

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

UNITED STATES OF AMERICA	:	
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v.	:	Criminal No. 18-170 (KBJ)
	:	Sentencing Date: December 20, 2018
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JAMES A. WOLFE	:	
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DEFENDANT’S SENTENCING MEMORANDUM

In accordance with 18 U.S.C. § 3553(a) and Fed. R. Crim. P. 32(i), James A. Wolfe, through counsel, respectfully submits this memorandum to aid the Court in determining an appropriate sentence. “A just sentence is one that is sufficient but not greater than necessary.” *United States v. Williamson*, 83 F. Supp. 3d 394, 404 (D.D.C. 2015) (Collyer, J.). For the reasons stated herein, we respectfully request that the Court impose a non-incarcerative sentence of probation with a community service obligation.

Mr. Wolfe lied to FBI agents in a December 2017 interview in connection with the FBI’s probe of leaks of information regarding the activities of the Senate Select Committee on Intelligence (“SSCI”) to various reporters. It is a decision, along with his breaking his marital vows and violating his former employer’s rules regarding contacts with the media, that he deeply regrets—and the consequences of those failings will follow him for the rest of his life. The FBI’s investigation was initially focused on the unauthorized release of Classified Information related to media reports concerning a FISA warrant and its subject, described as MALE-1 in the Indictment

and Statement of Offense. At the time of his December 2017 interview, Mr. Wolfe had already met with the FBI once but was not aware that the government, through a surreptitious search of his mobile phone and other investigative steps, already knew that he had undisclosed and unauthorized contacts with certain reporters and about his personal relationship with Reporter # 2.

As we will address more fully herein, Mr. Wolfe falsely denied his contacts with several reporters, largely because he had been involved in an inappropriate personal relationship with Reporter # 2 for several years which he was afraid to reveal. The agents confronted Mr. Wolfe during that interview with proof that they were already aware of that inappropriate relationship, and Mr. Wolfe thereafter, in the very same interview, acknowledged that relationship. He later acknowledged other unauthorized contacts with reporters, despite having falsely denied them during the December interview. Consistent with what Mr. Wolfe also said during all of his interviews, though, at no time did he provide Classified Information to reporters or improperly share such information with any other individuals. He has not been charged with doing so, despite numerous false media and social media articles and commentary suggesting the contrary.

Mr. Wolfe, with undersigned counsel, has carefully reviewed the draft Presentence Investigation Report (“PSR”) prepared by United States Probation Officer Kelli Willett. We have no material objections to the facts set forth in the draft PSR or its Guidelines calculations.¹ The

¹ We provided to Ms. Willett some minor factual corrections and also our objections to the inclusion and/or characterization of a 2004 traffic infraction and certain legal proceedings from 2004-08 related to Mr. Wolfe’s contentious divorce from his first wife. *See* PSR ¶¶ 67-69. We are advised that inclusion of such information is standard practice by the Probation Office. We do not know, given the briefing schedule, whether or how those points will be resolved in the final PSR so we address them here briefly. None of these matters, including a *nolle prossed* misdemeanor allegation from 2004, affect the calculation of his Criminal History of zero points, form the basis for any departure, nor, we respectfully submit, bear on any other appropriate sentencing consideration. *See* U.S.S.G. § 4A1.2 (c)(2) (minor traffic offenses are never counted in Criminal History). As such, we respectfully submit that the Probation Office’s apparent standard practice of automatically including traffic infractions or civil protective orders in PSRs is

PSR calculates the applicable Sentencing Guidelines level under the 2018 edition of the United States Sentencing Guidelines (the “Guidelines”), yielding a final adjusted offense level of 4 (0-6 months), with a corresponding Criminal History of zero points, in Zone A, which is consistent with the parties’ shared position regarding the appropriate Guidelines analysis as set forth in the Plea Agreement. PSR ¶¶ 55-66; Plea Agreement (Dkt. 36) at 3. Probation is expressly permitted for Zone A defendants. *See* U.S.S.G. § 5B1.1(a)(1). As we will address more fully herein, a non-incarcerative sentence is also fully consistent with the legislative directives undergirding the enactment of the Guidelines, recent guidance from the Sentencing Commission, and the factors outlined in 18 U.S.C. § 3553(a).²

Until his formal retirement earlier this year, Mr. Wolfe ably served this country for his entire adult life, first in the U.S. Army and then, for the past three decades, as the Director of Security for the United States Senate Select Committee on Intelligence. He tarnished that unblemished service by engaging in undisclosed interactions with members of the media, in violation of the very Committee regulations he helped establish and was tasked with enforcing. His initial denials of those contacts reflected an understandably human, but nonetheless improper,

inconsistent with the Guidelines, inappropriate, and prejudicial.

