

UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF ILLINOIS
 SPRINGFIELD DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	CRIMINAL NO. 11-30035
)	
JEFFREY B. FOILES,)	
)	
Defendant.)	

UNITED STATES' RESPONSE TO DEFENDANT'S SENTENCING COMMENTARY

The United States of America, by its attorneys, James A. Lewis, United States Attorney for the Central District of Illinois, Environmental Crimes Trial Attorney Colin L. Black, and Assistant United States Attorney Gregory M. Gilmore, respectfully submit this response to defendant's sentencing commentary.

Introduction:

The United States has no objection to the revised presentence report ("PSR"). The United States is not asking the Court to find that the Rule 11(c)(1)(C) has been breached, and asks the Court to accept the plea agreement.

Defendant's Claims:

The defendant objects to the PSR prepared by the United States Probation Office. The defendant objects to conclusion in the PSR that he should not receive a reduction in his Sentencing Guideline offense level calculation for acceptance of responsibility pursuant to § 3E1.1. (R.13 p.3)

Relevant Authority:

Sentencing Guideline Section 3E1.1(a) provides that “If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.”

Application Note 1(A) and 3 of the Commentary to §3E1.1 provide:

1. (A) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility.

....

3. Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under § 1B1.3 (Relevant Conduct) (see Application Note 1(A)), will constitute significant evidence of acceptance of responsibility for the purposes of subsection(a).

However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.

Application:

On June 23, 2011, the defendant entered guilty pleas to a two count Information charging him with Unlawful Sale of Wildlife in violation of 16 U.S.C. §3372(a)(1) and 3373(d)(2) and Unlawful Taking of Migratory Birds in violation of 16 U.S.C. §703 and 707(a). Evidence concerning those violations and relevant conduct proved that the defendant knowingly took in excess of the daily migratory bird limit – that he personally shot ducks in significant excess of the daily limit. On the same day that the defendant pled guilty, he issued a press release on his website which stated:

Today after years and months of trying allegations I can finally say I feel vindicated. The Federal Government conceded from 23 felony counts to 2 misdemeanors, Counts 2 & 5 of the original indictment. The “D&J Strait Meat Duck Club” (now “Fallin’ Skies Strait Meat Duck Club”) which was the club at the time, was charged with a false writing act. It was owned during 2002-2008 by myself & partner Dennis Marschuetz and his son Jason Marschuetz. They admitted to taking many over the limits and writing false names down. They were granted immunity pleas, along with many other guides at the club. Illinois club owners are bound by law to write down hunters’ names and kills. D & J also had a picking shed which also requires a log. This is where the false writing act came about. One of the days was I & a Whitetail Properties employee; together we had

killed 9 ducks, over by one. Mr. Jeff Evans (said employee) was also granted immunity in that incident, which was a false writing act violation. There were a lot of days at our club that we roosted over 25,000 birds. Pits 25-30 foot long and 6-8 hunters in the blind. Some days birds would pile in, shooting fast & furious and adrenaline racing. It's hard at times to keep a good control as everyone is shooting birds falling into flooded corn. Many a cripple would be found later, as dogs hunted making us "over the limit". One thing no one did at the club or anywhere was throw one away! We wrote it on the register & cleaned the bird. Everyone should know that just because 3 guys went to the pit they all shot & came in with less than a 3 man limit doesn't mean 1 man can't claim he killed over the limit. It's "party hunting". As a club owner you do not have to ever be on the property to get that ticket.

I at the very least feel at rest as the accusations of taking bands by shooting bird in parks was dismissed!!! I have hunted for 48 years and am proud of each and every one I have killed and only wish I had the 4 lanyards full that was stolen from me back. Of all the accusations that I have lived with that was the worst.

I have read hundreds of pages of immunity papers from many people. It was hard to understand why they picked me until I read where my ex-wife, Andrea Foiles Nicolay had requested the Fed. Agents to the house. The accusations that they were told were all accusations that I was never charged with. A bad divorce with an ex living with an ex employee is a bad deal!

When it comes down to it my choices were very clear, take 2 misdemeanors, server punishment and get to enjoy the sport I love in a very short time again with my son and friends OR a long hard trial with a false writing act charge (which is a felony) and never having a choice to

enjoy that again. It seemed simple but again a choice I didn't think twice about. Once reading the Federal document that stated they were "Charging one of the highest profiled hunters to stop the Commercialization of Waterfowl Hunting" I knew where I stood. To me that was telling us all from manufacturers of shotgun shells, boats, decoys, calls, and club owner they were on a mission.

