IN THE
UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 05-114974-A

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

CHALANA C. MCFARLAND

Defendant-Appellant.

A DIRECT APPEAL OF A CRIMINAL CASE
FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

BRIEF OF APPELLANT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v. APPEAL NO. 05-14974-A

CHLANA C. MCFARLAND

Defendant-Appellant.
_____/

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Counsel hereby certifies that the following may have an interest in the outcome of this appeal:

Lynn G. Fant - Counsel for Defendant-Appellant;

Chalana McFarland - Defendant-Appellant;

Gail McKenzie - Counsel for Plaintiff-Appellee, Assistant US Attorney;

David Nahmias - Counsel for Plaintiff-Appellee, US Attorney

Barbara Nelan - Counsel for Plaintiff-Appellee, Assistant US Attorney

Thomas Rowsey - Counsel for Defendant-Appellant below;

Thomas W. Thrash - United States District Court Judge.

C1-1

STATEMENT REGARDING ORAL ARGUMENT

The defendant-appellant requests oral argument. According to the Government, the sentence imposed is the longest sentence ever imposed on a defendant convicted of mortgage fraud. This case presents important issues regarding the reasonableness of such a harsh sentence on a first offender convicted of a non-violent property crimes. Oral argument will help develop the information necessary for this Court to reach a just decision.

STATEMENT OF TYPE SIZE AND STYLE

Pursuant to 11th Cir. R. 28-2(d), counsel for Appellant hereby certifies that the size and style of type used in this brief is TIMES NEW ROMAN 14 PT.

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STATEMENT OF JURISDICTION

The Eleventh Circuit Court of Appeals has jurisdiction to consider this case pursuant to 28 U.S.C. §1291 and Rule 4, of the Federal Rules of Appellate Procedure. This case involves a direct appeal of a criminal conviction from the United States District Court for the Northern District of Georgia, Atlanta Division.

STATEMENT OF THE ISSUES

I. Whether the thirty year sentence imposed by the district court on Appellant, who is a first offender convicted of a non-violent offense, is unreasonable?

II . Whether the district court treated the sentencing guidelines as *de facto m*andatory in violation of the Fifth, Sixth, and Eighth Amendments?

III. Whether the district court committed reversible error when it allowed the Government to elicit from two witnesses their opinion as to the guilt of Appellant in violation of F.R.E. 701, 702, and 704?

IV. Whether the district court committed reversible error when it allowed the Government to introduce evidence that Appellant possessed a false Florida driver's license in a different name because it was irrelevant under 401, improper character evidence under F.R.E. 404(b) and the Probative value was substantially outweighed by its prejudicial effect in violation of F.R.E. 403?

V. Whether the cumulative effect of the errors raised in Issues III and IV constitute reversible error?

STATEMENT OF THE CASE

(i) Course of Proceedings:

On April 27, 2004, a grand jury seated in the Northern District of Georgia, Atlanta Division, returned a 158 count indictment against Chalana C. McFarland and thirteen others[1] charging a conspiracy to commit mortgage fraud in the metro Atlanta area, along with a variety of crimes connected with mortgage fraud, such as money laundering, fraud involving social security numbers, and fraud against the Department of Housing and Urban Development (HUD). (Doc. #4).

Appellant was arrested on May 12, 2004, and appeared in magistrate court. (Doc. ##33,95). She was arraigned on the indictment, entered a plea of not guilty, and was released on a $10,000 personal appearance bond. (Doc. ##33,34). Approximately two months later, Appellant's retained counsel was allowed to withdraw, and counsel was appointed to represent Appellant. (Doc. #134). Neither attorney filed pretrial motions, and the case was certified ready for trial. (Doc. #161).

[1]The co-defendants are: Brenda Brown, Lisa Bellamy, Judith Hooper, Melvin Quillen, Thomas Christopher Davis, Sr., Brandon Wilhite, James Pettigrew, Kenneth Collins, Melinda Renee Tyner, Jewel Williams, and Sidney Williams. All of the defendants pled guilty with the exception of Collins and Pettigrew, whose charges were dismissed, and Appellant, who went to trial.

At the pretrial conference held by the district court on October 26, 2004, all of the defendants except Collins, Pettigrew, and Appellant indicated that they were changing their pleas to guilty. (Doc. #171). The district court set the trial date for January 24, 2005. (Doc. #172). During the next month, all of the co-defendants entered guilty pleas, and, for the most part, agreed to cooperate with the Government. (PSR, ¶21).

On December 14, 2004, the Government filed a superseding indictment charging Appellant as the sole defendant in a mortgage fraud conspiracy, related substantive charges, and perjury related to a deposition in a federal civil case regarding the mortgage fraud. Count one charged that between 1999 and late 2002, Appellant and the defendants from the original indictment conspired, in violation of 18 U.S.C. §371, to commit bank fraud in violation of 18 U.S.C. §1344 by defrauding mortgage lenders by submitting material false qualifying information and documentation and other fraudulent representations to obtain mortgage loans. Count one also alleged the conspiracy included: mail fraud, wire fraud, false use of social security numbers, fraudulent transfer of means of identification with the intent to commit wire fraud, mail fraud, and bank fraud (in violation of 18 U.S.C. §1028(a)(7)), structuring financial transactions involving the proceeds of unlawful activities, and money laundering in violation of 18 U.S.C. §1957 and

§1956(a)(1)(A)(I) and (B)(i), and obstruction of justice in violation of 18 U.S.C. §1503.

Counts 2-31 were bank fraud counts stemming from the conspiracy count. Counts 32-92 were wire fraud counts, and counts 93-165 were money laundering counts. Count 166 alleged that Appellant, aided and abetted by others obstructed justice by falsely stating records which were the subject of a grand jury subpoena, had been stolen from her office, which constitutes a violation of 18 U.S.C. §§1503 and 2. Counts 167-170 charged Appellant with three instances of perjury during a deposition on November 19, 2001, in a civil case filed against her and her law firm, by Central Pacific Mortgage Company in United States District Court for the Northern District of Georgia, the alleged perjury constituting a violation of 18 U.S.C. §1623.

Appellant pled not guilty to the superseding indictment on December 17, 2004. (Doc. #198). A pretrial conference was held by the district court with the attorneys, but not Appellant on January 4, 2005. The district court set another pretrial conference, this time with Appellant present, for a week later, on January 10, 2005. Appellant filed a motion for a bill of particulars and a motion for a hearing on the plea of former jeopardy. (Doc. ##202,203). A pretrial conference was held by the magistrate who denied the motion for a bill of particulars as moot. The motion for a

hearing on the plea of former jeopardy was withdrawn. (Doc. #211).

On February 15, 2005, after a trial lasting 11 days the jury returned a verdict of guilty on all counts. The District Court granted the Government's motion to detain, and placed Appellant in custody, where she has remained. (Doc. #249,250).

On August 26, 2005, the district court sentenced Appellant to 360 months [2](thirty years) in the custody of the Bureau of Prisons, supervised release for 5 years, a special assessment of $17,000, and restitution in the amount of $11,588,465.54. (Doc. #344).

A timely notice of appeal was filed. (Doc. #360). Appointed counsel moved the district court to withdraw from the case. (Doc. #363). The district court granted the motion and the undersigned was appointed. (Doc. #373). Appellant is currently awaiting designation by the Bureau of Prisons and is being detained at the Atlanta Pretrial Detention Center.

