make statements against others. When he refused the Government claimed he failed the test. . . . Once the Government realized that Maggio would not make certain statements against others, they responded by revoking major parts of the Plea Agreement and increased his potential liability.” Maggio Objections, page 2. Throughout Maggio’s debriefings and during an interview immediately prior to the polygraph examination, Maggio inculpated Individual A and Individual B in the bribery scheme. Maggio’s failure of the polygraph can be directly tied to his failure to disclose the full details and some of his own role, alongside Individual A and Individual B, in furthering the bribery scheme, along with some direct communications. For example, when Maggio was asked why he thought his polygraph results indicated deception, stated:

Maggio: The only thing I can think of, I mean not the only thing but that just popped up right now is [Individual B] at one time did that uh that [Individual B] would be appreciative....that [Individual A] is aware of the case and he would be appreciative of making the right decision.

* * *

FBI: And do you feel like you hadn’t told me that before, me or the agents?

Maggio: I probably hadn't told anybody about that, yeah probably not.

Draft Transcript, Post Polygraph Interview, 1/19/2016, at 7.²

² The United States showed this interview to Maggio’s previous counsel on January 26, 2016. On February 5, 2016, current counsel entered an appearance for Maggio. The United States immediately invited present counsel to view the post-polygraph interview, but to date present counsel has declined to review this evidence.

The United States requested to meet with Maggio and his counsel after this polygraph, in a continuing attempt to understand what motives or pressures caused Maggio to omit this information in prior interviews. Counsel appeared; Maggio did not. Maggio then ceased communication with prior counsel, retained current counsel, and began an unsuccessful legal and factual attack to his guilty plea. The United States' revocation of the plea agreement's sentencing stipulations is not some arbitrary "punishment" of a "no-fault" Maggio. Maggio has not held up his end of the bargain, and he should not be unjustly enriched by the favorable sentencing stipulations. Indeed, the sentencing stipulations were never binding on the Court in the first place, as reflected in the plea agreement itself: "The parties understand that the Court is not bound by these stipulations." Plea Agreement, docket no. 4, p. 10, paragraph 5; *see also id.* at paragraph 6 ("The defendant is aware that any estimate of the probable sentencing range under the Sentencing Guidelines that defendant may have received from the defendant's counsel, the United States, or the Probation Office, is merely a prediction, not a promise, and is not binding on the United States, the Probation Office, or the Court.").

**B. Maggio's Objection No. 2 – PSR Paragraph 8
(Decision to Run for the Arkansas Court of Appeals)**

Maggio objects to PSR paragraph 8 "regarding the civil trial against Mr. Maggio." Maggio Objections, page 2. The PSR does not make reference to any civil trial. Maggio then explains that he decided to run for the Arkansas Court of Appeals "based on many issues" and "included in that decision the costs of such candidacy."

This objection is difficult to follow. The United States notes, however, that paragraph 8 of the PSR is identical (with the deletion of the legal phrase "in or about" before the dates) to Maggio's factual admissions in the Plea Agreement. Plea Agreement, docket no. 4, p. 6 (second paragraph), paragraph 5F. Maggio can hardly object to something he swore under oath was true.

**C. Maggio's Objection No. 3 – PSR Paragraph 10
(Financial Support for Making “Tough Calls” While On the Bench)**

Maggio objects to the statement in PSR paragraph 10 that he would receive “financial support if he made the ‘tough calls’ while on the bench.” Maggio Objections, page 2. This is a direct quote taken from Maggio’s under oath factual admissions in the Plea Agreement. Plea Agreement, docket no. 4, p. 7 (second paragraph), paragraph 5F. Maggio further objects, “There was never any agreement by anyone regarding a ruling that would be favorable to any party.” Maggio Objections, page 2. This assertion flies in the face of all of the proof, including but not limited to Maggio’s under oath admissions and his post-polygraph interview. It also provides an excellent example why Maggio, if he continues on this path of false denial, does not qualify for a reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(a). *See* U.S.S.G. § 3E1.1, Application Note 1 (“In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following: (A) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which defendant is accountable . . .”).