Am I innocent of never killing an extra duck or goose and not knowing they were written down falsely? No, I totally admit I did that. Did I do this everyday as I have hunted across the US, Canada, Mexico & Argentina for years for 5 months or more at a time. No just look at the # of days & locations. 90% of the time it was a pure adrenaline rush without sound thinking and times more than not an honest mistake. I accept responsibility for the things I have done and I accept the punishment for those acts.

I encourage all hunters to be ever so diligent. Remember Party Hunting is illegal!! As a club owner make sure records are accurately kept by ALL individuals making entries. On those occasional days that the ducks are everywhere, don't get caught up in the moment and shoot over your individual limit. Over the limit is over the limit. Also, as a club owner, hold your guides accountable on how they act. Club owners are held accountable for things you do AND what your guides do as well.

To all my great customers we are still Foiles Migrators, World Championship Calls and proud to serve you any and everyday. I will be glad to talk to anyone and answer all I can as we are on the road all summer doing shows as always. Lisa, Cole & my family are here as always 5 days a week and we will be filming Foiles & the Migrators Season 2 this year as Cole and the Migration will be traveling across the country doing business as usual.

On August 3, 2011, the defendant directed his daughter to send an email to Foiles Migrators "pro staff employees" (in excess of 100 email addresses/individuals) which stated:

Guys, Need a favor asap!! As most of You know game fair is one of My biggest shows and has been for years! I do seminars there everyday at 2 and have had a packed house everyday Ive had one. Now they have pulled me off the seminar list as Chuck delaney the owner says he has had a lot of bad e mails about me coing and doing seminars. It's the same 20 nazis from The refuge forums, minnesota waterfowl forum (Matt Keller) who is doing this. Most are neverbes that are wannabees and have an escort with 6 decoys and an old faulks call!! Most actually are ex staffers, or the ones who I didn't let on the staff!!! Please send an e mail addressed to Chuck delaney stating how pissed you are that foiles isnt doin seminars, and That you wont attend because of. You can also state if You want that replacing me with "Fat Sean" is horrible as he just took an immunity plea to get out of trouble.

And I would also like to express My feelings on That! Sean took immunity to save his fat ass! I took the punishment for his bs and his lies against me. Now I wonder why?? Perfect way to start a call company if I throw the guy who I was employed by under the bus!! thats Him!! He had my vendor list, as you know My pro staff list and knew all about the company, then throws me under the bus to stay out of trouble and get me in to steal staffers and vendors! I know a lot of You have been in contact with Him and have been buddy buddy with him, Im not dealing with that anymore!!! He is NOT anything but an enemy to FMI and its staff and especially me so Im not dealing with that crap lightly anymore it shows complete disrespect for the company that You are staffing for!!!

This email needs to be sent asap as game fair is in a week. Please forward all emails you send to me at jefffoiles@gmail.com

Thanks so much Jeff

The problem with the defendant's conduct (his press release and email) is that the conduct is inconsistent with acceptance of responsibility in that he is not "truthfully admitting or not falsely denying any additional relevant conduct for which" he is accountable. §3E1.1 Commentary n.1(A). An excerpt from the defendant's press release states:

Some days birds would pile in, shooting fast & furious and adrenaline racing. It's hard at times to keep a good control as everyone is shooting birds falling into flooded corn. Many a cripple would be found later, as dogs hunted making us "over the limit". One thing no one did at the club or anywhere was throw one away! We wrote it on the register & cleaned the bird. Everyone should know that just because 3 guys went to the pit they all shot & came in with less than a 3 man limit doesn't mean 1 man can't claim he killed over the limit. It's "party hunting". As a club owner you do not have to ever be on the property to get that ticket.

This excerpt indicates that the defendant did not knowingly shoot over his daily limit ("It's hard at times to keep a good control" and "Many a cripple would be found later") and that he was guilty of the violations he pled to even though he was not personally present at the Club on days his guides shot over the limit ("As a club owner you do not have to ever be on the property to get that ticket."). The same is true for his email complaining about Sean Hammock when the defendant wrote "I took the

punishment for his bs and his lies against me” – that is, that the defendant pled guilty to offenses for conduct committed by his guides/employees.