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[2] The sentence was as follows: 60 months on Count 1, 360 months on Counts 2-31, 240 months on counts 32-92, 240 months on 93-165, 120 months on Count 166, and 60 months on Counts 167-170, all to be served concurrently.

(ii) Statement of Facts:

In the mortgage industry, a rapid transfer of property with the sole purpose of inflating the value of the property is referred to as a "flip" transaction. (Doc. #230-69). In the late 1990s, a group of professional individuals–mortgage brokers, real estate agents, appraisers, paralegals, and attorneys, along with assistance of "straw" buyers or "buyers" using stolen identities, worked together to defraud mortgage lenders by "flipping" properties in the metro Atlanta area. Many of these individuals were identified, and several were indicted, along with Appellant, in April of 2004. By the fall of 2004, all of the defendants except for Appellant entered into plea agreements with the Government, and agreed to cooperate with the prosecution of Appellant. (PSR, ¶21).

At the trial of this case, the Government contended that Appellant had closed about 100 loans involving fraudulent transactions. It presented testimony by the co-defendants in the case that Appellant was taught how to close fraudulent transactions by Brenda Brown, a paralegal. (Doc. #387-993). Brown was already heavily involved in fraudulent real estate transactions, having been mentored into this criminal activity by Judy Hooper, who in turn had a relationship with American Mortgage Exchange (AME), owned by Claude Blevins. Blevins employed Renee Meeks, a mortgage broker who was also involved in the fraudulent schemes. Chris Davis, an

acquaintance of Brown's was a real estate agent who was also involved in flipping transactions, and was responsible for locating properties to use in the transaction. Chris Davis' cousin, Melvin Quillen produced identities to use, and Davis' brother, Brandon Wilhite, an appraiser provided the inflated appraisals on the property.

Brown worked at the Small Business Administration with Appellant for two years while Appellant attended John Marshall Law School part time. (Doc. #387-894,990). After Appellant opened her own firm, she hired Brown to act as her paralegal and work the real estate closings. (Doc. #387-995). According to Brown and Appellant's other paralegal, Lisa Bellamy[3], Appellant was a fully knowledgeable participant in the mortgage fraud.[4] At trial the Government introduced evidence regarding several shell companies used to channel money through to facilitate the fraud such as WRM Financial, Pineapple House, Sweet Honey in the Rock, Dunaway Financial, BGB Construction, among others. The Government also offered evidence that Appellant had used different Social Security numbers on different forms, and had not paid her taxes in 1999 and 2000.

Appellant's defense at trial was that she was an unsuspecting participant in the

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[3] Bellamy graduated John Marshall Law school along with Appellant but could not pass the bar after several attempts and became Appellant's paralegal.

[4] Other co-defendants testified similarly.

transactions, and that she was not guilty of intentional involvement in the conspiracy. Clearly, many of the participants were involved in fraudulent real estate deals prior to, and after Appellant closed her law practice. Appellant explained the use of the different social security numbers as stemming from the theft of her purse and the resulting loss of her social security number.

After Appellant was convicted a Pre-Sentence Investigation Report (PSR) was prepared by a probation officer using the 2001 edition of the Sentencing Guidelines. (PSR, ¶133). The probation officer noted that the offense involved a conspiracy to commit several substantive offenses, and pursuant to U.S.S.G. §1B1.1.2 Application Note 3, (d) each offense in the conspiracy would be grouped together and calculated, for the most part, using U.S.S.G. §2B1.1. The probation officer noted that the Obstruction of Justice offense was governed by §2J1.2, but under the cross reference portion of the obstruction guideline, if the offense involved obstruction the investigation of a criminal offense, apply §2X3.1 (Accessory after the fact) with respect to that criminal offense, if the offense level is greater than the obstruction offense level in §2J1.2. Consequently, the probation officer grouped the obstruction offense under §2B1.1. The probation officer also noted that the Money Laundering offense would be calculated under §2S1.1, with the highest offense level establishing the offense level for the group, pursuant to §3D1.2(c) and §3D1.3(a). As to the

perjury counts, because they involved perjury in a civil matter, the counts group together under §2J1.3, and then the multiple count adjustment of §3D1.4 is applicable.

The probation officer recommended the following guideline application:

Count 1, Counts 2-31 (Bank Fraud), Counts 32-92 (Wire Fraud), Count 166 (Obstruction of Justice):

Base offense level pursuant to U.S.S.G. §2B1.1	6
Specific Offense Characteristics	
U.S.S.G. §2B1.1(b)(1)(K) based on a loss amount of $7,000,000.	+20
U.S.S.G. §2B1.1(b)(2)(B) More than 50 victims	+ 4
U.S.S.G. §2B1.1(b)(8)(C) (Sophisticated means)	+ 2
U.S.S.G. §2B1.1(b)(9)(C)(i) Unauthorized transfer or use of any means of identification or U.S.S.G. §2B1.1(b)(9)(C)(ii) Offense involved >5 ids	+2
Chapter 3 Adjustments	
U.S.S.G. §3B1.1(a) organizer Or leader in activity with 5+ participants or otherwise extensive	+4
U.S.S.G. §3B1.3 Abuse of Position of Trust	+2

U.S.S.G. §3C1.1 Obstruction of Justice	+2
Adjusted Offense Level	42

Count 1, conspiracy to commit Money Laundering, Counts 93-165 (Money Laundering):

Base Offense Level pursuant U.S.S.G. §2S1.1	34
Specific Offense Characteristics	
U.S.S.G. §2S1.1(b)(2)(B) (1956 adjustment)	+2
U.S.S.G. §2S1.1(b)(3) Offense involved sophisticated laundering	+2
Chapter Three Adjustments	
U.S.S.G. 3B1.1 Leadership Role	+4
U.S.S.G. 3C1.1 Obstruction of Justice	+2
U.S.S.G. 3B1.3 Abuse of Position of Trust	+2
Adjusted Offense Level	46

Counts 167-170 (Perjury)

Base Offense Level U.S.S.G. §2J13	12

No specific offense characteristics or Chapter 3 adjustments apply

Adjusted Offense Level	12

Multiple-Count Adjustment U.S.S.G. §3D1.4	Units

Adjusted Offense Level for Counts 1-166	46	1
Adjusted Offense Level for Counts 167-170	12	0
Combined Adjusted Offense Level		46

The probation officer did not recommend a downward adjustment for Acceptance of Responsibility pursuant to U.S.S.G. §3E1.1, as Appellant went to trial and denied her guilt. (PSR, ¶165).

Total Offense Level	46

Appellant had no criminal history, so her Criminal History Category was I. The resulting custody guideline range was Life. The count with the longest statutory maximum sentence was 30 years, but as the probation officer noted, each count was limited to the statutory maximum, but the sentences could be ordered to be served consecutively to achieve the guideline range. (PSR ¶170).

Appellant objected to the PSR. She contended that the relevant conduct calculations were too high, the number of victims recommended by the probation officer was not accurate, that the role in the offense adjustment should not have applied. Further, Appellant objected to the adjustments for obstruction, abuse of position of trust, the money laundering calculation, and contended that there were grounds for downward departure. (PSR, ¶¶136,137,141,142,143,145,146, 147,149,150, and page 51).

