ORAL ARGUMENT NOT YET SCHEDULED
No. 14-3031

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

DARLENE MATHIS-GARDNER,
Defendant-Appellant.

On Appeal from an Order of the
United States District Court for the District of Columbia
Case No. 1:11-cr-00100-RJL (The Honorable Richard J. Leon)

SEALED BRIEF FOR THE UNITED STATES

Unsealed February 24, 2015

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December 4, 2014

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties are listed in appellant's opening brief. The United States is not aware of any amicus having entered an appearance before this Court.

B. Ruling Under Review

The description of the ruling under review appears in appellant's opening brief.

C. Related Cases

The United States is not aware of any related cases.

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ISSUE PRESENTED

Whether the district court abused its discretion by summarily denying appellant's motion for early termination of supervised release when it had previously emphasized the importance of the three-year term of supervised release to achieve sufficient general deterrence?

STATUTES AND REGULATIONS

All applicable statutes and rules are in an addendum to this brief.

STATEMENT

Appellant Darlene Mathis-Gardner pleaded guilty to conspiring to defraud the United States in violation of 18 U.S.C. § 371 and to making false claims against the United States in violation of 18 U.S.C. § 287 in connection with a $1.3 million contract she obtained from the U.S. General Services Administration (GSA) as part of the renovation of the headquarters for Immigration and Customs Enforcement (ICE). Doc. 1, at 1-6 (A6-11); Doc. 6, at 1-10 (SA6-15).[1] The Honorable Richard J.

[1] The government has prepared a supplemental appendix (SA1-261) with the statement of offenses, the plea agreement, the sentencing submissions, and the sentencing transcript, for which it will move for leave to file under separate cover.

Leon sentenced appellant to eighteen months' imprisonment and three years of supervised release on each count, to be served concurrently, imposed $200 in special assessments, and ordered $389,738 in restitution to ICE. Doc. 19, at 1-7 (A12-18). Fourteen months after her release from prison, appellant moved to terminate her supervised release, Doc. 21, at 1-4 & Exs. 1-2 (A19-33), which the district court summarily denied, A4. This appeal of that denial followed.

A. The Information And Plea Agreement

On April 8, 2011, appellant was charged in a two-count information with conspiring to defraud the government and making false claims in obtaining a $1.3 million contract for interior design and project management services for the renovation of ICE's headquarters building in Washington DC. Doc. 1, at 1-6 (A6-11). The information charged appellant with conspiring to create fictitious invoices and making other fraudulent representations regarding her company's background, qualifications, and past performance on other government and commercial contracts—such as misrepresenting employees' security clearances and professional certifications, the tasks performed, and the amount billed—so that GSA would award it the contract. *Id.* at 4-5 (A9-

10). The information also charged appellant with making and presenting invoices to GSA that "overstated the number of hours of work performed by [her company's] personnel." *Id.* at 6 (A11).

On April 18, 2011, appellant pleaded guilty to both counts pursuant to a plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(B), admitting that her actions and involvement in the charged offenses were "fairly and accurately describe[d]" in the attached Statement of Offenses. Doc. 6, at 3 (SA8); Doc. 5, at 1-5 (SA1-5). In the plea agreement, appellant and the United States agreed that appellant would pay $389,738 in restitution to ICE. They also agreed that, given the amount of loss, the advisory sentencing guidelines range was 21-27 months, based on an offense level of 16, which included a two-level reduction for acceptance of responsibility, and no criminal history points. Doc. 6, at 6 (SA11). They further agreed that the United States would recommend a sentence of imprisonment in that range and a three-year term of supervised release. *Id.*

B. Sentencing

The United States recommended "a Guidelines-based sentence consisting of a period of incarceration within the range of 21-27 months,

a criminal fine of $18,000, a period of supervised release of three years, restitution to [ICE] of $389,738, and a $100 special assessment per count." Doc. 15, at 1-2 (SA138-39). Appellant was directly involved with numerous aspects of the conspiracy to defraud and "[t]he investigation revealed overbilling in every single invoice that [she] submitted during the nine month course of the [interior design and project management contract]." *Id.* at 7 (SA144). Even after appellant learned of the criminal investigation involving the contract, she "continued submitting forged documents to GSA." *Id.* at 10 (SA147). Thus, a Guidelines sentence was "necessary to reflect the seriousness of the offenses" and to "affirm that fraud is no less serious when committed against a government agency than against any other victim." *Id.* at 9 (SA146).

