

# 12-1672

*To Be Argued By:*  
DAVID T. HUANG

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**United States Court of Appeals**

**FOR THE SECOND CIRCUIT**

**Docket No. 12-1672**

—  
UNITED STATES OF AMERICA,

*Appellee,*

-vs-

MARIA LOGAN,

*Defendant-Appellant.*

—  
ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF CONNECTICUT

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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### **Statement of Jurisdiction**

The district court (Alfred V. Covello, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on April 19, 2012. Appendix (“A”)123-A125. On April 23, 2012, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). A126. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

## **Statement of Issues Presented for Review**

1. In the absence of a government motion under U.S.S.G. § 3E1.1(b) for a third-level reduction for acceptance of responsibility, did the district court err in declining to award the additional reduction to the defendant, who pleaded guilty after the final pre-trial conference and after the government had prepared extensively for trial?

2. Whether the Guideline sentence imposed by the district court was procedurally reasonable?

a. Did the district court plainly err by failing to articulate adequately the factors it considered under 18 U.S.C. § 3553(a) or failing to recognize explicitly its authority to depart downward under the Sentencing Guidelines?

b. To the extent the decision is even appealable, did the district court abuse its discretion in refusing to grant a downward departure under U.S.S.G. § 5K2.0 based on family circumstances, charitable works and an overstatement of the loss amount?

3. Whether the district court imposed a substantively reasonable sentence when it denied the defendant's various departure arguments

and instead sentenced her to the bottom of the stipulated Guideline range?<sup>1</sup>

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<sup>1</sup> Although the defendant presented five issues in her brief, the government has consolidated and addressed the substance of all of them in three issues.

# United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-1672

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UNITED STATES OF AMERICA,

*Appellee,*

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ON APPEAL FROM THE UNITED STATES DISTRICT  
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**BRIEF FOR THE UNITED STATES OF AMERICA**

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## **Preliminary Statement**

In this sentencing appeal arising from a multi-defendant mortgage fraud prosecution, the defendant makes several arguments in support of her claim that her 24-month Guideline sentence was procedurally and substantively unreasonable.

*First*, despite the fact that she entered into a written plea agreement which contemplated that

she would only receive a two-level reduction for acceptance of responsibility, she argues that the district court committed procedural error by failing to grant her a third-level reduction under U.S.S.G. § 3E1.1(b). She asserts that the government's decision not to recommend the third point was arbitrary under *United States v. Lee*, 653 F.3d 170 (2d Cir. 2011). There is no dispute, and the record clearly supports the conclusion, that the government's clear and uncontested reason for not recommending a third-point reduction for acceptance was that it had undergone significant trial preparation by the time of the defendant's guilty plea. Accordingly, the district court acted well within its discretion in finding that the government did not improperly withhold the third point.

*Second*, the defendant argues that her sentence was procedurally unreasonable because the district court failed to consider all of the factors under 18 U.S.C. § 3553(a), did not adequately explain the rationale for its sentence, misapprehended its authority to depart from the Sentencing Guidelines, and refused to depart downward under U.S.S.G. § 5K2.0 based on the defendant's family circumstances, her charitable works and her claim that the loss amount overstated the seriousness of her offense. Her claims as to the court's explanation of its sentence and its justification for refusing to depart or impose a non-Guideline sentence were not raised below

and therefore are subject to plain error review. The court committed no error, much less one that was obvious or affected the defendant's substantial rights. Before imposing sentence, the court clearly stated that it had considered everything in the record, including the § 3553(a) factors, and the defendant points to no evidence that the court misapprehended its sentencing authority in any way. As to her remaining claim that the court should have departed under § 5K2.0, this decision is not appealable and nonetheless was a proper exercise of discretion in finding that the combination of factors cited by the defendant did not justify a departure from the Guideline range.

*Third*, the defendant maintains that her sentence was substantively unreasonable and that a sentence below the Guideline range was warranted. The 24-month sentence, however, was at the bottom of the agreed-upon Guideline range, was not unduly different from the sentences imposed for other similarly situated co-defendants, and was not so shockingly high that it was beyond the range of permissible sentences for the defendant's participation in the vast mortgage fraud conspiracy that occurred here.

### **Statement of the Case**

On June 15, 2010, the defendant and nine others were charged in a 38-count indictment with, among other crimes, conspiracy to commit mail and wire fraud as part of an extensive

mortgage fraud conspiracy. A25-A68. The defendant was charged with one count of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. § 1349, and 26 counts of mail fraud, in violation of 18 U.S.C. § 1341. A25-A62.

On June 17, 2010, the defendant was arrested, presented, and arraigned on the indictment. She was released pending trial. Government's Appendix ("GA")9, GA11 (docket entries).

On October 24, 2011, the defendant pleaded guilty to conspiracy to commit mail and wire fraud. GA57-GA106.

On April 10, 2012, the district court sentenced the defendant to 24 months in prison, two years of supervised release, \$764,527.44 in restitution jointly and severally with other co-defendants, and \$27,000 in forfeiture. A123. Judgment entered on April 19, 2012. GA42-GA43. On April 23, 2012, the defendant filed a timely notice of appeal. A126.

On May 16, 2012, the defendant filed a motion for bail pending appeal, which the government opposed. GA44-GA45. The district court denied the motion in a written order on September 10, 2012. GA107-GA115. On September 17, 2012, the defendant filed a motion for bail pending appeal in this Court, which the government also opposed. GA55. This Court denied the motion on October 11, 2012 and directed the gov-

ernment to file its opposition brief no later than 35 days from the date of the order. GA116.

On or about October 12, 2012, the defendant self-surrendered to the custody of the Bureau of Prisons. She is currently serving her sentence of incarceration.