At the sentencing, the Government advanced its theory that the amount of loss consisted of a combination of methodologies. Category A consisted of actual losses to the mortgage lenders. Category B (16 properties) consisted of losses calculated based on estimate losses based on an examination of public properties. Category C (13 properties) included losses based on extrapolations gleaned from documents associated with the loans such as the HUD1s, loan files, bank and escrow account records. (Doc. #394-56). The Government contended that no matter how the amount of loss was calculated, a conservative estimate was higher than 7 million dollars, which resulted in the application of a 20 level increase (the maximum adjustment under the guidelines). (Doc. #394-93).

The defense contended that the more accurate accounting of loss would involve looking at the gain to the defendants, of approximately five and one half million dollars. Appellant contended that the inclusion of the figures under Category B and C required the court to speculate as to what would have happened if the mortgage fraud had not occurred. (Doc. #394-97). Appellant also contended that the number of victims pursuant to U.S.S.G. §2B1.1(B)(2)(b) should not have included those entities who had been fully compensated and who had no losses. (Doc. #394-97). Further, Appellant contended that it was also wrong to include the individuals identified as victims of identity fraud because that conduct had been penalized under the specific

offense characteristic upward adjustment pertaining to identity theft.

The district court overruled all of the defendant's objections. The district court found the amount of loss and the relevant conduct attributable to the defendant was reasonably estimated to be no less than $10,848,594.87. The district court found that the Government's approach to the calculation of the loss amount followed the guidelines by:

> first, using actual loss where that could be reasonably estimated, second using the difference between the legitimate sales price and the fraudulently inflated sales price when actual loss wasn't available, and when none of those methodologies were available, to then look to the gain to the defendant and the co-coconspirators. (Doc. #394-100-101).

The district court rejected Appellant's loss calculation theory as not representing the actual loss amounts, and therefore not being the appropriate measure of loss in this case. (Doc. #394-101).

The district court also rejected Appellant's argument that the "victims" who had been reimbursed for their losses because of the loss of the use of their funds and, in almost all instances are not fully compensated for all of their losses, such as the time, energy and effort spent to investigate the fraud in the first instances and determining it was a fraudulent loan. (Doc. #394-101). The district court found by a preponderance of the evidence that there were at least 70 victims. (Doc. #394-102).

The district court overruled the defense contention that giving the enhancement for use of stolen identities amounts to double counting when including the victims of the stolen identities in the list of victims and applied the enhancement. (Doc. #394-103).

The Government argued for a leadership role in the offense in the fraud and the money laundering aspect of the conspiracies. (Doc. #394-103-104, 106). The defense opposed this enhancement. (Doc. #394-106). The defense pointed out that Appellant was essentially being penalized a number of times throughout the guideline calculation for being the attorney in the transactions. (Doc. #394-106). Additionally, it was co-defendant Brenda Brown, the paralegal who was conducting the mortgage fraud prior to meeting Appellant. The entire group, Brown, Cromartie, Hooper, McCarthy, Blevins, Meeks, Davis, Patterson, Wilhite, Quillen were operating together prior to meeting Appellant. (Doc. #394-107). These individuals were not low level, but rather, mortgage company owners, appraisers, straw purchasers and buyers, without whom the fraud could not have been effective. (Doc. #394-107). Defense counsel pointed out the Blevins, the owner of the mortgage company where the majority of the loans originated, received a 21 month sentence, which certainly did not seem reflective of a leadership role. (Doc. #394-107). Further, Brenda Brown had full access to the checks, taught Appellant to perform real estate closings of this

nature and was otherwise involved. (Doc. #394-107). Counsel argued that the conspiracy was already operating when Appellant came into the picture, and the testimony at trial showed the co-defendants took the files out of the office and that Appellant knew nothing of the meeting or discussion. (Doc. #394-108). Finally, counsel argued that if the defendant was to receive an enhancement for abuse of a position of trust due to her status as an attorney, than the leadership role based on the same thing did not follow. (Doc. #394-108).

The district court found by a preponderance of the evidence that the defendant was the organizer or leader of a criminal activity that involved five or more participants and was otherwise extensive. The district court relied on the trial testimony at trial that the defendant directed that actions of James Paterson, Brenda Brown, Lisa Bellamy, Melvin Quillen, Brandon Wilhite and others. The district court also found that Appellant recruited into the scheme her family members Clifton and Linda Smith and Rubin and Grace Alexander, as well as friends Karyn Grantham and Lavon Meador. Consequently, the district court found that a four level enhancement applied. (Doc. #394-109). The district court clarified that it was not giving her the enhancement purely because Appellant was an attorney. (Doc. #394-109).

The district court found, over defense objection, that a two level enhancement for Obstruction of Justice was appropriate in light of the jury verdict on that count of

the indictment, (Doc. #394-110). The district court also applied a two level enhancement for abuse of position of trust. (Doc. #394-113).

The district court also overruled Appellant's objections to the calculation of the money laundering base offense level, the two the enhancement for her conviction under 18 U.S.C. §1956, sophisticated means of money laundering, role in the offense, and obstruction of justice. (Doc. #394-114,118,120,121,122).

Finally, the district court rejected a request by Appellant to use the 2000 edition of the guidelines because the majority of the conduct was governed by that edition. (Doc. #394-123,124). Counsel mentioned his belief that all of the co-defendants had been sentenced under the earlier edition. (Doc. #394-123). The Government responded that, "[n]o. I believe Brenda Brown was convicted under the 2000–was sentenced under 2001. I believe that's correct, your honor." (Doc. #394-123).[5]

The district court found the guidelines to be calculated correctly in the PSR,

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[5] In its motion for downward departure on behalf of Brenda Brown, the Government argued that the 2000 guidelines applied to Brown's conduct. (Doc. #303-2). Apparently, the district court departed downward from a range of 235-298 to a sentence of 87 months, in light of Brown's cooperation. Additionally, Chris Davis was sentenced under the pre-2001 guidelines which dramatically increased the sentencing guidelines range in Appellant's case.

and the total offense level was 46 and a Criminal History Category of I, with the custody guideline range being life, and restitution in the amount of $10,848,594.8. (Doc. #394-129).

Counsel for Appellant argued to the district court that a non-guidelines sentence should be imposed in the case taking into consideration the factors listed in 18 U.S.C. §3553. Specifically, counsel for Appellant requested the district court impose a sentence sufficient, but not greater than necessary, 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 in the future. Defense counsel pointed out one of the purposes of the sentencing guidelines was to promote fair and consistent sentences to be imposed on similarly situated individuals across the nation, and that the sentence sought to be imposed by the Government was not proportionate to the sentences imposed on the co-defendants, even taking into account their guilty pleas and cooperation with the Government. (Doc. #394-133). Counsel for Appellant pointed to the 87 month sentence imposed in Brenda Brown's case, noting that she was the paralegal who was involved in mortgage fraud prior to meeting with Appellant, and even afterwards. Several other of the co-defendants received a significant sum of money for their participation in the offense–Wilhite $394,000, and Brown $697,000. (Doc. #394-133). Defense counsel compared the

other sentences imposed in the case with the life sentence Appellant was facing. (Doc. #394-133-134).