Appellant requested that the court impose "a lengthy period of probation with community service rather than incarceration." Doc. 13, at 2 (SA17). She "implore[d] the Court to consider not just her criminal acts, but also her lack of any prior criminal history, her mental health issues that contributed to the offense, and her genuine desire to accept responsibility and give back to the community both with restitution and

community service." *Id.* She emphasized that "[s]he has always been hardworking, deeply involved in her community and church, and a dedicated parent" and posed an "extraordinarily low risk of general recidivism." *Id.*; *see also id.* at 8-9 (SA23-24) (detailing "her long-standing commitment to public service").

The district court held a sentencing hearing on July 13, 2011. It recognized that "[t]his isn't your typical sentencing in any way, shape or form." Sent. Tr. 41 (SA250). While it was "uncontested" that the Guideline range was 21 to 27 months, the court was "frankly shocked" that the plea agreement included only a two-level adjustment for appellant's early acceptance of responsibility. *Id.* at 42 (SA251). The court thus "effectively" adjusted the offense level down one additional level and queried, "if the Guideline range is effectively 18 to 24 months, what really makes sense?" *Id.* at 43 (SA252).

The court noted that "this is not run-of-the-mill white collar conduct. These are substantial amounts of money, millions of dollars in contracts. . . [and] the Government can be and is prone to be preyed upon by people who take advantage of the Government in various ways through filing false documents and conducting fraud operations." *Id.*

Moreover, defrauding the government "is not an uncommon problem," creating a substantial need for deterrence. *Id.* "Obviously you have been deterred. There is no question about that in my mind. There's no question you have accepted responsibility. None. Zero." *Id.* But "deterrence of others[] is paramount in my mind and has to be because of where we are, because of how vulnerable the Government agencies have been and can be to people who concoct fraud scams that are successful. We can't have that." *Id.* at 44 (SA253).

Thus, the court believed that there has to be "some jail time," but "a sentence with jail time alone is [not] enough either." *Id.* at 44-45 (SA253-54). "[T]here needs to be community service." *Id.* at 45 (SA254). The court referenced a prior sentencing in which it expressed its preference "to make her do her community service first while she is still fresh in the minds of ones as a lesson to others where they could see her in the community and then have her serve her jail time." *Id.* But "[t]he law won't permit me to do that." *Id.* "So you are going to have to do your jail time first and then you are going to have to do your community service next . . . during a period of what's called supervised release." *Id.*

The court thus decided on "a combination of jail time combined with community service." *Id.* at 46 (SA255). The court sentenced appellant to eighteen months of imprisonment and three years of supervised release on both counts to be served concurrently, $200 in special assessments, and restitution of $389,738. *Id.* at 46-47 (SA255-56). The court imposed several conditions on the supervised release, including "360 hours of community service during the three years of your supervised release at a rate of 120 hours a year in [a supervised and approved] program." *Id.* at 48 (SA257); Doc. 19, at 4 (A15).

C. The Motion For Early Termination Of Supervised Release

Appellant served her prison term and was released on December 31, 2012. On February 25, 2014, appellant moved for early termination of supervised release. Doc. 21 (A19-33).

