UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	
- v. -	S2 05 Cr. 518 (SAS)
FREDERIC BOURKE, JR.,	
Defendant.	

GOVERNMENT'S SENTENCING MEMORANDUM

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Defendant Frederic Bourke, Jr., is scheduled to be sentenced on November 10, 2009. The Government respectfully submits this Memorandum in response to the defendant's sentencing memorandum ("Def. Mem.") and to set forth its view of the appropriate sentence.

I. OVERVIEW OF THE OFFENSE CONDUCT

The defendant stands convicted of participating in one of the most audacious and most corrupt investment schemes ever attempted in the former Soviet Union, which is no small feat. Motivated by greed and his great admiration for rogue financier Viktor Kozeny, Bourke recruited family and friends, including retired Senator George Mitchell, to participate in this corrupt investment in which Bourke, other high flyers from his Aspen circles, and Wall Street institutional investors invested well over $100 million in Azerbaijani privatization vouchers through Kozeny's company, Oily Rock, and his investment bank, Minaret. There is no dispute that Bourke came to understand fully the restriction of the Foreign Corrupt Practices Act on his

activities, but he presumably thought he could escape punishment for any number of reasons: the investors had delegated all of the dirty work to Kozeny, a foreign national; Bourke's establishment credentials and those of other well-connected investors would deflect unwelcome suspicions; the investment was in a distant, obscure part of the globe; the likelihood seemed slim that potential witnesses -- a Swiss lawyer specializing in secret bank accounts, a American expatriate working as a translator for Russian bodyguards -- who were outside the inner circle of major investors would be reached by law enforcement (or would be credited in the face of witnesses who would back Bourke); top-flight attorneys had assured Bourke that his investment was structured in a way to insulate him from liability; and the scheme was simply too complicated for it to be unraveled in such a way as to implicate him.

It also safe to assume that Bourke cared little for the notions embodied in the Foreign Corrupt Practices Act, or for the cares and concerns of the average citizens of Azerbaijan. Confronted at minimum with evidence that Kozeny had engaged in corrupt business practices in the past, and, as Bourke professed to fear, would likely do so again if the opportunity arose, Bourke's only concern was whether he could be liable in any sense -- and whether his investment would still pan out. For the defendant, Azerbaijan was a place to reap tremendous profits without adding any economic value, a place to rename "Rickystan," as John Pulley testified.

The Foreign Corrupt Practices Act ("FCPA") was enacted by Congress to combat corruption worldwide, to enhance the United States' public image worldwide, and to allow legitimate businesses to compete against corrupt enterprises that engage in bribery and other illegal acts. As the House Report accompanying the bill stated: "The payment of bribes to influence the acts or decisions of foreign officials, foreign political parties or candidates for

foreign political office is unethical. It is counter to the moral expectations and values of the American public. But not only is it unethical, it is bad business as well. It erodes public confidence in the integrity of the free market system." House Report No. 95-640 (1977) at 4. "Bribery of foreign officials by some American companies casts a shadow on all U.S. Companies." *Id.* at 5. "Foreign corporate bribes also affect our domestic competitive climate when domestic firms engage in such practices as a substitute for healthy competition for foreign business." Senate Report No. 95-114 (1977) at 4.

Of the many FCPA prosecutions brought by the Department of Justice in the history of this statute, this prosecution concerns a scheme which is perhaps unrivaled in its scope and greed. Bourke and his fellow conspirators, through enormous bribes to a corrupt regime, planned to take over the most significant asset of an entire nation and keep for themselves the enormous profits they expected that asset to generate. Had they succeeded, this criminal conspiracy would have extinguished any hope that the impoverished people of Azerbaijan could share in the tremendous wealth of the country's natural resources after finally shaking off the yoke of communism. At the same time, American oil companies that follow the law and have competed fairly for contracts with SOCAR, Azerbaijan's state-owned oil company, would have been competitively disadvantaged by the Oily Rock scheme.

Bourke and the other Oily Rock investors discovered Azerbaijani privatization in the period following the collapse of the Soviet Union. The challenge for Azerbaijan was to establish a market-based economy as well as democratic institutions, both of which it was hoped would address the widespread poverty in Azerbaijan. As the Government's expert witness, Rajan Menon, testified, per capita income in Azerbaijan hovers around $5,000 per year, roughly half

that of per capita income in Mexico. (Tr. 166-67). Inequality of income distribution in Azerbaijan was severe, particularly because of the skewed distribution of wealth earned from Azerbaijan's significant oil reserves, which accounted for roughly 70% of Azerbaijan's export income. (Tr. 167-69).

Voucher-based privatization was a method developed by the World Bank and intended to benefit the people of the former Soviet republics by transferring assets owned by the state under communism to the people. (Tr. 173-75). Unfortunately, in Azerbaijan and elsewhere (namely, the Czech Republic, where Kozeny made the reputation by which Bourke was so impressed), the goals of voucher-based privatization were dashed by government corruption. (Tr. 179-80). Not only was there significant risk of corruption in the rapid shift from a command economy to a capitalist one, but Azerbaijan was firmly in the grips of Heydar Aliyev, a former Communist party leader, KGB official, and right hand man of Soviet Premier Leonid Brezhnev. (Tr. 159-60; 1671). Although Azerbaijan was not an outright dictatorship, it was best described as an authoritarian regime. (Tr. 160).

It was with a full appreciation of this milieu and the practices of his business partner, Kozeny, that Bourke entered into a scheme to capture the enormous profits of Azerbaijan's oil industry by setting up a complicated bribery scheme to ensure that millions of dollars would flow to the Azerbaijani officials and their families for years to come through off-shore bank accounts.

Not only does the gravity of Bourke's offense call for a substantial punishment, but so does the important goal of deterrence. It is significant that Bourke did everything he could to insulate himself from the FCPA violations in which he engaged -- investing in a remote country with little scrutiny in the media, through a foreign person, via an offshore shell company, using

attorneys to set up corporate structures which would, Bourke hoped, limit his exposure -- but he was still brought to justice. This prosecution has served notice to potential violators of the FCPA -- including passive investors, as Bourke inaccurately styles himself -- that they will not evade prosecution just because they have left most of the dirty work to foreigners like Viktor Kozeny or henchmen like Thomas Farrell.

Accordingly, regardless of how the Court calculates the Guidelines level, this significant offense, and Bourke's role in it, calls out for a substantial sentence of imprisonment. As further discussed below, the Guidelines level in this case, while high, is appropriate to the offense conduct. Moreover, Bourke's personal characteristics do not warrant the kind of dramatic downward variance he requests or the one that the Probation Department recommends.

II. GUIDELINES ISSUES

There are two major Guidelines disputes. A threshold issue, and one that has a significant effect on the offense level with respect to certain enhancements, is the question of which Guidelines book applies to the offenses of conviction. The second major dispute concerns the enhancement attributable to the benefit that the bribe-payers expected to receive, or, alternatively, the value of the bribes paid. These and other Guidelines issues are addressed below.

A. The Applicable Guidelines Manual

Bourke contends that use of the November 1, 2008 edition of the Guidelines Manual would violate the Ex Post Facto Clause and that the November 1, 1998 version should be used. The Probation Department employed the November 1, 2001 edition of the Guidelines Manual

because that manual covers the time period during which Bourke committed the offense charged in Count Three, false statements. (PSR ¶ 75 & pp. 31-32). For the reasons set forth below, the Court should use the current manual to determine the applicable Sentencing Guidelines range.