The district court then noted that the Government was making a motion for a downward departure from the guideline range due to Appellant's substantial assistance in the case. (Doc. #394-134). Counsel for Appellant informed the court that the same arguments applied in the range of 360 months to life. Defense counsel indicated his belief that the Government was going to recommend a four level departure, which would get the defendant's range down to a range of 360-life.[6] (Doc. #394-135). The district court noted the difference between Appellant and the other defendants was that:

> 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).

Defense counsel pointed out that even taking into consideration the difference between the defendant's election to go to trial and factor in the offense levels associated with those decisions, because of the application of "an older version of the guidelines being applied to her [Brenda Brown] case" the sentence was disparate when compared with the co-defendants. (Doc. #394-136).

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[6] This is what the Government recommended. (Doc. #394-140).

The district court made several comments during the imposition of sentence regarding its rationale for the 360 month sentence. The district court said that it was required to consider the factors in §3553(a) of Title 18. The district court indicated that it considered the offense to be an extremely serious one, and that mortgage fraud was not a victimless crime. In order to promote respect for the law, the court sated, "I think I'm required to impose a guideline sentence in this case." (Doc. #394-173).

The court, in following the Government's recommendation to impose a thirty year sentence, noted that Appellant had:

> 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 I think that's my duty in this case. (Doc. #394-172).

The district court further stated, Appellant:

> continued lying all 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...Throughout this whole process, she's shown no remorse. She continues to try to persuade everyone involved that somehow just got involved in this thing and didn't know what was going on...But the message needs to get out to other attorneys, you are the gatekeepers. You're the one 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 your 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. #394-173-175).

In its statement regarding the reasons for the sentence, the district court stated, "I'm sentencing her within the guideline range for the reasons that I have previously stated, primarily because of the seriousness of the criminal offense and the need to provide adequate deterrence against the commission of similar offenses by others." (Doc. #394-178-179). The district court imposed a thirty year sentence on Appellant, a first offender convicted of a non-violent crime, who was also a mother of a small child, and this appeal followed.

(iii) Standard of Review:

I. & II. Whether the district court treated the guidelines as *de facto* mandatory is a question of law subject to *de novo* review. The sentence itself is reviewed for reasonableness. *United States v. Booker*, –U.S.–, 125 S.Ct. 738, 765-66 (2005); *United States v. Winingear*, 422 F.3d 1241(11th Cir. 2005); *United States v. Talley*, –F.3d–, 2005 WL 3235409 (11th Cir. December 2, 2005), citing, *Booker*, 125 S.Ct. at 765.

III, IV, V. The district court's determination of regarding evidentiary errors are reversed if there is a reasonable likelihood that the defendant's substantial rights were affected. *United States v. Tokars*, 95 F.3d 1520 (11th Cir. 1996); *United States v. Sellers*, 906 F.2d 597 (11th Cir. 1990).

SUMMARY OF ARGUMENT

I. Appellant is a 37 year mother of a young daughter. Until 1999, there were no allegations that she has ever been involved in criminal activity. Appellant contends that the 30 year sentence of imprisonment imposed upon her by the district court is unreasonable in light of the factors enumerated by Congress in 18 U.S.C. 3553(a). The majority of the factors weigh in favor of a substantially lower sentence. Among the factors which the district court failed to adequately consider is the shocking disparity between the sentence of the next most punished individuals in the case, which is more than four times less severe than the sentence imposed on Appellant. The disparity is also evident when compared with other white collar sentences being imposed across the country. Appellant's thirty year sentence under the circumstances of her case is unreasonable and should be reversed.

II. It is clear from the comments made by the district court at Appellant's sentencing that the district court considered it "duty" bound to apply the guidelines. The district court has on (at least) three other occasions opined that the guidelines must be applied unless the defendant establishes that the guidelines produce a fundamentally unfair result. This standard is not contained in the text of §3553, and also runs afoul of the remedial portion of *Booker*. The application of this standard results in a *de facto* mandatory guideline system in this district court and resulted in

a sentence imposed in Appellant's case in violation of the 5th, 6th and 8th Amendments. Consequently, Appellant's sentence must be reversed.

III, IV, V. Appellant contends that the district court committed reversible error when it made evidentiary errors in the trial of the case. First, the district court allowed the Government to introduce evidence that Appellant had a false Florida driver's license. Additionally, the district court allowed two witnesses to testify that the transactions involved were not due to inexperience, but were flips, or in other words, that in the witnesses' opinions, Appellant was guilty of the offense. This violated F.R.E. 701, 702 and 704(b). The effect of these trial errors, either alone or together, prejudiced Appellant's substantial rights and merit a reversal of her conviction.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE THIRTY YEAR SENTENCE IMPOSED BY THE DISTRICT COURT ON APPELLANT, WHO IS A FIRST OFFENDER CONVICTED OF A NON-VIOLENT OFFENSE, IS UNREASONABLE

The Government has described the sentence imposed on Appellant as the longest sentence ever imposed for mortgage fraud in the nation.[7] The thirty year sentence imposed on Appellant, who is a first offender, and the mother of a four year old daughter, is slightly more than four times the longest other sentence imposed on any of the co-defendants in the case. Appellant contends the sentence is unreasonable because the district court gave undue weight to the sentencing guidelines, the concept of general deterrence, and the fact that Appellant had not acknowledged guilt, thereby imposing a sentence which was substantially greater than necessary to achieve the sentencing goals referenced in 18 U.S.C. §3553(a).

At sentencing defense counsel asked the district court to impose a non-guidelines sentence based upon the factors contained in 18 U.S.C. §3553(a). (Doc.

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[7] See Professor Douglas Berman, Sentencing Law and Policy Blog, August 29, 2005,(http://sentencingtypepad.com/sentencing_law_and_policy/2005/08/a_reocrdlong_wh.html), citing an Atlanta Journal article.

#394-131). Concentrating on the factor directing the court to consider "need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," the defense argued that "the purpose of the United States Sentencing Guidelines as they were initially drawn up, my understanding, is to promote a fair and consistent sentence to be imposed to similarly situated individuals across the nation." (Doc. #394-132). The defense reminded the court that co-defendant Brenda Brown's sentence was 87 months. (Doc. #394-133). Brown was the paralegal who testified at trial. She admitted teaching Appellant how to conduct fraudulent transactions, and acknowledged that she was doing fraudulent deals prior to Appellant, and after Appellant closed her law office. Although Brown was not an attorney, she too, occupied a position of trust in the mortgage lending community as an individual employed by a closing attorney. Brown was involved in the same relevant conduct as she alleged Appellant was involved in, recruited a significant number of other individuals into the scheme, created at least two fictitious companies to promote the fraud and launder money, and received approximately $697,000, as her share of the fraud.