**D. Maggio's Objection No. 4 – PSR Paragraphs 11, 12, 13, 17, 26, and 28
(Victims, Restitution, and Obstruction of Justice)**

1. Victims

Maggio’s objections to PSR Paragraphs 11, 12, 13, 17, 26, and 28, pertain to the PSR’s finding that there are victims in this case (the representatives of the estate of the decedent in the civil case that was the subject of the remittitur) and that they are owed restitution. Starting with PSR Paragraphs 11, 12, and 13, which describe the chronology of the remittitur and Maggio’s decision, the United States notes that these paragraphs are taken directly from Maggio’s under oath factual admissions in the Plea Agreement. *See* Plea Agreement, docket no. 4, p. 7 (third paragraph) and p. 8 (first two paragraphs), paragraph 5F.

PSR Paragraph 17 notes that no victim statements have been received by the United States. The victims chose to write directly to the Court; copies of their letters have been provided to Maggio and the U.S. Probation Office. The defendant's objection to PSR Paragraph 22 (Increase for \$4.2 million Value of Benefit) is addressed immediately below this section ("Maggio's Objection No. 4").

2. Restitution

Maggio's plea agreement provided that, "The parties agree that the matter of restitution, if any, will be submitted to the Court for determination." See Plea Agreement, docket no. 4, p. 12, paragraph 9D. Paragraph 68 of the PSR recommends that restitution in the amount of \$4.2 million (the amount by which Maggio, in exchange for the bribe, remitted the \$5.2 million judgment awarded to representatives of the estate of the decedent in the civil case) be ordered to the plaintiffs whose judgment Maggio corruptly reduced, pursuant to 18 U.S.C. §3663A and U.S.S.G. § 5E1.1. The Mandatory Victim Restitution Act (MVRA), codified in section 3663A of Title 18, is a mandatory restitution provision which applies in the case of a "crime against property [...] including any offense committed by fraud or deceit" and where "an identifiable victim [...] has suffered pecuniary loss." 18 U.S.C. §3663A(c)(1). The term "victim" is defined as "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered." 18 U.S.C. §3663A(a)(2). The award must reflect the actual loss caused by the offense. See *United States v. Petruk*, 484 F.3d 1035, 1036 (8th Cir. 2007).

It is the United States' burden to prove the victim's loss, but in cases where offsets are claimed, "Courts of Appeals have concluded that it is the defendant's burden to prove those offsets." *United States v. Bryant*, 655 F. 3d 232, 254 (3rd Cir. 2011) (citing *United States v. Elson*, 577 F.3d 713, 714 (6th Cir. 2009); *United States v. Calbat*, 266 F.3d 358, 365 (5th Cir.

2001). Disputes as to the “proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence.” 18 U.S.C. § 3664(d)(6)(e).

The United States respectfully submits that the receipt of campaign contributions in exchange for reducing a jury verdict constitutes a property crime involving fraud or deceit as defined by section §3663A(c)(1). Although bribery may not traditionally be viewed as a crime against property, courts do award restitution under this provision in the appropriate cases. *See e.g., United States v. Bahel*, 662 F.3d 610, 649 (2nd Cir. 2011) (affirming restitution of salary paid by United Nations to corrupt employee); *United States v. Sapoznik*, 161 F.3d 1117, 1121 (7th Cir. 1998) (affirming order requiring former police chief to return one year’s salary); *United States v. Skowron*, 529 Fed. Appx. 71, 74 (2nd Cir. 2013) (unpublished) (finding restitution of salary to employer whose employee was participating in a bribery scheme to obtain insider information); *but see, United States v. Adorno*, 950 F. Supp. 2d 426, 427 (E.D.N.Y. 2013) (failing to apply MVRA in bribery context).