Appellant argued that her "story is one of rehabilitation and success, as well as a dedication to making the lives of others better through giving back to the community." *Id.* at 2 (A20). She noted that "[s]he has complied with and successfully completed every condition of supervision" and "has expressed great remorse for her conduct in this case and . . . used her experience to give back to the community,"

including being active in her church and "work[ing] with our probation Office to develop a White Collar Female Ex-Offender pilot program with the support of the D.C. Chamber of Commerce." *Id.* at 3 (A21). Moreover, her "lack of any other criminal history also shows her respect for the law and her ability to safely live in the community" without supervision. *Id.* The government recommended that the district court grant the motion because appellant has complied with the requirements of supervised release, has taken rehabilitative steps beyond those requirements, and posed little or no risk of repeating her crimes or harming the community if supervision were terminated. Supp. Sealed App. 1-2.

On April 23, 2014, the district court denied the motion in a minute order. A4.

SUMMARY OF ARGUMENT

In sentencing appellant, the district court carefully calibrated a sentence including "a combination of jail time combined with community service" during a three-year term of supervised release to sufficiently deter others from defrauding the government. Sent. Tr. 45-

46 (SA254-55). The district court did not abuse its discretion in refusing to terminate the supervised release early.

A. The government recommended that the district court grant appellant's motion for early termination of supervised release, but that recommendation did not compel the court to grant the motion. At sentencing, the court made clear that it was imposing the supervised release term not to deter appellant from future crimes, for which it found "[z]ero" risk, Sent. Tr. 43 (SA252), but to "deter[] others" from defrauding the government, which was "paramount in [its] mind." *Id.* at 44 (SA253). Appellant's motion said nothing about this "paramount" consideration.

Instead, appellant relied primarily on the facts that "[s]he had no incidents or infractions while in custody," "has complied with and successfully completed every condition of supervision," and has exhibited significant rehabilitation since her incarceration. Doc. 21, at 3 (A21). But courts have made clear that model prison conduct and compliance with the conditions of supervised release are expected and do not, by themselves, mandate early termination of supervised release.

While it would have been reasonable for the district court to grant the motion, the district court did not abuse its discretion by denying it.

B. Vacatur for additional explanation is unnecessary. While this Court has held that district courts must explain their reasons in the context of imposing a sentence, it has never extended this duty to explain to the context of motions for early termination of supervised release. There are several practical differences between the two contexts, and the applicable statutes governing sentencing determinations (18 U.S.C. § 3553) and motions for early termination of supervised release (18 U.S.C. § 3583(e)) are materially different as pertain to the district court's duty to explain. In particular, while section 3583(e) requires courts to consider certain section 3553 factors before granting early termination of supervised release, it does not incorporate the hearing and explanatory requirements from section 3553(c).

Appellant relies primarily on the panel majority's decision in *United States v. Emmett*, 749 F.3d 817, 820 (9th Cir. 2014), that "[a] district court's duty to explain its sentencing decisions must also extend to requests for early termination." But the *Emmett* majority disregarded

the relevant statutory and practical differences between the two contexts, and "the majority's impractical, overly formalistic approach not only fails to give the usual 'considerable deference to a district court's determination of the appropriate supervised release conditions,' it also needlessly burdens our already overloaded district courts." 749 F.3d at 825 (Nguyen, J., dissenting) (citation omitted).

In any event, the *Emmett* majority expressly recognized that an adequate explanation can sometimes be inferred from the record as a whole. That is the case here, as the basis of the court's denial of appellant's motion is apparent from its prior statements at sentencing that the three-year term of supervised release was necessary to achieve sufficient general deterrence. With the court having said this once on the record already, there was no need for it to repeat itself.

Appellant also is wrong that *United States v. Lowe*, 632 F.3d 996 (7th Cir. 2011), and *United States v. Gammarano*, 321 F.3d 311 (2d Cir. 2003), necessitate vacatur. While these courts ordinarily require district courts to state that that they have considered the relevant section 3553 factors, they forego this requirement when the court's consideration of the factors was apparent from the record, which is the

case here. Vacating and remanding so that the district court can add a boilerplate sentence to its denial that it has considered the relevant section 3553 factors would needlessly delay the proceedings.

