No. 05-14974-AA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATE OF AMERICA,

Plaintiff/Appellee,

vs.

CHALANA C. McFARLAND,

Defendant/Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with Federal Rules of Appellate Procedure 26.1 and 28(a)(1) and Eleventh Circuit Rules 26.1-1 and 28-1(b), the United States Attorney for the Northern District of Alabama, through undersigned counsel, certifies that the following individuals and entities have an interest in the outcome of this case:

1. Advanta Mortgage Corporation, victim;
2. Aegis Mortgage Corporation, victim;
3. Briano Allen, victim;
4. America's Mortgage, victim;
5. Trecia Arthurton, victim;
6. Bank One, victim;
7. The Honorable Gerrilyn G. Brill, Magistrate Judge for the United States District Court for the Northern District of Georgia;
8. Centex Home Equity Corp., victim;
9. Central Pacific Mortgage Company, victim;
10. Chase Manhattan, victim;

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11. Chemical Mortgage, victim;

12. Citifinancial Mortgage, victim;

13. Citimortgage, victim;

14. Countrywide Home Loans, victim;

15. Creve Coeur Mortgage, victim;

16. Crossland, victim;

17. Loulouse Darbouze, victim;

18. EMC Mortgage Corporation, victim;

19. EQ Financial Services, victim;

20. Equibanc Mortgage/First Horizon, victim;

21. Fannie Mae, victim;

22. Lynn Gitlin Fant, counsel for Defendant/Appellee McFarland in this appeal;

23. Wilbert Ferguson, victim;

24. First American Title Insurance, victim;

25. First Choice Funding, victim;

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26. First Union Home Equity Bank, victim;

27. First Union National Bank, victim;

28. Flagstar Bank, victim;

29. Melony Floyd, victim;

30. Freddie Mac, victim;

31. Gage Guaranty, victim;

32. GMAC Residential Funding, victim;

33. GN Mortgage Corporation, victim;

34. Greater Atlantic Mortgage, victim;

35. Heartland Home Finance, victim;

36. Household Finance Corp., victim;

37. HSBC Mortgage Services, victim;

38. IMPAC Funding Corporation, victim;

39. Infinity Mortgage Company, victim;

40. Maria James, victim;

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41. LoanCity.com, victim;

42. Amy Long, victim;

43. Chalana C. McFarland, Defendant/Appellee;

44. Gale McKenzie, Assistant United States Attorney in the Northern District of Georgia, representing the United States in the district court;

45. Mortgage Bankers Service Corp., victim;

46. Mortgage Guaranty Insurance Company, victim;

47. Mortgage Portfolio Services, victim;

48. Mortgage Warehouse, victim;

49. David E. Nahmias, United States Attorney for the Northern District of Georgia;

50. National City Mortgage, victim;

51. National Finance, victim;

52. National Union, victim;

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53. Barbara E. Nelan, Assistant United States Attorney in the Northern District of Georgia, representing the United States in the district court;
54. New Freedom Mortgage Corp., victim;
55. Oakmont Mortgage/Ownit Mortgage, victim;
56. Option One Mortgage, victim;
57. Peoples Choice Home Loans, victim;
58. PMI Mortgage Insurance Company, victim;
59. Valerie Ponder, victim;
60. Premier Lending/Branch Bank Trust, victim;
61. Radian Guaranty, victim;
62. RBMG/NetBank, victim;
63. Republic Mortgage Insurance Co., victim;
64. Residential Funding Corp., victim;
65. Thomas C. Rowsey, counsel for Defendant/Appellee McFarland in the district court;

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66. Sebring Capital Partners LP, victim;
67. Sandra J. Stewart, Assistant United States Attorney in the Northern District of Georgia, representing the United States in this appeal;
68. SouthStar Funding, victim;
69. Stone Breeze HOA, victim;
70. The Honorable Thomas W. Thrash, Jr., United States District Court Judge for the Northern District of Georgia;
71. Triad Guaranty Insurance Corporation, victim;
72. United Guaranty Residential Insurance, victim;
73. The United States of America, Plaintiff/Appellee;
74. Wachovia, victim;
75. Latoya Ward, victim;
76. Wells Fargo, victim;
77. Juanita Wilson, victim;

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78. Worldwide Financial Services, victim.

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SANDRA J. STEWART

Assistant United States Attorney

STATEMENT REGARDING ORAL ARGUMENT

Because the facts and legal arguments are adequately presented in the briefs of the parties to permit resolution of the issues without oral argument, the United States ("the government") respectfully requests that this appeal be resolved without oral argument.

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STATEMENT OF JURISDICTION

The district court had jurisdiction over this criminal case charging violations of the laws of the United States pursuant to 18 U.S.C. § 3231. A final judgment of conviction and sentence was entered against Defendant/Appellant Chalana C. McFarland in the United States District Court for the Northern District of Georgia on August 29, 2005. (Doc. 344) She timely filed her notice of appeal from this final decision of a district court on September 1, 2005. (Doc. 360) The convictions and sentence in this criminal case are reviewable by this Court pursuant to Rules 3 and 4(b) of the Federal Rules of Appellate Procedure; 18 U.S.C. § 3742(a), *see United States v. Martinez*, No. 05-12706, 2006 WL 39541, at *3 (11th Cir. Jan. 9, 2006); and 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Was the 30-year sentence imposed by the district court on McFarland, a licensed attorney involved in a massive mortgage fraud case involving millions of dollars in losses, unreasonable in light of the applicable Guidelines sentencing range and the considerations contained in 18 U.S.C. § 3553(a)?

2. Does the sentencing record, when reviewed as a whole, establish that the district court properly applied the Sentencing Guidelines in an advisory manner as dictated by the Supreme Court in *United States v. Booker*, 543 U.S. 220, 125

S. Ct. 738 (2005)?

3. Should this Court reject McFarland's claim of prejudicial error regarding the alleged lay opinion testimony of two government witnesses, because the record reflects that the district court sustained McFarland's objection as to the testimony of one of those witnesses and the testimony of the other witness was properly admitted under Rule 701 of the Federal Rules of Evidence?

4. Did the district court properly deny McFarland's motion for a mistrial, where the district court sustained McFarland's objection to 404(b) evidence concerning her possession of a false Florida driver's license and gave a curative instruction to the jury, and where the evidence against McFarland was otherwise overwhelming?

5. Should McFarland's conviction be reversed for cumulative error where there is no showing of harmful error?

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITIONS BELOW

Defendant/Appellee Chalana C. McFarland was charged in a superceding indictment with 170 counts of violating the laws of the United States based on her participation in a multi-million dollar mortgage fraud scheme. (Doc. 194) Count One charged that McFarland conspired with Brenda G. Brown, Lisa R. Bellamy,

Judith H. “Judy” Hooper, Melvin Howard Quillen, Thomas Christopher Davis, Sr., Brandon G. Wilhite, Omar Rashad Turral, Melinda Renee Tyner, Jewel Williams, and Sidney Williams[1] to commit various crimes against the United States, including: bank fraud (18 U.S.C. § 1344); mail fraud (18 U.S.C. §§ 1341 and 1342); wire fraud (18 U.S.C. § 1343); fraudulent use of Social Security numbers (42 U.S.C. § 408(a)(7)(B); fraudulent transfer of means of identification (18 U.S.C. § 1028(a)(7)); fraud against the Department of Housing and Urban Development (18 U.S.C. § 18 U.S.C. § 1001); money laundering (18 U.S.C. § 1956(a)(1)(A)(I) and (B)(I)); engaging in monetary transactions involving property derived from specified unlawful activity (18 U.S.C. § 1957); and obstructing justice (18 U.S.C. 1503), all in violation of 18 U.S.C. § 371. (Doc. 194)

The remaining counts of the indictment charged McFarland with substantive crimes related to the mortgage fraud scheme charged in the conspiracy count. Counts two through 31 charged 29 counts of bank fraud; Counts 32 through 92 charged 60 counts of wire fraud; Counts 93 through 165 charged 73 counts of money laundering; Count 166 charged obstruction of justice; and Counts 167 through 170 charged four counts of perjury. (Doc. 194)

[1]Each of these co-conspirators entered guilty pleas to mortgage fraud charges prior to the return of the superceding indictment against McFarland.

McFarland pleaded not guilty plea (Doc. 198) and, after a jury trial, was convicted on all counts in the indictment (Doc. 249).