Brandon Wilhite, who also received a 87 month sentence was the appraiser in the case. His participation was integral to the scheme. Other defendants who were professionals, and very culpable were sentenced very lightly compared to the overly

harsh sentence imposed on Appellant. For instance, Claude Blevins, who owned AME, the mortgage brokerage company involved in initiating the majority of the loans, received 21 months. Lupita Mcarthy, received 36 months, Latonia Cromartie, 46 months, Renee Meeks, the mortgage broker working for AME, received 60 months, and Jimmy Patterson, the real estate agent, received a 5 month sentence. Melvin Quillen (straw buyer) received 33 months and Omar Turral, the individual who stole many of the identities, received 37 months. Lisa Bellamy, the paralegal employed by Appellant and who had graduated law school along with Appellant, received 41 months. Additionally, Judy Hooper, who was heavily involved, both before and after her acquaintance with Appellant, and who fled the country and changed her identity before being captured, received a 70 month sentence. Christopher Davis, a real estate agent, received a 33 month sentence. Melinda Renee Tyner, a loan originator and processor at AME, received 41 months. Jewel Williams, a real estate agent, received 63 months, and her husband Sidney Williams, received 64 months. Thus, Appellant's sentence of 360 months is approximately 4.13 times more severe than the next most punished co-defendants (Brown and Wilhite), and 10.9 times more severe than the least punished defendant (Chris Davis).

The district court rejected Appellant's plea for a non-guidelines sentence, stating:

> 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 I think that's my duty in this case. (Doc. #394-172).

During Appellant's sentencing, the district court twice mentioned it being duty-bound to apply the guidelines. In addition to the above comment regarding its duty to impose a guideline sentence, the district court also stated, "[i]n order to promote respect for the law, I think I'm required to impose a guideline sentence in this case."[8] (Doc. #394-173).

Despite the acknowledgment by the district court that it was required to consider the factors enumerated in 18 U.S.C. §3553(a), the comments made by the district court demonstrate that the court focused its attention on the sentencing guidelines and the deterrent value of a harsh sentence. (Doc. #394-172-174). In so doing, the district court ignored the fundamental unfairness of giving the co-defendants in the case substantially lower sentences. This is despite the fact that the co-defendants pled guilty and cooperated. Essentially, the only difference between Appellant and Brown's

[8] The district court prefaced its remarks about why it was imposing a guidelines sentence with, "[w]ell, as I've said before, these white collar sentencing hearings are always difficult. And I never take any pleasure out of what I do, but I try to do my duty. (Doc. #394-172).

conduct was that Appellant exercised her constitutional right to trial, and denied she was guilty. These differences simply cannot justify the imposition of a sentence of thirty years versus the imposition of a seven years, three months, sentence on a co-defendant with nearly identical criminal conduct, and this disparity is evidence that the thirty year sentence is unreasonable.

After the Supreme Court's ruling in *United States v. Booker*, -- U.S. –, 125 S.Ct. 738 (2005), the Court must impose a sentence that is "sufficient but not greater than necessary" considering the seven factors listed in 18 U.S.C. §3553(a). Those factors are in relevant part:

> 1. The nature of the offense and the history and characteristics of the defendant;
> 2. The purposes of sentencing (Retribution, Specific Deterrence, General Deterrence; and Rehabilitation);
> 3. The kinds of sentences available (i.e. alternatives to prison);
> 4-5. The sentencing guidelines and their Policy statements, which are advisory;
> 6. Avoiding disparity in treatment of similar offenders;
> and
> 7. The need to provide restitution.

Neither *Booker* nor §3553(a) give "special weight" to any single factor. However, the Sentencing Guidelines should certainly not be considered as the foremost factor in any event, as occurred in Appellant's case. The district court clearly stated that it considered the imposition of a guideline sentence as the lynchpin to

providing deterrence to other attorneys. (Doc. #394-174).

This view is erroneous because the sentencing guidelines themselves provide for exceptions in cases outside the heartland. (See, U.S.S.G. 5K2.0, and 5K2.1), and therefore, never have been strictly mandatory. In the instant case, the fact that Appellant's status as an attorney and the number of fraudulent loans involved were taken into account in so many ways to impact and increase the guidelines make the case for downward departure, even without the remedial portion of *Booker*. In Appellant's case, the guidelines would forbid consideration of the mitigating factors involved in Appellant's case, whereas, post-*Booker*, §3553(a) require consideration of these factors independently.[9]

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[9] E.G., *United States v. Nellum*, 2005 U.S. Dist. Lexis 1568 at *2 (N.E. Ind. Feb.3, 2005)("[M]any of the 3553(a) factors - such as the history and characteristics of the defendant are factors that the guidelines either reject or ignore.'"); *United States v. Myers*, 353 F.Supp.2d 1026, 1028 (D.D. Iowa 2005)("Guideline provisions and statutory provisions under 3553(a) often contradict each other."); *United States v. Cherry*, 366 F.Supp.2d 372, 378 (E.D. Va. 2005)('[T]he guidelines reject the consideration of many of the critical factors...that the Court is required to consider pursuant to 3553(a)"); *United States*

(continued...)

The fact that the district court imposed a sentence within the guideline range does not make the sentence *per se* reasonable. *United States v. Talley*, –F.3d–, 2005 WL 3235409 (11th Cir. December 2, 2005). In *Talley*, the Court stated that the Government's argument that a "'sentence at the low end of the applicable advisory range is, per se, a reasonable sentence,'"[and] "does not comport with the *Booker* decision." Id. The *Talley* Court noted, "[t]o say that a sentence within the guideline range [renders the sentence reasonable] is to ignore the requirement that the district court, when determining a sentence, take into account the other factors listed in section 3553(a). Id., citing *Booker*, 125 S.Ct. at 765-66.

Although the district court is not required to state on the record that it has explicitly considered each of the statutory sentencing factors or discuss each of the factors, ultimately, the sentence imposed must not fail to achieve the purposes of sentencing as stated in §3553(a). *Talley*, supra, at *4. In Appellant's case, the comments of the district court laying out what it considered the most important factors, must be reviewed in conjunction with the other factors listed in §3553, the majority of which militate in favor of a substantially lower sentence.

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[9](...continued)
v. *Ranum*, 353 F.Supp.2d 984, 986 (E.D. Wis. 2005).

1. The Nature of the Offense and History and Characteristics of the Defendant.

All of the parties involved in this case have acknowledged that mortgage fraud is a serious offense, and not a victimless crime. However, the crime is a non-violent one, and the risk of Appellant being able to perpetrate such a crime again is minimal, and can be guarded against by a sentence with includes supervision by U.S. Probation. Thus, the risk of future danger to the community can be severally curtailed without the imposition of a harsh prison term.

As to the history and characteristics of the defendant, the evidence established that in high school Appellant valued education and worked hard. (Doc. #394-164, PSR, 189). Appellant attended college prep classes, even though she was from a poor, working class neighborhood and her family background included, "broken homes, drug and alcohol addictions, poverty, illness, and other struggles that no child should have had to deal with." (Doc. #394-165). She went on to obtain a Bachelor's Degree, and then to graduate from John Marshall Law School, in 1996, even making the Dean's list. (PSR, 190-191). Thus, the vast majority of Appellant's life has been spent working hard, and as law abiding citizen. Her friend, Kathryn Epp, a professor of accounting at Kennesaw State University and a graduate of Emory and Georgia State University testified at sentencing:

> ...Although there was no evidence of this during the trial, Chalana is a person of good character who has the

> potential to do good work as a positive member of our society. As I have mentioned she has a history of helping those in need, and there are many helping professions where she could perform needed and vital work....there are many people who believe in her and love her and would do everything in their power to help her find her way in the
>
> world if she were one day soon allowed to come home....Like many of those individ
> further her education to in order to become a criminal, and she is not an evil person. Rather, in a time of personal desperation, she made very poor choices. (Doc. #394-166-168).