Congress has directed that a defendant's sentencing range should be calculated under the Guidelines that "are in effect on the date the defendant is sentenced." 18 U.S.C. § 3553(a)(4)(ii). Notwithstanding that statutory directive, under the now-defunct mandatory Guidelines regime, the Second Circuit held that the Ex Post Facto Clause of the Constitution applies to amendments to the Sentencing Guidelines that provide for a more severe sentence than was generated by the Guidelines in effect at the time the crime was committed. *See, e.g., United States* v. *Gonzalez*, 281 F.3d 38, 45 (2d Cir. 2002). That body of case law turned on the mandatory nature of the Guidelines.

Following the advent of the current advisory Guidelines regime, the Government submits that the former *ex post facto* analysis is no longer good law and the Guidelines manual in effect at the time of sentencing should always be used. Several courts have agreed. In the Second Circuit, the question remains an open one. *See United States* v. *Johnson*, 558 F.3d 193, 194 n.1 (2d Cir. 2009) ("we note that other courts have determined that, in light of their advisory status, the Sentencing Guidelines cannot ever run afoul of the Ex Post Facto Clause" and that "remains an open question to be decided in the appropriate case" in this Circuit). We respectfully submit, however, that a consideration of the case law that governed this issue under the mandatory Guidelines regime compels the conclusion that the current manual should be used for all sentencings, in light of the Supreme Court's most recent decisions confirming the advisory

nature of the Sentencing Guidelines – such as *Gall*, *Kimbrough*, and *Irizarry*.[1] Accordingly, the Government's view is that application of the Guidelines Manual in effect at the time of a defendant's sentencing no longer violates the Ex Post Facto Clause, even if the sentencing range applicable to that defendant has increased since the offense was committed.

The starting point for this analysis is 18 U.S.C. § 3553(a)(4)(ii), which requires a District Court to consider the sentencing range calculated under the Guidelines that "*are in effect on the date the defendant is sentenced* . . . ." (emphasis added.). The Guidelines Manual echoes this statutory command, providing that a sentencing court must generally apply the Guidelines in effect at the time of sentencing, *see* U.S.S.G. § 1B1.11(a), unless such application would violate the Ex Post Facto Clause of the U.S. Constitution. *See* U.S.S.G. § 1B1.11(b)(1). The Ex Post Facto Clause, U.S. Const., Art. I, § 9, Cl. 3, provides: "No Bill of Attainder or ex post facto Law shall be passed." The Supreme Court has explained that this provision "bars application of a law 'that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.'" *Johnson* v. *United States*, 529 U.S. 694, 699 (2000) (quoting *Calder* v. *Bull*, 3 Dall. 386, 390 (1798)).

In concluding, before *Booker*, 543 U.S. 220 (2005), that the Ex Post Facto Clause applied to Guidelines amendments, the Second Circuit relied on the leading case of *Miller* v. *Florida*, 482 U.S. 423 (1987), in which the Supreme Court held that changes in the method of scoring offenses under Florida's sentencing guidelines that increased the defendant's presumptive sentencing range violated the *ex post facto* restriction applicable to the states, U.S. Const., Art. I,

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[1] *Gall* v. *United States*, 128 S. Ct. 586, 591 (Dec. 10, 2007); *Kimbrough* v. *United States*, 128 S. Ct. 558, 563 (Dec. 10, 2007); *Irizarry* v. *United States*, 128 S. Ct. 2198, 2202 (2008).

§ 10, Cl. 1. *See, e.g., United States v. Gonzalez*, 281 F.3d 38, 45 (2d Cir. 2002) (applying *Miller*'s reasoning to amendments to Federal Sentencing Guidelines). In *Miller*, the Court noted that an *ex post facto* law must both operate retrospectively and "disadvantage the offender," 482 U.S. at 430 (internal quotation marks omitted), and concluded that the revisions to Florida's guidelines passed both prongs of the test. The Court explained that increases in Florida's guidelines had the "purpose and effect" of increasing the length of the sentences, *id.* at 431, because departures from the presumptive sentencing range would require the judge to provide "clear and convincing reasons" based on "facts proved beyond a reasonable doubt," and the decision would be subject to appellate review. *Id.*at 432. In contrast, a sentence within the range did not require supporting reasons and was not reviewable on appeal. *Id.* at 432-33. Those features of the Florida system meant that a defendant was "substantially disadvantaged" by a severity-enhancing change in the Florida sentencing laws. *Id.* at 432-33.

The Supreme Court rejected the state's effort to analogize the Florida guidelines to the United States Parole Commission's guidelines, which had been found by the courts of appeals not to be subject to the Ex Post Facto Clause. 482 U.S. at 434; *see, e.g., DiNapoli* v. *Northeast Regional Parole Comm'n*, 764 F.2d 143 (2d Cir. 1985); *cf. also Barna* v. *Travis*, 239 F.3d 169, 171-72 (2d Cir. 2001) (per curiam) (holding that New York state parole commission guidelines are not "laws" covered by the Ex Post Facto Clause). The Court noted that the Parole Commission's guidelines may have provided only "flexible guideposts for use in the exercise of discretion," *Miller,* 482 U.S. at 435 (internal quotation marks omitted), but that the Florida guidelines "create a high hurdle" before discretion can be exercised at all, *id.* at 435. The hurdle existed, the Court reiterated, because of the requirement that an outside-the-range sentence must

be justified by credible reasons based on facts not weighed in the presumptive sentence. *Id.* at 435. The Court also cited legislative history indicating that the Parole Commission had "unfettered discretion" under its guidelines system, which a Florida sentencing court clearly did not. *Id.* at 435 (quoting S. Rep. No. 225, 98th Cong., 2d. Sess. 38 (1983)).

The Second Circuit's pre-*Booker* case law applying *Miller* to the Sentencing Guidelines has now been completely undermined by a series of Supreme Court decisions including *Booker*, *Rita*, *Gall*, *Irizarry*, and *Kimbrough*. Put in the terms used by the Supreme Court in *Miller*, the Federal Guidelines are no longer a "high hurdle" that must be surmounted by district courts, with variances permitted only by facts not already incorporated into the presumptive sentence. *Cf. Miller*, 482 U.S. at 434. Instead, they have become like the New York parole guidelines, which are only "flexible guideposts for use in the exercise of discretion," *id.* at 435, and if that is so, then the Ex Post Facto Clause does not apply to the Sentencing Guidelines.

This is precisely the conclusion adopted by the Seventh Circuit, one of the first courts of appeals to have fully considered the continued applicability of the Ex Post Facto Clause to the Guidelines in the wake of *Booker*. In *United States* v. *Demaree*, 459 F.3d 791 (7th Cir.), *cert. denied*, 127 S. Ct. 3055 (2007), the Seventh Circuit held that the district court did not violate the Ex Post Facto Clause by applying the version of the Sentencing Guidelines in effect when the defendant was sentenced, rather than the less severe version of the Guidelines that was in effect when she committed the offense. The court noted that the government had confessed error, *id.* at 793, but rejected that confession, reasoning that "*Booker* demoted the Guidelines from rules to advice," and that "the ex post facto clause should apply only to laws and regulations that bind rather than advise." *id.* at 794-95 (quoting *United States* v. *Roche*, 415 F.3d 614, 619 (7th Cir.