A jury awarded the plaintiffs the sum of \$5.2 million dollars. Maggio’s remittitur order, written and entered in exchange for a bribe, was the direct and proximate cause of the \$4.2 million reduction in the verdict. Maggio may claim the verdict was excessive, but the fact remains that a jury determined the losses by a preponderance of the evidence. The fact that Maggio was only promised a small donation in exchange for reducing the jury award does not mitigate Maggio’s conduct, but rather aggravates it.

Further, the fact that Maggio escaped civil liability for his conduct is of no matter in these criminal proceedings. *Cf.* 18 U.S.C. §3664(l) (estopping defendant from denying the essential allegations of the offense of conviction in any subsequent state or federal civil proceeding). Maggio was dismissed from the pending state court civil suit (in which the plaintiff victims are seeking to recover the remittitur amount) because that court found that he had judicial immunity

for his actions, wholly unrelated to the merits of the claim. *See* Maggio's Sentencing Memorandum, docket no. 42, Exhibit 8. As such, the fact that he may have been able to escape the consequences from his actions because of civil immunity from lawsuits does not insulate him from criminal restitution.

Even if the Court does not determine that § 3663A's MVRA applies to this case, there is a permissive restitution provision which the Court may apply. The Victim Witness Protection Act provides that the court "may order, in addition to or [...] in lieu of any other penalty authorized by law, that defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim's estate." 18 U.S.C. §3663(a)(1)(A). In determining whether to order restitution under this section, the Court "shall consider—(I) the amount of loss sustained by each victim as a result of the offense; and (II) the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate." 18 U.S.C. §3663(a)(1)(B)(i)(I). As set forth above, the civil plaintiffs were deprived of an impartial arbiter of their case, who deprived them of their jury award. *See e.g., United States v. McNair*, 605 F.3d 1152, 1221 (11th Cir. 2010) (affirming restitution order of \$851,927 to county affected by corrupt politician). Although Maggio submits the deposition transcript of an expert in the pending civil matter in support of his position that the verdict would have been reduced by an impartial judge, that same expert acknowledges that the possibility that it would not have been reduced. *See* Maggio's Sentencing Memorandum, docket no. 42, Exhibit 5, page 59.

The United States submits that Maggio's "I stole it, but it wasn't worth that much anyway" speculation regarding the value of the pain and suffering of the decedent has no place in this criminal litigation. The jurors in the civil matter, after hearing all the testimony and reviewing the evidence, awarded damages in the amount of \$4.2 million. Therefore, the Court

should award restitution in the amount of \$4.2 million to the plaintiffs in the Martha Bull litigation.

3. Obstruction of Justice

Maggio also objects to PSR Paragraph 26, which provides that Maggio's base offense level is increased by 2 levels pursuant to U.S.S.G. § 3C1.1 for obstruction of justice "with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and the obstructive conduct related to the defendant's offense of conviction and any relevant conduct; or a closely related offense" PSR Paragraph 26; U.S.S.G. § 3C1.1. This enhancement is appropriate for at least two reasons. First, Maggio obstructed or impeded the administration of justice by testifying falsely under oath before the Arkansas Ethics Commission on June 4, 2014:

Ethics Commission: Okay. Um...so, obviously, that, the nursing home lawsuit last spring, you were aware that was in your court 'cause they were b-, appearing before you all the time?

Maggio: Yes.

Ethics Commission: You were well too aware of it. Um...the timing of these...checks to the PACs.

Maggio: Okay.

Ethics Commission: And that's part of why all this is interesting to the public. Do you, would you like to respond to any of that? Do you have any, any comment? I mean, the timing looks very unfortunate.

Maggio: And that's a good word, unfortunate coincidence.

Ethics Commission: Okay.