Clearly, Appellant is not a "hardened" criminal who must be locked away to keep her from menacing society, as we would a violent criminal. Thus, the first factor-- the nature of the crime and the history and characteristics of the defendant-- militate against a finding that a thirty year sentence is reasonable in this case.

2. The Purposes of Sentencing (Retribution, General Deterrence, and Rehabilitation).

Admittedly, retribution has long been an important aspect of sentencing. However, a thirty year sentence is excessive retribution (or revenge) under the circumstances of this case.

At sentencing, and in response to the Government's argument that only a guideline sentence of thirty years would provide general and specific deterrence, defense counsel noted,

> ...as far as deterrence...I went to law school, and I can't imagine what a 10-year sentence would mean to any

> of my classmates. Miss McFarland graduated from law school started practicing law, and shortly thereafter found herself in the position that she's in. A 10-year sentence121 months, would certainly send a message to all attorneys out
>
> there that mortgage fraud is not a game that you want to participate in.For someone like Chalana McFarland that has all the assets that she has in terms of support of family, the education, her intelligence, a 10-year sentence is an enormous sentence. (Doc. #394-150).

In "white collar" cases, there does not appear to be proof that longer imprisonment leads to greater general deterrence. Research suggests otherwise, that it is the risk of indictment and conviction that has a more significant effect. See, David Weisburd & Elin Waring, White-Collar Crime and Criminal Careers 151 (2001).

Finally, as noted above, in terms of specific deterrence, a sentence of substantially less than thirty years would act as a specific deterrence for Appellant.

3. The Kinds of Sentences Available.

In addition to imprisonment, there are a variety of other kinds of sentences available to the district court. For example, community service, half-way house, electronic confinement, as well as supervision of the US Probation officer are available for sentencing purpose and were apparently not considered by the district court.

4-5. The Advisory Sentencing Guidelines.

Although the sentencing guidelines are an important consideration under §3553(a), since *Booker*, several courts have found that a mechanical application of the Guidelines' loss tables may overstate a defendant's culpability and lead to sentences that are not reasonable under §3553(a). See, *United States v. Olis*, 429 F.3d 540 (5th Cir. 2005); *United States v. Ranum*, 353 F.Supp.2d 984, 990 (E.D. Wis. 2005)("One of the primary limitation of the guidelines particularly in white-collar cases is their mechanical correlation between loss and offense level"). This especially true in Appellant's case where the fact that Appellant was an attorney, and the fraud extensive and multi-faceted, resulted in the assessment of redundant enhancements. For instance, in Appellant's case, she was punished with multiple enhancements because the fraud was extensive-- by a 20 level increase for the amount of loss, a 2 level increase for the number of victims, and 4 levels for an aggravating role enhancement, in part because the offense "had five or more participants or was otherwise extensive." Additionally, Appellant was punished for being a leader/organizer (partially because as the attorney, she was in control of the closings), and again for her abuse of position of trust as an attorney. Her offense level was likewise enhanced for money laundering and for "sophisticated means of money laundering." All of these enhancements resulted in a thirty years to life guideline range, which is an unreasonable guideline range under the circumstances of this case.

6. Avoiding Disparity in Treatment of Similar Offenders.

One of the most shocking things about Appellant's sentence is how disparate her thirty year sentence is compared to the next most punished individuals convicted for the conspiracy. As noted above, Appellant's sentence is more than four times harsher than Brenda Brown and Brandon Wilhite's sentences, and more than ten times harsher than the least punished of the defendants in the case.

Additionally, Appellant's sentence is disparate when compared with other white collar defendants across the country. For example, on July 13, 2005, Bernie Ebbers was sentenced to 25 years in prison for securities fraud after a trial. Reports in the case indicate that Ebbers, the President and CEO of WorldCom conspired to over-state earnings by five billion dollars and the company went bankrupt. Appellant's crime pales in comparison, and yet her sentence is five years longer than Ebbers. (*United States v. Ebbers*, SDNY case #02-CR-01144).

Likewise, on July 20, 2005, John Rigas, the Chairman and CEO of Adelphia Communications was sentenced to 15 years for securities fraud, after he was convicted by a jury. Apparently he and his sons misappropriated over $100 million in company funds for person use and hid over $2 billion in Adelphia debt from investors, which led to the company's bankruptcy. (*United States v. Rigas*, SDNY, Case #04-CR-059).

Closer to home, State Representative Charles W. Walker, Sr., was recently

sentenced to 121 months in custody, and restitution in the amount of $698,044, on his multiple convictions for fraud. (*United States v. Walker*, SDGA case #04-CR-059).

Appellant's sentence is also disparate when compared with the median national sentence (per 2003) in federal cases for other offenses. For instance according to the Sentencing Commission, the median national sentence in federal cases for murder is 180 months; for sexual assault–48 months; for money laundering - 33 months; for fraud 15 months. United States Sentencing Commission, Office of Policy Analysis, 2003 Datafile, OPAFY2003, at 10 www.ussc.gov/JUDPACK/2003/5c03.pdf (Last visited Dec. 23, 2005).

The desire to reduce unwarranted sentencing disparity was central to the promulgation of the sentencing guidelines. In *United States v. Fayette*, 895 F.2d 1375 (11th Cir. 1990), the Court noted, "[t]he guidelines were promulgated to rationalize the sentencing process by, among other things, promoting uniformity in sentencing by similar criminal conduct by similar offenders." *Fayette*, citing, Guidelines, Ch.1, Part A, Introduction 3 at (Policy stm)(Nov. 1989), 28 U.S.C. 991(b)(1)(B)(West Supp.1989), *see also*, Bryer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L.Rev. 1, 4-5 (1988).

Because Appellant's sentence is disparate when compared to the other defendants in her case and when compared with other white collar defendants across

the country, and when compared to sentences for violent offenses such as murder and sexual assault, it is unreasonable and should be reversed.

7. The Need for Restitution.

Appellant was sentenced to pay a tremendous amount in restitution. Obviously, this factor also militates against a thirty year sentence, which will effectively prevent any hope of restitution in the case.

A consideration of the §3553 factors lead to the conclusion that the thirty year sentence imposed in the case is unreasonable and should be vacated.

II. THE DISTRICT COURT TREATED THE SENTENCING GUIDELINES AS *DE FACTO* MANDATORY IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS.

At sentencing the district court made several statements which indicate that it felt duty bound to impose a sentence within the guideline range. For instance, as noted above the district court said:

> 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 I think that's my duty in this case. (Doc. #394-172).

The district court went on to state, "[i]n order to promote respect for the law, I think I'm required to impose a guideline sentence in this case." (Doc. #394-173).

Clearly, the district court felt constrained by the guidelines, notwithstanding the remedial portion of *Booker*.

The district court's comments in Appellant's case echo the sentiments expressed by the district court in other recent cases. For instance, in the case of *United States v. Robert Stewart,* in imposing sentence the district court stated in April of 2005:

> Well, as I've said before, my reading of *Booker* is that the guidelines remain an important factor in deciding the sentence in a criminal case, and that a non-guideline sentence is only to be imposed in unusual circumstances where the structure of the guidelines or the sentencing range produced by the guidelines produces a fundamentally unfair result. And I don't think that this is such a case, so I will impose a guideline sentence in this case. (USA v. Stewart, NDGA #04-CR-076(TWT) , CTA 11 # 05-12380-B)(NDGA Doc. #191-51)(Attached as Appendix A).