2005)). As the court observed, a district judge's "choice of sentence, whether inside or outside the guideline range, is discretionary and subject therefore to only light appellate review. The applicable guideline nudges him toward the sentencing range, but his freedom to impose a reasonable sentence outside the range is unfettered." *Id.* at 795 (citations omitted). Moreover, the court pointed out that there would only be a "semantic effect" in adhering to the rule that application of revised Guidelines trigger *ex post facto* concerns. *Id.* at 795. That is because "[i]nstead of purporting to apply the new guideline, the judge who wanted to give a sentence based on it would say that in picking a sentence consistent with section 3553(a) he had used the information embodied in the new guideline." *Id.* at 795. The Sixth Circuit reached the same conclusion in *United States* v. *Barton*, 455 F.3d 649, 655 n.4 (6th Cir. 2006) ("Now that the Guidelines are advisory, the Guidelines calculation provides no such guarantee of an increased sentence, which means that the Guidelines are no longer akin to statutes in their authoritativeness. As such, the Ex Post Facto Clause itself is not implicated.").

At least two trial courts in this Circuit have adopted the holding in *Demaree*. In *United States* v. *Gilmore*, 470 F. Supp. 2d 233, 238-39 (E.D.N.Y. 2007), Judge Glasser, citing *Demaree* and *Barton*, held that the Ex Post Facto Clause did not prohibit retroactive application of a change in the advisory Sentencing Guidelines. In *Gilmore*, the Government conceded that it should have applied the Guidelines manual in effect at the time of the offense, given an intervening amendment before sentencing. Judge Glasser held that the Government's "concessions were misguided," because the advisory nature of the Guidelines made the Ex Post Facto Clause inapplicable. 470 F. Supp. 2d at 238-39. Moreover, in a recent sentencing in this District, Judge Rakoff cited *Dearee* and agreed with the Government's position that the Ex Post

Facto Clause did not govern selection of the applicable Guidelines manual. Transcript, September 2, 2009, *United States* v. *Treacy*, 08 Cr. 366 (JSR), at 22-26 (attached as Ex. A).

On the other hand, the Court of Appeals for the District of Columbia Circuit has rejected the reasoning of *Demaree*, *see United States* v. *Turner*, 548 F.3d 1094, 1098-1100 (D.C. Cir. 2008), and held that even in the post-*Booker* sentencing regime, the relevant *ex post facto* analysis remains the same. Furthermore, in cases arising in a number of other circuits, including the Second Circuit, the issue does not appear to have been contested by the parties, and with little discussion the courts have simply followed the pre-*Booker* practice of applying an earlier Guideline Manual to avoid *ex post facto* concerns. Thus, in *United States* v. *Kilkenny*, 493 F.3d 122, 127-30 (2d Cir. 2007), the Second Circuit remanded a case for resentencing where it was "not disputed that defendant was disadvantaged by the application of the 2002 Guidelines" in sentencing him for a bank fraud scheme executed in 2000. The Court did not cite *Demaree* or otherwise acknowledge the question of whether *Booker* impacted the *ex post facto* analysis.[2]

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[2] *See also, e.g., United States v. Wood*, 486 F.3d 781, 790-91 (3d Cir. 2007) (agreeing with government's concession that application of Guidelines amendment in sentencing defendant for robbery that took place before effective date of amendment constituted plain error that affected defendant's substantial rights); *United States v. Carter*, 490 F.3d 641, 643 (8th Cir. 2007) (noting that following *Booker*, the Eighth Circuit has still "recognized that retrospective application of the Guidelines implicates the *ex post facto* clause") (citation, quotation marks, and alteration omitted). Likewise, even where other courts have suggested some disagreement with *Demaree*, their discussions have come in *dicta*. *Cf. United States v. Duane*, 533 F.3d 441, 446 & n.1 (6th Cir. 2008) (assuming *arguendo* in extended *dicta* that "a retroactive change to the Guidelines could implicate the *Ex Post Facto* Clause"); *United States v. Gilman*, 478 F.3d 440, 449 (1st Cir. 2007) (stating that the *ex post facto* issue raised by *Demaree* "is doubtful" in the First Circuit); *United States v. Thompson*, 518 F.3d 832, 870 (10th Cir. 2008) (affirming application of 2001 Guidelines where offense was committed in 2001, but stating in *dicta* that "the *ex post facto* clause bars the sentencing court from retroactively applying an amended guideline provision when that amendment disadvantages the defendant"); *United States v. Rising Sun*, 522 F.3d 989, 992 n.1 (9th Cir. 2008) (district court "was correct" in using 2003 edition of

(continued...)

The Government's confession of error in cases like *Kilkenny* — which was decided on July 5, 2007 — was gradually undermined, however, by the Supreme Court's decisions that were issued days beforehand and in the months that followed. In *Rita v. United States*, for example, the Supreme Court declined to adopt an enforceable presumption of reasonableness for within-Guidelines-range sentences, and instead merely allowed circuit courts to choose for themselves whether to adopt a loose presumption in that regard. 551 U.S. 338, 345-50 (2007). The Second Circuit, notably, chose not to adopt such a presumption. *See United States v. Fernandez*, 443 F.3d 19, 26-28 (2d Cir. 2006). Likewise, in *Gall v. United States*, 128 S. Ct. 586, 591 (Dec. 10, 2007), the Court declined to adopt the Government's proposed proportionality principle for reviewing non-Guidelines sentences, which would have required judges to provide stronger justifications the further they deviated from the Guidelines range. Then came *Kimbrough v. United States*, 128 S. Ct. 558, 563 (Dec. 10, 2007), which overturned decisions like *Castillo* and held that judges are, indeed, permitted to vary from the advisory Guidelines ranges based on policy disagreements with the Sentencing Commission.

This line of cases culminated with *Irizarry v. United States*, where the Supreme Court held that a district judge need not give advance notice of an intent to deviate from the Guidelines range under Fed. R. Crim. P. 32. 128 S. Ct. 2198, 2202 (2008). After *Booker*, the *Irizarry* Court held, a defendant no longer has "[a]ny expectation subject to due process protection . . . that a criminal defendant would receive a sentence within the presumptively applicable guideline

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[2](...continued)
Guidelines in sentencing defendant for murder committed in 2003, where Guidelines range was subsequently increased).

range." 128 S. Ct. at 2202.[3] This holding — that a defendant has no constitutionally protected "expectation" of receiving a sentence within a given guideline range — fatally undermined the premise of earlier circuit precedents that the Ex Post Facto Clause bars the application of revised Guidelines Manuals that call for more severe sentences than were provided at the time of the offense. *See Kilkenny*, 493 F.3d at 126 (citing *Miller*, 482 U.S. at 430, for the proposition that the Ex Post Facto Clause is designed to give citizens "fair warning" of a law's effect). Decisions such as *Kilkenny*, which predate *Gall*, *Kimbrough*, and *Irizarry*, are accordingly no longer good law. *See, e.g., Wojchowski* v. *Daines*, 498 F.3d 99, 106 (2d Cir. 2007) (holding that although decision of circuit panel is generally binding, one exception is when "there has been an intervening Supreme Court decision that casts doubt on our controlling precedent") (internal quotation marks omitted). The Second Circuit made that explicit in *United States* v. *Johnson*, 558 F.3d 193, 194 n.1 ("we note that other courts have determined that, in light of their advisory status, the Sentencing Guidelines cannot ever run afoul of the Ex Post Facto Clause" and that "remains an open question to be decided in the appropriate case" in this Circuit).

In sum, the Supreme Court's most recent decisions have called into substantial question the remaining validity of Second Circuit precedents applying the Ex Post Facto Clause to the Sentencing Guidelines. We also submit that the reasoned opinion in *Demaree* sets forth the better of the argument and we accordingly request that the Court adopt the holding in that case,

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[3] In reaching that conclusion, the Supreme Court overruled the Second Circuit's contrary decision in *United States v. Anati*, 457 F.3d 233 (2d Cir. 2006). In *Anati*, the Second Circuit had suggested that there it was "doubtful" that a judge could impose a sentence outside a guideline range based on a "personal view" that one category of offenses was more serious than another, contrary to the advice provided by the Sentencing Commission. As noted, *Kimbrough* rejected this view, and confirmed the broad discretion of a district judge to choose a sentence that differs from the range suggested by the Guidelines.

which was subsequently followed by Judge Glasser in *Gilmore* and Judge Rakoff in *Treacy*. Accordingly, the Government respectfully submits that in the absence of an *ex post facto* violation, this Court should follow the statutory mandate of 18 U.S.C. § 3553(a)(4)(ii) and apply the Guidelines Manual in effect at the time of sentencing.