Maggio: That's a good word. Um...I will say I had, I will say this. I had zero prior knowledge of anything at all to do in any way, shape, or form with...the formation or the existence of any of those PACs. Don't know why they were formed. Don't, don't know who formed them. Don't much care. I had nothing to do with them. Never talked about them. Never ever. In fact, handling the

nursing home lawsuit, we were all painfully aware that that needed to be a big roped-off area. I didn't expect a dime from any nursing home.

Ethics Commission: Wait. What now?

Maggio: I didn't expect any money from any nursing home, period.

See Exhibit A, Draft Transcript, Sworn Testimony of Mike Maggio, Arkansas Ethics Commission, June 4, 2014, pages 22-23. This testimony is contradicted by the evidence in this case, including but not limited to the text messages referred to in Maggio's under oath factual admissions before this Court.

Maggio also obstructed justice during the course of the investigation by "destroying . . . evidence that is material to an official investigation . . . (e.g., shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence). . . or attempting to do so" U.S.S.G. § 3C1.1, Application Note 4(D). More specifically, as Maggio admitted under oath, he deleted pertinent text messages during the investigation:

During this time period, MAGGIO's communications with Individual B were about the campaign or the litigation. In March 2014, when Individual A's contributions to the PACs became publicly known, MAGGIO talked with another person about deleting text messages between MAGGIO and Individual B. That person also suggested MAGGIO delete text messages between MAGGIO and that person. MAGGIO then deleted these text messages.

Plea Agreement, docket no. 4, p. 8 (first paragraph), paragraph 5F. Accordingly, Maggio's base offense level is appropriately increased for his obstruction of justice.

**E. Maggio's Objection No. 5 – PSR Paragraph 22
(18 Level Increase for \$4.2 million Value of Benefit)**

As reflected in PSR Paragraph 22, Maggio's base offense level of 14 is increased by 18 levels because the benefit received by Individual B in return for the bribe to Maggio (the \$4.2 million amount of the remittitur) was between \$3,500,000 and \$9,500,000. *See* U.S.S.G. §

2C1.1(b)(2) & Application Note 3, and U.S.S.G. § 2B1.1(b)(1)(J). Maggio objects to this 18 level increase without providing any legal authority or alternate dollar amount, stating simply, “There was no loss to the Government, no victim and no personal gain.” Maggio’s objection misses the mark.

U.S.S.G. § 2C1.1(b)(2) provides for an increase in the bribery base offense level “[i]f the value of...the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with a public official...exceeded \$5,000....” The amount of the increase is then determined by cross reference to the enhancement table in U.S.S.G. § 2B1.1; here, to U.S.S.G. § 2B1.1(b)(1)(J) (more than \$3,500,000, but less than \$9,500,000). The bribery guidelines use the following illustration: “A government employee, in return for a \$500 bribe, reduces the price of a piece of surplus property offered for sale by the government from \$10,000 to \$2,000; the value of the benefit received is \$8,000.” U.S.S.G. § 2C1.1(b)(2), Application Note 3.

The commentary to the bribery guideline emphasizes that “for deterrence purposes, the punishment should be commensurate with the gain to the payer or recipient of the bribe, whichever is higher.” U.S.S.G. § 2C1.1, Commentary (Background). Relying on this commentary, appellate courts have repeatedly held that courts should use the expected benefit of the official act to the bribe-giver, and not the amount of the bribe received, in calculating the amount of loss under § 2C1.1(b)(2). *See United States v. Ziglin*, 964 F.2d 756, 758 (8th Cir. 1992) (holding that district court properly based loss on amount of tax liability defendant sought to eliminate for third parties, not on defendant’s personal kickbacks from role in bribery scheme); *United States v. DeVegter*, 439 F.3d 1299, 1303-04 (11th Cir. 2006) (reversing district court that based enhancement on value of bribes instead of estimated profit to company receiving contract); *United States v. Muhammad*, 120 F.3d 688, 700 (7th Cir. 1997) (assessing loss from

defendant-juror who sought bribe to sway jury verdict as the \$933,000 damage award at stake in trial and not the \$2,500 bribe juror sought); *United States v. Kant*, 946 F.2d 267, 269 (4th Cir. 1991) (reversing district court that based enhancement on value of bribes instead of estimated profit to company receiving contract).