C. The cited memoranda from the Administrative Office of the U.S. Courts set forth general criteria for identifying candidates for early termination of supervised release, but they are not exhaustive of the applicable statutory considerations and are not intended to bind district courts. While the government agrees with appellant that she was a suitable candidate for early termination based on the identified general criteria, the district court disagreed. That decision was within its discretion and should be affirmed.

ARGUMENT

In sentencing appellant, the district court carefully calibrated a sentence including "a combination of jail time combined with community service" during a three-year term of supervised release to sufficiently deter others from defrauding the government. Sent. Tr. 45-46 (SA254-55); *cf. United States v. Anderson*, 545 F.3d 1072, 1077 (D.C. Cir. 2008) (district court did not abuse its discretion by imposing sentence based on "the need to promote respect for the law and deter

others from similar conduct"). The district court expressed its view that the supervised release, including its community-service requirement, was so important to achieving sufficient general deterrence that it would have imposed the supervised release first, if the law allowed, to serve as "as a lesson to others where they could see her in the community." Sent. Tr. 45 (SA254). The district court acted well within its "wide discretion" in denying the motion to terminate it early. *United States v. Hook*, 471 F.3d 766, 771 (7th Cir. 2006).

A. The District Court Did Not Abuse Its Discretion By Denying Appellant's Motion For Early Termination Of Supervised Release

Appellant's motion for termination of supervised release relied primarily on the facts that "[s]he had no incidents or infractions while in custody" and "has complied with and successfully completed every condition of supervision." Doc. 21, at 3 (A21). But "[m]odel prison conduct and full compliance with the terms of supervised release is what is expected of a person under the magnifying glass of supervised release and does not warrant early termination." *United States v. McKay*, 352 F. Supp. 2d 359, 361 (E.D.N.Y. 2005). To warrant early termination of supervised release, a "defendant must show something

'of an unusual or extraordinary nature' in addition to full compliance," *United States v. Etheridge*, 999 F. Supp. 2d 192, 196 (D.D.C. 2013) (quoting *United States v. Caruso*, 241 F. Supp. 2d 466, 469 (D.N.J. 2003)), so that the early termination is "warranted by the conduct of the defendant released and the interest of justice." 18 U.S.C. § 3583(e)(1).

In attempting to show that her situation was sufficiently unique to warrant early termination of supervised release, appellant pointed to her "great remorse for her conduct in this case" and her "lack of any other criminal history." Doc. 21, at 3 (A21). But the district court had already considered both of these factors at sentencing, expressly observing that "[t]here's no question [she has] accepted responsibility" and been deterred from further criminal conduct. Sent. Tr. 43 (SA252). "None. Zero." *Id.*; *see also id.* at 38-41 (SA247-50) (appellant expressed her remorse). The court stated that a combination of jail time and supervised release was necessary, not to deter *her* from future crimes, but to "deter[] others" from defrauding the government, which was "paramount in [the court's] mind." *Id.* at 44 (SA253). Appellant's motion for early termination said nothing about this "paramount" consideration.

Appellant did note her "dedication to making the lives of others better through giving back to the community," Doc. 21, at 2 (A20), pointing to several ways "she has used her experience to give back to the community," Doc. 21, at 3 (A21). But again this was nothing new, as appellant had relied on "her long-standing commitment to public service" in her sentencing submissions. Doc. 13, at 8-9 (SA23-24). The court specifically ordered a three-year term of supervised release including community service "as a lesson to others where they could see her in the community." Sent. Tr. 45 (SA254). Appellant's motion did not claim that any of the conditions of the supervised release impeded the amount or effectiveness of that service, and it appears that she has used her time to great effect and will continue to do so throughout the remainder of her supervised release. That was precisely why the court imposed the supervised release in the first place. *Id.* Indeed, while appellant's motion stated that she "completed the community service directed by the Court very early and has continued to serve the community beyond that requirement," Doc. 21, at 2 (A20), the judgment required 120 hours of community service for each year of the three-year supervised release term, Doc. 19, at 4 (A15); Sent. Tr. 48 (SA257).