Before trial, McFarland filed a Motion in Limine requesting, among other things, that the district court exclude evidence concerning her possession of a Florida driver's license with her photograph on it, identifying her as Rachel Cosby, her ex-husband's ex-wife. (Doc. 215-5) The district court denied the motion in part and reserved ruling on it in part. (Doc. 221)

During trial, the government elicited testimony from government witness Lisa Bellamy about the Florida driver's license, over McFarland's objection. (Doc. 386-928-29) Initially, the district court overruled the objection. (*Id.*) Shortly thereafter, however, the court reversed its ruling, sustained the objection, and instructed the jury to disregard the testimony. (*Id.*) At a later break in the trial, McFarland made a motion for mistrial, which the district court overruled. (*Id.*) In overruling the mistrial motion, the district court specifically found that its instruction was sufficient to cure any potential prejudice. (*Id.*)

Also during trial, McFarland objected to the testimony of two witnesses on the grounds that their testimony went to an ultimate issue of fact and invaded the province of the jury. (Doc. 383-431-32; Doc. 387-1025-26) Robbie Taylor was asked if the problems in McFarland's closing files were "created by fraud or

created by inexperience." (Doc. 383-431-32) Brenda Brown was asked if she and other members of the McFarland law firm deliberately made closing files and checks related to those files unavailable to the Attorneys' Title auditor or whether they did so through ignorance. (Doc. 387-1025-26) As to the first witness, Robbie Taylor, the district court sustained the objection, before the witness was permitted to answer the posed question. (Doc. 383-1025-26) As to the second witness, Brenda Brown, the district court overruled the objection.

A sentencing hearing was conducted on August 24, 2005. (Doc. 394) At that hearing, the district court took testimony and heard argument on each of McFarland's objections to the presentence report. (Doc. 394-7-122) McFarland objected to the loss calculation (Doc. 394-7-100); to an enhancement for her leadership role in the fraud offense (Doc. 394-103-09); to an enhancement for obstruction of justice in relation to the fraud offense (Doc. 394-109-11); to an enhancement for her abuse of position of trust in relation to the fraud offense (Doc. 394-11-13); to the money laundering base offense level (Doc. 394-114-17); to an enhancement for her conviction under 18 U.S.C. § 1956 (Doc. 394-117-18); to an enhancement based on her leadership role in the money laundering offenses (Doc. 394-120-21); and to an enhancement based on her obstruction of justice in relation to the money laundering offenses (Doc. 394-121-22) The district court overruled

each objection, explaining its reasons for doing so on the record. (Doc. 394-7-122)

The court then found that McFarland's total adjusted offense level was 46 and her criminal history category was I, resulting in a sentencing range of life imprisonment. (Doc. 394-127-28) This sentencing range was, thereafter, adjusted based on the government's motion for a downward departure of four levels, based McFarland's assistance in an unrelated case. (Doc. 394-139) The Guidelines range was then reduced to 360 months to life, based on an adjusted offense level of 42 and a criminal history category of I. (Doc. 394-140)

After the court determined the Sentencing Guidelines range, the government recommended that McFarland be sentenced within that range. (Doc. 394-140-49) The district court then heard argument from McFarland's counsel recommending that the court impose a 10-year sentence. (Doc. 394-150) The district court heard testimony from two friends of McFarland (Doc. 394-163-72); heard McFarland's allocution (Doc. 394-151-63); and then imposed a 360-month sentence, which was at the bottom of the applicable Guidelines range (Doc. 394-175-76).

A final judgment of conviction and sentence was entered against McFarland on August 29, 2005. (Doc. 344) She timely filed her notice of appeal on September 1, 2005. (Doc. 360) McFarland is presently incarcerated.

II. STATEMENT OF THE FACTS

Chalana McFarland and her coconspirators participated in a vast mortgage fraud scheme from mid 1999 through late 2002 defrauding mortgage lenders and insured depository financial institutions of in excess of $10 million dollars over 100 properties. The government presented the testimony of 35 witnesses who testified against McFarland. Fourteen of the witnesses had personal knowledge of the mortgage fraud scheme from their own participation in the scheme and directly implicated McFarland, as well as themselves, in the crimes with which McFarland was charged. These witnesses included Melvin Quillen (Doc. 383-222-331); Brandon Wilhite (Doc. 383-332-83); Karyn Grantham (Doc. 384-511-51); Latonia Cromartie (Doc. 383-552-629); Melinda Renee Tyner (Doc. 385-630-88); Renee Antoinette Jones Meeks (Doc. 385-689-736); Lupita McCarthy (Doc. 385-734-752); Thomas Christopher Davis (Doc. 385-767-806); Lavon Meador (Doc. 385-807-27); Donna Lee (Doc. 385-827-52); Larry Harvey (Doc. 385-853-67; Doc. 386-871-93); Lisa Bellamy (Doc. 386-893-969); Brenda Brown (Doc. 386-978-1129); and Omar Turral (Doc. 388-1209-1228). Because of the space limitation, the government will very briefly outline what the testimony of these many witnesses established.

The scheme itself involved what is referred to in the mortgage industry as

"flip" transactions or deals. A "flip" involves the rapid transfer of property with the sole purpose of inflating the value of the property. (Doc. 381-68-70, 76; 383-226-31) A property is located and a contract for sale is negotiated with the seller for a fair market price. (Doc. 381-76, 193-94; 383-226-31, 380, 384-399-400) Then, an appraiser provides an inflated appraisal of the property's worth and that fraudulent appraisal is used by a straw buyer to obtain a loan from a bank or other financial institution based on the inflated value of the property. (*Id*.) Often times, identities are stolen and documents are forged in relation to these transactions, and both were done in this case. (*Id*.)

To accomplish mortgage fraud in this manner requires the cooperation of a number of individuals, including an appraiser, someone to falsify loan applications, individuals to act as straw purchasers, and most significantly, a closing attorney. The cooperation and participation of the closing attorney is crucial, because the closing attorney is responsible for insuring, among other things, that the borrowers and sellers are who they claim to be by producing identification; that they are both present at the closing; that the borrower has brought and pays a down payment on the property; that the paperwork, especially the HUD-1 settlement statement is in order; and to ensure that funds are dispersed in accordance with that HUD-1 statement. (Doc. 381-74, 78-82; Doc. 388-1320-42) Every real estate closing in

Georgia requires the presence of a licensed attorney, and the attorney acts as the eyes and ears of the lender, who the attorney represents. (*Id*.)

Testimony from numerous witnesses at trial, including most of the other participants in the mortgage fraud in this case, established that McFarland and her coconspirators participated in more than 100 illegal flip transactions. (*See, e.g.*, Doc. 383-348) In each of those flip transactions, McFarland acted as the closing attorney and she personally received cash benefits from her participation.

In addition to her participation in the mortgage fraud conspiracy, McFarland also engaged in other criminal activity. She and her coconspirators purchased stolen identities of Florida A&M University students using funds from the escrow account controlled by McFarland. (Doc. 384-570-73; 388-1209-28) Several of the students testified about the adverse impact on their credit and disruption in their lives due to the theft and use of their identities. (Doc. 387-1130-1151)

McFarland and her coconspirators also laundered nearly $5.5 million in proceeds from the mortgage fraud scheme through bank accounts, primarily the McFarland law firm escrow account. (Doc. Dc. 389-1566-1606); Doc. 390-1613-36) The settlement checks drawn on McFarland’s escrow account were used to pay all of the participants in the mortgage fraud scheme and to pay the expenses incurred in arranging the fraudulent mortgage loans. (*Id*.) To conceal the fraud,

McFarland used the shell company or fictitious entity bank accounts of the coconspirators to convert loan proceeds to cashier's checks which were then deposited back into the McFarland escrow account to create the appearance of the borrower's down payment. (*Id*.; Doc. 387-1004-06, 1008-09) During the conspiracy, McFarland had several different bank accounts, including two separate escrow accounts. (*Id.*)

Testimony at trial also established that McFarland obstructed justice by participating in the hiding and destruction of her closing files, once the fraud had been discovered. (Doc. 384-600-04; 385-706-10; 387-1076-81) Specifically, testimony established that McFarland caused her attorney in this case to advise the United States Attorney's Office and the grand jury investigating her participation in mortgage fraud and money laundering that the McFarland Law Firm's closing files and other records the grand jury had subpoenaed had been stolen on or about January 29, 2001. (*Id*.) When she made this representation to the United States Attorney's Office and the grand jury, McFarland knew that the records in question were not stolen and did not leave her office until the third week of April 2001, or thereabouts. (*Id*.) Moreover, the records were only removed after they had been subpoenaed on April 24, 2001. (*Id*.)

In addition, at McFarland's direction, her Firm Administrator and her

aunt/bookkeeper signed false affidavits stating that the closing files, a computer, and some other records had been removed from the law firm when they arrived at work on January 29, 2001. (Doc. These representations were false and were made specifically to impede and obstruct the investigation into McFarland's participation in mortgage fraud.

Testimony at trial also established that McFarland was involved in Social Security fraud. (GXs 150, 151; Doc. 384-440-42) On September 1, 2000, McFarland put her name on the credit report of another individual for use in qualifying for a title agency agreement with Old Republic, a title insurance company. (Doc. 384-440-51; 387-128-29) On her application to Old Republic, McFarland used a false social security number and a false address, signing her name as Chalana M. Cosby. (*Id.*)

McFarland also committed four instances of perjury when she lied under oath in a deposition in a civil case brought by a defrauded mortgage company against McFarland and her law firm. (Doc. 389-1400-1555) In that November 19, 2001 deposition, McFarland lied about the amount of money she received for closing a particular transaction. (*Id.*) She also lied, under oath, stating that the policy of her law firm was to require borrowers to have a down payment before a loan was closed. (*Id.*) In fact, all of the loan closings involved in this case, down

payments from the borrowers were only required in 11 out of the 101 transactions.