B. The Offense Conduct Under the November 1, 2008 Guidelines

If the Probation Department had correctly applied the November 1, 2008 Guidelines, rather than the November 1, 2001 Guidelines, the offense level, assuming that the rest of the PSR's analysis is correct (some of which the Government disputes below), would be 40 rather than 34.

1. The Base Offense Level

In the 2008 Guidelines manual, the base offense level under § 2C1.1 is 12, rather than the base offense level of 10 that the 2001 manual sets.

2. The Four-Level Enhancement Based on the Bribe Recipients

Under the 2008 manual, the offense level would be increased by four levels based on the positions held by the bribe recipients. In contrast, under the 2001 manual, the offense level is enhanced by the greater of the score determined under two factors, (i) the value/benefit/loss amount, as measured by the table set forth in § 2B1.1, and (ii) whether the offense involved payments to an elected official or an official holding a high-level decision making or sensitive position, which results in an increase of 8 levels. As such, if the enhancement resulting from the § 2B1.1 table is 8 or greater, due to an monetary amount of $70,000 or more, the fact that bribes were paid to high-level officials become irrelevant as a Guidelines matter. *See* U.S.S.G. § 2C1.1(b)(2) (2001 Guidelines); PSR at 32.

This interrelationship of the "loss amount" factor and the bribe recipients factor made little sense and was inconsistent with the general approach of the Guidelines (for example, a significant loss amount in a fraud case does not negate an otherwise applicable vulnerable-victim enhancement). The 2008 manual decouples these two issues and presents a more logical and equitable framework: regardless of the amount of the bribes or the benefits to be received, the offense level is increased by 4 (to a minimum offense level of 18) if payments were made to an elected official or an official holding a high-level decision making or sensitive position, reflecting that such corruption has a greater impact on its victims. *See* U.S.S.G. § 2C1.1(b)(2) (2008 Guidelines). Accordingly, under the correct Guidelines manual, the offense level should be increased by four because the bribes were paid to high-level officials in decision-making and sensitive positions.

3. Enhancement for the Value of the Bribes Paid or Benefits To Be Received

Whether the 2008 or the 2001 Guidelines manual is used, the offense level is increased based on "the value of the payment, the benefit received or to be received in return for the payment, . . . or the loss to the government from the offense, whichever is greatest." U.S.S.G. § 2C1.1(b)(2) (2008 Guidelines); *see* U.S.S.G. § 2C1.1(b)(2) (A) (2001 Guidelines).

The PSR forgoes a calculation of the benefit to be received and concludes that the offense level should be enhanced by 20 levels because the bribes paid exceeded $11 million. PSR ¶ 70; *see* U.S.S.G. § 2B1.1(b)(1)(K) (2001 Guidelines). This understates the offense level for two reasons: first, the benefits to be received in return for the payments significantly outstripped the amount of the payments, and second, even if they were the correct measure, the payments were much greater than $11 million.

a. The Benefits To Be Received

It was clear from the evidence at trial that the value of the bribes paid was exceeded by the benefit to be received for paying the bribes, as one would expect. The expectation of Bourke and his co-conspirators was that the investment consortium would gain a one-third share of SOCAR's future profits, with two-thirds flowing through Swiss bank accounts to the Azerbaijani officials who would permit the privatization to occur. SOCAR "was in need of modernization, and its financial condition was uncertain. But its oil fields and refineries were undoubtedly worth billions of dollars, and it owned percentages in every foreign oil deal negotiated since the Soviet breakup." Steve LeVine, *The Oil and the Glory* (Random House 2007), at 316. As expert witness Professor Rajan Menon testified on the Government's case, Azerbaijan is estimated to have 7.1 billion barrels of proven oil reserves. (Tr. 169). As a result of the "Deal of the Century" negotiated with foreign oil companies in 1994, SOCAR has received in annual revenues amounts as high as $3 billion; as extraction improves, it is estimated that SOCAR's annual revenues could climb as high as $20 billion. (Tr. 171).

The evidence established that the defendant well understood these economics, and he made the corrupt investment on behalf of himself, his family, and friends, with the belief that, based on his inside knowledge of the conspiracy, the deal was highly likely to go through, and that the profits he would realize would be tremendous. Bourke estimated tremendous returns even in discussions with his lawyers, who presumably might have had more serious concerns about the propriety of the transactions had Bourke been entirely candid about their nature and the likely profits. Bourke told one of his corporate lawyers, trial witness David Hempstead, that the likelihood that SOCAR would be privatized was 90-95% and that Bourke would as a result make

twenty times his original investment, which was $5.3 million. (Tr. 1973). Bourke also assured another one of his corporate attorneys, trial witness Arthur Levine, that this investment scheme was an extraordinary opportunity to make billions of dollars in returns. (Tr. 1553).

Bourke's assessment of his likely returns were even higher when he shared them with a friend and fellow investor. When Bourke's close friend, Harry Demetriou, who became an investor in Bourke's own investment company, Blueport, inquired about whether he could participate in the investment with a $500,000 investment, Bourke welcomed him in by stating in substance, as Demetriou quoted him, "What's the difference whether I make $1.6 billion profit or whether I make $1.5 billion and a friend of mine makes $100 million?" (Deposition of Harry Demetriou, April 20, 2009, at 15 (direct examination), 21-22 (direct examination), 59-60 (cross-examination) (attached as Ex. B)).[4]

Moreover, although Bourke invested over $5 million in Oily Rock through Blueport, receiving approximately 3.5 million shares in Oily Rock as a result (GX 524), Bourke then received another 4.5 million shares in Oily Rock through stock options as a grant for his service as chairman of a related entity, Oily Rock Investment Corporation ("ORIC"). (Tr. 2232-35, 2263-87; GX 220, 602, 615). This of course more than doubled Bourke's upside potential on the investment.

Because Bourke expected to make at least twenty times his investment of $5.3 million (not counting his substantial stock options), the expected value of his investment -- i.e., his

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[4] As the Court will recall, Harry Demetriou's deposition was taken pursuant to Rule 15 of the Federal Rules of Criminal Procedure upon the defendant's request in advance of trial due to Demetriou's terminal illness, but the defendant ultimately declined to offer a transcript of Demetriou's testimony at trial.

personal return on the bribes paid by the members of the conspiracy -- was over $100 million. The expected value to be received by members of the entire conspiracy increases this amount substantially beyond the $400 million threshold that the Guidelines set for the highest enhancement for the value of the benefit to be received.[5] Accordingly, the offense level is increased by 30 levels. U.S.S.G. § 2B1.1(b)(1)(P). Combined with the other calculations set forth above, this yields an offense level of 46 once all of the Chapter Two enhancements are considered.

b. The Value of the Bribes

Section 2C1.1(b)(2) provides for an alternative calculation for purposes of this enhancement based on the value of the bribes to be paid. Whereas this number, as would be expected in bribery cases, is substantially less than the value of the benefit expected to be