**Statement of Facts and Proceedings  
Relevant to this Appeal**

**A. The offense conduct**

The following facts, which are essentially undisputed, are taken from the Pre-Sentence Report (“PSR”) and the government’s sentencing memorandum (Confidential Appendix (“CA”)62-CA78):

The defendant was a straw buyer who purchased five properties in a multi-year mortgage fraud centered in New London, Connecticut that ultimately caused approximately \$9 million in losses. PSR ¶¶ 9-12; CA63, CA79. Her own involvement spanned fifteen months and she was paid \$27,000 for her participation. PSR ¶¶ 5, 9-12; CA79. Although the defendant had a minor role in the conspiracy, that role nevertheless consisted of signing loan documents in which she lied about her job, her income, her assets and liabilities, and her intention to live in the property. PSR ¶¶ 9-12; CA79. She then attended closings in which she played the role of a property buyer and mortgage borrower. PSR ¶¶ 9-12; CA79. The defendant has admitted that, in ex-

change for thousands of dollars, she lent her name and identity to help perpetuate a long-running fraud on multiple victim lenders. PSR ¶ 15.

For many, if not all of her fraudulent transactions, the defendant made the following material misstatements:

1. She lied about her intention to live in these houses as her primary residence, when in fact she never lived in them or intended to live in them. GA93; CA63. In several cases, she not only signed the loan application attesting to her intent to live in that home, but she also signed false statements of occupancy. CA63.

2. She falsely claimed that she worked at a company called The Cutting Edge as a bookkeeper or performing clerical work. PSR ¶¶ 9-12; CA79. In reality, she listed her occupation as home maker or housewife in the federal tax returns she filed during the same time period. CA63-CA64.

3. She claimed to make anywhere from \$4,500 to over \$8,000 a month at her fictitious job. PSR ¶¶ 9-12; CA79. In truth, during this time period, she reported on her federal income tax returns the following income: \$3,980 in 2005 (solely from unemployment compensation) and \$0 in 2006. CA64.

4. Finally, in many instances, she did not disclose to the victim lenders that she already

had other mortgages on properties that she had recently purchased. PSR ¶¶ 9-12; CA79.

The defendant obtained nearly \$1.5 million in fraudulent mortgages. CA79. In return, she obtained \$27,000 from her co-conspirators. CA79. She reported none of this illicit income on her 2005 or 2006 federal income tax returns. CA64. As a result of her conduct, the defendant caused losses of approximately \$926,850.00. CA86.

## **B. Guilty plea**

In May 2011, the government sent a draft plea agreement to defense counsel in this case. CA103. The draft contemplated, *inter alia*, a three-level reduction for prompt acceptance of responsibility. CA107.

The defendant did not respond formally to this draft plea agreement. On July 25, 2011, she filed a motion to suppress statements she made to law enforcement. GA22. With the defendant's suppression motion pending, the district court scheduled and held a final pre-trial conference on October 18, 2011. GA28-GA29. At that point, jury selection was scheduled for October 24, 2011, and trial was to begin on November 7, 2011. GA24. Before the conference, co-defendants Maurizio Lancia and Stacey Petro changed their pleas to guilty. GA28-GA29. Petro indicated her intention to plead guilty by no later than October 12, 2011, GA28, and Lancia indicated his intention to plead guilty by no later

than October 14, 2011. GA28. Both of their plea agreements contemplated that they would receive a full three-level reduction for acceptance of responsibility. A74-A75, A86-A87.

By the start of the October 18 pre-trial conference, which occurred immediately after the guilty pleas for Lancia and Petro, the defendant had still not indicated to the government that she wanted to plead guilty. During the conference, the defendant moved to continue jury selection, GA29, and the court granted the motion over the government's objection, postponing jury selection to November 30, 2011 and the trial to December 1, 2011. GA29.

On October 20, 2011, the government sent a revised draft plea agreement to defense counsel which did not include the recommendation for a third-point for acceptance and was subject to a short deadline because the government was preparing to seek a superseding indictment against all of the remaining defendants who had not yet pleaded guilty. CA88-CA89; CA118. In response, defense counsel indicated, *inter alia*, that he did not agree with the government's decision to withhold the third point for acceptance in the revised agreement and that he would continue to discuss with the defendant the possibility of pleading guilty. CA88.

On October 21, 2011, the government sent defense counsel a letter outlining the status of plea discussions and reiterating its rationale for not

recommending the third point for acceptance. CA118-CA119. As the government explained,

[T]o date your client has not notified the government of her intention to enter a plea of guilty and we have not been permitted to avoid preparing for trial and to allocate our resources efficiently. To the contrary, since the offer in May was extended and since the end of July, there has been a tremendous amount of work done on this matter, including adding a second Assistant United States Attorney to the trial team, adding a second financial analyst, preparation of witnesses, literally thousands of hours of work by the trial team resulting in our providing an exhibit list and a witness[] list. We have even attended a pretrial conference with the Court. This unfortunately necessitates a less favorable offer to your client pursuant to U.S.S.G. § 3E1.1.

CA119. The government clearly indicated that there were no other plea offers except the one it proposed on October 20, 2011. CA118. Later that day, defense counsel indicated a willingness to plead to the terms of the May 2011 draft plea agreement, not the revised October 2011 agreement. CA120-CA121. But the government's October 20 letter had explicitly stated that the May 2011 draft was no longer valid. CA118.

On the morning of October 24, 2011, the defendant indicated, for the first time, her willingness to plead to the terms of the October 2011 plea agreement. CA67; GA95. That afternoon, she entered a guilty plea to the charge in Count One of conspiracy to commit mail and wire fraud. GA30; A99. As part of the plea agreement, the parties explicitly understood that the government would recommend a two-level, not a three-level, reduction for acceptance of responsibility. A102; *cf.* A74 (Plea Agreement for Maurizio Lancia), A86 (Plea Agreement for Stacey Petro). The parties entered into the following Guideline stipulation:

The defendant's base offense level under U.S.S.G. § 2B1.1 is 7. That level is increased by 14 on a loss that exceeds \$400,000 but is not more than \$1,000,000. The parties further agree that a two (2) level downward adjustment is applicable based on defendant's minor role in the conspiracy pursuant to U.S.S.G. [§] 3B1.2(b) . . . . *[T]he parties[] calculate that two (2) levels will be subtracted under U.S.S.G. § 3E1.1 for acceptance of responsibility, as noted above, resulting in a total offense level of 17.*

. . . .

A total offense level 17, assuming a Criminal History Category I, would result in a range of 24 to 30 months of imprison-

ment (sentencing table) and a fine range of twice the gross gain or loss pursuant to 18 U.S.C. § 3571(d). The defendant is also subject to a supervised release term of 3 years. 18 U.S.C. § 3583(b)(2).