In addition, McFarland committed perjury when she lied about the availability of her closing records in that same deposition with the mortgage company. (*Id*.) McFarland misrepresented in that deposition that her records were not available because all of the files from her office had been stored, since November of 1999, in her attic of her home and they had been sucked out in a storm. (*Id*.; Doc. 387-1058, 1076-81) Further, she falsely claimed that she was notified on January 21, 2001 that closing files and a CPU for a computer in her office were missing from that office, well before a grand jury subpoena for those records from the United States Attorney's Office issued in April 2001, and notice of the civil suit was filed in February 2001. Those allegations were proved false by testimony from other conspirators at trial. (Doc. 383-368-69; Doc. 387-1058, 1076-81)

In that same deposition, McFarland lied about her knowledge concerning the identity of Brenda Brown. (*Id*.) In the deposition, McFarland stated that she knew of a company named BGB Construction, but claimed not to know whether Brenda Brown, her paralegal, had an interest in the company. In fact, McFarland knew about Brenda Brown's Company and had helped her set up the company to be used to pass through loan proceeds obtained through the mortgage fraud conspiracy.

McFarland personally caused checks to be paid to BGB Construction totaling over $325,000. (Doc. 387-1001-03)

Finally, in addition to the charged conduct, McFarland falsely represented information to the State Bar of Georgia in response to a complaint filed against her. The complaint involved McFarland's failure to pay the seller in a real estate transaction money due to him from the sale of property. *See* sealed presentence report at 28-29. McFarland acted as the closing attorney with regard to the real estate transaction. *Id*. In response to the complaint, McFarland claimed to have paid the seller, when in fact she had not. *Id*. McFarland also implied in the letter that she had these funds available in her escrow account and would be willing to deposit the funds into a court receivership pending the outcome of any action. *Id*. In fact, McFarland did not have the funds available as her escrow account was nearly empty at that time. *Id* at 29.

Further, in June of 2002, in another separate matter, a couple of McFarland's clients filed a grievance with the State Bar of Georgia claiming that McFarland settled their case without their authorization to do so and she failed to distribute the settlement funds to them. *Id*. McFarland failed to respond to the Bar or her clients when they attempted to contact her about the matter. *Id*.

Finally, even after a grand jury was issued for McFarland's closing records

and she became aware that she was being investigated, she continued to participate in illegal conduct. Id. She was involved in additional mortgage fraud in Florida, participating in at least six mortgage fraud "flip" transactions and she used a stolen identity to purchase a property in Florida in which the lender suffered a $50,000 loss. McFarland also lied to her probation officer after her indictment in this case about the purchase of some property in Lauderhill, Florida. *Id*. at 29-30. McFarland told the probation officer that a friend had helped her purchase property. *Id*. However, the individual she claimed was her friend was, in fact, the victim of identity theft and had filed a complaint with the local Florida police department alleging that McFarland had used her name and personal information to obtain a mortgage without her knowledge. *Id*. at 30-31. To make matters worse, McFarland then encourage the victim not to report her illegal activity to the police. *Id*. at 31.

Finally, McFarland also failed to reveal all of her assets to the probation officer. *Id*. She also lied to the district court at a bond hearing, telling the court that she had not obtained the loan on her private residence through a fraud, when in fact that loan was only paid with proceeds from another flip transaction by a straw purchaser that she recruited. (Doc. 394-8-40)

III. STANDARDS OF REVIEW

Under *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005), this Court reviews a defendant's ultimate sentence for reasonableness in light of the factors in 18 U.S.C. § 3553(a). *United States v. Williams*, No. 05-11549, 2006 WL 68559, at *2-3 (11th Cir. Jan. 13, 2006); *United States v. Martinez*, No. 05-12706, 2006 WL 39541, at *4 (11th Cir. Jan. 9, 2006).

Where statutory *Booker* error in applying the Sentencing Guidelines has not been preserved by an objection in the district court, this Court reviews the issue for plain error. *See United States v. York*, 428 F.3d 1325, 1335 (11th Cir. 2005); *United States v. Rodriguez*, 398 F.3d 1291, 1298 (11th Cir.), *cert. denied*, 125 S. Ct. 2935 (2005). To establish plain error, an appellant must demonstrate that (1) there was error; (2) that the error is plain; and (3) that the plain error affects the substantial rights of the appellant; and, if those three conditions are met, the Court, in its discretion, may notice the error if (4) it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id*.

This Court reviews a district court's evidentiary rulings for a clear abuse of discretion, *see United States v. Abraham*, 386 F.3d 1033, 1035 (11th Cir. 2004), *cert. denied*, 126 S. Ct. 417 (2005); *United States v. Tinoco*, 304 F.3d 1088, 1119 (11th Cir. 2002), and will only reverse if any error "affected the defendant's

substantial rights," *United States v. Tinoco*, 304 F.3d at 1119 (internal quotation marks and citations omitted).

This Court reviews "the district court's refusal to grant a mistrial for an abuse of discretion." *United States v. Diaz*, 248 F.3d 1065, 1101 (11th Cir. 2001); *see also United States v. Perez*, 30 F.3d 1407, 1410 (11th Cir. 1994). "If a district court gives a curative instruction, [this Court] will reverse only if the evidence 'is so highly prejudicial as to be incurable by the trial court's admonition.' " *Id.* (internal citations omitted).

Finally, the cumulative effect of multiple errors may require a reversal of an appellant's conviction only where, in combination, they prejudice a defendant's right to a fair trial. *See United States v. Baker*, 432 F.3d 1189, 1223 (11th Cir. 2005); *United States v. Ramirez*, 426 F.3d 1344, 1353 (11th Cir. 2005).

SUMMARY OF THE ARGUMENT

McFarland's 30-year sentence was reasonable under the facts in this case, and McFarland has failed to demonstrate to the contrary. In reaching its sentence, the district court applied the appropriate procedures required by this Court. Before sentencing McFarland, the district court properly calculated McFarland's Sentencing Guidelines range as 360 months to life, and she has not contended to the contrary. It then considered the factors contained in § 3553(a). McFarland, a

licensed practicing attorney, was involved in massive mortgage fraud involving almost $11 million in losses and over 70 victims. That fraud could not have been carried out without her full participation. Moreover, McFarland repeatedly refused to take responsibility for her actions, she refused to cooperate with authorities, and she obstructed justice when the fraud was revealed. Furthermore, contrary to her contentions, she was not similarly situated to other defendants involved in the fraud, because none of the other participants were attorneys, and as several witnesses testified, the fraud would not have gone undetected without the professional expertise of an attorney. For these and other reasons, the sentence imposed in this case was reasonable.

Further, the district court did not apply the Sentencing Guidelines in a mandatory manner in violation of *United States v. Booker*. The sentencing record, reviewed as a whole, establishes that the district court understood its sentencing authority and, specifically, understood that it was not obliged to sentence McFarland within the Sentencing Guidelines range. Moreover, because McFarland did not raise this objection in the district court, she must satisfy this Court's standards for review of plain errors. She has failed to do so, because she has not demonstrated that error occurred; that it was plain; or that there is a reasonable probability the district court would have imposed a different sentence if it had

applied the Guidelines in an advisory manner.

Additionally, the district court did not allow the government to admit inadmissible opinion testimony. First, the district court did not permit the government to elicit expert or lay opinion testimony from Robbie Taylor. Instead, it sustained McFarland's objection to this testimony, before the question was answered, and no such evidence was presented for the jury's consideration. Second, as McFarland admits in her brief, opinion testimony is admissible under Rules 701 and 702 of the Federal Rules of Evidence, even if the opinion is on an ultimate issue of fact. Therefore, the district court properly permitted the government to elicit lay witness opinion testimony from Brenda Brown, because her opinion testimony was based on personal perceptions and observations, was helpful to an understanding of her testimony and the facts in issue, and was not based on scientific, technical, or other specialized knowledge.

The district court also did not abuse its discretion in denying McFarland's motion for a mistrial. When the government elicited allegedly irrelevant testimony from Lisa Bellamy concerning a fraudulent Florida driver's license McFarland had in her possession, the district court sustained McFarland's objection and gave a curative instruction to the jury. While the jury heard some limited testimony about the driver's license, the curative instruction was sufficient to cure any error. In

light of the overwhelming evidence against McFarland, including relevant admissible evidence concerning her possession of other fraudulent identification, i.e., social security numbers, the error was not so prejudicial as to be incurable by the trial court's admonition.

Finally, because McFarland has demonstrated, at most, a single instance of prejudicial testimony that was cured by the district court, there is no basis for reversing the conviction for cumulative error.