Similarly, in *United States v. Jeff Stone*, the district court stated when imposing sentence in May of 2005:

> Well, I'm going to impose a sentence within the guideline range in this case for the following reasons: As I've said before, in my opinion, the guidelines are the only national source for consistency in sentencing in the federal judicial system. You can argue that in individual cases that the guidelines produce a sentence that's unduly harsh or unfair, but in my opinion, the overall increase in fairness and consistency outweighs individual instances of unfairness and hardship.
>
> Nevertheless, following *Booker*, I treat the guidelines

> as advisory, not as mandatory, but given my reading of the Supreme Court's decision in *Booker*, they are to be given great weight in making the sentencing decision.
>
> **As I've said in other cases, in order to impose a non-guidelines sentence, I believe there must be some fundamental unfairness approaching a miscarriage of justice to give a non-guideline–to impose a non-guidelines sentence.**
>
> In this case, in particular, because of the number of defendants and the inevitable variations in their individual circumstances, in my opinion, the only way to achieve some measure of consistency is with an honest, consistent application of the guidelines. And I recognize that the sentence that would be imposed as a result is a harsh one, but Mr. Stone's personal circumstances show the extent to which in this day that drugs destroy people's lives. And he's a good example of that. And our national institutions, the Congress, the Sentencing Commission, have rightly, in my opinion, made the decision that people involved in the distribution of drugs should be severely punished to serve as a deterrent to others and as the appropriate punishment for their own criminal conduct. And I think that decision is the right one. Therefore, I'm going to overrule your request for a non-guideline sentence...(*United States v. Jeff Stone*, NDGA Case #02-CR-745 (TWT)(NDGA Doc. #1145-26-28)(CTA 11 Case #05-13023-I)(Emphasis added)(Attached as Appendix B).

Additionally, a co-defendant in the same case was sentenced by the district court. On May 10, 2005, the district court stated while sentencing John Dunlap:

> Well as I've said many times by now, the guidelines bring a measure of consistency and fairness to sentencing, and it's just fundamentally unfair for a defendant to geta sentence of 151 months in my courtroom and then get a sentence of

> probation in the next courtroom, and the only way that consistency is going to be achieved in federal sentencing is to follow the guidelines except in extraordinary cases where there's some fundamental unfairness inherent in the structure of the guideline s or in their application to a particular case.
>
> The one non-guideline sentence that I have imposed was a result of that where, because of a quirk in the way the case was indicted, two individuals who engaged in exactly the same conduct and who had exactly the same background, exactly the same criminal record, weren't treated the same; they were treated dramatically differently.
>
> If the guidelines didn't exist and I was free to just do whatever I wanted to, in all likelihood I'd do what you asked me to do, Mr. Citronberg. But I don't think this is an extraordinary case where a non-guideline sentence is authorized.
>
> And it may seem harsh and I'm sure it will and I'm certain that what has happened to Mr. Dunlap is a tragedy to him and to his family, but I'm required in order to follow my oath of office in this case and do what I'm supposed to do to sentence within the guideline range. *United States v. John Dunlap*, NDGA 02-CR-745(TWT), CTA 11 #05- (Doc. #1106-112-113)(Attached as Appendix C).

These comments by the district court establish without doubt that the district court, despite mentioning the requirement that it consider the factors set forth in §3553(a), in reality considered the guidelines the most important factor, and duty bound to impose a sentence within the range, unless the defendant meets the burden of establishing a fundamental miscarriage of justice. This is reversible error in light

of the plain language of §3553 as well as the remedial opinion in *Booker*.

The district court's comments regarding the issue demonstrate that the court believed that under *Booker*, it was to impose a guidelines sentence unless the defendant established the standard for a downward departure, or otherwise established that the guidelines were fundamentally unfair, resulting in a miscarriage of justice. Thus, the court's comments indicate that the district court considered the guidelines binding unless the defendant could show something unusual about his case or that the sentence required by the guidelines was fundamentally unfair, approaching a miscarriage of justice.

Instead, the district court should have weighed the factors listed in 18 U.S.C. §3553(a) and impose a reasonable sentence. In stark contrast, the district court indicated that it had made a global decision to always impose the guidelines unless the defendant can demonstrate that the guidelines fundamentally unfair, approaching a miscarriage of justice.

This statute contains no indication that the district court is to give the sentencing guidelines the type of weight articulated by the court in imposing sentence on Appellant. That is, the district court explicitly stated that it would always apply the guidelines unless the result was a sentence that was fundamentally unfair. Placing this burden on the defense results in the district court's application of the sentencing

guidelines in a *de facto* mandatory manner, clearly violating the Fifth, Sixth, and Eighth Amendment.

The standard articulated by the district requiring that the defense establish "some fundamental unfairness approaching a miscarriage of justice to...impose a non-guidelines sentence," appears to be a misapplication of the plain error standard of review. For instance, in *United States v. Rodriguez*, 398 F.3d 1291, 1298 (11th Cir. 2005), the Eleventh Circuit stated, "plain error review should be exercised 'sparingly, and only 'in those circumstances in which a miscarriage of justice would otherwise result.'" Likewise, the requirement that the defense establish that the guidelines result in some fundamentally unfair range of imprisonment to justify a non-guidelines sentence appears to be a misapplication of due process jurisprudence. See, *United States v. Miller*, 255 F.3d 1282 (11th Cir. 2001)*; Seigel v. LePore*, 234 F.3d 1163 (11th Cir. 2000); *Snowden v. Singletary*, 135 F.3d 732 (11th Cir. 1998); *Roe v. Alabama,by and through Evans*, 43 F.3d 574 (11th Cir. 1995). This standard is completely improper, especially given the explicit direction by 18 U.S.C. §3553(a) that the district court consider a number of factors, none of which carry the standard articulated by the district court.

The standard articulated by the district court creates an even heavier burden than the "heartland" analysis applicable to downward departure under the guidelines which

existed pre-*Booker*. By imposing such a heavy burden on the defense, the district court turned the advisory guideline system envisioned by the remedial portion of *Booker*, into a *de facto* mandatory "guidelines" system which violates the Fifth, Sixth, and Eighth Amendment. Accordingly, Appellant's sentence should be reversed.

III. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED THE GOVERNMENT ELICIT FROM TWO WITNESSES THEIR OPINION AS TO THE GUILT OF APPELLANT IN VIOLATION OF F.R.E. 701, 702, and 704

At trial the Government called Robbie Taylor, the Executive Vice President of Attorney's Title Fund. Near the end of the testimony the following exchange took place:

Q: Were you able to audit either account of Chalana McFarland?

A: No.

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?

[Defense Counsel] Objection your honor; calls for a conclusion. It, I think, ventures into the realm of the jury. (Doc #230-431).

