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

REPLY BRIEF OF APPELLANT

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IN THE UNITED STATES COURT OF APPEALS
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Plaintiff-Appellee,

v. APPEAL NO. 05-14974-A

CHALANA 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.

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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 and also complies with the type-volume limitations set forth in F.R.A.P 32(A)(7)(B). This brief contains 3,672 words and is therefore less than 7,000 excluding the Table of Contents, Table of Authorities, and Required Certificates as required under FRAP 32(A)(7)(B).

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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?

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

In her opening brief Appellant contended that the 30 year sentence of imprisonment imposed upon her by the district court was unreasonable in light of the factors enumerated by Congress in 18 U.S.C. §3553(a), and it violates the prime directive that the sentence be no greater than necessary to comply with the purposes of sentencing. At her sentencing and in her opening brief Appellant outlined a litany of factors which compel the conclusion that a 30 year sentence is unreasonable in her case.[1]

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[1] In its responsive brief the Government ignores each and every redeeming quality possessed by Appellant and cited in her opening brief which establishes that she has spent the vast majority of her life as a hard working, valuable member of society who rose from a poor, working class neighborhood, and instead maintains that a 30 year sentence is reasonable this first offender, despite the requirement of §3553(a) that the sentence be no greater than necessary.

(continued...)

The Government, in its responsive brief, attempted to justify as reasonable the 30 year sentence by reiterating the concerns it announced at sentencing; namely, that Appellant was, first and foremost an attorney, and was unrepentant. Appellant contends that the fact that she exercised her right to trial and is an attorney simply does not justify the four-fold increase in her sentence as compared with the co-defendants in her case. Every other factor cited by the Government outside the aforementioned circumstances applies equally to each and every one of Appellant's co-defendants. The fact that mortgage fraud is a serious economic crime and has a tremendous societal impact applies with equal force to all of the defendants in this case, despite the fact that they may have pled guilty and cooperated. The Government's attempt to argue that Appellant's sentence is justified because Appellant is different, and not similarly[2] situated with her co-defendants must

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[1](...continued)

[2]It is worth noting that some of the other defendants acknowledged the destruction of files --Brown, Bellamy, Cromartie, Tyner, Jewel and Sidney Williams were involved in the destruction of files they believed contained flipped deals. Brown and Bellamy burned their files, Sidney Williams disposed of the CPU. (PSR, ¶97). As for the other factors, some of Appellant's co-defendants

(continued...)

necessarily be evaluated in light of the differences between the defendants. This boils down to the fact that Appellant did not pled guilty, was convicted of perjury, and was an attorney. These distinctions cannot justify the huge differences in the sentences imposed.

The Government criticizes Appellant's reliance on the fact that her crime is non-violent in support of her argument that the 30 year sentence was unreasonable, and argues that economic crimes committed by breech of trust should be punished harshly. Appellant is not contending that non-violent, economic crimes are not serious, but rather, that a 30 year sentence is most assuredly not necessary to ensure the safety of the public, (incapacitation) which is the one of the most important justifications for lengthy sentences for violent crimes. Moreover, the argument that economic crimes "also deserve to be treated harshly, especially when that economic harm is great and

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[2](...continued)
continued to engage in criminal activity, and it is beyond question that the cooperation of professionals in banking, real estate, and law are all necessary for the successful mortgage fraud to take place. Thus, most of the factors mentioned by the Government and the district court apply equally to many of the co-defendants who received sentences drastically less serious than Appellant's sentenced.

severely impacts a large number of individuals," applies with equal force to the co-defendants in the case, who were sentenced to 87 months or less, as opposed to the 30 year sentence imposed upon Appellant.

The comments by the district court and the Government focus on Appellant's status as an attorney, noting that "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." (Government's brief at page 26). The Government asserts that "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." (Government's brief at page 26). Again, the fact that Appellant was an attorney cannot justify a sentence that is as disproportionate as the one in this case. Surely the Government's position that attorneys are deserving of a punishment four times more than other defendants because of their position of being an attorney cannot be upheld.

Other factors articulated by the Government such as the offense being widespread and the fact that it involved many victims obviously applies to all of the defendants, particularly the next most punished defendant, Brenda Brown, whose involvement pre-dated and continued after Appellant's own conduct. (See

Government's brief, page 24,26). Thus, when the factors that unite the defendants are taken out of the equation and the differences are noted, the Government's argument boils down to: because Appellant is an unrepentant attorney, she should be punished with a sentence quadruple the length of the next most punished co-defendants in her case, ten times more than some of the co-defendants, and indeed, punished more severely than others who have stolen more, and from higher places.