ARGUMENT

I. McFARLAND'S 30-YEAR SENTENCE WAS REASONABLE IN LIGHT OF ALL OF THE FACTS IN THE CASE AND THE CONSIDERATIONS CONTAINED IN 18 U.S.C. § 3553(a).

In issue I of her brief, McFarland argues that her 30-year sentence is unreasonable, because it is greater than necessary to achieve the goals of sentencing. For the reasons that follow, this Court should find that the district court's 30-year sentence in this case was not unreasonable in light of the 18 U.S.C. § 3553(a) factors.

A. The District Court Applied The Appropriate Analysis In Sentencing McFarland.

After *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005), this Court reviews a defendant's sentence for reasonableness in light of the factors in 18 U.S.C. § 3553(a). *United States v. Williams*, No. 05-11594, 2006 WL 68559, at *2-3 (11th Cir. Jan. 13, 2006); *United States v. Martinez*, No. 05-12706, 2006 WL 39541, at *4 (11th Cir. Jan. 9, 2006). This review for reasonableness is deferential; in determining whether the sentence is reasonable, the Court "recognizes that there is a range of reasonable sentences from which the district court may choose...." *United States v. Talley*, 431 F.3d 784, 788 (11th Cir. 2005). Further, while a sentence within the Sentencing Guidelines range is not *per se* reasonable, ordinarily this Court expects that such a sentence will be reasonable. *Id.* "[T]he

party who challenges the sentence bears the burden of establishing that the sentence is unreasonable in the light of both [the] record and the factors in 18 U.S.C. § 3553(a). The sentence imposed by the court should be sufficient, but not greater than necessary, to comply with the purposes set forth in § 3553(a)(2). *Id.*; *see also United States v. Martinez*, 2006 WL 39541, at *4.

In this case, the district court fully complied with its sentencing obligations and imposed a reasonable sentence.

B. The District Court Properly Calculated McFarland's Sentencing Guidelines Range, And She Has Not Contended To The Contrary.

First, the district court correctly calculated the Sentencing Guidelines range and McFarland has not challenged that calculation in this Court. The district court considered each of McFarland's objections to the application of enhancements to her sentence, including her objections to the loss amount calculation and the number of victims (Doc. 394-7-100); to an enhancement based on her leadership role in the fraud offense (Doc. 394-103-09); to an enhancement based on her obstruction of justice in relation to the fraud offense (Doc. 394-109-11); to an enhancement based on her abuse of a position of trust in relation to the fraud offense (Doc. 394-111-13); to the money laundering base offense level (Doc. 394-114-17); to an enhancement for her conviction under 18 U.S.C. § 1956 under

U.S.S.G.[2] § 2S1.1(b)(2)(B) (Doc. 394-117-18); to an enhancement based on the money laundering involving sophisticated means (Doc. 394-118-20); to an enhancement based on her leadership role in the money laundering offenses (Doc. 394-120-21); and to an enhancement based on her obstruction of justice in relation to the money laundering offenses (Doc. 394-121-22). As to each objection, the district court explained its reasoning as to why it applied the enhancement.

The court then calculated the Sentencing Guidelines range, finding that McFarland's total adjusted offense level was 46 and her criminal history category was I, resulting in a sentencing range of life imprisonment. (Doc. 394-127-28) This sentencing range was thereafter adjusted based on the government's motion for a downward departure of four levels, based her assistance in an unrelated case. (Doc. 394-139) The adjusted Guidelines range was then 360 months to life, based on an offense level of 42 and a criminal history category of I. (Doc. 394-140)

C. **The District Court Also Fully Considered The Factors Contained In § 3553(a).**

In addition to the Sentencing Guidelines range, the district court fully considered the factors contained in § 3353(a) before sentencing McFarland.

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[2]"U.S.S.G." refers to the November 1, 2001 Sentencing Guidelines Manual, the version of the Sentencing Guidelines used in imposing McFarland's Sentence. (Doc. 394-123-24)

Although the district court did not recite the factors listed in § 3553(a) before imposing sentence, or state on the record that it had considered each factor, such recitation was not required. *See United States v. Martinez*, 2006 WL 39541, at *4; *United States v. Williams*, 2006 WL 68559, at *3. Further, the district court was not required to detail the weight that it afforded to each sentencing factor. *See United States v. Scott*, 426 F.3d 1324, 1329-30 (11th Cir. 2005). References to the § 3553(a) factors were made throughout the sentencing hearing (*see*, *e.g.*, Doc. 394-124, 139, 150, 172), and both parties argued at length about what the appropriate sentence should be based on the § 3553(a) factors.

Because the district court considered all of the § 3553(a) factors, including the Sentencing Guidelines, in imposing sentence, it did not abuse its discretion in imposing the 30-year sentence in this case.

D. McFarland Has Failed To Demonstrate That Her Sentence Is Unreasonable.

McFarland bears the burden of demonstrating to this Court that her sentence was unreasonable. She has failed in meeting that burden. While she has presented arguments on why she believes each of the § 3553(a) factors should be weighed in her favor, she does not present any persuasive argument why this Court should find the district court abused its considerable discretion.

1. The nature and circumstances of the offense and the history and characteristics of the defendant

McFarland was involved in a multi-million dollar fraud involving numerous victims, both individual victims and institutional victims. She used her position of trust and her skills as an attorney, to commit the fraud and to launder the proceeds of the fraud. When the authorities were closing in on her and her accomplices, McFarland tried to conceal evidence from the government and she lied. All of these facts led to appropriate enhancements to her sentence under the Guidelines.

McFarland places great weight on the fact that her crime was non-violent. But violent crime is not the only crime in a civilized free society that should be punished harshly. Economic crimes, like McFarland's, which are committed by breaching the trust of individuals, also deserves to be punished harshly, especially when that economic harm is great and severely impacts a large number of individuals. As the district court noted in rejecting McFarland's objection to the number of victims enhancement:

> If anything, Government's exhibit 8 would underestimate the number of victims. It doesn't include the other people who were victimized by this scheme like the neighbors who see their property values go down when these vacant houses sit around for years at a time after foreclosure. It doesn't include the neighbors who see tax assessments jacked up because of the phony appraisals and inflated sales prices. It doesn't include the public, who pays higher interest rates for mortgages because of the degree of the fraud. It doesn't include the public who has to go to greater lengths to justify their

> honest eligibility for loans when the lenders are having to go to extraordinary lengths to try to eliminate the kind of fraud being perpetrated by Miss McFarland and her codefendants.

(Doc. 394-102-03) The economic and societal harms caused by McFarland's crimes are great.

It is also worth noting that McFarland and her codefendants stole the identities of innocent individuals and used those stolen identities in their perpetration of the fraud in this case. This additional harm – another circumstance of McFarland's offenses – also weighed in favor of a harsh sentence.

Contrary to McFarland's arguments, this factor did not weigh against the district court's 30-year sentence.

2. The need for the sentence imposed to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public from further crimes of the defendant, and to provide the defendant with training and treatment

In imposing McFarland's sentence, the district court emphasized that the sentence it was imposing was necessary to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment, to adequately deter others, and to protect the public from future crime by McFarland. (Doc. 394-172-74) This conclusion by the district court was reasonable.

In her argument, McFarland focuses on the retribution aspect of her sentence

and on whether it would result in general deterrence, to the exclusion of the other considerations under this sentencing factor. As the government explained at sentencing, however, mortgage fraud is an enormous problem in this country and in the State of Georgia in particular. (Doc. 394-141-43) Further, because the risks involved in perpetrating mortgage fraud are not as great as they might be for other more violent crimes, and because the crime is not that difficult for an attorney to commit and is hard to detect, when individuals are caught, they should be harshly punished to deter others from attempting such crimes. (Doc. 394-144-45) Additionally, because mortgage fraud of the nature committed by McFarland requires the active participation of the closing attorney, attorneys involved in real estate fraud like McFarland are even more deserving of harsh punishment than other participants.

Finally, McFarland does not address the need for the sentence in her case to deter her specifically. As the district court noted in sentencing her, even after she had been caught and indicted, McFarland continued to engage in illegal conduct, including lying to the court. (Doc. 394-173) She never acknowledged her guilt, even in the face of overwhelming evidence, and never demonstrated any remorse. (Doc. 394-173-74) As the district court noted: "She continues to try to persuade everyone involved that somehow she just got involved in this thing and didn't

know what was going on." (*Id.*) Her complete lack of contrition and remorse demonstrate the need for a harsh sentence to deter her from further crimes and to protect the public.

This factor also did not mitigate against the district court's sentence.

3. The kinds of sentences available

While the district court did not state that it considered other sentencing options, based on its statements at sentencing, it did not believe any other sentence would meet the goals of sentencing. This determination by the district court was reasonable in light of all of the other factors.