A103-A104 (footnote omitted) (emphasis added). Although the defendant reserved her right to seek a downward departure and/or a non-Guideline sentence, A104, she did not reserve her right to seek a third-level reduction under U.S.S.G. § 3E1.1(b). Nor does the agreed-upon Guideline range contemplate that the defendant could receive such a reduction. At the plea hearing, neither party discussed or referenced the potential for a third-level reduction for acceptance of responsibility. GA65-GA66.

There were several other material differences between the May 2011 proposed agreement and the final plea agreement. The defendant reserved her right to appeal any sentence, not simply a custodial sentence. A104. Unlike the May 2011 draft agreement, the final agreement did not contain a stipulation of offense conduct. A107-A108. And, in the final plea agreement, the government agreed at sentencing to dismiss the remaining 26 counts against the defendant. A106.

Two other co-defendants, Angel Urena and David Kinney, also attended the final October 18 pre-trial conference and ultimately pleaded guilty. Urena decided to plead guilty on October

20, 2011, and the change of plea proceeding occurred on October 24, 2011 (the same day as the defendant), and Kinney pleaded guilty on November 9, 2011. GA30, GA32. As with the defendant, Urena's plea agreement did not contemplate a third-level reduction for acceptance of responsibility, and the government did not make such a motion at his sentencing. GA133, GA147. Kinney was the last indicted defendant to plead guilty. GA32. He has not yet been sentenced, but his plea agreement does not contemplate that he will receive the third-level reduction for acceptance under § 3E1.1(b). GA120; *see also* GA94 (government explaining, at the defendant's sentencing, that "with respect to the third point, as with Mr. Urena, and as would be the case for Mr. Kinney, we are not moving for the third point under Section 3[E]1.1").

### **C. The sentencing**

The Pre-Sentence Report ("PSR") determined that the defendant's base offense level was 7 under U.S.S.G. § 2B1.1(a)(1). PSR ¶ 27. It then added 14 levels under § 2B1.1(b)(1)(H) because the loss from the defendant's crime exceeded \$400,000. PSR ¶ 28. Two levels were subtracted for minor role, and two levels were subtracted for acceptance of responsibility. PSR ¶¶ 29, 33. With a resulting total offense level of 17 and no criminal history, the defendant's Guideline range was 24 to 30 months in prison. PSR ¶¶ 34, 36, 75. Although the defendant filed objections to

the PSR, her only quarrel with the Guideline calculation was the failure to give her a third point for acceptance. PSR, Addendum.

In the defendant's sentencing memo, she argued that she was entitled to an additional third-level reduction for acceptance of responsibility because her plea was timely and not meaningfully later than the pleas of some of her co-defendants who received a three-level reduction. CA3, CA6-CA11. She also advocated for a departure under U.S.S.G. § 5K2.0 based on three separate grounds: (1) she was the primary caregiver of her two young children; (2) she and her husband have provided foster care for eight children; and (3) the loss in this case overstated the seriousness of the offense because it did not account for her minor role in the conspiracy, and it grossly exceeded the amount of money she received from her crimes. CA3, CA11-CA29. After discussing the factors under 18 U.S.C. § 3553(a), she urged the district court to impose a sentence of probation. CA29-CA35.

The government's sentencing memorandum summarized the offense conduct, which involved the defendant's role as a straw borrower on five properties over a fifteen-month period, as well as her refinancing her personal residence through fraudulent means. CA62. The government emphasized the undisputed fact that the defendant signed loan documents in which she lied about her job, her income, her assets and liabilities,

and her intention to live at the property. CA62. She lent her name and identity to help perpetuate a long-running fraud on multiple victim lenders in exchange for \$27,000. CA62.

Turning to the defendant's arguments, the government set out its reasons for not seeking a third-level reduction for acceptance of responsibility. In particular, the government detailed the incremental trial preparation efforts it undertook in the time between when co-defendants Lancia and Petro indicated their willingness to plead guilty and when, at least ten days later, the defendant indicated her willingness to plead guilty. CA67-CA68.

The government also opposed the defendant's departure arguments. *First*, the government explained that the defendant's family circumstances were not so extraordinary as to warrant a departure. CA69-CA72. Here, there was no dispute that the defendant's husband was a devoted husband and father, financially supported the family and served as the clearest alternative to care for the couple's young children. CA71. The government also argued that the defendant failed to make a sufficient showing that her other family members could not help care for her children. CA71.

*Second*, in addressing the defendant's foster parenting as a basis for departure, the government explained that departures for civic or charitable works under U.S.S.G. § 5H1.11 are, like

family circumstances departures, are generally disfavored. CA72. The government also noted that the defendant received approximately \$1,500 a month from the state for her foster parenting, which she appeared to use to supplement her family's income. CA72.

*Third*, the government objected to a departure based on the defendant's argument that the agreed-upon loss of \$400,000 to \$1,000,000 overstated the seriousness of her criminal conduct. CA72-CA73. The loss stipulation, as well as the corresponding Guideline range, reflected only the losses resulting from the five properties that the defendant fraudulently purchased, not the \$9 million in losses from the entire conspiracy. CA72-CA73. In addition, the fact that she played a minor role in the conspiracy was already factored into the Guideline range through the two-level minor role reduction she received. CA72-CA73; A103.

Ultimately, the government recommended a sentence of 24 to 27 months in prison, which was at the low end of the Guideline range agreed to by the parties. A75-A76.

The defendant filed a reply brief which, *inter alia*, continued to argue that she should receive an additional one-level reduction for acceptance. In support of her argument, she did not focus at all on the government's trial preparation, but instead on the fact that, unlike many of her co-defendants, she had made statements to the FBI

acknowledging her guilt and thereby accepted responsibility. A111-A112. She also took issue with the suggestion that she had “stipulated” to the Guideline range of 24 to 30 months in the plea agreement, pointing out that she had merely agreed to the Guideline calculation and otherwise reserved her right to seek a sentence below the range. A110.