Counsel for the Government conceded the question was improper by offering to rephrase the question and asking, "You're aware that your firm requested specific files from Chalana McFarland? Mr. Taylor responded yes. (Doc. #230-431). Counsel for the Government then asked, "and have you determined through subsequent investigations that some of those files you requested at the time were, indeed, flip transactions? The witness responded, "yes," and the Government quickly ended its examination. The effect of this testimony was to violate F.R.E. 701, 702, and 704.

Also at trial, when Brenda Brown testified, the Government was able elicit her opinion, over defense objection that the problems with Attorney's Title Company audit and the with getting the files, was not due to ignorance on the law firm's part, but rather "deliberate acts." (Doc. #387-1026). This opinion also violates F.R.E. 701,702, and 704(b). The cumulative effect of both of these errors combined deprived Appellant of a fair trial, and requires reversal.

Essentially, the Government had both of the witnesses testify as if they were an expert witness testifying with respect to the mental state of the defendant, i.e., that the defendant had the requisite mental state for guilt, and that her defense should be rejected. In the instant case, Mr. Taylor, had no personal observation regarding the real estate transactions, but could be held in high esteem by the jury in light of his status as Executive Vice President. Likewise, the Government played up Brenda

Brown's knowledge regarding flip transactions throughout.

F.R.E. 704(a) was amended to allow testimony (otherwise admissible) in the form of an opinion even if it embraced the ultimate issue to be decided by the trier of fact. However the amendment did not open the door to all opinions, and questions which merely allow the witness to tell jury what result to reach are not permitted. *Owen v. Kerr-McGee Corp*, 698 F.2d 236 (5th Cir. 1983). Rule 704(b) prohibits a party from offering expert testimony on the mental state of the defendant. Thus, the testimony from Taylor and Brown regarding appellant's mental state was improper.

Additionally, even if the opinions were offered as lay opinions, F.R.E. 701 requires the opinion be rationally based on the perception of the witness and be helpful to a clear understanding of the witness's testimony. Thus, the foundation for the opinion must be based on the witness's personal observations. In *United States v. Marshall*, 173 F.3d 1312 (11th Cir. 1999), the Eleventh Circuit reversed a conviction because the government was able to ask a law enforcement agent his opinion regarding the defendant being the source of the drugs. The court found the error to be reversible because the agent did not observe the transaction, and the jury may have believed that the agent who was experienced, must have had some additional information to support his opinion which was not presented to the jury.

In the instant case, Mr. Taylor, had no personal observation regarding the real estate

transactions and therefore it was error to allow him to proffer his opinion to the jury that the deals were criminal acts.

These evidentiary errors were not harmless error in the context of this case and the conviction should be reversed.

IV . THE DISTRICT COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED THE GOVERNMENT TO INTRODUCE EVIDENCE THAT APPELLANT POSSESSED A FALSE FLORIDA DRIVER'S LICENSE IN A DIFFERENT NAME BECAUSE IT WAS IRRELEVANT UNDER 401, IMPROPER CHARACTER EVIDENCE UNDER F.R.E. 404(b) AND THE PROBATIVE VALUE WAS SUBSTANTIALLY OUTWEIGHED BY ITS PREJUDICIAL EFFECT IN VIOLATION OF F.R.E. 403.

Prior to trial Appellant filed a pre-trial motion to exclude certain items of evidence Appellant expected the Government to introduce at trial. (Doc. #215- 4). Among other things, the defense moved to exclude under F.R.E. 403 and Rule 404(a), the introduction of "various legal Driver's Licenses held by defendant at different and various times in an effort to raise questions in the jurors' mind about the character of

the defendant. The Government may also attempt to introduce a driver's license with the Defendant's picture, identifying her to be _____, the name of Defendant's ex-husband's ex-wife, or testimony to that effect." (Doc. #215-5). The Government replied that the evidence was appropriate for cross examination of the "defendant about the license if she were to testify that she would never use the identity of others, or give similar testimony should she choose to take the stand. (Doc. #220-5).

At trial, when the Government asked one of its witnesses, Lisa Bellamy, (the other paralegal, i.e., not Brenda Brown) whether she "[knew] of any identification documents connected with the defendant in this case," defense counsel objected, referring to "a matter that we discussed previously." (Doc. #386-928). The district court overruled the objection. (Doc. #386-928). The witness testified that Appellant had a false identification document in the form of a Florida Driver's license in the name of Rachel Cosby. (Doc. #386-928). After several more questions the district court interjected, "I did not understand that's what you were discussing, Miss mcKenzie, and I sustain your objection Mr. Rowsey." (Doc. #386-929). The court then instructed the jury to disregard the "statement about the Florida Driver's license." (Doc. #386-929). Defense counsel indicated at that point, "your honor, I'd like to take up the matter at the break." (Doc. #386-929).

At the break defense counsel moved for a mistrial and argued that the curative

instruction were insufficient. (Doc. #386-935). The district court noted that it may not have been clear regarding the ruling on the motion in limine, but in any event, the curative instructions were sufficient. (Doc. #386-935).

The evidence offered by the prosecution regarding the false driver's license only went to the Government's attempt to establish the "bad" character of the defendant in violation of F.R.E. 404(b). This rule provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. This type of evidence is also subject to an analysis of its probative value in relation to its prejudicial impact on the defendant. *United States v. Mills*, 138 F.3d 928 (11th Cir. 1998) . Other than establishing bad character, this evidence was not relevant under, as defined by F.R.E. 401. (Relevant evidence is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.). This evidence was not relevant to the issues on trial–a fact conceded by the Government when it agreed that it would only use the evidence to cross examine, if the defendant opened the door. (Doc. #220-5).

Pursuant to the balancing test of F.R.E. 403, the evidence regarding false identification should not have been admitted at trial. Evidence is inadmissible when its probative value is substantially outweighed by the danger of unfair prejudice,

confusion of the issues, misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence. This evidence was not harmless in the context of Appellant's case and her conviction must be reversed.

V. THE CUMULATIVE EFFECT OF THE ERRORS RAISED IN ISSUES III AND IV REQUIRE REVERSAL.

Assuming arguendo that the issues raised in Issues III and IV are not reversible standing alone, Appellant contends that the cumulative error so prejudiced Appellant's right to a fair trial that reversal is required. See, *United States v. Preciado-Cordoboas*, 981 F.2d 1206 (11th Cir. 1993); *United States v. Adams*, 74 F.3d 1093 (11th Cir. 1996).

Appellant maintains the admission of the evidence regarding the false Florida Driver's license combined with the court's improper admission of the opinion testimony by Mr. Taylor and Brenda Brown regarding their opinion regarding the guilty of the defendant and that she possessed the requisite mental state for guilt deprived so prejudiced her right to a fair trial that reversal is required.

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CONCLUSION

For all of the foregoing reasons, Appellant respectfully requests that this Court vacate her conviction and sentence and remand her case to district court.

Dated: This 23rd day of December 2005.

Respectfully submitted,

_____

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7), I certify that the number of words in this brief as counted by my word-processing system is 11763 words, which is less than the 14,000 words allowed for Appellate Briefs.

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Lynn G. Fant

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing Brief of Appellant upon:

Ms. Barbara Nelan, Esq.
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by depositing a copy of the same in the United States mail with proper postage affixed thereto to ensure delivery of the same, and by electronically uploading the brief on the Eleventh Circuit website.

Dated: This 23rd day of December 2005.

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LYNN FANT