4 & 5. The sentencing range established by the Guidelines and any policy statements by the Sentencing Commission

The district court considered the Sentencing Guidelines and the policy statements contained therein and determined that a sentence within the Guidelines range was appropriate. The court then sentenced McFarland at the lowest end of the sentencing imprisonment range established by the Guidelines. As already noted, McFarland does not challenge any of the district court's Sentencing Guidelines findings. The district court's determination that a Sentencing Guidelines sentence was appropriate in this case was not unreasonable.[3]

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[3]While McFarland does claim that there were redundant enhancements imposed in her case, *see* McFarland brief at 33, she does not challenge the

6. The need to avoid unwarranted sentencing disparities

In the court below and in her brief to this Court, McFarland focuses on alleged sentencing disparities in support of her argument that her sentence is unreasonable. In rejecting her argument, the district court noted:

> [E]very one of those individuals that you mentioned came into court, pled guilty, accepted responsibility for their actions, and every single one of them, except Claude Blevins, your client put to the test [sic.] of coming in here and testifying and proving her guilt.
>
> But for those factors, the sentences for every single one of those individuals would have been much higher.
>
> Your client has not accepted responsibility for her guilt. She's shown no remorse, she's done nothing but tell one lie after another. She's done everything possible to try to obstruct the investigation in this case, and that's what makes her different from the others.

(Doc. 394-135)

McFarland's harsher sentence is also supported by her unique role as the closing attorney during all of the fraudulent dealings. If McFarland had been acting lawfully, none of the fraud could have occurred. This makes her different than every other codefendant, including Brenda Brown. In her brief, McFarland alleges that her role was identical to that of Brenda Brown, and that the only difference between the two of them was that she exercised her right to trial. *See*

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application of any of the enhancements on appeal.

McFarland brief at 26-27. That assertion is simply not supported by the record. Brenda Brown was not an attorney acting under a license that she obtained after swearing an oath to uphold the laws of Georgia and the United States; she did not have a title agency with a title insurance company; she did not represent anyone at closing; and she did not have an escrow account through which all of the fraudulent proceeds were passed.

Because, as the district court noted, McFarland did not accept responsibility for her crimes and did not cooperate with the government, she was not similarly situated to her co-conspirators, and the sentencing disparities that exist as a result do not entitle her to a lesser sentence and do not support her argument that her sentence was unreasonable. *See*, *e.g.*, *United States v. Regueiro*, 240 F.3d 1321, 1325-26 (11th Cir. 2001) (" 'to adjust the sentence of a co-defendant in order to cure an apparently unjustified disparity between defendants in an individual case will simply create another, wholly unwarranted disparity between the defendant receiving the adjustment and all similar offenders in other cases' "), *citing United States v. Chotas*, 968 F.2d 1193, 1197-98 (11th Cir. 1992); *see also United States v. DeVegter*, No. 04-14075, 2006 WL 345849, at *3 (11th Cir. Feb. 16, 2006); *United States v. Smith*, 289 F.3d 696, 714 (11th Cir. 2002).

Finally, McFarland points to other white collar criminals who received lesser

sentences than her. While those defendants might have received lesser sentences, that in itself does not establish that McFarland's sentence was unreasonable. *Id.* Without knowing all of the facts and circumstances surrounding those cases and the defendants' participation in the crimes involved, and without knowing details about the individuals involved, it cannot be concluded that a lesser sentence is warranted in McFarland's case to avoid *unwarranted* sentencing disparities.

7. Restitution

Finally, the mere fact that McFarland will not be able to earn any more money to pay restitution if she is incarcerated does not weigh significantly in favor of a lighter sentence.

The district court in this case followed the sentencing procedures required by this Court and properly exercised its discretion in determining the appropriate sentence for this defendant. Accordingly, McFarland has failed to show that the 30-year sentence imposed by the district court was unreasonable.

II. THE SENTENCING RECORD, WHEN REVIEWED AS A WHOLE, ESTABLISHES THAT THE DISTRICT COURT PROPERLY APPLIED THE SENTENCING GUIDELINES IN AN ADVISORY MANNER AS DICTATED BY THE SUPREME COURT IN *BOOKER*.

In issue II of her brief, McFarland argues that the district court erred in applying the Sentencing Guidelines in her case, because in doing so, it treated those Guidelines as *de facto* mandatory. The sentencing record in this case as a

whole reveals, however, that the district court understood that the Sentencing Guidelines were merely advisory and that, in imposing McFarland's sentence, the court had to consider all of the factors contained in 18 U.S.C. § 3553(a) in addition to the Guidelines range. Because the court applied the advisory Guidelines, there was no statutory *Booker* error.

A. **The Application Of Mandatory Sentencing Guidelines Results In Statutory *Booker* Error**.

In *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005), the Supreme Court recognized that two types of error occurred when the Federal Sentencing Guidelines were applied in a mandatory fashion, constitutional and statutory. *See United States v. York*, 428 F.3d 1325, 1335 (11th Cir. 2005). "[F]irst, following *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), it held that sentence enhancements based solely on judicially found facts pursuant to the mandatory Federal Sentencing Guidelines violated the Sixth Amendment; and second, it rendered the guidelines effectively advisory in order to comport with the Sixth Amendment by excising those provisions of the statute that made the guidelines mandatory." *United States v. Davis*, 407 F.3d 1269, 1270 (11th Cir. 2005). "Statutory *Booker* error arises 'when the district court misapplies the Guidelines by considering them as binding as opposed to advisory.' " *United States v. Glover*, 431 F.3d 744, 749 (11th Cir. 2005); *see also*

United States v. York, 428 F.3d at 1335. McFarland argues that the district court in her case committed statutory *Booker* error by applying the Federal Sentencing Guidelines in a mandatory fashion.

B. <u>Review Of This Issue Is For Plain Error Because McFarland Did Not Raise It In The District Court</u>.

Before turning to an analysis of the *Booker* issue raised by McFarland, this Court must first determine what standard of review applies. Because McFarland did not object to her sentence and sentencing procedure on the grounds they violated the mandate of *Booker*, this Court should apply the plain error standard of review. *See*, *e.g.*, *United States v. York*, 428 F.3d at 1335; *United States v. Rodriguez*, 398 F.3d 1291, 1297-1300 (11th Cir.), *cert. denied*, 125 S. Ct. 2935 (2005). Under the plain error standard of review, McFarland bears the burden of establishing that (1) there was error; (2) that the error is plain; and (3) that the plain error affected her substantial rights. " 'A defendant's substantial rights are affected when there is a reasonable probability that the district court would have imposed a different sentence if the guidelines were not mandatory.' " *United States v. York*, 428 F.3d at 1336 (internal citation omitted). If those three conditions are met, the Court, in its discretion, may notice the error if (4) it seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id*. McFarland has failed to meet her burden to establish that plain

error occurred in her case because she has not demonstrated that the district court committed *Booker* error, plain or otherwise[4], by applying the Sentencing Guidelines in her case in a mandatory fashion and she has not established that there is a reasonable probability that the district court would have imposed a different sentence if it had applied the Guidelines in a non-mandatory manner.

C. <u>The District Court Did Not Apply The Sentencing Guidelines In A Mandatory Manner</u>.

In support of her argument, McFarland cites incomplete portions of the district court's comments at the sentencing hearing and presents them out of context. The district court's comments at sentencing, in context, were as follows:

> The hearings are difficult because people that commit white collar crime on a large scale are almost always smart, personable, come from good families, have friends. They've done good things, they're intelligent, they're articulate, they're persuasive, and their pleas for mercy are incredibly touching.
>
> But all those characteristics are the same ones that make it possible for them to steal large, large sums of money. And Miss McFarland, I regret to say, fits that pattern exactly.
>
> *I'm going to impose a guideline sentence in this case not because I have any ill will towards Miss McFarland, not out of any sense of malice, but because that's my duty in this case.*

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[4]If McFarland establishes that the court applied mandatory Sentencing Guidelines, after *Booker*, the error would be plain. *See United States v.Rodriguez*, 398 at 1299.

In terms of deciding whether or not to impose a Guideline Sentence, I'm required to consider the factors in Section 3553(a) of Title 18.

The first two of those are to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense and to afford adequate deterrence to criminal conduct.

The offense in this case I consider to be an extremely serious one for the reasons I've said in this hearing and in the others in this case.

Mortgage fraud is not a victimless crime.

Stealing from banks, stealing from mortgage companies, stealing from mortgage insurance companies and title insurance companies, those are all serious, serious offenses that affect many people other than those who are the immediate victims and principally affect other homeowners and whole neighborhoods in this case.

In order to promote respect for the law, I think I'm required to impose a guideline sentence in this case.

Until I had listened to the evidence in this case, it was inconceivable to me that a member of the Georgia Bar could participate in the level of fraud, criminality, stealing, lying, and obstruction of justice that Miss McFarland engaged in.

She continued lying all the way through the bond hearing that we had in this case when she tried to persuade me that the Rock Springs Road house mortgage had not caused a loss. If that wasn't an outright lie, if she could maintain that somehow the fact that one of these flip transactions had paid off the loan in full, it was certainly meant to deceive me.