At sentencing on April 10, 2012, the defendant reiterated many of the points articulated in her sentencing memoranda, including her request for a departure under the Guidelines for family circumstances and charitable works, her argument for a third-level adjustment for acceptance of responsibility, and her claim that the loss amount overstated the seriousness of her crimes. GA78-GA92. On the acceptance issue, she argued that the government wrongfully withheld the third point under U.S.S.G. § 3E1.1(b). CA6-CA11; GA85. After hearing defense counsel’s remarks, the district court thanked him for “a very thoughtful presentation.” GA92.

In its sentencing remarks, the government discussed the defendant’s role in the conspiracy. GA92-GA93. It stated, “She was a straw buyer, meaning that she played a role of someone who was going to buy houses, to live in them, and to pay mortgage payments, and she was none of those. She bought . . . five properties within six months in 2006.” GA92. The government ex-

plained that “[h]er involvement spanned 15 months. She obtained \$1.5 million worth of mortgages, and for her participation she received over \$20,000 . . . .” GA93.

As to the defendant’s acceptance argument, the government pointed out that it had treated her similarly to two other defendants who had not entered timely guilty pleas and who, therefore, did not receive the third point. GA94. The government also explained that it had “consistently told defense counsel” its position on this issue and had covered it in the plea agreement, “and so it should not come as a surprise to [the defendant] that we’re not” moving for the third point. GA94. In response to the defendant’s reliance on her statements to the FBI, the government argued:

And [defense counsel] makes a lot of . . . how [the defendant] accepted responsibility from the moment that the FBI agents knocked on her door in February 2008. Well, while that may or may not be the case, she was interviewed in February of 2008, the simple fact of the matter, Your Honor, is that she did not plead guilty until October 24, 2011, three and a half years later, and if the standard for acceptance under 3(e) is that someone admits their guilt when agents approach them, and that qualifies them for a third point, I think that’s a stark revision of

the rules. And we wish that she could have come in and pled guilty. She could have pled guilty before indictment . . . . She could have pled in time in the 16 months after she was indicted to plead guilty. And so the standard is when she actually did plead guilty, not when she admitted her guilt, not when she was given a draft plea agreement, not when she had discussions with the government, it's when she actually pled guilty, and she did not actually indicate she was going to come before the Court and plead guilty until October 24th, 2011, the day of her plea. So I don't think there's any unfairness to [the defendant]. The government's decision was thoughtful and not arbitrary.

GA94-GA95.

It also addressed and rebutted the defendant's family circumstances argument, pointing out that her husband "is here, he's supportive, he supports the family, and he has, difficult as it may be, has to care for their children, as I understand that he will do." GA95. And "because agents came and talked to her, now over four years ago, she's had a lot of time to prepare and think about this day, and the possibility of this day." GA95.

Finally, as to her claim that the agreed-upon loss overstated the seriousness of her conduct,

the government pointed out the stipulation in the plea agreement was fair and that “[t]he government did not try to tag her with all the losses from the conspiracy, which have been over \$9 million . . . . Her losses stem from only the five mortgages that she did. And so I think the guidelines already reflect that . . . .” GA96.

After determining that the Guideline range was as the parties had agreed in the plea agreement, GA102, the court specifically addressed the acceptance-of-responsibility argument and held as follows:

With respect to the government’s withholding of the remaining one point for acceptance of responsibility, the Court concludes that is at their discretion, and it does not constitute an abuse of that discretion by the government, and the thoughtful reference to which [defense counsel] referred the Court [*United States v. Lee*, 653 F.3d 170 (2d Cir. 2011)], the Court concludes is simply not applicable to these circumstances because the matter there involved a hearing and not a preparation for trial.

GA102-GA103.

The court then turned to the imposition of sentence and explained:

The record may reflect that the Court has considered the presentence report, the

attachments thereto, the respective submissions of the parties, everything that's been said here today, including the arguments of counsel and statements made by the defendant, as well as those who have appeared in her behalf today, together with the factors set forth in Title 18 of the United States Code Section 3553.

GA103. “[I]n light of all of those considerations,” the court concluded that it was “fair, just and reasonable” to sentence the defendant to 24 months in prison, two years of supervised release, restitution of \$764,527.44, forfeiture of \$27,000, and a \$100 special assessment. GA103-GA104; A123. The court allowed the defendant to self-surrender to the Bureau of Prisons. GA104; A121.

The defendant never asked for a clarification of the court's sentence or for a more detailed explanation of its reasons for refusing to depart downward or vary from the Guideline range and instead imposing a sentence at the bottom of the Guideline range.

#### **D. The post-sentencing motions for bail pending appeal**

On May 16, 2012, the defendant moved for bail pending appeal, which the government opposed. GA44. On September 10, 2012, the district court denied the defendant's motion in a written decision. GA107-GA115. In rejecting the

defendant’s argument that the government wrongfully withheld the third point for acceptance, the court distinguished this case from the Court’s decision in *Lee*. The court concluded that the key rationale in *Lee*—that the government impermissibly withheld the third acceptance point because it had to prepare for a *Fatico* hearing—was “entirely absent in this case.” GA112. The court noted that “it is uncontested that the basis the government consistently offered in declining to extend the third point under [U.S.S.G. § 3E1.1 was the timeliness of the defendant’s plea and its relation to the government’s ability to avoid the costs of preparing for trial.” GA111. Accordingly, the court concluded that *Lee* was “significantly distinguishable” and did not demonstrate a substantial issue for appeal. GA112.

In addressing the defendant’s procedural reasonableness challenge to her sentence, the district court stated that the factors under 18 U.S.C. § 3553(a), as well as the defendant’s arguments and submissions “played significant roles in the court’s deliberations.” GA114. Here, too, the court concluded that this claim presented no substantial issue of law or fact to merit release pending appeal. GA114-GA115.

On September 17, 2012, the defendant filed a motion for bail pending appeal in this Court, which the government also opposed. GA55. After hearing oral argument from the parties on Octo-

ber 9, 2012, this Court denied the motion on October 11, 2012. GA55, GA116. In so doing, this Court concluded that the defendant “fail[ed] to raise a substantial question of law or fact likely to result in a reduced sentence or a sentence that does not include a term of imprisonment.” GA116. The Court also severed the defendant’s appeal from those of her co-defendants and ordered expedited briefing. GA116.

### **Summary of Argument**

The district court’s sentence should be affirmed.