² In its objections to the draft PSR, the government advised the Probation Office that it would be seeking an upward departure under U.S.S.G. § 5K2.0(a)(4) (Departures Based on Circumstances Identified as Not Ordinarily Relevant) and an upward variance based on § 3553(a). The government changed its position several days later, and informed the Probation Office of its intent to rely instead on U.S.S.G. § 5K2.7 (Disruption of Governmental Function) and U.S.S.G. § 5K2.14 (Public Welfare) for an upward departure. The government did not articulate any basis for these departures or variance. We will respond to the government’s arguments once we become aware of them, including potentially seeking a corresponding downward departure pursuant to U.S.S.G. § 5K2.20 (Aberrant Behavior). Our sentencing memorandum assumes that the draft PSR’s calculations and recommendations will not change but we will address any changes in the final PSR in our reply memorandum.

attempt to conceal his extramarital personal relationship with a reporter and to preserve his job. But his personal indiscretions and his contacts with certain reporters in which he shared limited, unclassified information about matters occurring before the Committee violated no federal law.³ Instead, when confronted by the FBI about these relationships, Mr. Wolfe initially lied, before ultimately acknowledging minutes later in the same interview that he had indeed had such a personal relationship with “Reporter # 2”—something the agents clearly knew already with proof they had obtained from Mr. Wolfe’s own communications, along with the fact that he had had undisclosed contacts with other reporters. It was those lies that have brought him before this Court—not the underlying conduct about which he was answering questions.

Mr. Wolfe has paid and will continue to pay a very heavy price for his conduct. He lost his job and career, he betrayed his commitment to his wife and family and country, and he has been the subject of numerous articles falsely damning him for purportedly betraying his responsibilities regarding Classified Information. His rights and opportunities have also been altered for the rest of his life due to his status as a felon. Those consequences, while very real and very humbling, are separate from the punishment the Court must now consider.

Mr. Wolfe has much to do in attempting to repair his marriage and he will almost certainly never regain his reputation given the very public shaming he has endured nor have any meaningful employment opportunities in the field where he has worked for the past 30 years. But his foolish decision to lie about his affair was corrected almost immediately in the same fateful interview last December and he later acknowledged other unauthorized contacts with the media that he first

³ The underlying conduct behind the false statement in Count 3 of the Indictment, the particular charge to which Mr. Wolfe pleaded guilty, relates to his having told “Reporter # 3” the identity of a person who had been subpoenaed by the SSCI, and then the timing of that same person meeting with SSCI staff.

falsely denied. We do not condone lying to federal agents. And his offense conduct is contradicted sharply by his longstanding and highly-regarded service to his country, his community, and his family as documented in the many attached letters.

Indeed, the attached letter, Exhibit 1, from the bipartisan present and past U.S. Senators who lead SSCI, whose internal policies and procedures Mr. Wolfe violated with his unreported and unapproved contacts with reporters, expresses the Senators' belief that there is "[no] public utility in depriving [Mr. Wolfe] of his freedom." Exhibit 1. Their letter urges the Court to impose a sentence that achieves justice through the "imposition of probation or community service." *Id.* We respectfully submit that these factors distinguish him from other recent false statement cases before this Court and in this District and warrant—consistent with the Guidelines, recent amendments to their commentary, and Section 3553—imposition of a non-incarcerative, probationary sentence that requires Mr. Wolfe to continue his life of public service with a meaningful community service obligation.

BACKGROUND

James A. Wolfe will appear before the Court for sentencing on December 20, 2018. He entered his guilty plea on October 15, 2018, to Count 3 of the Indictment, which charged him under 18 U.S.C. § 1001 with making certain false statements to the FBI, namely falsely denying having had unauthorized contacts with Reporter # 3.⁴ The underlying facts are set forth in the

⁴ Though the allegations from the Indictment are set forth in full in the PSR, as we emphasized to the Court at the Plea Hearing, Mr. Wolfe did not plead guilty to, and does not admit, having shared any information from a Classified Document—even unclassified information—in March or April 2017, as had been alleged originally in Count 2 of the Indictment, and we believe that the government would not be able to prove any such sharing of information by even a preponderance of the evidence. To that point, it is our understanding that Mr. Wolfe was never given access to the contents of the Classified Document in question during any relevant time period—though that document has subsequently been declassified.

Statement of the Offense accompanying Mr. Wolfe's plea and in the PSR. In his December 15, 2017, FBI interview, he falsely denied having had unauthorized contact with several reporters in contravention of SSCI rules. As set out in the Statement of the Offense, those contacts ranged from unremarkable undisclosed contact with Reporter # 1 (about items like public wifi passwords) to tipping off Reporter # 3 as to an individual whom SSCI had subpoenaed or met with. While these undisclosed contacts were not appropriate under Committee rules, at no time did Mr. Wolfe share Classified Information or substantive information with any of the Reporters. Mr. Wolfe acknowledged that he had lied with respect to Reporter # 2 during that same interview after the agents confronted him with photographs and other documentation demonstrating that he had not been truthful. He later acknowledged in January 2018 that he had contacts with the other reporters referenced in the Indictment.