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[5] The Probation Department rejected this analysis because, according to the Government's witnesses, particularly Professor Rajan Menon, the privatization of SOCAR was highly unlikely and the investment was risky. (PSR ¶ 81). The Probation Department's view of this testimony is mistaken; rather, the Government submits, the testimony cited in the PSR actually supports its Guidelines analysis rather than undermines it. Expert witness Professor Rajan Menon was correct that it was highly unlikely that SOCAR would have been privatized by auction -- *which is exactly why the defendant and his co-conspirators paid bribes to make that happen*. In other words, but for the tremendous corrupt payments that Kozeny, Bourke and the members of the conspiracy offered and tendered to the Azerbaijani officials, the auction of SOCAR that Bourke anticipated (and told witnesses was very likely to occur) would not have happened. Bourke understood that to get the Azerbaijani leadership to part with such a valuable asset, the bribes had to be enormous, and they were. Professor Menon's opinion on the likelihood of SOCAR's privatization was the very reason that the Government offered testimony from Professor Menon: to show that, absent some corrupt arrangement, this deal would never have happened, supporting the view that Kozeny and Bourke had inside information about the likelihood of SOCAR's privatization because they had paid to make it happen. Bourke was very comfortable with the risk because, as he boasted, there was a 90% to 95% chance that SOCAR would be privatized as a result of the bribes. (Tr. 1973). When the SOCAR privatization auction was not scheduled as soon as Bourke had hoped and expected, his response was to find out whether Kozeny was paying the Azerbaijani officials enough. (Tr. 2496-97).

received by the bribe payers, it nonetheless yields a substantial offense level.

The value of the bribes paid and to be paid to Azerbaijani officials in this case exceeded $100 million. Apart from the "entry fee" direct payments of cash in currency and wire transfers, which exceeded $10 million, the members of the conspiracy spent over $200 million on bribes and Azerbaijani privatization vouchers in order to obtain a one-third share of the state-owned oil company, SOCAR.

The amounts spent on vouchers and options were a central part of the bribery scheme. First, the vouchers were only acquired by the conspiracy so that they could be used at a rigged privatization auction in which only the members of the conspiracy would be in a position to purchase SOCAR. Second, the vouchers and options themselves were purchased with the explicit understanding that two-thirds of them -- and the corresponding profits that would flow from the privatized SOCAR -- would be allocated to the Azerbaijani officials through secret trusts and bank accounts. Thus, of the over $100 million in vouchers that Oily Rock purchased, at least $66 million of those vouchers were to be for the Azerbaijani officials. Subsequently, when the share capital in Oily Rock was increased from 150 million shares to 450 million shares, 300 million of those shares were issued for the benefit of the Azerbaijani officials.

Accordingly, if the value of the bribes paid is to be used to calculate the enhancement under § 2C1.1(b)(2), this results in an enhancement of at least 26, reflecting bribes worth more than $100 million. U.S.S.G. § 2B1.1(b)(1)(N). Combined with the other calculations set forth above, this yields an offense level of 42 once all of the Chapter Two enhancements are considered.

C. Bourke's Role

Regardless of which Guidelines book is applied, the offense level is increased under Section Three if the Court determines that the defendant played an aggravating role in the offense conduct. The Government submits that, because the defendant was an organizer and leader of criminal activity that involved five or more participants and was otherwise extensive, the offense level is increased, pursuant to U.S.S.G. § 3B1.1(a), by four levels.[6] Although Kozeny was the principal organizer of the criminal activity, "[t]here can, of course, be more than one person who qualifies as a leader or organizer of a criminal associations or conspiracy." Application Note 4, U.S.S.G. § 3B1.1. Alternatively, the offense level should be increased by three levels, pursuant to U.S.S.G. § 3B1.1(b), because the defendant was at least a manager and supervisor of the criminal activity.

In considering whether an aggravating-role enhancement should apply, the Guidelines explain that "[f]actors the court should consider include the exercise of decision making authority, the nature of the participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others." Application Note 4, U.S.S.G. § 3B1.1. If the organization contains fewer than five members, the offense level should be only increased by two levels. As the Second Circuit has explained, "[a] defendant acts as a 'manager

[6] It is clear that the criminal activity involved five or more members and was otherwise extensive: the members were, at a minimum, Kozeny, Bourke, Bodmer, Farrell, and Clayton Lewis, all of whom participated to some measure in sophisticated transactions involving credit facilities, issuance of bearer shares, offshore investment vehicles and the like, all to obscure the nature of the scheme.

or supervisor' of a criminal enterprise involving at least five participants if he 'exercise[s] some degree of control over others involved in the commission of the offense' or 'play[s] a significant role in the decision to recruit or to supervise lower-level participants.'" *United States* v. *Payne*, 63 F.3d 1200, 1212 (2d Cir. 1995) (quoting *United States* v. *Liebman*, 40 F.3d 544, 548 (2d Cir. 1994) and *United States* v. *Greenfield*, 44 F.3d 1141, 1147 (2d Cir. 1995)).

While Bourke contends, in an effort to minimize his role, that the criminal enterprise was conceived by Kozeny alone after their first visit to Azerbaijan together,[7] Kozeny's plans hit a wall when the Azerbaijani officials informed him that he would need two million rather than one million vouchers to acquire SOCAR. It was then that Bourke and Aaron Fleck stepped in as lead investors, corporate officers and cheerleaders for the investment, eventually helping to attract investment from a variety of sources. Without these American validators, Kozeny's plans would have died in December 1997.

Bourke's leadership role was manifested in several ways: his recruitment of several investors and board members; his service on the boards of directors of several of the entities; his own high-level contacts in Baku, London, and New York on behalf of the conspiracy with Azerbaijani officials like Ilham Aliyev and Barat Nuriyev; and Bourke's lead role in organizing the medical trips that the two Azerbaijani officials made to New York. As the evidence at trial

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[7] Of course, there is no affirmative evidence that Bourke can point to on this on point, since nobody but he and Kozeny are aware of their private conversations during and after the trip. Bourke's self-serving description of his falling out with Kozeny during the fall of 1997 because of Kozeny's declining to invest in one of Bourke's projects, a narrative which is further enhanced by Bourke's purported reluctance to attend Kozeny's Christmas party, is far from convincing. The only relevant evidence on the subject, other than the defendant's girlfriend's predictable testimony, suggests exactly the opposite, as in Bourke telling Richard Friedman and others in the recorded conversation that "I've spent three years checking [Kozeny] out" and "[h]e's a great guy." (GX4A-T at 4).

demonstrated, Kozeny, Shafiq Gabr, Bourke, and Fleck were the inner circle of the Oily Rock investors. Bourke and Fleck recruited other American investors so that the investment could succeed when Kozeny desperately need a cash infusion. As *Fortune* magazine described AIG's due diligence on its investment with Oily Rock, based on documents obtained by *Fortune,* "[i]n checking out Kozeny, the company called people already in the deal, such as Bourke -- who said, not surprisingly, that Viktor was 'brilliant, dedicated, a visionary.'" *Fortune*, March 20, 2000, at 42.

Bourke also sat on the boards of several of the entities that Kozeny created, including the Oily Rock Investment Corporation, of which Bourke was president. Bourke was instrumental in recruiting retired Senator George Mitchell to the board of Oily Rock, and Bourke handled all of the salary and benefit negotiations on Mitchell's behalf. As even Bourke's own words on the tape recording admitted at trial demonstrate, Bourke did so so that Mitchell could lend his prestige to the investment, helping to clean up Kozeny's poor image. Bourke also took a leadership role in setting up Oily Rock USA Advisors and Minaret USA Advisors, which were the vehicles through which lobbyists were hired to benefit President Aliyev's government.