IV. United States' Response to Maggio's Sentencing Memorandum

On March 21, 2016, Maggio filed a Sentencing Memorandum and Motion for Downward Departure (docket no. 42). Many of Maggio's sentencing arguments are addressed in Section IV of this memo, below. However, the United States responds here separately to the factual inaccuracies of Maggio's filing.

A. A Sentence of Probation Was Never on the Table

Maggio's assertion that he "has complied with the agreement between himself and the government" is flatly wrong. The United States has already addressed Maggio's breach in this pleading in Section III.A (Maggio's Objection No. 1 – PSR Paragraphs 3 and 16 – Breach of Plea Agreement and Polygraph Examination) and will not repeat that text here. However, Maggio goes further in his Sentencing Memorandum to state that "the Government stated that it was not opposed to probation in a previous hearing." Maggio Sentencing Memorandum, p. 4. This is false. The United States has never, in court or otherwise, stated that it would not oppose probation. To the contrary, from the outset, the United States represented to Maggio that a sentence of incarceration was the appropriate consequence for this crime. This is reflected in Maggio's plea agreement, which contains the following stipulation, "The United States agrees to recommend a sentence within the guidelines range." Plea Agreement, docket no. 4, p. 10, paragraph 5G. Nor was there ever a "presumptive sentence of probation." Maggio Sentencing Memorandum, p. 4. In fact, *if* Maggio had complied with terms of his plea agreement, and *if* the

Court had agreed with the calculations set out in Paragraph 5 of Maggio's plea agreement, the advisory U.S.S.G. range would have been 30-37 months.

B. Maggio's Loss of His Judicial Position Was Unrelated to this Bribery Case

Maggio's Sentencing Memorandum suggests that he has already been punished for accepting a bribe by the loss of his position as a circuit judge. Nothing could be further from the truth. The Arkansas Supreme Court ordered Maggio permanently removed from his judicial office on September 11, 2014, for reasons wholly unrelated to this bribery case. *See* Exhibit B, *Judicial Discipline and Disability Comm'n v. Maggio*, 2014 Ark. 366 (S. Ct. Ark. 2014) (removing Maggio from office because of comments made in a public electronic forum and personal involvement in a hot-check case; and making "no finding" on a complaint related to the campaign contributions and remittitur).

The underlying findings to his dismissal elaborate on the reasons Maggio was removed as a judge. *See* Exhibit C, Letter of Suspension and Removal from Office dated August 6, 2014. Maggio violated a host of judicial canons through his postings on a public electronic forum, tigerdroppings.com, using the handle "geauxjudge." As documented by the Judicial Discipline and Disability Commission (JDDC), these postings included his revelation of confidential adoption information on his docket regarding a famous actress:

Re: Charlize Theron adopt a baby today?

geauxjudge: I don't know if right board but I have a friend who is the judge that did her adoption today. It was a single parent adoption. I offered to be the baby daddy. He said that she came dressed with long brown wig, oversized clothes, trying to camouflage [sic] her appearance. They took pics but can't be published because closed proceeding. He said she did have an entourage . . . I know CSB [cool story, bro]. Just when you hear it on TMZ

[question back to geauxjudge] Did she get herself a black baby?

Yep.

[question back to geauxjudge] Are you a judge as well?

Yep.

Exhibit C, page 3. Maggio's postings also commented on cases currently in front of his court, bringing into question his neutrality. *See id.* at p. 4-5. Maggio also made many inappropriate gender, race, and sexuality related, and plainly vulgar, statements on the board. *See id.* at p. 5-8. When Maggio's identity as geauxjudge was revealed by a blogger, and after the JDDC announced its investigation, Maggio attempted to delete his posts. *See id.* at p. 8. Finally, Maggio endeavored to have a "hot check" warrant issued for his then-girlfriend's ex-husband's child support check, which was returned for insufficient funds. *See id.* at p. 8-9.