The government commends appellant for her rehabilitative steps and works in the community and previously recommended early termination of her supervised release. *See* p. 8, *supra*. But that recommendation was merely that, a recommendation. It does not compel the court to grant the motion, as the court must independently exercise its discretion and determine that early termination is warranted. *See* 18 U.S.C. § 3583(e)(1) (the court "may" grant early termination if it finds "such action is warranted by the conduct of the defendant released and the interest of justice"). The premise of the abuse-of-discretion standard is "that the [district] court has a *range of choice*, and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law." *United States v. Volvo Powertrain Corp.*, 758 F.3d 330, 345 (D.C. Cir. 2014) (citations and internal quotation marks omitted; emphasis added). While it would have been reasonable for the district court to grant the motion, it did not abuse its discretion by denying the motion. "Whether we agree or disagree with the District Court's interpretation, it is clearly not an abuse of discretion and must be upheld." *Trahan v. Brady*, 907 F.2d 1215, 1219 (D.C. Cir. 1990).

B. Vacatur For Additional Explanation Is Unnecessary

Appellant is wrong (Br. 6-10) that vacatur is required because the court summarily denied the motion in a minute order. "Neither 18 U.S.C. § 3583(e) nor relevant case law require[s] the district court to explain its denial of early termination of supervised release." *United States v. Mosby*, 719 F.3d 925, 931 (8th Cir. 2013); *see also id.* (finding "no abuse of discretion in [the district court's] summary denial of [appellant's] motion").

Appellant's argument to the contrary based on cases from other circuits is unavailing. This Court has not imposed an explanatory requirement on denials of motions for early termination of supervised release, and appellant's reliance on sister circuit precedent is misplaced.

Appellant relies primarily (Br. 6-7) on the 2-1 decision in *United States v. Emmett*, 749 F.3d 817, 820 (9th Cir. 2014), that "[a] district court's duty to explain its sentencing decisions must also extend to requests for early termination." But the *Emmett* majority's reasoning in so holding was flawed.

According to the *Emmett* majority, "the relevant statutory text [of section 3583(e)] is best interpreted to create a duty to explain" because,

like sentencing determinations, section 3583(e) requires district courts to consider certain section 3553 factors before terminating supervised release. 749 F.3d at 820. The relevant statutes governing imposition of a sentence (18 U.S.C. § 3553) and early termination of supervised release (18 U.S.C. § 3583(e)), however, are materially different concerning a district court's duty to explain. When imposing an original sentence, district court must consider the factors set forth in 18 U.S.C. § 3553(a), *and* "state in open court the reasons for its imposition of the particular sentence," *id.* § 3553(c). In contrast, while 18 U.S.C. § 3583(e) requires courts to consider "the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)," *id.*, it does not include the explanatory requirement from section 3553(c).

Moreover, while section 3553(c) requires a hearing before a district court imposes a sentence, *see also* Fed. R. Crim. Proc. 32(i), section 3583 does not require a hearing before a court denies a motion for termination. A hearing is not required if "the relief sought is favorable to the person and does not extend the term of probation or of supervised release" and "an attorney for the government has received notice of the

relief sought, has had a reasonable opportunity to object, and has not done so." Fed. R. Crim. Proc. 32.1(c)(2)(B)-(C)); *see also* 3 Charles Alan Wright & Sarah N. Welling, Federal Practice & Procedure § 563 n. 5 (4th ed. 2011) (Rule 32.1(c) "does not compel the court to hold a hearing before refusing a request for modification"); Pub. L. 100-182, § 12 (clarifying procedures for early termination of supervised release).