Throughout this whole process, she's shown no remorse. She continues to try to persuade everyone involved that somehow she just

> got involved in this thing and didn't know what was going on.
>
> Well, her statement in court today shows how intelligent she is, how persuasive she is, how perceptive she is at what is naturally going to appeal to anybody that's got a heart; namely, the effect of this sentence on her family and her child, her friends.
>
> She knows what's going on. She's known what was going on all along. And she went in with her eyes open knowing what she was doing, knowing what others were doing, and succeeded in processing through her law firm some $20 million in fraudulent mortgage loans.
>
> It really was nothing but a fraud factory. And in order to afford adequate deterrence, I believe the sentence in this case has to be one that her friends and family will rightfully consider to be a harsh one.
>
> But the message needs to get out to other attorneys, you are the gatekeepers. You're the ones that keep the system honest. And if instead you join in the fraud, join in the feeding at the trough, sure it may get you a Mercedes automobile in the short run; but if you're caught and if you're prosecuted in federal court, you're going to prison.
>
> And that's the only way I know to get that message out, is to impose a sentence in this case that is within the guideline range.

(Doc. 394-172-74) (Emphasis indicates the comments relied on by McFarland.) When the comments of the district court are considered in their entirety, it is clear the court understood that the Sentencing Guidelines were advisory and that it had the authority to sentence outside of the Guidelines range. The court felt duty bound – not legally bound – to sentence McFarland within that range, based on the court's evaluation of all of the facts presented at the sentencing hearing and trial

and its application of the § 3553(a) factors. The court's comments in the record simply do not support the argument that it applied the Guidelines range as mandatory.

Moreover, there are other indications in the sentencing record that the district court understood that, in addition to the Sentencing Guidelines, it was required to consider the sentencing factors contained in 18 U.S.C. § 3553(a). For instance, after hearing argument, and ruling on all of McFarland's objections to the guideline enhancements recommended in the presentence report, the court said ti would recess for 15 minutes, "and then I'll do the Guidelines calculations and hear any argument as to the – whether I should impose a non-Guideline sentence." (Doc. 394-124) Then, after hearing argument from McFarland's counsel on why the Guidelines sentence should not apply, the district judge asked the government prosecutor to state the government's position on a downward departure "before I make this decision about a guideline or non-guideline sentence." (Doc. 394-138-39) And finally, throughout the sentencing hearing, the court and the parties mentioned the § 3553(a) factors (*e.g.*, Doc. 394-150, 172) and the court permitted the parties to argue the application of those factors. These indications in the record further evidence the district court's understanding that the Guidelines were not mandatory.

D. Comments Made By The District Court In Sentencing Other Defendants Are Irrelevant To An Evaluation Of Whether The Court Improperly Mandatorily Applied The Sentencing Guidelines In McFarland's Case.

Furthermore, McFarland primarily relies in her argument on comments the district judge in her case made in other cases, specifically his comments about fundamental unfairness, *see* McFarland brief at 37-38. This Court may not consider those comments, however, because they are not a part of the record in this case and they have no relevance to McFarland's sentence.[5]

"Trial judges are presumed to know the law and to apply it in making their decisions." *Walton v. Arizona*, 497 U.S. 639, 653, 110 S. Ct. 3047, 3057 (1990); *United States v. $242,484.00*, 389 F.3d 1149, 1155 (11th Cir. 2004). McFarland has failed to overcome this presumption. This is particularly so when the record as a whole reveals that the district court understood that, in addition to the Sentencing Guidelines, it was required to consider and apply other factors before sentencing McFarland.

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[5]The attachments to McFarland's brief in which the cited comments are contained should not be considered by this Court in reaching its decision, because they are not a part of the record in this case. *See* Fed. R. App. P. 10(a) (record on appeal consists of, among other things, "the original papers and exhibits *filed in the district court*") (emphasis added). To the extent the Court might consider them, however, the government would point out that the attachments do not help McFarland's argument.

E. Even If The District Court Committed *Booker* Error, McFarland Has Not Established That Her Sentence Would Have Been Different If It Had Properly Applied The Guidelines As Advisory.

Finally, even assuming McFarland could demonstrate that the district court committed *Booker* error in sentencing her, she has not, and cannot, establish that the district court would have imposed a different sentence if the Sentencing Guidelines had been applied as advisory. *United States v. York*, 428 F.3d at 1336. A review of the record in this case establishes, not only that the district court understood the Sentencing Guidelines were merely advisory, but that it believed the Guidelines sentence was appropriate based on all of the sentencing factors it was obligated to consider. McFarland has not met her burden of proving plain error. Therefore, this Court should reject her claim for relief based on *Booker* error.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING LAY OPINION TESTIMONY IN VIOLATION OF RULE 701 OF THE FEDERAL RULES OF EVIDENCE.

In issue III of her brief, McFarland argues that the district court committed reversible error when it allowed the government to elicit from two witnesses their opinion as to McFarland's guilt in violation of Federal Rules of Evidence 701, 702, and 704. Contrary to McFarland's assertions, however, the government was not permitted to present lay or expert opinion testimony from both of the witnesses.

The district court sustained McFarland's objection to the testimony of government witness Robbie Taylor and no opinion evidence was presented from that witness. Further, while the district court permitted government witness Brenda Brown to testify that she and other members of McFarland's law firm deliberately misled the auditor from Attorneys' Title Insurance Company about the law firm's closing files, and checks related to those files, that testimony was not on an ultimate issue of fact for the jury's determination. It was properly presented as lay opinion testimony under Rule 701, even if it was considered an opinion on an ultimate issue for the jury to determine. For these reasons, the district court did not commit any error, and even it did, McFarland's substantial rights were not affected by that error.

A. Opinion Testimony Is Admissible Under Rules 701 And 702 Of The Federal Rules Of Evidence, Even If The Opinion Is On An Ultimate Issue Of Fact.

McFarland's argument on this issue is based on Federal Rules of Evidence 701, 702, and 704. Rule 701 governs lay opinion testimony and provides that, "[i]f the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." *See* Fed. R. Evid. 701. Rule 702 governs the admissibility of expert testimony. *See* Fed. R. Evid. 702. Expert opinion testimony is only admissible when a specific foundation is laid for that testimony. *Id*. Finally, Rule 704 addresses the admissibility of opinion testimony on an ultimate issue of fact. It provides that a lay witness may provide testimony on any ultimate issue of fact, but an expert witness may only provide testimony on an ultimate issue of fact that does not involve the mental state or condition element of an offense. *See* Fed. R. Evid. 704. Pursuant to Rule 704, a lay witness may give opinion testimony on an ultimate issue of fact, including a defendant's mental state, although an expert witness may not. *See*, *e.g.*, *United States v. Valdez-Torres*, 108 F.3d 385, 388 (D.C. Cir. 1997) ("under Federal Rule of Evidence 701, an eyewitness may express an informed opinion that would help resolve a fact in issue, here, [the defendant's] intent"); *Virgin Islands v. Knight*, 989 F.2d 619, 629-30 (3rd Cir. 1993) (testimony regarding whether the defendant's firing of the gun was an accident was admissible lay opinion testimony under Rule 701); *United States v. Juvenile Male*, 864 F.2d 641, 647 (9th Cir. 1988) (the victim's lay opinion testimony as to the defendant's intent was admissible under Rule 701).

The testimony elicited from Robbie Taylor and Brenda Brown was not

elicited as expert testimony as the opinion testimony was based on the observations and perceptions of the witness and did not purport to be the result of scientific, technical, or specialized knowledge of the witness. *See* Fed. R. Evid. 702. Therefore, the question before this Court is whether the government improperly presented lay opinion testimony.

While this Court has not explained what constitutes lay witness opinion testimony under Rule 701, the Eighth Circuit provided some guidance on that issue in *United States v. Espino*, 317 F.3d 788, 796-97 (8th Cir. 2003). In *Espino*, the Eighth Circuit held that Rule 701 allows lay witness opinion testimony when such testimony is based on " 'relevant historical or narrative facts that the witness has perceived,' . . . "and if it 'would help the factfinder determine a matter in issue.' " *Id*. (internal citations omitted). The Eighth Circuit continued:

> "While the ordinary rule confines the testimony of a lay witness to concrete facts within his knowledge or observation, the [c]ourt may rightly exercise a certain amount of latitude in permitting a witness to state his conclusions based upon common knowledge or experience." ... Lay opinion testimony is admissible only to help the jury or the court to understand the facts about which the witness is testifying and not to provide specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events."

Id. "The general application of Rule 701 indicates that a lay witness may testify about facts within his or her knowledge." *Id*.

Applying this law to the facts of this case, there was no error in the government's question to Robbie Taylor, or in its question to Brenda Brown and her answer to that question.

B. <u>The District Court Sustained McFarland's Objection To The Opinion Testimony The Government Attempted To Elicit From Robbie Taylor And No Inadmissible Evidence Was, Therefore, Admitted</u>.