Maggio's self-destruction of his judicial career was complete before the criminal case began. It is disingenuous for Maggio to claim that his punishment in this case should somehow be lessened because he has already been sanctioned for unrelated behavior by removal from judicial office.

C. Maggio's Alleged Health Problems Do Not Support a Probationary Sentence

Maggio seeks a probationary sentence on the grounds that he has chronic depression, hypertension, sleep apnea, and a cleft palate which requires regular surgery. However, when speaking to the Probation Officer (as reflected in the PSR): "He stated he is in currently in good health and denied the need for treatment or medication." PSR, paragraph 42 ("Physical Condition"). Even so, the conditions Maggio cites in an effort to gain a probationary sentence are insufficient to satisfy the traditional three-part test applied to requests for special treatment on account of medical conditions. Although originally styled to examine departure requests, the Eighth Circuit has observed that this test provides "persuasive authority" when examining variance requests based upon health. *United States v. Chase*, 560 F.3d 828, 832 (8th Cir. 2009). Under the test, courts ask three questions:

First, is the particular defendant's physical condition such that he or she would find imprisonment more than the normal hardship? Second, would imprisonment subject him or her to more than the normal inconvenience or danger? Specifically, would imprisonment worsen his or her condition or does he or she require special care not provided by the [Bureau of Prisons]? Third, does the physical condition have any substantial present effect on the defendant's ability to function?

United States v. Charles, 531 F.3d 637, 641 (8th Cir. 2008) (citing *United States v. Coughlin*, 500 F.3d 813, 818 (8th Cir. 2007)).

None of these factors is satisfied here. Most significantly, as reflected by Maggio's conduct while on bond and throughout his life as a lawyer and judge, nothing about his condition prevents his ability to function. The Bureau of Prisons (BOP) regularly houses inmates with medical and psychiatric conditions. If committed to BOP custody, Maggio's condition can be reviewed by the Office of Medical Designations and he will be assigned to an institution capable of treating his condition, be it a dedicated medical center or some other facility. Whatever his destination, psychiatric services and medications will be available to meet his needs.

Not surprisingly, courts have rejected variance and departure requests for more substantial ailments. *See, e.g., Charles*, 531 F.3d at 639 (sleep apnea, congestive heart failure, and seizures); *United States v. Johnson*, 318 F.3d 821, 825 (8th Cir. 2003) (coronary heart disease and Hodgkin's lymphoma); *United States v. Eagle*, 133 F.3d 608, 611 (8th Cir. 1998) (glaucoma, hypertension, avascular necrosis, and severe arthritis requiring hip replacement); *United States v. Guajardo*, 950 F.2d 203, 208 (5th Cir. 1991) (cancer, hypertension, amputated leg) (cited with approval in *United States v. Harrison*, 970 F.2d 444, 447 (8th Cir. 1992)). Maggio's alleged health problems do not support a probationary sentence.

V. The § 3553 Sentencing Factors Support a Sentence of 120 Months

Maggio asserts that he is entitled to a downward variance when considering the sentencing factors identified in 18 U.S.C. § 3553(a). It is the position of the United States that after considering those factors, the Court should not depart or vary from the applicable guidelines range. In support of the United States' sentencing recommendation of 120 months, the United States focuses on the following factors:

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

18 U.S.C. § 3553(a).

The nature and circumstances of this offense are repulsive. In essence, Maggio sold a verdict as a means to obtain a higher judicial office. He breached the bond of trust that voters in Faulkner, Van Buren, and Searcy counties bestowed upon him. He breached the trust of the plaintiffs who put their faith in the legal system to justly resolve their dispute with the nursing home. This conduct seriously undermines the public's trust and confidence in its public officials, and undermines the integrity of our judicial system. The seriousness of his conduct warrants the imposition of a term of imprisonment consistent with the seriousness of his offense.