Finally, when Kozeny's efforts to close the deal seemed to flounder in late 1998, as privatization continued to stall, Bourke further increased his leadership role in the conspiracy, first flying to London to meet with Barat Nuriyev in November 1998, and then arranging, through Senator Mitchell, an audience with President Aliyev in early 1999, in an effort to pressure Aliyev into privatizing SOCAR. (Tr. 2718, 2757, 2763 (Testimony of Eric Vincent)). Thus, even after the conspiracy was unraveling, even after Bourke had made a show of resigning from Oily Rock USA Advisors, the defendant continued to try to realize the riches he had

expected to reap from his Azerbaijani investment.

In prior presentations to the Court, the defendant has repeatedly emphasized that he did not make money in this scheme. However, this has no bearing on the application of § 3B1.1. Indeed, the success of a criminal venture is not a basis for a reduced sentence. *See* U.S.S.G. § 2X1.1 (if a defendant has completed all of the acts that the defendant believed necessary for a successful completion of the substantive offense, the offense level for an attempted offense, just as for a conspiracy, is the same as for a completed offense). In analogous situations -- fraudsters who are left broke after their schemes collapse, bank robbers who are caught while fleeing, drug dealers who buy sham narcotics -- this argument could not be made seriously. The fact that Bourke's outrageous bribery scheme did not net him the huge riches he thought he could earn for his relatively modest (by his standards) $5 million investment says nothing about his criminal intent and the scope of the offense he planned and committed.

Bourke contends, to the contrary, that he is entitled to a mitigating role adjustment because, he submits, "while [he] ultimately became fairly active in participating in the *investment* opportunity, he was not an active participant in the *criminal* activity." (Def. Mem. at 15). This distinction is a hollow one. The investment could not have succeeded without the bribery: the enormous financial incentive to be provided to the Azerbaijani officials was at the heart of the investment in vouchers, the price of which reflected the market's assumption that SOCAR would never be privatized. Bourke further points out that "there was no evidence that [he] personally participated in the bribing of any Azeri officials" (*id.*), but the fact that Bourke did not need to get his hands dirty lugging suitcases of cash or setting up offshore accounts does not make him a

minor participant within the Guidelines.[8]

D. The Enhancement for Obstruction

The PSR assesses a two-level enhancement because Bourke made false statements to the FBI during the course of the investigation. (PSR ¶ 86). Although the defendant does not dispute this enhancement, the Government submits that it was incorrectly applied to Bourke's offense conduct on that basis because the FBI did not credit Bourke's false statements, and therefore they did not obstruct or impede the investigation or prosecution of this offense. *See* Application Note 5(b), U.S.S.G. § 3C1.1.

On the other hand, such an enhancement does apply where the defendant's conduct includes "committing, suborning, or attempting to suborn perjury, including during the course of a civil proceeding if such perjury pertains to conduct that forms the basis of the offense of conviction." Application Note 4(b), U.S.S.G. § 3C1.1. Here, the defendant committed perjury in testimony before the grand jury of New York County when he testified, in connection with the investigation that ultimately resulted in Kozeny's indictment for grand larceny, that he had no knowledge of bribery of government officials in Azerbaijan. (Testimony of Frederic Bourke, Jr., New York County Grand Jury, February 20, 2002, at 353-54). Of course, Bourke's perjury in the state grand jury was compounded by his dishonest dealings with District Attorney's Office throughout its investigation of Kozeny, during which Bourke concealed his own misconduct. Accordingly, the two-level enhancement should be assessed on this basis.

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[8] Bourke contends that the jury verdict does not necessarily indicate that he knew of the bribery because of the Court's conscious avoidance instruction, but this is belied by the conviction on the false statements count.

III. ADDITIONAL SENTENCING FACTORS

A. Deterrence

In his sentencing submission, Bourke embarks on a theoretical discussion of general deterrence considerations which is not helpful to him. As Bourke contends through one of his citations, in deterring so-called white-collar criminals "'*certainty of punishment tends to matter much more than sanction severity.*'" (Def. Mem. at 22 (quoting Sally Simpson, *Corporate Crime, Law and Social Control*, at 35 (Cambridge University Press 2002) (emphasis added by the defendant)). Even assuming that this is correct, however, these two factors trade off in any calculation concerning deterrence. That is, if punishment is more certain, punishment need not be so severe to achieve deterrence; if punishment is less certain, however, greater severity of punishment is necessary to achieve the same level of deterrence.

And that is just the point in this case. There is only limited certainty of punishment for conduct that violates the FCPA, and there was very little certainty of punishment when Bourke and his co-conspirators embarked on this offense: Bourke and other investors were people of substantial wealth and influence; they were investing, in some cases, passively, through offshore investment vehicles in a consortium spearheaded by a foreign person in a foreign nation; and they had top-flight lawyers who took pains to limit them from any legal exposure. Certainly Bourke felt secure enough about his relationship to the bribes that were paid that he proffered for four days and lied to the FBI repeatedly. There was never any certainty of punishment in this case, nor was Bourke ever deterred by any such concern, even after the federal investigation began.

Moreover, there were undoubtedly other individuals who were implicated in the offenses for which Bourke stands convicted and who were not prosecuted. The Government said as

much in its rebuttal summation with respect to several of the investors, and Bourke points it out as well: he contends, "as the evidence demonstrated at trial there were a number of investors in Oily Rock, or co-investors, who were familiar with Kozeny or his background and decided to invest. Some even traveled to Baku. Yet those investors have not been prosecuted by the government." (Def. Mem. at 16).[9] That is correct, and it is indeed troubling to consider that individuals who may have been roughly as culpable as Bourke will escape conviction and punishment. This, however, is the nature of our system of justice and the cherished presumption of innocence. But where punishment is far from certain, deterrence can only be achieved through relatively punitive sentences.

Furthermore, in considering the general deterrence value of this particular case, it is no exaggeration to say that corporate executives, investors, and their law firms across the nation are watching this case, following the guilty verdict, to see how Bourke will be punished. As one FCPA practitioner at Miller & Chevalier told *American Lawyer,* "[The Bourke verdict] struck fear in boards of companies across the country." (*AmLaw Litigation Daily*, July 10, 2009, quoting James Tillen). Following the verdict, numerous corporate law firms immediately issued advisories to their clients, advisories which are also widely available on the Internet to anyone performing cursory research on the FCPA and its sanctions.[10] Just as news of Bourke's

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[9] A number of these investors have now submitted letter to the Court seeking leniency for Bourke.

[10] *See, e.g.,* DLA Piper, "Investor Who Learned About Bribes But Failed To Get Out Convicted of FCPA Conspiracy," July 16, 2009 ("The U.S. government has sent a message that it continues to prosecute corruption involving government officials throughout the world, and that it will use all the resources, and take all the time, it needs to do so."); Skadden, Arps, Meagher & Flom, "FCPA Conviction of Investor Frederic Bourke Highlights the Importance of (continued...)

conviction at trial spread quickly throughout the pertinent corporate and legal communities, news of his sentence will make a similar impact. This kind of general deterrence is an important product of a conviction, and it would be undermined by the exceedingly light sentence that Bourke asks of this Court.