During the December interview, Mr. Wolfe's access to his SSCI documents and emails was terminated by his employer and, although he technically remained on the SSCI staff until his retirement the following May, he did not return to work substantively after his FBI interview. Six months later, he was indicted and arrested in his home on June 7, 2018, and jailed overnight pending his initial appearance in U.S. District Court in Baltimore, MD, where he was released from custody. Following his presentment in this Court, Mr. Wolfe, through counsel, promptly negotiated a resolution of this matter, which is detailed in the Plea Agreement.

In addition to having agreed to the facts set forth in the Statement of Offense (Dkt. 37) and his acknowledgement of his conduct and acceptance of responsibility in his discussions with the Probation Officer, Mr. Wolfe will address the Court directly at sentencing and attempt to further explain in his own words and to the best of his ability how he erred from a life dedicated to serving his country and engaged in the foolish and illegal actions that bring him before the Court. The

impact of Mr. Wolfe's conduct and his conviction on him and his family have already been profound, and he will continue to suffer the collateral consequences of his transgressions personally and professionally for years to come.

This sentencing memorandum is divided into several sections. Part I addresses the application of the Sentencing Guidelines. Part II addresses Mr. Wolfe's history and characteristics. And Part III explains why we believe that a non-incarcerative sentence is appropriate.

APPLICATION OF STATUTORY SENTENCING FACTORS

18 U.S.C. § 3553(a) requires federal courts to impose sentences that are "sufficient, but not greater than necessary." *Accord Williamson*, 83 F. Supp. 3d at 404.⁵ The primary directive of § 3553(a) is the imposition of a sentence that is sufficient, but not greater than necessary, to comply with the purposes articulated in § 3553(a)(2), namely:

- (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 educational or vocational training, medical care, or other correctional treatment in the most effective manner.

In determining a minimally sufficient sentence, § 3553(a) further directs sentencing courts to consider the following factors:

- 1) the nature and circumstances of the offense and the history and characteristics of the defendant (§ 3553(a)(1));
- 2) the kinds of sentences available (§ 3553(a)(3));
- 3) the advisory sentencing guidelines range (§ 3553(a)(4));
- 4) any pertinent policy statement issued by the Sentencing Commission (§ 3553(a)(5));
- 5) the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct (§ 3553(a)(6)); and
- 6) the need to provide restitution to any victims of the offense. (§ 3553(a)(7)).

⁵ The Court is well familiar with the post-*Booker* sentencing standards and they will not be repeated here unnecessarily. See generally *United States v. Booker*, 543 U.S. 220 (2005).

Accord Williamson, 83 F. Supp. 3d at 401. Pursuant to the applicable sentencing Guidelines and the § 3553(a) considerations in this matter, we respectfully submit that those factors all support the imposition of a sentence on Mr. Wolfe that does not involve incarceration but, instead, obligates him to provide a meaningful amount of community service as part of a term of probation.

I. The Sentencing Guidelines Calculations (18 U.S.C. § 3553(a)(4)).

As set forth in the Plea Agreement, and confirmed in the PSR, the following Guidelines calculation is applicable under the 2018 United States Sentencing Guidelines:

Base Level	6
Acceptance of Responsibility	(2)
Total Offense Level and Range	4 (0-6 months)

See PSR ¶¶ 55-63. With this calculation and the lack of any Criminal History points, *see id.* ¶¶ 66, 115-16, Mr. Wolfe falls squarely into Zone A of the Guidelines, permitting a probationary sentence.

The government has advised the Probation Office of its intention to seek an upward departure or variance. Beyond its barebones citation to U.S.S.G. § 5K2.7 (Disruption of Governmental Function) and U.S.S.G. § 5K2.14 (Public Welfare) in its objections to the PSR, the government has not provided any further information regarding its position. Mr. Wolfe will respond once the government files its sentencing memorandum and presumably articulates its position. That response may, if warranted, seek a downward departure for Aberrant Behavior. *See* U.S.S.G. § 5K2.20.

Mr. Wolfe is also a nonviolent first offender within Zone A, which brings him within the ambit of the most recent Guidelines amendments and recent commentary from the Commission, which emphasize that sentencing courts are encouraged to consider imposing sentences other than

imprisonment for such defendants. *See* U.S.S.G. §5C1.1 (comment n. 4) (effective Nov. 1, 2018).

In explaining this amendment, the Commission stated:

This new application note is consistent with the statutory language in 28 U.S.C. § 994(j) regarding the ‘general appropriateness of imposing a sentence other than imprisonment’ for ‘a first offender who has not been convicted of a crime of violence or an otherwise serious offense’ and cites the statutory provision in support.