1. The district court’s conclusion that the government did not abuse its discretion by withholding a third point for acceptance of responsibility because of its extensive trial preparation was amply supported by the record. Indeed, the defendant does not challenge the court’s factual finding that the government had engaged in extensive trial preparation, but instead argues that her plea was timely because it was not materially later than those of her co-defendants who did receive a third acceptance point and because the defendant acknowledged her guilt almost immediately when the FBI first came to talk to her. But the defendant did plead guilty later than those co-defendants who received the third point, and every defendant who pleaded guilty after the final pre-trial conference did not receive the third point. Moreover, although the

defendant did talk to the FBI agents when they first came to meet with her, she did not actually plead guilty and accept responsibility as contemplated by § 3E1.1 until three and a half years after this meeting. The district court's decision here was not based on any clearly erroneous findings of fact and was consistent with this Court's decision in *Lee*, 653 F.3d 170, which held that the government arbitrarily refused to file an acceptance motion based on its preparation for a *Fatico* hearing prior to sentencing.

2. The defendant's 24-month sentence was procedurally reasonable. Her arguments that the district court did not consider all of the § 3553(a) factors, adequately explain the rationale for the sentence, or acknowledge its authority to downwardly depart were not raised below and are, therefore, subject to plain error review. The defendant does not point to anything in the record to suggest that the district court failed to consider all the sentencing factors under 18 U.S.C. § 3553(a). The district court stated that it had considered all of the statutory factors and all of the sentencing arguments she presented. In the absence of any evidence—much less clear evidence—that the sentencing judge misapprehended his sentencing options or authority, this Court has not required the district court to address and reject each and every sentencing argument.

Nor did the district court commit procedural error by denying the defendant's various departure grounds, including her family circumstances and charitable works arguments. The denial of a request for a downward departure is not appealable and, even if it were, the district court did not abuse its discretion. The defendant's departure arguments were neither novel, nor compelling. The parties fully briefed the departure arguments and discussed them at the sentencing hearing, and, with the benefit of this advocacy, the district court properly exercised its discretion in refusing to depart. The family circumstances and charitable works departures are already considered disfavored grounds for a sentence reduction, and here, the defendant failed to show how her circumstances qualified her for different treatment than other similarly situated defendants. The claim that the loss amount overstated the seriousness of the offense likewise fails because the defendant was only held responsible for her own fraudulent transactions, not the fraudulent transactions of her co-conspirators.

3. The defendant's 24-month sentence—at the bottom of the agreed-upon Guideline range—was not so shockingly high that it rises to the level of being substantively unreasonable. The defendant participated in an extensive mortgage fraud conspiracy in which she purchased multiple properties, obtained nearly \$1.5 million in

fraudulent mortgages, and received \$27,000. Moreover, other straw borrowers in this case received similar sentences for substantially similar conduct.

## **Argument**

### **I. The district court did not commit procedural error when it did not grant the defendant a third-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(b).**

#### **A. Relevant facts**

The facts pertinent to consideration of this issue are set forth above in the Statement of Facts and Proceedings Relevant to this Appeal.

#### **B. Governing law and standard of review**

Under Section 3E1.1 of the Sentencing Guidelines, a defendant who “clearly demonstrates acceptance of responsibility for [her] offense” receives a two-level decrease in her offense level. U.S.S.G. § 3E1.1(a). Under § 3E1.1(b), a defendant may qualify for an additional one-level reduction if (1) her offense level before the two-level reduction under § 3E1.1(a) is 16 or greater; and (b) “upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of [her] own

misconduct by timely notifying authorities of [her] intention to enter a plea of guilty, *thereby permitting the government to avoid preparing for trial* and permitting the government and the court to allocate their resources efficiently” (emphasis added). Moreover, application note 6 to U.S.S.G. § 3E1.1(b) provides, in relevant part:

[T]o qualify under subsection (b), the defendant must have notified authorities of [her] intention to enter a plea of guilty at a sufficiently early point in the process so that the government may avoid preparing for trial and the Court may schedule its calendar efficiently. Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) *may only be granted* upon a formal motion by the Government.

U.S.S.G. § 3E1.1(b), comment. (n.6) (emphasis added). *See also United States v. Hargrett*, 156 F.3d 447, 452 (2d Cir. 1998) (explaining that § 3E1.1(b) “does not mandate an automatic reduction in the offense level for those who plead guilty; instead, it allows a reduction for those who actually conserve prosecutorial resources”). Accordingly, as this Court has recognized, “a government motion is a necessary prerequisite to the additional one-level decrease under Guide-

lines § 3E1.1(b)” subject only to “narrow limitations.” *United States v. Sloley*, 464 F.3d 355, 359 (2d Cir. 2006); *Lee*, 653 F.3d at 173.

This Court has recognized only narrow exceptions § 3E1.1(b)’s requirement of a government motion: (1) the government’s refusal to move for the third point based on “an unconstitutional motive, such as a defendant’s race or religion,” or (2) where the plea agreement gives the government sole discretion to file the motion, a decision not to file the motion based on bad faith. *Sloley*, 464 F.3d at 360-61.

The government’s withholding of a § 3E1.1(b) motion may also constitute procedural error if “based on an unlawful reason.” *Lee*, 653 F.3d at 173. For example, a withholding of the motion is error if it was based on the government’s preparation for a *Fatico* hearing. *See id.* at 173-74. The Court explained, “[T]he plain language of § 3E1.1(b) refers only to the prosecution resources saved when the defendant’s timely guilty plea permits the government to avoid preparing *for trial*.” *Id.* at 174 (quotation marks, alteration, and reference omitted). Because “[a] *Fatico* hearing is not a trial,” the government’s decision in *Lee* was “not justified.” *Id.*

This Court reviews a district court’s interpretation of the Sentencing Guidelines *de novo*, and reviews the district court’s findings of fact for clear error. *See United States v. Rubenstein*, 403 F.3d 93, 99 (2d Cir. 2005); *United States v. Fiore*,

381 F.3d 89, 92 (2d Cir. 2004). When a district court's application of the Guidelines to the facts is reviewed, this Court takes an "either/or approach," under which the Court reviews "determinations that primarily involve issues of law" *de novo* and reviews "determinations that primarily involve issues of fact" for clear error. *United States v. Vasquez*, 389 F.3d 65, 74 (2d Cir. 2004); *see also United States v. Selioutsky*, 409 F.3d 114, 119 (2d Cir. 2005) (court "review[s] issues of law *de novo*, issues of fact under the clearly erroneous standard, [and] mixed questions of law and fact either *de novo* or under the clearly erroneous standard depending on whether the question is predominantly legal or factual") (citations omitted).