Regarding the huge disparity between Appellant and her co-defendant, the Government cites several cases in support of its contention that disparity between the sentences "do not entitle her to a lesser sentence and do not support her argument that her sentence was unreasonable." (Government brief at page 29). These cases do not support the Government's contention as the cases deal with the legality of downward departure from the sentencing guideline range to adjust for disparities. For instance, *United States v. Regueiro*, 240 F.3d 1321 (11th Cir. 2001) and *United States v. Smith*, 289 F.3d 696 (11th Cir. 2002), both involved the determination by the Court of Appeals that the Sentencing Commission had adequately considered possible co-defendant disparity, and thus disparity was not a factor taking the case out of the heartland. *United States v. Chotas*, 968 F.2d 1193 (11th Cir. 1992) also involved sentencing guideline analysis. *United States v. DeVegter*, –F.3d–, 2006 WL 345849 (11 Cir., February 16, 2006), is even more attenuated as it deals with a the

interpretation of the proper dollar amount to attribute to the defendant which might lead to a sentencing disparity. None of these cases deal with the situation now before the Court, that is, the specific directive in 18 U.S.C. §3553(a)(6) that the court shall consider the need to avoid unwarranted sentence disparity among defendants with similar records who have been found guilty of similar conduct. Therefore, the cases cited by the Government on 29 of its brief do not support the imposition of such a disparate sentence on Appellant.

The Government shrugs off Appellant's argument that several other high profile white collar crime cases recently in the forefront of the news establishes that Appellant's sentence is also disparate compared with the sentences involved in other white collar cases nationwide and ignores the obvious inequity of punishing the fraud of much less, with much more time. (Government's brief at page 30). The Government ignores the fact the *USA v. Ebbers* involves a conviction, after trial, of offenses involving over five billion dollars and a sentence of five years less than Appellant's sentence. *USA v. Rigas,* involves a conviction of an offense involving 100 million dollars and a sentence of half the length of Appellant's sentence, and the Government offers no meaningful response which can justify Appellant's 30 year sentence in comparison with these sentences. Appellant contends that if the facts were different from what Appellant maintained in her opening brief, it would have pointed out the

errors.

The Government also contends that the 30 year sentence is necessary to specifically deter Appellant from other criminal conduct–again, for the same reasons–that she never acknowledged her guilt, never demonstrated any remorse, and maintained her innocence. (Government's brief, page 26). This argument ignores the availability of other types of sentences which would effectively supervise Appellant and deter recidivism without the necessity of incarceration to protect the public. Moreover, Appellant lost her license to practice law and will no longer be able to conduct closings, thus removing the necessity of incarceration in order to prevent more of the same type of fraud. The record below indicates that the district court did not consider alternative sentences, and thus did not comply with 18 U.S.C. §3553(a).

Appellant has established that 30 years imprisonment is substantially greater than necessary to comply with the purposes of sentencing goals as announced in 18 U.S.C. §3553 and is grossly disproportionate with the sentences of the other defendants in the case, and with other defendants across the country convicted of fraud offenses involving significantly greater sums of money. Appellant's sentence should be reversed.

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

A. Standard of Review.

In her opening brief Appellant contended that the comments made by the district court evidence that the district court treated the guidelines as if they must be applied unless the defendant established the guidelines produced a fundamentally unfair result, and that this was an error which violated the Fifth, Sixth, and Eighth Amendments. The Government maintained in its responsive brief that because Appellant did not point this out in district court, the issue must be considered for plain error. Appellant disagrees and maintains that the issue must be resolved by this Court de novo.

At sentencing Appellant clearly requested a non-guidelines sentence pursuant to the factors outlined under 18 U.S.C. §3553(a). Appellant contends that this invocation of a non-guidelines sentence, coupled with the standard of review issued in *Booker* itself clearly preserves the issue. Although there is a superficial resemblance between the issue raised by Appellant and the cases issued by the circuit courts shortly after *Booker* was decided dealing with plain error, the situation in Appellant's case is not the same. The district court's erroneous manner of analyzing

the factors in §3553 as they relate to the sentencing guidelines, is similar to cases which examine misconceptions by the district court at sentencing and review the issue de novo.

For example, there is no jurisdiction over appeals from the denial of a downward departure, unless the district court misapprehends its authority to downwardly depart. These cases involve de novo review, despite the lack of a specific objection on the part of the defendant that the district court was misunderstanding its authority to downwardly depart. See, *United States v. Pressley*, 345 F.3d 1205 (11th Cir. 2003); *United States v. Mignott*, 184 F.3d 1288 (11th Cir. 1999); *United States v. Ortega*, 358 F.3d 1278 (11th Cir. 2003). In *United States v. Webb*, 139 F.3d, 1396 (11th Cir. 1998), the Eleventh Circuit treated it as reversible *per se* when the district court erred in believing it lacked authority to depart downward, where the decision not to depart premised on mistaken view of law.