U.S. Sentencing Commission, Amendments to the Sentencing Guidelines, at 73 (Apr. 30, 2018) (emphasis added).⁶ As set forth more fully herein, notwithstanding the availability of a purely probationary sentence, we believe Mr. Wolfe should fulfill a meaningful amount of community service as part of any punishment. He has likely forever lost his ability to serve his country, a role he cherished, and such a sentence will not only serve as a reminder of the kind of service he once provided but also harness what Mr. Wolfe has to offer his community in a more productive manner than simply serving a jail term.⁷

II. Mr. Wolfe’s History and Characteristics (18 U.S.C. § 3553(a)(1)).

After *Booker*, a defendant’s history and characteristics are once again important factors for the sentencing court’s consideration.⁸ Mr. Wolfe does not take lightly the gravity of his offense

⁶ This perspective echoes other recent guidance from the Commission on the issue of appropriate sentences for first-time, nonviolent offenders. “Sentences [for Zone A offenders] that involve any amount of incarceration are in excess of the least restrictive sentence available, and so cannot be said to be an ‘alternative’ to the sentence that would otherwise be imposed.” Alternative Sentencing in the Federal Criminal Justice System, U.S. Sentencing Commission, p.6 (May 2015). In providing this guidance, the Commission noted that their 2015 definition modified the 2009 definition of alternative sentences. *See id.* n.32.

⁷ Mr. Wolfe has, in fact, served a night in jail in this matter as a result of being arrested in his home and detained pending his initial appearance in federal court in Baltimore, MD.

⁸ *See Rita v. United States*, 551 U.S. 338, 364-65 (2007) (Stevens, J., concurring) (“Matters such as age, education, mental or emotional condition, medical condition (including drug or alcohol addiction), employment history, lack of guidance as a youth, family ties, or military, civil, charitable, or public service are not ordinarily considered under the Guidelines. These are, however, matters that § 3553(a) authorizes the sentencing judge to consider.”) (citations omitted);

conduct nor his personal conduct underlying his offense. His illegal activity is well-documented in the Statement of the Offense. But Mr. Wolfe's offense conduct tells only part of his story, as the numerous accompanying letters in support of Mr. Wolfe and the additional information set forth in the PSR demonstrate.⁹

A. Background and Career

Mr. Wolfe grew up in a stable, working class family in northern Kentucky, just outside Cincinnati, Ohio. He will turn 58 on the day the Court is scheduled to impose his sentence. His father was a construction equipment operator and his mother held various jobs, including working for a florist, in a machine shop, and as a medical assistant. He and his elder brother, now deceased, grew up in a trailer park in the Florence, Kentucky area. His parents divorced when Mr. Wolfe was a teenager. His mother eventually remarried and was able to move into a single family home. Following his graduation from high school, Mr. Wolfe enlisted in the U.S. Army, serving approximately four years before his honorable discharge with the rank of Sergeant in 1987. He continued to serve in the Army Reserve for another six years, earning a final promotion to Staff Sergeant. *See* PSR ¶ 94. Mr. Wolfe was awarded several medals and commendations during his military service, summarized in the PSR. *See id.* ¶ 95.

see United States v. Preacely, 628 F.3d 72, 84 (2d Cir. 2010) (Lynch, J., concurring) (“[Section 3553(a)(1)] requires sentencing courts to treat the Guidelines only as a starting point, and then to craft an appropriate sentence taking full account of ‘the history and characteristics of the defendant.’”).

⁹ The accompanying letters from Mr. Wolfe's family, former colleagues, supporters, and friends are collected as Exhibits 1-4. Specifically, the letter from the SSCI leadership is attached as Exhibit 1; the letter from Jane Rhodes Wolfe, his wife, is attached as Exhibit 2; the letters from his sons are attached as Exhibit 3; and letters from other supporters, family members and former colleagues are attached as Exhibit 4. These letters have been redacted in accordance with Fed. R. Crim. P. 49.1. Undersigned counsel has retained the originals and will provide them to the Court or government counsel upon request. Some documents were sent to counsel electronically so a PDF or fax version is the only “original” in our possession.

During his military service and continuing while he was working for the Senate, Mr. Wolfe pursued a college education at night and ultimately earned a degree in Management Studies from the University of Maryland in 1991. In 1987, Mr. Wolfe began working for the U.S. Senate Select Committee on Intelligence (SSCI) and was soon named its Director for Security. He held that non-partisan position for some 30 years, ably serving both Democrat and Republican leadership. Mr. Wolfe served his country his entire adult employment life, both in the military and as a civilian.

Notwithstanding the contentious dissolution of his first marriage, which had lasted 20 years, Mr. Wolfe helped raise two fine sons, one of whom is currently stationed in South Korea with the U.S. Army, and the other who is training in South America to become a mountain climbing guide. Their heartfelt letters to the Court reflect Mr. Wolfe's dedication to his sons and to his example of service and hard work. Their passion, support and respect for their father is vividly captured in those letters, attached as Exhibit 3. His devotion to his family is also captured in letters from his aunt and his mother's first cousin. *See* Exhibit 4 (Bishop and Hensley letters).