### C. Discussion

Here, the district court properly concluded that the government did not abuse its discretion in refusing to file the § 3E1.1(b) motion and, in any case, the defendant's reliance on *Lee* was distinguishable. Whatever the defendant's disagreements with the district court's findings, the record amply supports the procedural reasonableness of district court's sentence.

The defendant notified the government of her intention to plea very late in the trial preparation process. In fact, she pleaded guilty on October 24, 2011, the original date of jury selection in this case. *Compare* GA30 (Docket no. 376) *with*

GA24 (Docket no. 272). Of the sixteen total defendants charged in this case or related cases—all of whom pleaded guilty—the defendant was the 14th defendant to plead guilty. CA63. And of the ten defendants indicted in June 2010, the defendant was the ninth to plead guilty. CA67. And the other two indicted co-defendants who pleaded guilty at the same time or later than the defendant likewise did not receive a third point reduction for acceptance.

The defendant first signaled her willingness to plead guilty *to any charge* on October 21, 2011—sixteen months after her indictment and three days after participating in the final pre-trial conference. Even at that point, her only effort to plead guilty was to try to accept a draft plea offer that the government had made in May 2011 and had subsequently withdrawn. CA118, CA120-CA121. Thereafter, the defendant had extensive discussions with the government about various aspects of the terms of a plea resolution, and there were no assurances that a plea agreement would, in fact, be reached. CA88-CA134. It was not until October 24, 2011—the very day of her guilty plea before and the original date of jury selection in this case—that the defendant finally indicated her acceptance of a valid plea offer.

More importantly, by the time of her plea, the government had undertaken and completed the vast majority of its trial preparation. The district

court's conclusion that the government did not abuse its discretion in withholding the third point is not based on any clearly erroneous findings of fact, nor does the defendant claim otherwise.<sup>2</sup> Indeed, the record amply supports this conclusion. CA67-CA68 (outlining government trial preparation efforts immediately before the defendant's plea); *see also* CA119 (government letter to defense counsel, before the defendant's plea, indicating that the government would not make a motion under § 3E1.1(b) because, in preparing for trial, the government had "add[ed] a second Assistant United States Attorney to the trial team, add[ed] a second financial analyst, prepar[ed] witnesses, [and undertook] literally thousands of hours of work by the trial team resulting our providing an exhibit list and a witness[] list"). The defendant has never challenged the validity of the government's extensive trial preparation. *See* Def.'s Br. at 33 ("The underlying factual record is largely undisputed."). In short, the timing of the defendant's decision to plead guilty did not allow the government to

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<sup>2</sup> In its order denying the motion for bail, the district court explained: "In the instant case, it is uncontested that the basis the government consistently offered in declining to extend the third point under []U.S.S.G. § 3E1.1 was the timeliness of the defendant's plea and its relation to the government's ability to avoid the costs of preparing for trial." GA111.

“avoid preparing for trial” or “allocate [its] resources efficiently.” U.S.S.G. § 3E1.1(b).

The defendant argues that the government’s decision not to file the acceptance motion for her was “arbitrary and irrational.” Def.’s Br. at 32-33. She claims that her October 24 plea was timely because it occurred “more than five weeks before trial.” Def.’s Br. at 33. This argument contravenes both the letter and the spirit of § 3E1.1(b) because the defendant herself moved to continue jury selection just six days before her plea. In fact, the court had originally set October 24, 2011, as the date of jury selection. GA24. Moreover, the argument does not address in any way the extensive trial preparation the government had indisputably completed by that date. Merely because the government had some additional trial preparation to complete does not mean that the timing of the plea allowed the government “to avoid preparing for trial.” In effect, the defendant seeks to get the same three-level reduction as the five co-defendants who pleaded guilty to informations before the June 2010 indictment, as well as the seven co-defendants who pleaded guilty in the sixteen months after indictment and prior to the final pre-trial conference.

Nor is this a case where the defendant can claim unfair surprise as to the government’s decision not to move for the third-level reduction at sentencing. The defendant entered into her plea

knowing full well that the government would not make a motion for a third point for acceptance of responsibility under U.S.S.G. § 3E1.1(b). The parties discussed this specific issue extensively leading up to the plea. CA118-CA119, CA120-CA121. The final plea agreement did not contemplate the filing of a § 3E1.1(b) motion. A102. The parties also discussed the issue before sentencing and with the United States Probation Office. CA136; PSR, Addendum. Finally, the issue was fully briefed in the parties' sentencing memoranda and discussed at sentencing. CA6-CA11, CA66-CA69, GA85-GA87, GA94-GA95, GA102-GA103; CA67 (noting that, even though the defendant knew "that the government would not move for the third point, she nevertheless chose to accept the plea agreement and proceed with the plea"). Indeed, the government unequivocally stated at sentencing that it was not moving for the third point, "as we've consistently told defense counsel, it's in the plea that we're not, and so it should not come as a surprise to [the defendant] that we're not." GA94.

At base, the defendant is claiming that the district court erred by not giving her a reduction that she had failed to negotiate in her plea agreement. Her plea agreement did not contain a provision for a § 3E1.1(b) motion. She accepted this agreement and received the benefits of it at sentencing. Of course, the defendant did not have to accept the agreement and, in fact, could

have chosen to plead guilty with no agreement. Or she could have negotiated language in the plea agreement in which she reserved her right to argue for a third-level reduction under § 3E1.1(b). The final plea agreement does not contain such a provision. Instead, she chose to accept the plea agreement as it was, presumably because there were elements of the agreement that benefited her, including the stipulation on loss (which capped the loss at \$1 million in a \$9 million fraud), a two-level reduction for her minor role, and the government's agreement to dismiss the remaining 26 counts against her. Having successfully negotiated the plea that she received, the defendant should not fault the district court for failing to give her a potential benefit that she knowingly and willingly gave up before pleading guilty.