Additionally, other Eleventh Circuit authority supports a remand for re-sentencing in Appellant's case. It is clear that the district court was mistaken in its view that a sentence within the guideline range should always be imposed unless the defendant can establish the guidelines work a manifest injustice and reversal is warranted. A long line of Eleventh Circuit authority compels resentencing in cases where the district court imposed sentence under the mistaken belief that a mandatory

minimum applied. *United States v. Rush*, 874 F.2d 1513, 1515 (11 Cir. 1989)("Because the district court believed that mandatory minimums applied, resentencing is necessary."); *United States v. Robinson*, 883 F.2d 940 (11th Cir. 1989)("Resentencing is necessary because the district court erroneously believed that mandatory minimums applied here"); *United States v. Giltner*, 889 F.2d 1004, 1009 (11th Cir. 1989)("[A]ppellant's sentence—twelve years-was within the statutory limits and the fifteen year maximum permitted by the plea agreement. We also recognize, however, that the appellant's sentence might have been affected by the district court's belief that the minimum custody sentence was five years on each conspiracy count. Therefore, we vacate Giltner's sentences…and remand the case to the district court for resentencing…"); *United States v. Cruz*, 106 F.3d 1553, 1557 (11th Cir. 1996)(sentence imposed on the mistaken belief that a mandatory minimum term applied is a sentence "'imposed in violation of law'")(quoting,18 U.S.C. §3742(a)(1); *see also*, 18 U.S.C. §3742(f)(1)(where sentence is imposed in violation of law, court of appeal "shall remand the case for further sentencing proceedings").

Finally, *Booker* itself mandates the standard of review regarding sentences requiring review for reasonableness. There does not appear to be, under this standard, a requirement that the defendant object to the sentence, after its imposition. Thus, Appellant's request that the district court impose a sentence that was a non-guidelines

sentence, preserved the issue for de novo review in this Court.

B. The District Court Had a Mistaken View of the Factors.

Contrary to the contention of the Government in its responsive brief that Appellant cited incomplete portions of the district court's comments and presented them out of context, Appellant maintains that the record as a whole establishes that district court mistakenly placed the on the defendant a burden to establish the guidelines were fundamentally unfair. (Government's brief at 33). The Government concedes that the district court felt bound to sentence McFarland within that [the guideline] range. (Government's brief at page 35). However, the Government appears to be arguing that there is a difference between being "duty bound" and "legally bound." Appellant contends that this is a distinction without a difference. Appellant notes that word "duty" implies and obligation or action required by one's position or occupation. See The American heritage Dictionary of the English Language, Fourth Edition, 2000 Houghton Mifflin Company.

Obviously, the district court "knew" the guidelines were advisory under *Booker*. Appellant's contention is rather that despite the advisory nature of the guidelines, the district court's sentencing philosophy prevented the court from actually applying the guidelines in an advisory fashion and erroneously imposed a much greater burden than called for under §3553(a) for establishing a non-guidelines sentence should be

imposed.

The Government contends that this court should not consider the comments by the district court in other sentencing hearings close in time to Appellant's sentencing in order to review what the district did in Appellant's case because these comments are not in the record of Appellant's case. Appellant contends that these comments are extremely relevant in light of the district court's remarks which indicate that the views expressed in the particular cases cited, were applicable to other cases. For instance in *USA v. Stewart*, the district court said, "as I said before, my reading of Booker is that..." In *USA v. Stone*, the district court said, "as I've said before, in my opinion..., and, "as I've said in other cases..." In *USA v. Dunlap*, the district court said, "well, as I've said many times by now..." These comments indicate that the statements by the district court regarding its guideline philosophy apply globally, and are not limited to these particular sentencing hearings. See Appellant's opening brief, Appendix A, B, and C. Thus, this is no different than if the district court had published its comments in opinion. These comments are akin to Appellant citing an unpublished opinion, and thus, do not need to be part of the record in Appellant's case. Under All the comments were made in open court and pertain to the exact issue raised in Appellant's case.

The 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 imposed on it by the court 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*.

III., IV, V.

In her opening brief McFarland contended 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. The Government's responsive brief did not adequately rebut these arguments and McFarland contends her conviction should be reversed on these grounds.

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 20th day of March 2006.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

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

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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 20th day of March 2006.

_____
LYNN FANT