During his time working for the Senate, Mr. Wolfe earned a well-founded reputation for taking seriously his job and the sensitive issues that were discussed before the SSCI. Letters from James Clapper, the former Director of the Office of National Intelligence, Robert S. Litt, the former General Counsel for the Office of the Director of National Intelligence and a former federal prosecutor, and Denis McDonough, former White House Chief of Staff and a former member of the National Security Council, attest to Mr. Wolfe's dedication to the mission of the Committee and respect for the sensitivity of classified matters occurring before it. *See id.* (Clapper, Litt, and McDonough letters). Numerous letters from former colleagues on the Committee staff, including its former General Counsel and a former Staff Director, confirm Mr. Wolfe's dedication to ensuring that sensitive matters before Committee were protected and that its credibility was

maintained. *See, e.g., id.* (L. Britt Snider and Andrew W. Johnson letters). He is described by another former colleague as the best security officer he has worked with in 35 years. *Id.* (Bryan Smith letter).

Exhibit 1, the letter from SSCI itself, signed by Chairman Burr, Vice Chairman Warner, and former Chairman Feinstein, is a powerful, bipartisan testament to Mr. Wolfe's service and the high esteem in which he was held by Committee leadership. As reflected in the letter, SSCI leadership respectfully urges the Court to impose a non-incarcerative sentence notwithstanding Mr. Wolfe's violation of the Committee's rules and his failing during his FBI interview.

The letters also share Mr. Wolfe's dedication to enriching the lives of others, particularly in ways that celebrated the work of the United States Senate, including through the Senate tours he regularly gave to friends and others he has known throughout his life, and even to those he did not know but who were referred to him. *See* Exhibit 4 (Peeler and Byrnes letters). He reveled in giving these tours, totally separate from his job requirements, offering anecdotes and stories that have made lasting positive impressions as detailed in the attached letters.

Mr. Wolfe has also supported neighbors and former colleagues and their families. *Id.* Veteran Marine and CIA Officer David Byrnes relates how Mr. Wolfe reached out to help Mr. Byrnes's family during his overseas deployments. *Id.* (Byrnes letter). Mr. Wolfe and his sons raised \$5,000 to support wounded soldiers, sponsoring a climb of Mt. Whitney. *See id.* (Smith letter). As documented by Reverend Erik J. Arnold and Dawn Weglein in their letters, in addition to his responsibilities at work and in helping to raise his sons, Mr. Wolfe also volunteered in the Ellicott City community for many years, helping to feed the homeless through an organization called Our Daily Bread. *See id.* (Arnold and Weglein letters). Ms. Weglein describes a particular example from six years ago when Mr. Wolfe stepped in to deliver food for Our Daily Bread at the

last minute when Ms. Weglein's father passed away. Mr. Wolfe has recently been able to intensify his pre-existing commitment to Our Daily Bread as a result of being unemployed and unable to work as a result of the charges against him. These documented examples all point to a man who has given time and effort to his community selflessly over the past several decades.

In 2008, Mr. Wolfe remarried. Ultimately and directly pertinent to the criminal conduct before the Court, Mr. Wolfe strayed from his vows to his wife and his behavior has severely tested their marriage. But as noted in her letter to the Court, Ms. Rhodes Wolfe, a former FBI agent herself, has continued to stand behind Mr. Wolfe and they have begun the hard work together to try to salvage their marriage. We note the force and passion of her perspective on how Mr. Wolfe was treated during the investigation and his arrest, the views not only of a supportive spouse but of a former FBI agent.

III. A Non-Incarcerative Sentence is Consistent with the Section 3553(a) Factors.

Following *Booker*, the D.C. Circuit has stated that the Guidelines are no longer binding sentencing edicts, "but rather are one factor that a district court must consider when imposing a sentence." *United States v. Gardellini*, 545 F.3d 1089, 1092 (D.C. Cir. 2008). Pursuant to 18 U.S.C. § 3553(a)(2), the sentencing court must impose a sentence that is minimally sufficient to achieve the goals of sentencing based on all of the § 3553(a) factors present in a case. This so-called parsimony provision serves as the "overarching instruction" of the statute. *See Kimbrough v. United States*, 552 U.S. 85, 111 (2007). A sentencing court has unique competence to make the "defendant-specific determinations" relevant to the § 3553(a) analysis. *Gardellini*, 545 F.3d at 1095. We respectfully submit that the § 3553(a) factors present in Mr. Wolfe's case demonstrate that a sentence which does not result in incarceration will reasonably and appropriately result in a

sentence that provides just punishment, offer adequate deterrence, and recognize the unlikelihood of Mr. Wolfe's recidivism.

A. Mr. Wolfe's history and characteristics justify a lenient sentence

As discussed above, Mr. Wolfe served his country honorably and supported and cared for his family and his community for almost his entire adult life. His fateful decision to conceal an affair and generally deny improper contacts with other reporters, the most significant of which were tips about the status of a witness before the SSCI, *see, e.g.*, Statement of Offense (Dkt. 37) at ¶ 13, stands in stark contrast to a man who, as attested by his peers and other members of the Intelligence Community, had an unblemished devotion to preserving and protecting Classified Information through three decades of non-partisan service to the Senate regardless of the majority party. We respectfully submit that these personal characteristics provide ample support for a sentence that does not involve incarceration.