The defendant also argues that the timing of her plea was not materially different than the timing of the pleas of co-defendants Maurizio Lancia and Stacey Petro, both of which occurred on October 18 immediately before the final pre-trial conference. *See* Def.'s Br. at 33-36. It is true that the defendant's plea came six days after their pleas, but Lancia and Petro had indicated their willingness to plead well before then. The district court calendared Petro's change of plea hearing on October 12, 2011 and Lancia's change of plea hearing on October 14, 2011. GA28 (Docket nos. 336, 342). In the ten days between

when Petro indicated her willingness to plead and when the defendant ultimately did, the government continued to (i) subpoena, review, process, and disclose additional discovery, (ii) finalize and disclose the government's exhibit list; (iii) interview witnesses, write interview reports, and prepare multiple witnesses for trial (including on the morning of the pretrial conference on October 18, 2011), (iv) draft a superseding indictment against the defendant and the remaining defendants (which the defendant was aware would occur); (v) review and discuss responses to the remaining defendant's pretrial motions, including this defendant's, *see, e.g.*, GA28; and (vi) finalize and file the government's pretrial submissions, including proposed jury instructions and *voir dire* questions. GA28; CA67-CA68. The defendant did not challenge these facts below, and that concession only underscores the reasonableness of the district court's decision to reject her argument.

Instead, she argues only that she did not minimize her offense conduct at her plea or sentencing, like co-defendant Lancia supposedly did. *See* Def.'s Br. at 35. As discussed above, however, § 3E1.1(b) focuses on the timeliness of acceptance of responsibility, not the quality or fulsome-ness of it. The defendant also points out that she had discussed with the government "the possibility of resolving the case with a plea" as "far back as December 2010." Def.'s Br. at 34.

Plea discussions, however, certainly do not relieve the government from preparing for trial, which is proper focus of § 3E1.1(b).

The defendant's final argument concerning acceptance is that the district court's interpretation of *Lee* was "narrow" and "misplaced." Def.'s Br. at 36. Given that the undisputed reason for the government's refusal to move for the third-level reduction was because of its *trial preparation*, this case is fully consistent with the reasoning of *Lee*. Furthermore, the district court here properly concluded that the government's basis for withholding acceptance in *Lee*—preparing for a *Fatico* hearing—was "simply not applicable" in this case. GA102-GA103. In short, there was no reason under the Guidelines for the district court to "grant the third point *sua sponte*." Def.'s Br. at 36.

**II. The district court did not commit plain error by failing to consider the defendant's downward departure arguments and the relevant sentencing factors under 18 U.S.C. § 3553(a), and its decision not to depart, to the extent it is even appealable, represented a proper exercise of discretion.**

**A. Relevant facts**

The facts pertinent to consideration of this issue are set forth above in the Statement of Facts and Proceedings Relevant to this Appeal.

### **B. Governing law and standard of review**

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court declared the United States Sentencing Guidelines “effectively advisory.” *Id.* at 245. After *Booker*, a sentencing judge is required to “(1) calculate[] the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) consider[] the calculated Guidelines range, along with the other § 3553(a) factors; and (3) impose[] a reasonable sentence.” *United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006); *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005).

On appeal, a district court’s sentencing decision is reviewed for reasonableness. *See Booker*, 543 U.S. at 260-62. The Supreme Court has explained that the reasonableness standard requires review of sentencing challenges under an abuse of discretion standard. *See Gall v. United States*, 552 U.S. 38, 46 (2007); *see also United States v. Watkins*, 667 F.3d 254, 260 (2d Cir. 2012) (“We are constrained to review sentences for reasonableness, and we do so under a deferential abuse-of-discretion standard.”) (quotation marks and citation omitted). “It is by now familiar doctrine that this form of appellate scrutiny

encompasses two components: procedural review and substantive review.” *Watkins*, 667 F.3d at 260 (quotation marks and citation omitted).

“A district court commits procedural error where it fails to calculate the Guidelines range (unless omission of the calculation is justified), makes a mistake in its Guidelines calculation, or treats the Guidelines as mandatory.” *United States v. Cavera*, 550 F.3d 180, 190 (2d Cir. 2008) (en banc) (citations omitted). A district court also commits procedural error “if it does not consider the § 3553(a) factors, or rests its sentence on a clearly erroneous finding of fact.” *Id.* Finally, a district court “errs if it fails adequately to explain its chosen sentence, and must include ‘an explanation for any deviation from the Guidelines range.”” *Id.* (quoting *Gall*, 552 U.S. at 51).

More specifically, with respect to the consideration of departure grounds as a basis for procedural error, this Court has explained that “a refusal to downwardly depart is generally not appealable.” *United States v. Stinson*, 465 F.3d 113, 114 (2d Cir. 2006) (per curiam) (quotation marks and citation omitted); see also *United States v. Valdez*, 426 F.3d 178, 184 (2d Cir. 2005); *United States v. Ekhtator*, 17 F.3d 53, 55 (2d Cir. 1994) (“When a district has discretion to depart from the sentencing range prescribed by the Guidelines and has declined to exercise that discretion in favor of a departure, its decision is

normally not appealable.”); *United States v. Desena*, 260 F.3d 150, 159 (2d Cir. 2001).

A narrow exception to this general rule exists “when a sentencing court misapprehended the scope of its authority to depart or the sentence was otherwise illegal.” *Stinson*, 465 F.3d at 114 (quotation marks and citation omitted). Absent “clear evidence of a substantial risk that the judge misapprehended the scope of his departure authority,” however, this Court presumes that the judge understood the scope of his authority. *Id.*; see also *United States v. Sero*, 520 F.3d 187, 193 (2d Cir. 2008) (per curiam) (noting that the “presumption that a district court understands its authority to depart may be overcome only” in a “rare situation”) (quotation marks and citation omitted). Such a substantial risk may arise “where the available ground for departure was not obvious and the sentencing judge’s remarks made it unclear whether he was aware of his options.” *United States v. Silleg*, 311 F.3d 557, 561 (2d Cir. 2002) (quotation marks and citation omitted).