Not only is general deterrence is an important consideration, but in this particular case, there is nothing about Bourke's unsympathetic conduct that should exempt him from these considerations. While Bourke may fancy himself a "whisteblower" who has been vindictively singled-out and prosecuted, as he has contended in pre-trial motions, some of the paramount sentencing concerns in this case actually have nothing to do with Bourke, but have everything to

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[10](...continued)
Anti-Corruption Due Diligence," July 13, 2009; Wilson Sonsini Goodrich & Rosati, "Jury Convicts Frederic Bourke of Conspiracy To Violate the FCPA," July 13, 2009 ("Frederic Bourke's conviction provides a high-profile illustration of the wide scope of criminal liability under the FCPA. . . . The Bourke guilty verdict signifies that the FCPA will continue to serve as a vital weapon in the government's arsenal to combat corrupt business practices and makes evident that one can be criminally liable for a bribe made or facilitated by a business partner or agent."); Willkie Farr & Gallagher, "Investor Convicted on FCPA-Related Charges" ("Bourke's conviction illustrates the expansive scope of the FCPA and its potential to reach investors. . . . The government's prosecution of Bourke demonstrates the increasing importance for investors and investment companies to assure that appropriate FCPA compliance safeguards are in place . . . ."); Mayer, Brown, "FCPA Guilty Verdict Underscores Enforcement Priority: Individuals Will Be Prosecuted," July 30, 2009 ("The Bourke trial and conviction underscore an important enforcement priority at both the U.S. Department of Justice and the U.S. Securities and Exchange Commission: Individuals will be investigated and charged for violating the FCPA. While this is not a new trend, the rare trial conviction serves as a sharp reminder of the potency of the message being sent. . . . The era is long past when the company alone would be the subject of an FCPA prosecution."); Fulbright & Jaworski, "High Profile Conviction Likely To Further Bolster FCPA Enforcement," July 13, 2009; Steptoe & Johnson, "International Law Advisory -- Private Investor Convicted for Involvement in Scheme To Bribe Officials in the Republic of Azerbaijan"; Jenner & Block, "U.S. v. Bourke FCPA Prosecution Highlights Dangers of Turning a Blind Eye to Red Flags," July 17, 2009 ("The 'willful blindness' theory has played a role in DOJ settlements in the past. . . . Bourke's was the first in which the DOJ litigated to trial a willful blindness theory.").

do with his conduct.

Accordingly, while specific deterrence may be less important here, general deterrence principles counsel a sentence that speaks loudly about the seriousness of Bourke's conduct, as well as his refusal to accept responsibility for it.

B. Avoidance of Unwarranted Sentencing Disparities

The defendant contends that a Guidelines sentence would create an unwarranted disparity with other similar sentences. The points of comparison Bourke draws are flawed, however. Bourke concedes that are very few FCPA sentencing precedents, and even fewer that involve convictions after trial. The Government would add to those two points that there are none which involves bribes paid to the president of a country to gain control of its leading industry in its entirety. Thus, Bourke's citation to Sentencing Commission statistics for hundreds of run-of-the-mill commercial bribery cases is inapposite. In fact, "most of the individuals convicted of violating the FCPA have received a sentence that includes a term of incarceration, particularly those sentenced during the past five years." F. Joseph Warin & Patrick F. Speice, Gibson, Dunn & Crutcher, "Go Directly To Jail: Sentencing of Individual Criminal Defendants in Foreign Corrupt Practices Act Cases," *Bloomberg Law Reports, Risk & Compliance*, Sept. 2008, at 1.

> "To date, only a few individual criminal defendants have been sentenced under § 2C1.1 for violating the FCPA, and the sentencing determinations appear to be very fact-specific. The size of the benefit obtained or sought as a result of the bribe, the defendant's role in the bribery scheme, the defendant's acceptance of responsibility, and the defendant's degree of cooperation with ongoing investigations are all likely to influence the sentence that the court imposes on a particular defendant. Generally speaking, however, senior executives and other high-ranking employees who are implicated in a foreign bribery scheme are likely to fact at least some term of incarceration, *even if they accept responsibility for their actions, plead guilty, and agree to cooperate with any*

ongoing government investigation."

Id. at 7 (emphasis added). Of course, Bourke neither pled guilty nor cooperated.

Bourke points to several FCPA sentences that were imposed after a conviction at trial (Def. Mem. at 27), but he omits discussion of the offense conduct underlying these sentences. In fact, further analysis of the FCPA sentences which Bourke cites demonstrates why Bourke merits a lengthier sentence, not a shorter one.

Bourke first points to *United States v. Douglas Murphy and David Kay* (S.D. Tex. 2002), in which the defendants were sentenced after trial to 63 months and 37 months, respectively. Murphy and Kay were convicted of several FCPA counts, conspiring to violate the FCPA, false statements, and, in Murphy's case, obstruction of justice. Murphy and Kay were executives at American Rice who bribed Haitian officials with, in total, $528,000, to avoid $1.5 million in Haitian import tax that would have been levied on their company's Haitian subsidiary. Obviously, the amounts in question were a mere fraction of the bribes paid in the instant case, and the benefit to be received was a relative pittance in comparison to the gain that Bourke expected to reap personally. Nevertheless, both defendants received multi-year sentences.

Bourke next discusses *United States v. Robert King* (W.D. Mo. 2001), in which the trial defendant joined a conspiracy to pay bribes to obtain a land concession in Costa Rica, as well as to obtain favorable changes in local laws and regulations to permit development of port, airport and other facilities. The conspirators agreed to pay a $1 million bribe to close the deal. *See United States v. King*, 351 F.3d 859, 862 (8th Cir. 2003). It is unclear from the available materials how to measure the scope of the benefit to be received, but the size of the bribes was, again, much smaller than in Bourke's case. Moreover, it is notable that King was an investor in

the project, distinguishing him from the company's president and vice president, who were also prosecuted, *see id.*, but King still received a thirty-month sentence.

The defendant next points to *United States v. Mead* (D.N.J. 1998), in which the defendant, who was the CEO of a company seeking contracts to perform import controls and inventory inspections for the Republic of Panama, was sentenced to a split sentence of four months' imprisonment and four months' home detention. Bourke omits mention that the bribes paid in this case amounted only to $50,000.

Finally, Bourke discusses *United States v. Liebo* (D. Minn. 1989), in which the vice president of an aerospace company participated in a conspiracy to bribe official of Niger to get certain contracts. While the defendant was sentenced only to probation, Bourke omits mention that the bribes to be paid by this conspiracy amounted only to $130,813. Moreover, Liebo was acquitted on most of the FCPA counts, but was convicted only of the count concerning his purchase of some airline tickets for an official's honeymoon and a related false statements count. *United States v. Liebo*, 923 F.2d 1308, 1310 (8th Cir. 1991). Accordingly, the bribes that the sentencing judge considered were something between a few thousand dollars and $130,813.

In focusing on post-trial sentences from relatively old cases, Bourke also omits several significant FCPA sentences that have been given in more recent cases to defendants notwithstanding that they pled guilty. Even those these defendants engaged in less serious conduct and accepted responsibility for it, they still received significant sentences of imprisonment, relative to the amounts of the bribes and benefits in question. For instance, in *United States v. Yaw Osei Amoako* (D.N.J. 2007), the defendant and other executives of a telecommunications company seeking business in several African nations arranged bribes of

$270,000 to obtain contracts worth $11.5 million; Amoako was sentenced after pleading guilty to 18 months' imprisonment. In *United States v. Basu* (D.D.C. 2008), the defendant and others conspired to pay bribes of $127,000 to obtain World Bank contracts; Basu was sentenced after pleading guilty to 15 months' imprisonment. In *United States v. Faheem Mousa Salam* (D.D.C. 2006), the defendant, who was working for an American contractor in Iraq, paid bribes of $60,000 to an Iraqi police official to get contracts worth approximately $1 million; Salam was sentenced after pleading guilty to three years' imprisonment.