B. The objectives of § 3553(a)(2) can be satisfied by a non-incarcerative sentence

A non-incarcerative sentence is not inconsistent with the sentencing objectives set forth in 18 U.S.C. § 3553(a)(2). We certainly agree that lying to FBI agents cannot be countenanced. The nature of those lies is, however, a factor the Court should consider and we address that in greater detail in our discussion of arguably comparable cases. Though his affair with Reporter # 2 was not a criminal offense, he tried to conceal it from the agents in his December 2017 interview. The FBI agents, of course, were already well aware of the affair and his unauthorized contact with other reporters, as evidenced in their preparation of a Questionnaire prior to the interview which they walked him through prior to confronting him with certain evidence after he lied. Regardless of the actual impact of Mr. Wolfe's false denials, though, Mr. Wolfe, to his credit, admitted to the FBI during the very same interview that he had, in fact, lied with respect to Reporter # 2 and he

later acknowledged, albeit in discussions that were not detailed, other improper contact and communications with other reporters.

Through his conduct and felony conviction, Mr. Wolfe has caused himself significant devastation, both personally and professionally. He has faced a barrage of highly negative (and largely false) media attention, forever damning his reputation well beyond what an ordinary defendant faces. He was publicly branded a leaker by the President of the United States in a context that falsely suggested he had compromised Classified Information.¹⁰ He has been subjected to a blistering set of articles regarding his affair.¹¹ Those were and are very real punishments but, aside from the high octane media attention, they are, of course, natural consequences of the poor choices that he made when he decided to lie to the agents that day.

There was not, however, a significant impairment to the government's investigation as a result of the false denials—including because the FBI already knew the answers to many of the questions they were asking (and indeed had photographic proof regarding certain issues)—and certainly there has been no financial loss or tangible harm to any victim. To the extent one may consider either his wife (a former FBI agent) or the SSCI (including the current Ranking Member of the Judiciary Committee) as victims here, it is notable that they both urge the Court to impose a lenient, non-penal sentence. A prison sentence in this context would achieve only purely punitive goals and substantially discount the other important sentencing goals set forth in the statute. The Court has at its disposal sentencing options completely consistent with the Guidelines, and in line with recent amendments to the commentary, that would better serve Mr. Wolfe and the ultimate

¹⁰ See Eileen Sullivan & Katie Brenner, Trump praises arrest of former Senate Committee Aide in Leaks Inquiry, N.Y. Times (June 8, 2018).

¹¹ See generally Def.'s Reply in Supp. of Mot. for Order Governing Extrajudicial Statements at 3-4 (Dkt. 20).

community interests, including probation with a term of community service (or, if some restraint on his liberty appears required to the Court, time-served). To put it simply, even without a sentence that includes actual incarceration, the twin goals of incarceration—punishment and rehabilitation—have in some measure already been and can continue to be met fully outside of the bars and fences of a penal institution.

1. *Seriousness of the Offense; Promoting Respect for the Law; and Just Punishment for the Offense*

Pursuant to § 3553(a)(2)(A), a sentencing court must impose the most parsimonious sentence consistent with the seriousness of the offense, the need to promote respect for the law, and the need to provide just punishment. To be sure, the offense conduct here is serious, and we obviously respect the law enforcement goal of prosecuting and punishing those who lie to agents conducting important investigations. Until the time he engaged in the offense conduct, Mr. Wolfe had no convictions for criminal conduct.¹² We respectfully submit that given Mr. Wolfe’s personal characteristics, a “just punishment” in this case may reasonably include a non-incarcerative sentence—a point reinforced by the Guidelines and commentary applicable to this case.

2. *Affording Adequate Deterrence to Criminal Conduct*

Under § 3553(a)(2)(B), a sentencing court must also consider the goals of specific deterrence and general deterrence. A term of incarceration for Mr. Wolfe is not necessary to

¹² As described in the draft PSR, in the midst of a very bitter divorce, his ex-wife made certain allegations against Mr. Wolfe that he strongly denies. Mr. Wolfe was never arrested, and the case she initiated was *nolle prossed* by the government. See PSR ¶ 67. Tellingly, there was no impairment of his security clearance as a result of these allegations. Given the circumstances, we do not believe it appropriate to include this bare record in the PSR, much less for the Court to consider it in any way in assessing Mr. Wolfe’s sentence or Criminal History, which was properly determined to have no points, or his background. Further, the draft PSR also improperly included a Virginia HOV traffic infraction from over 14 years ago as “other criminal conduct”—it is not criminal conduct and should not be considered as part of Mr. Wolfe’s Criminal History. See PSR ¶ 68; *but see* Va. Code § 33.2-501(B) (HOV violations are defined as traffic infractions) and Va. Code § 18.2-8 (“Traffic infractions are . . . not deemed to be criminal in nature.”).

advance either goal. Through the powerful process of recognizing and admitting publicly his improper personal, professional, and criminal conduct and accepting a felony conviction, Mr. Wolfe has faced immense guilt and shame. He will almost certainly be unable to work again in his field of experience or to hold a security clearance. Indeed, his felony conviction will substantially impair any other employment opportunity, which plays a substantial role in punishing him. As a government employee his entire adult life, Mr. Wolfe has a limited retirement benefit to support himself from now through the remainder of his life. He has undertaken the hard work to begin to repair the damage he caused to his marriage, a marriage he cares about deeply, and he has much more work to do in that respect. He has also expanded his longstanding support of a community charity in light of his recently increased opportunities to do so. And he has even attempted to repay to the identifiable contributors to his legal defense fund nearly \$10,000 in contributions. This is not the profile of a man who is likely to re-offend; rather, this is a man who is working hard to regain the trust of his family and his community and who hopes to lead a quiet, honorable life. Incarceration is unnecessary to promote specific deterrence here.