These statutory distinctions make sense because of practical differences between the two contexts. When imposing a sentence, a district court "must make an individualized assessment based on the facts presented." *Gall v. United States*, 552 U.S. 38, 50 (2007). The court has to weigh many potentially competing considerations, and thereafter "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Id.*

By the time a defendant files a motion for early termination of supervised release, however, the district court would have already conducted a sentencing hearing and placed on the record its reasons for believing that the sentence—including the supervised release (and any conditions)—is warranted. And any appeals of the sentence's

procedural and substantive reasonableness would be made from the judgment of conviction and brought already. The main issue before the court on a motion for early termination of supervised release is not the propriety of its original sentencing determination, but whether there are changed circumstances or something else supporting the "rarely-granted remedy of early termination of supervised release," *Emmett*, 749 F.3d at 824 (Nguyen, J., dissenting). In the relatively few instances in which the defendant has non-frivolous arguments as to why his or her situation is so "unusual or extraordinary" to merit that relief, *Etheridge*, 999 F. Supp. 2d at 196 (citation omitted), an explication of the court's reasoning would help the parties understand the court's acceptance or rejection of those arguments, and facilitate any appellate review. But in the heartland of cases, it would only create extra work. As Judge Nguyen aptly explained in his *Emmett* dissent, "the majority's impractical, overly formalistic approach not only fails to give the usual 'considerable deference to a district court's determination of the appropriate supervised release conditions,' it also needlessly burdens our already overloaded district courts." 749 F.3d at 825 (citation omitted).

In any event, the *Emmett* majority expressly recognized that "'adequate explanation in some cases may also be inferred from . . . the record as a whole.'" *Emmett*, 749 F.3d at 821 (quoting *United States v. Carty*, 520 F.3d 984, 992 (9th Cir. 2008) (*en banc*)). That is the case here, as the basis of the court's denial of appellant's motion is apparent from its prior statements at sentencing that the three-year term of supervised release was necessary to achieve sufficient general deterrence. Sent. Tr. 45-46 (SA254-55). Because the court said this once on the record already, repeating itself was unnecessary. *See United States v. Nonahal*, 338 F.3d 668, 671 (7th Cir. 2003) ("Although a remand is sometimes warranted when a district court fails to provide such an explanation, in this case a remand is unnecessary because the district court's reasons for denying the modification are apparent."); *cf. Emmett*, 749 F.3d at 825 (Nguyen, J., dissenting) ("Under the majority view, if the district court had said, 'I considered these facts already,' would that have led to a different result? Presumably so, but isn't that already quite obvious from the record?").

Appellant's reliance on *United States v. Lowe*, 632 F.3d 996 (7th Cir. 2011), and *United States v. Gammarano*, 321 F.3d 311 (2d Cir. 2003),

see Appellant Br. 8-10, fares no better. Cognizant of the practical differences between sentencing determinations and motions for early termination of supervised release, both courts have held that a district court need not "make specific findings of fact with respect to each of [the pertinent section 3553] factors" before deciding a motion for early termination of supervised release. *Gammarano*, 321 F.3d at 315; *see also Lowe*, 632 F.3d at 998 (same).

While these courts also observed that a district court must ordinarily include "a statement that [it] has considered the statutory factors," *Gammarano*, 321 F.3d at 315-16 (citation and internal quotation marks omitted); *see also Lowe*, 632 F.3d at 998 (same), they have not required such a blanket statement of consideration when it was apparent from the record. *See Nonahal*, 338 F.3d at 669, 671 (affirming even thought the court "denied [appellant's] motion without explanation"); *Gammarano*, 321 F.3d at 314 (affirming even though the district court "did not explicitly state that it had considered the factors listed in § 3553(a) in its order of August 8, 2002 denying the motion to terminate supervised release"). Such consideration is apparent here from the district court's expressed need for the three-year term of

supervised release to achieve adequate general deterrence, which is directly tethered to the relevant statutory consideration that the sentence should "afford adequate deterrence to criminal conduct." 18 U.S.C. § 3553(a)(2)(B); *see also id.* § 3583(e) (requiring consideration of section 3553(a)(2)(B)). Vacating and remanding so that the district court can add a sentence to its denial that "it has considered the relevant section 3553 factors" would undermine the basic principle that "district courts are presumed to know and apply sentencing law," *United States v. Jones*, 596 F.3d 881, 884 (8th Cir. 2010), and needlessly delay the proceedings.