Robbie Taylor, the Executive Vice President of Attorneys' Title Title Fund, a title insurance company through which McFarland issued title commitment letters and title insurance policies, testified for the government. (Doc. 383-384-434) After Ms. Taylor testified at length about the problems she experienced in trying to conduct an audit of McFarland's records and accounts, the government asked her about her opinion and the following occurred:

> Q. Now, have you become familiar with the problems on the files closed by Chalana McFarland in this case through the subsequent claims and so forth?
>
> A. Somewhat.
>
> Q. Okay. Were the problems here created by fraud or created by inexperience?
>
> MR. ROWSEY [DEFENSE COUNSEL]: Objection, Your Honor; calls for a conclusion. It, I think, ventures into the realm of the jury.
>
> THE COURT: What do you say, Miss McKenzie?
>
> MS. McKENZIE [FOR THE GOVERNMENT]: Your Honor,

> she’s familiar with the transactions, has gone behind the transactions, and I believe –
>
> THE COURT: You’re going to have to lay a whole lot more foundation than that for that question.
>
> MS. McKENZIE: Let me rephrase the question. Maybe she can answer it specifically.
>
> BY MS. McKENZIE
>
> Q. You’re aware that your firm requested specific files of Chalana McFarland.
>
> A. Yes.
>
> Q. And have you determined through subsequent investigation that some of those files you requested at the time were, indeed, flip transactions?
>
> A. Yes.

(Doc. 383-431-32) Thereafter, the government did not elicit any opinion testimony as to whether the problems with the files created by McFarland were created through fraud or inexperience. (*Id*.)

McFarland first argues in her brief that the question asked by the government, and objected to by defense counsel, attempted to elicit expert testimony concerning McFarland’s mental state. Even assuming that was true,

which the government does not concede[6], the district court sustained McFarland's objection and instructed the government that it would have to establish a proper foundation before it would be permitted to ask such a question. (Doc. 383-432) The government did not further pursue the line of questioning, but instead proceeded to question Ms. Taylor about her own personal examination of the files.

McFarland argues that Federal Rules of Evidence 701, 702, and 704 were violated when the government attempted unsuccessfully to elicit the alleged opinion testimony from Robbie Taylor. While the government may have asked a question that attempted to elicit opinion testimony from Robbie Taylor, no such evidence was ever presented to the jury for its consideration in response to the question asked and, therefore, McFarland could not have been prejudiced. The

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[6]It appears from a reading of the record and a review of the question and answer in context that the government was attempting to elicit lay opinion testimony, not expert testimony. Before the question in issue was asked, the government had questioned Ms. Taylor extensively about her personal knowledge of McFarland's records and her personal dealings with McFarland relative to this case. Further, when the district court asked the Assistant United States Attorney if she had anything to say in response to defense counsel's objection, she stated that the basis for her question was that Ms. Taylor was "familiar with the transactions, has gone behind the transactions. . . ," indicating that she was looking for an opinion based on Ms. Taylor's personal observations of the evidence. (Doc. 383-431) And finally, the Assistant United States Attorney rephrased her question to ask Ms. Taylor a question about her personal observations, whether her personal investigation of McFarland's files revealed "flip" transactions, which are by nature fraudulent. (Doc. 383-432)

district court did not abuse its discretion in sustaining the objection and requiring a further foundation from the government before permitting the government to present this testimony. "An abuse of discretion arises when the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact." *United States v. Baker*, 432 F.3d 1189, 1202 (11th Cir. 2005). In sustaining the objection here, the district court did not make any erroneous findings of fact or conclusions of law and, therefore, did not abuse its discretion. Consequently, McFarland is not entitled to a reversal of her conviction based on this allegation of error.

Moreover, the government did not pursue the line of questioning and attempt to further elicit any opinion testimony from Ms. Taylor and, as is argued in part III.C. of this brief below, the lay opinion testimony elicited from Brenda Brown was properly admitted.

C. The District Court Properly Permitted Brenda Brown To Testify As To Her Opinion That She And Her Coworkers Acted Deliberately, And Not Out Of Ignorance.

McFarland also argues that the district court erred in permitting the government to elicit the following testimony from government witness Brenda Brown, over her objection:

> Q: [By the government] Okay. Now, back to the title company, Attorneys' Title.

After that February 2000 audit when the B.G.B. problem came up and they couldn't get the files and so forth, did they offer assistance to your office?

A. [Ms. Brown] Yes, they offered some accounting assistance.

Q. And did Miss McFarland take them up on that?

A. No, she didn't.

Q. Was the condition of the checks and the non-availability of the closing files due to ignorance on your – on the law firm's part?

MR. ROWSEY: Objection, Your Honor, calls for speculation by this particular witness. It enters into the province of the jury.

THE COURT: Overruled.

BY MS. McKENZIE:

Q. Or was it due to deliberate acts?

A. Deliberate acts.

Q. Did Attorneys' Title continue to try to get files and records from the law firm?

A. Yes.

(Doc. 387-1025-26) This testimony was properly admitted because it was evidence of this witness's intent and the witness's first hand knowledge of the intent of other members of the McFarland law firm. In discussing her own intent and her own conduct, Brenda Brown is clearly not expressing an opinion; she is testifying based on her firsthand knowledge. As to Ms. Brown's testimony

concerning other members of the McFarland law firm, the testimony was proper opinion testimony under Rule 701 of the Federal Rules of Evidence, which permits a lay witness to give an opinion based on that witness's perception of events when such testimony is helpful to a clear understanding of the facts and is not based on scientific, technical, or other specialized knowledge. *See* Fed. R. Evid. 701.

In her brief, McFarland attempts to characterize this testimony of Brenda Brown as expert testimony based on the government's elicitation of testimony throughout its examination of Brown about mortgage fraud and flip transactions. However, the testimony at issue has nothing to do with Ms. Brown's knowledge of flip transactions in general, but instead relates to her personal involvement in trying to evade Robbie Taylor and the auditor from Attorneys' Title and her observations of other members of the McFarland law firm and their attempts to evade an audit by Attorneys' Title, as well. In expressing her opinion that the actions of other members of the law firm were deliberate, Ms. Brown was merely expressing her reasonable opinion based on her perceptions and knowledge. This shorthand rendition of her own actions and those of her fellow members of the firm as being deliberate was admissible to help explain her testimony that they were all evading the auditors with knowledge that Robbie Taylor and the Attorneys' Title auditor wanted to see the McFarland law firm's closing files and checks. *See*

generally United States v. Freeman, 514 F.2d 1184, 1191 (10th Cir. 1975) (lay opinion testimony admissible as a "shorthand rendition of [the witness's knowledge of the total situation and the collective facts"). This lay opinion testimony was admissible and the district court did not abuse its discretion in allowing it into evidence.

Finally, this lay opinion testimony by Brenda Brown was not an opinion on an ultimate issue of fact in this case. Instead, it was an opinion on whether the actions of other members of the law firm, preventing Attorneys' Title from conducting its audit, were deliberate. That was not an issue in this case that the jury was called upon to decide. Moreover, even if it was an issue of ultimate fact in this case, as McFarland claims in brief, because it was lay opinion testimony, not expert testimony, it was fully admissible. *See* Fed. R. Evid. 704.

McFarland has failed to demonstrate that the district court abused its discretion with respect to its admission of any lay opinion testimony. Therefore, she is not entitled to relief on this issue.

IV. THE DISTRICT COURT CORRECTED ANY ERROR IN THE ADMISSION OF EVIDENCE CONCERNING McFARLAND'S POSSESSION OF A FALSE FLORIDA DRIVER'S LICENSE BY GIVING A CURATIVE INSTRUCTION TO THE JURY AFTER ITS ADMISSION, AND McFARLAND CANNOT DEMONSTRATE THAT THE JURY'S EXPOSURE TO THIS SINGLE PIECE OF ULTIMATELY EXCLUDED EVIDENCE WAS SO PREJUDICIAL AS TO ENTITLE HER TO A NEW TRIAL.

In issue IV of her brief, McFarland argues that the district court committed reversible error when it allowed the government to introduce evidence that she possessed a false Florida driver's license. McFarland alleges that the admission of this evidence was improper because it was irrelevant under Federal Rule of Evidence 401, it was improper character evidence under Federal Rule of Evidence 404(b), and because its probative value was substantially outweighed by its prejudicial effect in violation of Federal Rule of Evidence 403. However, the evidence concerning McFarland's possession of a Florida driver's license was ultimately excluded by the district court and McFarland's objection was sustained, albeit not until after the question was answered by the witness. The district court also instructed the jury to disregard the answer. This curative instruction, in light of the entire trial, was sufficient to cure any error in the admission of the evidence. For that reason, the district court did not abuse its discretion in denying McFarland's motion for a mistrial, and this Court should deny her request for a new trial.