Thus, while it is not even clear that any of the sentences to which Bourke points were outside of the relevant Guidelines range, none of the offense conduct in these cases approaches that in which Bourke engaged. It is fair to say that none of these cases involved a scheme as ambitious as the one Bourke joined, and none of these defendants had the same wealth and sophistication that should have counseled Bourke against his illegal conduct. Accordingly, not only would a Guidelines sentence not create a disparity between Bourke's sentence and other FCPA sentence, but any disparity would be warranted because Bourke's FCPA conspiracy was so much more enormous in its scope and purpose than those in these prior cases.

C. The Defendant's Individual Characteristics

It is usually the case that a criminal conviction is not the entire measure of a person, and this case is no different. Bourke's friends and family has submitted a remarkable set of letters attesting to Bourke's character and good works, including charitable contributions of time and money that may well go beyond what society should expect of an individual of Bourke's wealth and advantages. But Bourke's plea for leniency on this basis would be more persuasive if he had found it in his character to take responsibility for his actions in this case. Even at this late date,

regardless of whether it has any effect on his Guidelines calculation, Bourke has the opportunity to show and promote respect for the law by accepting responsibility and showing remorse for his actions. Instead, the many friends and family who hold Bourke is high esteem will take away from these years of proceedings, mistakenly, that Bourke was wrongfully convicted, because they continue to believe Bourke's protestations of innocence; the alternative is to accept that Bourke's cynical conduct in response to this investigation and prosecution is at odds with the image Bourke has always sought to portray.

In addition to committing the offense conduct itself, Bourke has displayed through his actions a pronounced lack of respect for the law and for others. While Bourke's failure to accept responsibility is reflected in his Guidelines calculation, this is not a simple case of a defendant who declines to plead guilty and goes to trial. Bourke purported to cooperate with this investigation. Instead, he proffered for four days with the FBI and lied repeatedly. Following his indictment, he not only mounted, as expected, a significant trial defense, but he filed a frivolous motion claiming that this was a vindictive prosecution, that he was being singled out as a "whistleblower" whose revelations threatened U.S.-Azerbaijan relations, a threat for which he was being targeted by the Department of Justice.

Bourke's efforts to derail an investigation and prosecution of his activities in Azerbaijan went beyond the courtroom and his proffers with the FBI, however. In an effort to get potential witnesses to align themselves with him, Bourke used threats -- both veiled and unveiled -- against two potential witnesses against him (witnesses who, unlike Hans Bodmer and Thomas Farrell, resided in the United States and could easily be subpoenaed). Amir Farman Farma, who gave significant testimony against Bourke at trial, testified that one night he and his wife were

leaving their residence when they encountered Bourke outside their building in New York. Even though Farman Farma had always tried to be helpful to Bourke, and continued to do so a limited way even after this encounter, Bourke told Farman Farma that "those people who don't help us, we're going to go after them." (Tr. 1499). Farman Farma did not think much of the comment at the time, but his wife considered Bourke's remarks "threatening." (Tr. 1499). Bourke was more direct with Christine Rastas, who also testified at trial. After Rastas left Kozeny's employ and returned to the United States, Bourke asked her to meet him to discuss her former employment in Azerbaijan. When Rastas declined to meet Bourke, he threatened to smear her. As Rastas testified, "he tried to intimidate me into talking more. . . . He told me he had heard that I was fired from Minaret Group for stealing money and for sleeping with John Pulley." (Tr. 889). Thus, in these instances, the same levers of power which Bourke has employed for the good of many have also been used to threaten harm to those who get in his way.

Finally, it must be noted that, for all of Bourke's wealth and success -- and the good works which he points to, made possible by his tremendous success -- he was not content to play by the rules. When he saw the prospect of a tremendous fortune, one which would outstrip the tremendous fortune he had already made, he cast the laws of this country aside and willfully engaged in a corrupt scheme to bribe foreign officials. This was not a single, rash act, but one which Bourke pursued with intensity of effort over the course of more than a year. And, when questions about his dealings in Azerbaijan arose years later, Bourke decided he could lie and bluster his way out of trouble, claiming that it was he who was on the side of right, fighting to expose Kozeny's wrongdoing. Bourke's sentence must reflect his dishonesty, his greed, his arrogance, his determination to commit this crime, and his fundamental disrespect for the law.

IV. FINE

While a fine is no substitute for the punishment of imprisonment, a substantial fine is warranted here as well. The relevant statute states: "If *any person* derives pecuniary gain from the offense . . . the defendant may be fined not more than the greater of twice the gross gain . . . unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process." 18 U.S.C. § 3571(d) (emphasis added).

As the Probation Department has agreed, the maximum fine in this case is twice the amount of the bribes that were received by any persons as a result of the offense. This comports with the plain language of the statute. It also makes sense in the context of bribery sentences, given that in unsuccessful bribery cases, there would generally be no gain by the defendant, and no loss to anyone but the defendant. The intent of 18 U.S.C. § 3571(d) is to increase financial penalties when large sums are involved in an offense, and there is no reason to read the statute to eliminate this possibility here. Indeed, the defendant has no answer to the Probation Department's determination that the maximum fine is twice the amount of the bribes paid; instead, "Mr. Bourke asserts there was no pecuniary gain or loss" because he "did not derive any pecuniary gain from the offense" and "he and the other Oily Rock investors lost all of the money they had invested in the Azerbaijani privatization venture." (Def. Objections to the PSR at 24).

Bourke further contends that it would be difficult to calculate the amount of the bribes that were paid and therefore attempting to do so "would unduly complicate or prolong the sentencing process." (*Id.* at 25). Bourke's repeated refrain on this point seems to ignore a large body of evidence at trial. Bribes were paid in the form of cash in a duffel bag, wire transfers to offshore accounts, shopping sprees and medical treatment, and, above all, the two-thirds transfer

of vouchers and options to the Azerbaijani officials. Bourke repeatedly asserts that this transfer did not actually occur, but both Farrell and Bodmer, who were responsible for the voucher allocation and the holding companies, respectively, testified that it did, even prior to the share issuance and dilution in the spring of 1998. Accordingly, a conservative estimate of the bribes actually paid would still be well into the tens of millions of dollars.

In determining the amount of a fine, several factors should be considered under the Guidelines, including that the combined sentence promote respect for the law, provide just punishment, and afford adequate deterrence. U.S.S.G. § 5E1.2(d). The Court should also consider any collateral consequences of conviction, including civil obligations, and any restitution that arises, *id.*, which in this case is zero. The Court should also consider the costs to the government of a term of imprisonment or other sentence costs, and any other "pertinent equitable considerations." *Id.* "The amount of the fine should always be sufficient to ensure that the fine, taken together with other sanctions imposed, is punitive." *Id.*

The Probation Department recommends a fine of $1,000,000. This amount does not seem to be high enough to accomplish the goals of a fine in sentencing. Bourke's net worth far exceeds $100 million. (PSR ¶ 119 & n. 11). His gross income in 2007 was $32 million, and he paid nine times the recommended fine just in income tax. (PSR ¶ 123). It would seem that, in this defendant's case, a substantially higher fine is necessary to really be considered punitive. Accordingly, an upward departure beyond the Guidelines fine range is appropriate.

CONCLUSION

For all of the foregoing reasons, the Government respectfully submits that the Guidelines range in this case is 120 months, and that such a sentence would be reasonable and appropriate in light of all of the sentencing factors.

Moreover, if the Court were to determine that mitigating factors counsel some downward variance, the Government respectfully urges the Court to reject the dramatic downward variance recommended by the Probation Department and to sentence the defendant to significant term of imprisonment to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment for the offense, to afford adequate deterrence to such conduct, and to reflect the nature and circumstances of the offense and the history and characteristics of the defendant.

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Respectfully submitted,

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