Further, the goal of general deterrence for others who might be inclined to commit similar crimes does not require Mr. Wolfe's incarceration. This case has garnered a significant amount of media attention and plainly sends a loud message to the public that lying to federal agents—even when those lies were denials animated by a desire to conceal a personal failing—has profound consequences. While that media attention has been unfair at times, in this sense alone, the goal of general deterrence has been attained. To the extent that this case is also about improperly sharing information with the media, even if that action is not itself a crime, this case also provides general deterrence in making it clear that the conduct will be investigated and that there are consequences, both from an employment standpoint and possibly from a prosecution standpoint.

3. *Incapacitation of Mr. Wolfe is Not Necessary to Protect the Public*

Under § 3553(a)(2)(C), a sentencing court must evaluate the need to “protect the public from further crimes of the defendant[.]” Section 3553(a)(2)(C) implements the penological concept of “incapacitation (physically preventing the defendant from committing crimes on ‘the outside,’ by imprisoning him)” *United States v. Kubiczko*, 660 F.3d 260, 262 (7th Cir. 2011); *see also Rita*, 551 U.S. at 347-48. There is no information whatsoever suggesting that Mr. Wolfe will commit crimes in the future or that his incapacitation is necessary to protect the public. He stands before the Court humbled by his actions and their consequences.

Mr. Wolfe has had ample opportunity to review and reflect upon his actions. As demonstrated by the letters of support attached hereto (Exhibits 1-4), Mr. Wolfe is well-loved, respected, and supported by members of his community. To the extent that the Court perceives some value in even a relatively modest term, we also note that Mr. Wolfe did serve a night in jail following his arrest. His formal arrest in his own home and having to spend a night in jail were powerful and sobering experiences.

In sum, Mr. Wolfe is exceedingly unlikely to engage in any criminal conduct, regardless of the sentence imposed. We respectfully submit that incarceration does not relate to any meaningful concept of protecting the public from Mr. Wolfe.

4. *Need for Education or Vocational Training, Medical Care, or Other Correctional Treatment*

Pursuant to § 3553(a)(2)(D), a sentencing court must also assess the need for the sentence imposed “to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.” These factors do not apply meaningfully to Mr. Wolfe; he very much wants to work but will almost certainly never work again in the area where he has the most relevant experience. He does not face any significant

medical care issues at this stage of his life.

5. *Other 3553(a) Factors*

A non-incarcerative sentence is also consistent with similar prosecutions and does not promote unwarranted disparity. *See* 18 U.S.C. § 3553 (a)(6). Mr. Wolfe's Guidelines, the November 1, 2018, amendments to the Guidelines commentary regarding nonviolent first offenders, and the factual circumstances of his false statements all distinguish his case from other recent false statement prosecutions in this District.

In *United States v. Jeffrey Kahn*, the Court imposed a one month term of incarceration with five months of home confinement where the Guidelines were determined to be at a Level 10 (Zone B) and there was a financial loss to the Office of Personnel Management of nearly \$80,000.00. Mr. Kahn's offense conduct consisted of claiming falsely that he had performed thorough background checks for the government, which caused the government to have to re-examine many dozens of personnel files for other deficiencies that presented significant risk that otherwise ineligible individuals might obtain government employment or security clearances. *See* Judgment as to Jeffrey Kahn at 2-3, *United States v. Jeffrey Kahn*, No. 18-CR-00056 (D.D.C. Aug. 28, 2018), ECF No. 39; *see also* Government's Mem. in Aid of Sentencing at 3-4, *United States v. Jeffrey Kahn*, No. 18-CR-00056 (D.D.C. July 23, 2018), ECF No. 28. Indeed, 55 false statements over many months were identified in that process. Here, of course, Mr. Wolfe is in a substantially lower Guidelines level and Zone, and his false denials caused no actual harm as the government already knew about his relationship with the primary reporter at issue (and Mr. Wolfe admitted during the same interview that he had that relationship). The nature of his other past media contacts did not affect SSCI nor the investigation in any material way we are aware of, and Mr. Wolfe was effectively suspended from his work that day and for the remaining pendency of the investigation.