With respect to Maggio's own history and characteristics, Maggio argues that his good deeds and history of public service as a judge warrant a probationary sentence. Maggio's racist, sexist, sexual, vulgar, and indeed bullying comments, all made during his service as a judge, should also be considered along with his Sentencing Memo's litany of alleged good deeds. *See*

Maggio Sentencing Brief at 10-12; Exhibit 3 (JDDC Letter of Suspension and Removal from Office).

A guidelines sentence adequately reflects the seriousness of this offense, promotes respect for the law, provides just punishment for the offense, and offers adequate deterrence to other public officials. Indeed, a key objective of sentencing corrupt public officials in particular should be “to send a message to other [public officials] that [bribery] is a serious crime that carries with it a correspondingly serious punishment.” *United States v. Kuhlman*, 711 F.3d 1321, 1328 (11th Cir. 2013); see also *United States v. Morgan*, Nos. 13-6025, 13-6052, 2015 WL 6773933, at *22 (10th Cir. Nov. 6, 2015) (reversing and remanding for resentencing five-year probationary sentence for elected official engaged in bribery who had an advisory guideline range of 41 to 51 months; appellate court noting that it is difficult to discern “how a non-custodial sentence would deter public officials from soliciting bribes,” because, among other reasons, “[g]eneral deterrence comes from a probability of conviction and significant consequences.”).

Finally, the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct weighs in favor of a lengthy prison sentence. Where judicial officials participate in bribery schemes, significant terms of imprisonment are, and should be, the result. See, e.g., *United States v. Acevedo Hernandez*, Crim. No. 14-380 (D.P.R.) (Jun. 11, 2015) (sentence of 120 months for commonwealth judge who accepted bribes to acquit a businessman of vehicular homicide charges); *United States v. Terry*, 707 F.3d 607 (6th Cir. 2013) (sentence of 63 months for state court judge who denied summary judgment motions in exchange for campaign contributions); *United States v. Teel*, 691 F.3d 578 (5th Cir. 2012) (sentences of 75 months and 51 months for state court judges who issued favorable rulings in civil cases in exchange for bribes in the form of bank loans); *United States v.*

Collins, 972 F.2d 1385 (5th Cir. 1992) (sentence of 82 months for federal judge who accepted bribe to reduce sentence by more than half).

VI. Conclusion

When considering the seriousness of Maggio's corruption and the damaging impact that his acceptance of a bribe has on public faith in the judiciary, the United States respectfully submits that Maggio's offense warrants a guideline sentence of imprisonment of 120 months. Under the circumstances, a term of imprisonment of 120 months is sufficient, but not greater than necessary, to comply with the purposes set forth in section 3553(a).

WHEREFORE, the United States respectfully requests that this Court sentence Maggio to 120 months imprisonment.

Respectfully submitted,

PATRICK HARRIS
Attorney for the United States,
Acting Under Authority Conferred By
Title 28, United States Code, Section 515

/s/ Julie Peters

By: JULIE PETERS
AR Bar No. 2000109
Assistant United States Attorney
P. O. Box 1229
Little Rock, Arkansas 72203
501-340-2600
julie.peters@usdoj.gov

RAYMOND HULSER
Chief, Public Integrity Section

/s/ Charles R. Walsh

By: CHARLES R. WALSH
NY Bar No. 4194619
CT Bar No. 422356
By: EDWARD P. SULLIVAN
NY Bar No. 2731032
Trial Attorneys, Public Integrity Section
Criminal Division
U.S. Department of Justice

1400 New York Ave.
Washington, DC 20005
202-514-2000
charles.walsh@usdoj.gov
edward.sullivan@usdoj.gov

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CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2016, a copy of the foregoing was filed electronically using the CM/ECF system and a copy was sent to all counsel of record.

/s/ Julie Peters