Before trial, McFarland filed a Motion In Limine that requested, among other things, that the district exclude evidence concerning her possession of a Florida driver's license with her photograph on it, identifying her as Rachel Cosby, her ex-husband's ex-wife. (Doc. 215-5) In its response, the government indicated

that it intended to introduce the driver's license at issue "to show the defendant's signature," arguing that the license had been lawfully issued. (Doc. 220-5) At a hearing on the motion, the district court denied the motion in part and reserved ruling on the motion in part. *See* minute entry to Doc. 221 on U.S. District Court Docket Sheet in this case. Therefore, before the testimony at issue was elicited from Lisa Bellamy, the district court had not ruled it inadmissible under Federal Rule of Evidence 404(b) or on any other grounds.

At trial, the government was eliciting relevant testimony from Lisa Bellamy, a paralegal who worked for McFarland, about stolen social security numbers as follows, when the testimony at issue occurred:

> Q. [By the government]: Okay. In addition to the purchased identities used for the flips, did other people have stolen social security numbers?
>
> A. [By Ms. Bellamy] Yes.
>
> Q. Who, to your knowledge?
>
> A. Brenda Brown.
>
> Q. Okay. Do you know of any identification documents connected with the defendant in this case?
>
> A. I know Miss –
>
> MR. ROWSEY [DEFENSE COUNSEL]: Objection, Your Honor.

I think there needs to be a foundation laid if there's any relevance to a matter that we discussed previously.

THE COURT: Overruled.

BY MS. McKENZIE [FOR THE GOVERNMENT]

Q. Do you know whether the defendant had any false identification documents?

A. She had a Florida driver's license in the name of Rachel Cosby.

Q. How do you know that?

A. I've seen it.

Q. How did that come about?

A. It fell out one day at the office.

Q. Okay. And do you know whether or not she got it from the flea market or got it from the Florida DL –

A. I have no idea.

Q. Okay. Do you have –

THE COURT: I did not understand that's what you were discussing, Miss McKenzie, and I sustain your objection, Mr. Rowsey.

Ladies and Gentlemen, disregard the statement about the Florida driver's license.

MR. ROWSEY: Your Honor, I'd like to take up the matter at the break.

THE COURT: All right.

(Doc. 386-928-29) At the subsequent break in the trial, defense counsel made a motion for mistrial on the grounds that the evidence of the alleged false driver's license was mentioned to the jury and it should not have been because it was irrelevant. (Doc. 386-934-35) Defense counsel acknowledged that the district court had sustained his objection ultimately and given a curative instruction, but for the record he wanted to make his motion for a mistrial. (Doc. 386-935) Contrary to McFarland's assertion in her brief at pages 46-47, defense counsel did not argue that the curative instruction given was insufficient; he merely noted that it had been given and made his motion for mistrial. Further, defense counsel did not request any additional instruction be given. The district court denied the motion for mistrial, noting that it had not made its ruling clear before trial as to whether it was going to permit the testimony, although it had definitively ruled that a false social security number McFarland used to obtain a title insurance agency was admissible and it thought that was what the government was getting into when it initially overruled defense counsel's objection. (Doc. 386-935) The court then indicated it thought its curative instruction was sufficient to cure any error and overruled McFarland's motion for a mistrial. (Doc. 386-935)

The district court did not abuse its discretion in overruling McFarland's motion for a mistrial. It ultimately excluded the false driver's license evidence and

instructed the jury to disregard it. In light of the overwhelming admissible evidence against McFarland in this case, this Court should find that reversible error did not occur.

"The decision of whether to grant a mistrial lies within the sound discretion of a trial judge as he or she is in the best position to evaluate the prejudicial effect of improper testimony." *United States v. Perez*, 30 F.3d 1407, 1410 (11th Cir. 1994). This Court will only reverse a district court's refusal to grant a mistrial if an abuse of discretion has occurred. *United States v. Ramirez*, 426 F.3d 1344, 1353 (11th Cir.), *cert. denied*, 126 S. Ct. 417 (2005); *United States v. Abraham*, 386 F.3d 1033, 1036 (11th Cir. 2004); *United States v. Diaz*, 248 F.3d 1065, 1101 (11th Cir. 2001). "When a curative instruction has been given to address some improper and prejudicial evidence, [this Court] will reverse only if the evidence 'is so highly prejudicial as to be incurable by the trial court's admonition.' " *United States v. Perez*, 30 F.3d at 1410, *citing United States v. Funt*, 896 F.2d 1288, 1295 (11th Cir. 1990); *accord United States v. Diaz*, 248 F.3d at 1101; *United States v. Dodd*, 111 F.3d 867, 870 (11th Cir. 1997). A curative instruction purges the taint of prejudicial evidence, because a jury is presumed to follow its instructions. *United States v. Calderon*, 127 F.3d 1314, 1334 (11th Cir. 1997). Finally, this Court may reverse the district court only if, in the context of the entire trial and any

curative instructions, admission of the evidence prejudiced McFarland's substantial rights. *See United States v. Hernandez*, 896 F.2d 513, 517-18 (11th Cir. 1990). "Improper and prejudicial testimony is less likely to mandate a mistrial when there is other significant evidence of guilt which reduces the likelihood that the otherwise improper testimony had a substantial impact upon the verdict of the jury." *United States v. Perez*, 30 F.3d at 1411 (internal quotation marks and citations omitted); *accord United States v. Hernandez*, 896 F.2d at 518.

In her brief, McFarland does not address the standards of review that apply to the issue she raises. Instead, she focuses on the nature of the evidence as being inadmissible 404(b) evidence and the allegation that the probative value of the evidence is outweighed by its prejudicial effect. But McFarland ultimately won her argument that the evidence should not have been admitted in the court below, and now the only issue for this Court is whether she was entitled to a mistrial because of the initial admission of the evidence. Because the district court excluded the evidence and gave a curative instruction to the jury instructing it to disregard it, and because there was overwhelming evidence implicating McFarland in the crimes with which she was charged, including evidence concerning her possession of other false identification documents, the district court did not abuse its discretion in refusing to declare a mistrial. Moreover, because the evidence of

McFarland's guilt was very strong[7], there is no probability that her substantial rights were violated by the initial admission of the evidence.

The district court ultimately excluded the evidence to which McFarland objects. It also gave a curative instruction to the jury to disregard the testimony relating to the Florida driver's license, and McFarland neither objected to the curative instruction on the grounds it was insufficient to cure the error or requested further instructions when the district court denied the motion for mistrial, indicating she was satisfied with the instruction given. Additionally, McFarland has failed to demonstrate in this Court that the curative instruction given was insufficient to purge the taint of the inadmissible evidence. Finally, there was overwhelming evidence of McFarland's guilt presented in this case, and McFarland has not claimed to the contrary; she has not attacked the sufficiency of the evidence presented in her case. In light of these factors, this Court should affirm the district court on this issue.

V. BECAUSE THERE WAS NO ERROR IN THE DISTRICT COURT'S EVIDENTIARY RULINGS, THIS COURT SHOULD REJECT McFARLAND'S CUMULATIVE ERROR ARGUMENT BASED ON THOSE SAME EVIDENTIARY RULINGS.

In issue V of her brief, McFarland argues that the cumulative effect of the

[7]*See* the Government's Statement of the Facts, above.

errors raised in issues III and IV of her brief requires reversal, even if the individual errors do not. Because no single reversible error occurred in this case, no cumulative error may be found.

This Court has recognized that, even where individual errors may be harmless, this Court will reverse if the cumulative effect of the errors is so prejudicial to a defendant's right to a fair trial that a new trial is required. *See United States v. Baker*, 432 F.3d 1189, 1203 (11th Cir. 2005); *United States v. Ramirez*, 426 F.3d 1344, 1353 (11th Cir. 2005). However, where no individual error has been demonstrated, no cumulative error can exist. *See United States v. Waldon*, 363 F.3d 1103, 1110 (11th Cir.) (*citing United States v. Allen*, 269 F.3d 842, 847 (7th Cir. 2001)), *cert. denied*, 543 U.S. 867, 125 S. Ct. 208 (2004).

McFarland has failed to demonstrate that any error occurred with regard to issues III and IV. At most, she has demonstrated that the district court initially erred in admitting the testimony regarding her Florida driver's license, and that testimony was ultimately excluded. However, even if that error constitutes an error for purposes of cumulative error analysis, it is a single harmless error and no cumulative error can occur from a single error. *Id.* Therefore, McFarland is entitled to no relief on her cumulative error argument.

CONCLUSION

For the above reasons, this Court should reject McFarlands's arguments and affirm the convictions and sentence in this case .

Respectfully submitted,

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United States Attorney

____

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in F.R.A.P. 32(a)(7)(B). This brief contains 12,670 words.

____

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February, 2006, the foregoing brief was served on counsel for the Defendant/Appellee, by placing a copy of the same to her in the United States Mail, first class and postage prepaid, addressed as follows:

Lynn Fant
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and by mailing the original and additional copies by first class certified mail, postage prepaid, to the Clerk of this Honorable Court on the same date, addressed as follows:

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U.S. Court of Appeals - Eleventh Circuit
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