The Special Counsel investigation has also yielded two other recent false statement prosecutions in this courthouse, of Alex van der Zwaan and George Papadopoulos. van der Zwaan was sentenced by Judge Amy B. Jackson to a term of 30 days in prison, and Papadopoulos was sentenced by Judge Randolph D. Moss to 14 days of incarceration. Both cases have exactly the same Guidelines calculation as Mr. Wolfe (0-6 months), though both were sentenced prior to the recent amended Guidelines commentary emphasizing the applicability of non-prison sentences for nonviolent first offenders. Those cases share key characteristics that distinguish them from Mr. Wolfe's situation, including that their false statements had a much more significant actual impact on the course of the government's respective investigations.

For example, van der Zwaan was represented by counsel during his interview (and, therefore, was presumably prepared for and anticipated his interview, unlike Mr. Wolfe). His false statements during that interview included affirmatively false narratives and concealing his prior destruction of evidence, acts that impaired significantly the Special Counsel's investigation. *See* Statement of the Offense at ¶¶ 5-7, *United States v. van der Zwaan*, No. 18-CR-00031 (D.D.C. Feb. 20, 2018), ECF No. 9. He did not acknowledge any of his lies until two weeks later. Judge Jackson also noted, in imposing the prison term, that given van der Zwaan's family's substantial wealth, the punitive impact of a simply imposing fine was diluted.

Papadopoulos also did not acknowledge his lies until much later, despite having the benefit of counsel at a second interview in which he still "did not correct the record." *See* Government's Sentencing Mem. at 6, *United States v. Papadopoulos*, No. 17-CR-00182 (D.D.C. Aug. 17, 2018), ECF No. 44. Like van der Zwaan, Papadopoulos's false statements were not simply denials but included confecting elaborate false narratives, *see* Statement of the Offense at ¶¶ 2, 22-31, *United States v. Papadopoulos*, No. 17-CR-00182 (D.D.C. Oct. 5, 2017), ECF No. 19, that materially

impacted the Special Counsel's investigation, including by impairing the government's ability to contact or detain a key foreign witness during that witness's brief travel through the United States. *See* Government's Sentencing Mem. at 6, *Papadopoulos*. We note that Papadopoulos has also persisted, both before his sentencing and after, in suggesting that he intends to withdraw his plea, calling into question whether he has ever truly accepted responsibility. No such investigatory damage flowed from Mr. Wolfe's actions and he has fully embraced his guilt.¹³ What is more, Mr. Wolfe, who did *not* have counsel at any time during any of his FBI interviews, admitted his relationship with Reporter # 2 during the same December interview and acknowledged other unauthorized contacts with other reporters during a follow up interview a few weeks later while his home was being searched.

C. Financial Punishment Considerations

As discussed in the PSR at ¶¶ 96-99, 102, Mr. Wolfe is a retired career government servant living on his pension and savings who, at the age of 58, has no meaningful employment prospects in his area of experience and expertise. Despite his limited financial resources, he has mailed checks attempting to refund the generous contributions made to his legal defense fund. A fine may well be an appropriate component of the punishment here but given Mr. Wolfe's financial circumstances, we respectfully submit that any such fine should be consistent with, and at the

¹³ Another case for comparison is the prosecution of former CIA Director General David Petraeus. General Petraeus improperly shared Classified Information with his mistress while she was writing a book. He lied to agents when confronted about his illegal disclosures, but he was permitted by the government to resolve his case with a misdemeanor charge and he received a probationary sentence. General Petraeus, of course, was a highly decorated and widely admired war hero but Mr. Wolfe has also served the country with distinction for over 30 years, was not afforded the same charging leniency and, as we have emphasized, there is no charge nor evidence of his having compromised Classified Information, unlike General Petraeus.

lower end of, the Guidelines range determined for this case, between \$500 and \$9,500.¹⁴

CONCLUSION

For the foregoing reasons, we respectfully ask the Court to impose a non-incarcerative sentence and, instead, impose a sentence of probation with a community service obligation in addition to the one day in jail that Mr. Wolfe has already served. Mr. Wolfe, despite the conduct that brings him before the Court, has long been and can again be a good and productive member of society. He has much to do in attempting to repair his marriage and he will almost certainly never regain his reputation or have any meaningful employment in the area where he has worked for the past 30 years. But his foolish decision to pursue an affair and then lie about it was corrected almost immediately during the very same fateful interview last year. We do not condone lying to federal agents. But Mr. Wolfe's conduct is contradicted sharply by the character of the man that his family and community and country relied upon and loved and respected, as documented in the attached letters, including a remarkable bipartisan letter from the Senators leading SSCI. Mr. Wolfe has committed serious mistakes for which he has paid dearly, and we respectfully urge the Court to consider the Guidelines, the totality of Mr. Wolfe's life, the very public shaming he has endured, and his dedication to rehabilitating himself in determining an appropriate sentence.

¹⁴ Mr. Wolfe has submitted his required financial disclosures and paid his \$100 Special Assessment.

Respectfully submitted,

_____/s/_____

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of December 2018, I caused a true and correct copy of the foregoing Sentencing Memorandum of Defendant James A. Wolfe, to be filed with the Clerk of Court using the CM/ECF filing system.

_____/s/_____

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