The evidence in the case, however, did not concern the actions of the defendant’s guides/employees when the defendant was absent from the hunting club, but instead the defendant’s participation in shooting in excess of his daily migratory waterfowl limit.¹

A video-taped hunt on December 15, 2007, is demonstrative of the defendant’s actions in shooting in excess of his daily bag limit of migratory waterfowl. (DVD excerpts, 12/15/07, attached as an exhibit) The following summary describes the events recorded on the DVD:

On December 15, 2007, three separate hunts were filmed by Paul Sawyer. Participating in the first hunt were Cole Foiles (C. Foiles), Merle McGlasson, John

¹ The defendant’s Commentary also discusses at great length an internal U.S. Fish and Wildlife memo which was drafted to request authorization to spend investigative funds so that two law enforcement officers could hunt in an undercover capacity with the defendant as paid hunters being guided by the defendant and his employees. Although not relevant, the defendant seems to make much from the fact that the memo described the defendant as an “industry leader” in hunting products, videos and guiding. That information was taken from the defendant’s biography section of his website. The defendant also implies that the defendant was “targeted” since he was well known for his duck hunting products. That is also incorrect. The case originated when a Youtube video aired wherein it appeared the defendant shot ducks from an “unplugged shotgun” – that is, a semi-automatic shotgun with a capacity of four or more shotshells and allegations the defendant’s hunting club hunted over a manipulated corn field, and shot ducks over the daily limit. A site inspection of the hunting club indicated that the hunting hole had significantly greater amounts of ear corn on the ground than did harvested areas outside the hole and travel lanes compared to the hole. These aspects of the case, including the undercover hunt, led to the Federal search warrants in May of 2008 and the recovery of many hours of video-recorded hunts of the defendant. Any suggestion that the Federal government is “out to get” law-abiding duck hunting clubs, guides, video producers, call makers, etc., is simply false. Unlawfully commercializing and unlawfully taking migratory waterfowl is of course against the law and is a different matter.

McDonald and Tony Crowder. Participating in the second hunt were Jeff FOILES (FOILES), Tim McGowen, Kurt Daniels and Merle McGlasson. Participating in the third hunt were Jeff FOILES, Cole Foiles and Jason Muntz. A total of eight individuals were depicted hunting. Jeff FOILES, Cole Foiles and Merle McGlasson were filmed on two separate hunts on this day. Individually each hunter could have legally taken a daily bag limit consisting of six ducks, four of which could be mallards, of which no more than two could be hens.

The video began with FOILES standing outside directing the other hunters on where they were to hunt. FOILES stated that he was going to hunt Canada geese while C. Foiles, McGlasson, McDonald and Crowder were going to hunt ducks at the "round hole."

The group consisting of C. Foiles, McGlasson, McDonald and Crowder were filmed during the morning hunt. The four men killed 13 drake mallards, 4 hen mallards, 2 gadwall, 1coot and 2 teal. The total of mallards killed (17) by the group exceeded the sum of the individual mallard bag limits (16) by one mallard. As the men left the pit and drove back to the clubhouse, the dog found 1 drake mallard and 1 teal that the men had not retrieved.

Back at the clubhouse, C. Foiles told FOILES, *"We killed out this morning."* FOILES responded, *"Good. Good deal."* FOILES at this time knew that C. Foiles and McGlasson each had a daily bag limit of mallard ducks attributed to them.

FOILES, McGowen, McGlasson and Daniels then began a filmed hunt from the "round hole." FOILES directed the hunters throughout the hunt. Early in the filming, FOILES told the cameraman, *"You only got one more to go and you're done"* as a hunter chuckled in the background. FOILES implied that the group was going to shoot the cameraman's limit of ducks. Throughout the hunt, FOILES kept track of the number of ducks killed and retrieved. FOILES asked the hunters for a count of the ducks and the hunters replied with the number of ducks killed. The following conversation was held regarding the number of ducks killed:

McGlasson said, *"Need one teal or something here for a full limit."* Another hunter said, *"Need a mallard here and this will be a full limit. Jeff's got a full limit."* McGlasson said, *"We are about done."* FOILES said, *"Now I got a full limit. Who needs a drake, anybody down there?"* A hunter replied, *"Nope, we're limited."* FOILES asked, *"Need a teal or anything down there?"* A hunter replied, *"Just need 1 here."* FOILES said, *"Right, there's one."* A hunter said, *"Okay, here are 2 full limits."* FOILES said, *"Two full limits there. What do you need?"* A hunter replied,

"None here." FOILES, while talking on the phone said, "No, I am going to move some of them here. Get them over here!"