Finally, *United States v. Brinson-Scott*, 714 F.3d 616 (D.C. Cir. 2013), does not require vacatur here. As appellant recognizes, *Brinson-Scott* "dealt with an original sentencing," not "a motion to terminate supervised release," Appellant Br. 10, which is materially different as relates to a district court's duty to explain. *See* pp. 18-20, *supra*.

C. The Cited Memoranda From The Administrative Office Of The U.S. Courts Are Immaterial To The Resolution Of This Appeal

The cited memoranda from the Administrative Office of the U.S. Courts (Appellant Br. 11-12) propose "general criteria" for identifying

suitable candidates for early termination of supervised release "in a systematic way." A34, 36. But these criteria are not exhaustive of the statutory considerations set forth in 18 U.S.C. §§ 3553(a) and 3583(e) – *e.g.*, they do not discuss whether the supervised release is necessary to deter others, even though that is a relevant statutory consideration – and are not intended to bind district courts. As the memoranda make clear, "the decision to terminate supervision early will be made by the sentencing judge." A34.

The government fully agrees with appellant (Br. 12) that she was a suitable candidate for early termination based on the identified general criteria and recommended that the court grant her motion. The court disagreed. That decision was within its discretion and should be affirmed.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted.

/s/ Nickolai G. Levin

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December 4, 2014

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Sealed Brief For The United States complies with the type-volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,613 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point New Century Schoolbook font.

December 4, 2014

/s/ Nickolai G. Levin
Nickolai G. Levin

CERTIFICATE OF SERVICE

I, Nickolai G. Levin, hereby certify that on December 4, 2014, I electronically filed the foregoing Sealed Brief for the United States with the Clerk of the Court of the United States Court of Appeals for the District of Columbia by using the CM/ECF System. A paralegal in my office also will deposit 6 copies of the brief in this Court's 24-hour filing depository, and I will send two sealed copies to counsel for appellant by FedEx Overnight delivery.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

December 4, 2014

/s/ Nickolai G. Levin
Nickolai G. Levin

Addendum

18 U.S.C.A. § 3553

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be

incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.1

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

[(b) omitted]

(c) Statement of reasons for imposing a sentence.--The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

[(d)-(f) omitted]

18 U.S.C.A. § 3583

§ 3583. Inclusion of a term of supervised release after imprisonment

[(a)-(d) omitted]

(e) Modification of conditions or revocation.--The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)--

(1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison

if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

[(f)-(k) omitted]

Rule 32. Sentencing and Judgment

[(a)-(h) omitted]

(i) Sentencing.

(1) In General. At sentencing, the court:

(A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report;

(B) must give to the defendant and an attorney for the government a written summary of--or summarize in camera--any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

(C) must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and

(D) may, for good cause, allow a party to make a new objection at any time before sentence is imposed.

(2) Introducing Evidence; Producing a Statement. The court may permit the parties to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)-(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

(3) Court Determinations. At sentencing, the court:

(A) may accept any undisputed portion of the presentence report as a finding of fact;

(B) must--for any disputed portion of the presentence report or other controverted matter--rule on the dispute or determine that a

ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

(C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

(4) Opportunity to Speak.

(A) By a Party. Before imposing sentence, the court must:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and

(iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

(B) By a Victim. Before imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard.

(C) In Camera Proceedings. Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).

[(j)-(k) omitted]

Rule 32.1. Revoking or Modifying Probation or Supervised Release

[(a)-(b) omitted]

(c) Modification.

(1) In General. Before modifying the conditions of probation or supervised release, the court must hold a hearing, at which the person has the right to counsel and an opportunity to make a statement and present any information in mitigation.

(2) Exceptions. A hearing is not required if:

(A) the person waives the hearing; or

(B) the relief sought is favorable to the person and does not extend the term of probation or of supervised release; and

(C) an attorney for the government has received notice of the relief sought, has had a reasonable opportunity to object, and has not done so.

[(d)-(e) omitted]