From the men's conversation they had 4 full limits of ducks to include 16 mallards and 8 other ducks. The video also depicts four stringers full of ducks lying in the pit. Therefore the fewest number of ducks the men had was 12 drake mallards, 4 hen mallards, 5 teal and 3 "other" ducks. A short while later a drake mallard was killed. The second hunt concluded with the four hunters killing 13 drake mallards, 4 hen mallards, 5 teal and 3 other ducks while FOILES knew McGlasson had a limit of ducks attributed to him earlier in the day.

McGlasson, McGowen and Daniels prepared to leave the pit and had the following discussion with FOILES:

FOILES told McGlasson, *"Merle, I don't know if we even need Tony's yet but you can write him down and come back if you want."* FOILES was referring to writing Tony Crowder's name down in the hunting register and inviting McGlasson to return and continue hunting knowing that McGlasson had killed two limits of ducks already.

FOILES then instructed McGowen on what to write in the hunting register. McGowen asked FOILES, *"What do you want to do with these two ducks right here?"* FOILES answered, *"They can be Tony's or..."* Sawyer interrupted and said, *"I would just eat them."* FOILES answered back, *"They can be on Tony's."* McGowen said, *"Okay."* FOILES told McGowen, *"Call me back and tell me what you've done."* McGowen said, *"I will."* FOILES then told McGowen, *"Yeah, give me those two ducks and put them on Tony's. They got two I think."* McGowen answered, *"Yeah, they picked that one up."*

The film showed C. Foiles and Muntz beginning a new hunt with FOILES. C. Foiles and FOILES had already each killed a limit (or claimed a limit) of ducks for this day. During the hunt, the three killed seven drake mallards, six hen mallards, two mallards of unknown sex and four teal. At this point, FOILES was depicted having the following conversation on the phone:

FOILES said, *"Alright, what do we got? Two teal for Tony. Remember this. You got a mallard hen up there, Cole. Alright."* Muntz asked, *"Are we done?"* Sawyer said, *"I think we already shot our limit."* FOILES, still on the phone, said, *"Look up Drew's*

deal, see if Drew's deal is in there. Yep, see if his deal's in there. Put that hen on there too and switch that out. Okay, alright brother. Tony needs 2 Teal...Okay gotcha."

FOILES hung up the phone and Muntz said, *"I think we are done."* C. Foiles said, *"We're done on hens. Is there a hen out here?"* FOILES answered, *"And there's another one, that one that you two shot, another one there, another duck here out of them two. There's a drake right here, there's a drake back there."* C. Foiles said, *"We're done on hens."* FOILES said, *"You got Pauley's, too."* C. Foiles answered, *"Pauley's too, okay, we can keep shooting then."* FOILES pointed out six mallard ducks that needed to be retrieved. FOILES told C. Foiles and Muntz that they were going to kill the cameraman's(Sawyer's) limit of ducks, as well.

A short while later FOILES asked C. Foiles and Muntz how many ducks they had. C. Foiles and Muntz both responded that they needed one duck. FOILES said, *"Okay, then we work on Paul."* FOILES was again referring to shooting Sawyer's daily bag limit.

The men continued killing ducks. FOILES said, *"Folks this is mayhem, I tell you what it's the 15th of December. We ran this pump all night keeping this thing open. We been keeping this open, hot water right out of the well and I tell you what. They are eatin' it alive. It's a snowstorm and their windshields are clogged and when that happens they listen and they come right in. It's awesome. They're hungry, looking for some carbs. Get a little corn, get some sugar, get some carbs. Little do they know they're getting a shot of steel to go along with it. I don't know how many peoples we ran through here and killed out today but it is a bunch of them. It's a blast, man. I love it. Every kind of duck there is too, wigeons, we got teal, green wing teal, we got gadwalls, we got hell divers, we got coots, we got bufflehead, we got saw bills. I'm sorry we haven't killed many of that stuff...[shot is heard] Cool, kill'em shoot'em. He got another one that is what he did...This round hole, this round hole is one I made back in '01. And we redid this hole two or three times, we used to have a blind, it used to be behind us on the bank, you might of seen us last year in Fallin' Skies 4. We would just grind 'em in there and it was awesome but what was happening is they was going out in the middle of this lake out here and so I said I had enough of that deal there. Took that pit out and moved it made another hole and put it in another spot and put this big tank in here, put some dog boxes on. Put it right in the center. Run these corn rows here and I took the combine and just combined a little hole out here in the middle, put some decoys on it. It aint nothing like being in the center of the hole, they are eating us up. So, here comes some right now."*

FOILES and Muntz continued to talk about the number of ducks they killed and the killing of Sawyer's daily bag limit. FOILES and Muntz then had the following conversation:

FOILES said, *"Boys, as bad as I hate to say it, I think we are done."* FOILES then asked Muntz, *"Does your brother hunt?"* Muntz said, *"Hugh."* FOILES again asked, *"Does your brother hunt?"* Muntz responded, *"He doesn't have his license."* FOILES said, *"I have to ask a question here up front."* Muntz interrupted and said, *"McMurtrie didn't go today."* FOILES said, *"Who?"* Muntz replied, *"Brian McMurtrie."* FOILES said, *"Brian McMurtrie. Okay. McMurtrie's killing his limit today, then."* FOILES, now talking on the phone said, *"Hey, with Drew on there, what happens then...Okay, he's got that, that's taken care of, what about Brian McMurtrie, Brian McMurtrie from Jerseyville...Oh you will, alright okay. We're good out here we're done, I think, but Brian McMurtrie is a little bit here. Okay alright, bye."* FOILES hung up the phone and said to Muntz, *"Hey listen to me! Call McMurtrie and get his license number...You got something to write it on? Give him McGowen's number and tell him to call McGowen and give him his license number!"*

Later Muntz did call McMurtrie and instructed him to call McGowen. McMurtrie did as he was told.

A short while later, FOILES turned to the camera and said, *"Look at this, folks, it's like field of dreams. What I'm going to do is, I've been watching this all day long. I killed a duck maybe two and I'm going to shoot my limit here in just a second while I'm talking to ya. I'm going to pick out drakes. So, when I get a right drake here I'll shoot one. All this hard work and all this stuff for 6-7 years man this is what it is all about right here. [shot is heard] Cole, he's just grindin'em. There's what it is all about, your kid out there, grindin'em man. You get ahold of him."* Muntz replied, *"You want me to do it now? We got 10 minutes left."* FOILES said, *"Get ahold of him. Yep, call him now and tell him to call McGowen and give him that number."*

The men continued to talk about the number of ducks they killed factoring in that they were shooting limits for Sawyer and McMurtrie. The men continued to kill ducks until ending the hunt and returning to the clubhouse. FOILES then said, *"That's it, it's a wrap. Pickin' shed cleaned up. Part of the deal man. Everybody thinks this is easy, you go out and you kill ducks, you build a duck call, you sell it to somebody and then come out and do this. That ain't what it is all about. Finger's busted*

up, cleaning ducks, clean the deal, get rid of the carcasses, tag the ducks, blah, blah, blah, blah, keep the ice out, check the oil, start the pumps, pay the bill, see ya next time."

FOILES is then walked into the clubhouse office and talked with McGowen about the hunting register. FOILES asked McGowen, *"Everything's good?"* McGowen replied, *"Everything's good, filled it out. I was way ahead of 'ya man. Me and Merle got ours tagged."* FOILES said, *"So did we have..."* McGowen replied, *"Oh yeah, we are right on the money, everything, 79."* FOILES said, *"Cool, unbelievable."* McGowen said, *"3 geese and a coot."*

On this day the eight hunters could have legally killed a total of 32 mallards (of which only 16 could be hen mallards) and a total of 48 ducks. The video captured the killing of 62 mallards (16 hen mallards) and 22 "other ducks," for a total of 84 ducks. The club's daily hunting register listed 63 mallards and 19 other ducks killed. The club's daily hunting register also listed eight other hunters as killing ducks at the club that day but were not shown hunting on video, including Sawyer and McMurtrie.

This summary demonstrates that the defendant was not merely an individual who got caught up in "fast and furious" action and accidentally shot in excess of his daily limit or pled guilty because of the actions of his employees. Nor did he plead guilty because a hunting dog recovered a cripple the defendant mistakenly thought survived.

Based upon the foregoing, the United States contends that the PSR is correct as written. The United States asks the Court to accept the 11(c)(1)(C) agreement and

sentence the defendant accordingly.

Respectfully submitted,

JAMES A. LEWIS
UNITED STATES ATTORNEY

s/Gregory M. Gilmore
Gregory M. Gilmore
Assistant United States Attorney
318 South Sixth Street
Springfield, Illinois 62701
(217) 492-4450
greg.gilmore@usdoj.gov
Reg. No. 6217499

Colin L. Black
Trial Attorney
Environmental Crimes Section
United States Department of Justice

Certificate of Service

I certify that I filed the foregoing pursuant to the ECF system which will provide a copy of the foregoing electronically to counsel of record on September 20, 2011:

s/Gregory M. Gilmore_____