In addressing motions for downward departures, this Court “does not require that district judges by robotic incantations state ‘for the record’ or otherwise that they are aware of this or that arguable authority to depart but that they have consciously elected not to exercise it.” *United States v. Diaz*, 176 F.3d 52, 122 (2d Cir. 1999) (quotation marks and citation omitted); see also

*United States v. Margiotti*, 85 F.3d 100, 103 (2d Cir. 1996) (per curiam) (“Sentencing is rigid and mechanistic enough as it is without the creation of rules that treat judges as automatons.”).

In addition, to the extent that the defendant did not raise a perceived sentencing error below, this Court applies a plain error standard of review. *United States v. Villafuerte*, 502 F.3d 204, 207 (2d Cir. 2007). This Court has applied the plain error standard of review to unpreserved claims that the district court failed to adequately consider the § 3553(a) factors or explain its reasoning for imposing a particular sentence. *Id.* at 207-212. Requiring that such claims be raised before the sentencing judge “alerts the district court to a potential problem at the trial level and facilitates its remediation at little cost to the parties, avoiding the unnecessary expenditure of judicial time and energy in appeal and remand.” *Id.* at 208. Moreover, “[r]equiring the [sentencing] error to be preserved by an objection creates incentives for the parties to help the district court meet its obligations to the public and the parties.” *Id.* at 211.

Pursuant to Fed. R. Crim. P. 52(b), plain error review permits this Court to grant relief only where (1) there is error, (2) the error is plain, (3) the error affects substantial rights, and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. See *United States v. Williams*, 399 F.3d 450, 454 (2d

Cir. 2005) (citing *United States v. Cotton*, 535 U.S. 625, 631-32 (2002), and *United States v. Olano*, 507 U.S. 725, 731-32 (1993)).

To “affect substantial rights,” an error must have been prejudicial and affected the outcome of the district court proceedings. *Olano*, 507 U.S. at 734. This language used in plain error review is the same as that used for harmless error review of preserved claims, with one important distinction: In plain error review, it is the defendant rather than the government who bears the burden of persuasion with respect to prejudice. *Id.*

This Court has cautioned that reversal under the plain error standard of review should “be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.” *Villafuerte*, 502 F.3d at 209 (internal quotation marks omitted).

### C. Discussion

- 1. The district court did not commit plain error when it stated it had considered the § 3553(a) factors and the parties’ sentencing presentations and there was no clear evidence it misapprehended its authority to depart.**

The defendant first argues that the district court failed to consider all the § 3553(a) factors,

explain its sentence, or recognize its authority to downwardly depart. *See* Def.'s Br. at 38-49. She did not make these claims below and thus, they are subject to plain error review. *Villafuerte*, 502 F.3d at 207. Under this stringent standard of review, her claim fails.

The district court did not err, much less plainly err. As the defendant acknowledges, the district court stated at sentencing that it had reviewed the PSR, the parties' sentencing memoranda and other submission, the parties' sentencing presentations, the defendant's own statement at sentencing, and those who appeared on her behalf. GA103. The court expressly stated that it had considered the § 3553(a) factors as well in fashioning an appropriate sentence. GA103.

In this context, the defendant's argument is essentially that the district court could have and should have said more at sentencing to explain or justify its sentence. This Court, however, has consistently held that, in the absence of clear record evidence of a substantial risk that the sentencing judge misapprehended his authority to depart or impose a non-Guidelines sentence, *Stinson*, 465 F.3d at 114, a sentence is presumed to be procedurally reasonable. *Fernandez*, 443 F.3d at 30.<sup>3</sup>

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<sup>3</sup> As discussed above, there is no requirement that a sentencing court explicitly recognize its power to de-

Here, the record reveals no reason to disturb this presumption. Before imposing sentence, the district court stated that it had reviewed and considered, among other things, the PSR, the parties' sentencing memoranda, counsels' remarks, the defendant's remarks, and the 3553(a) factors. GA103. The issues that the defendant raises now were thoroughly briefed, discussed at sentencing by both parties, and considered by the court. The court remarked on defense counsel's "thoughtful" sentencing presentation and imposed its sentence "in light of all of those considerations." GA103. The defendant cites to no evidence—much less "clear evidence"—that the district court misapprehended the scope of its sentencing authority or its power to depart. Moreover, the defendant's argued-for bases for departure were not novel or otherwise unusual, thereby further supporting the presumption that the experienced district court judge understood his departure authority. *Silleg*, 311 F.3d at 561. At bottom, there is "no basis in the record to conclude that the district court was not fully aware of the extent of its discretion to depart down-

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part, or to address and reject every departure or non-Guidelines argument. Indeed, this Court "does not require that district judges by robotic incantations state 'for the record' or otherwise that they are aware of this or that arguable authority to depart but that they have consciously elected not to exercise it." *Diaz*, 176 F.3d at 122.

ward from the Sentencing Guidelines.” *United States v. Bonner*, 313 F.3d 110, 112 (2d Cir. 2002) (per curiam); *see also United States v. Brown*, 98 F.3d 690, 694 (2d Cir. 1996) (noting “strong presumption that a district judge is aware of the assertedly relevant grounds for departure”) (emphasis added).

The defendant’s reliance on *United States v. Hernandez*, 604 F.3d 48 (2d Cir. 2010), misses the mark. In *Hernandez*, this Court concluded that the district court had committed procedural error by failing to properly consider evidence of the defendant’s rehabilitation in the 15-year lapse between the original sentencing and the re-sentencing. *Id.* at 53. Notably, this Court pointed to record evidence that the district court misapprehended the scope of re-sentencing. *Id.* at 54. Here, unlike in *Hernandez*, there is no “record evidence” to suggest that the district court did not “faithfully discharge[] [its] duty to consider the statutory factors.” *Fernandez*, 443 F.3d at 30. Rather, the defendant merely reiterates her belief that the district court should have seen things her way. But such garden-variety dissatisfaction with a sentence does not, without more, constitute a procedural error. And here, even if there were an error, it was not “so plain [such] that the trial judge and prosecutor were derelict in countenancing it, even absent the defendant’s timely assistance in detecting it.” *Villafuerte*, 502 F.3d at 209 (quotation marks and

citation omitted). The district court imposed a sentence that it considered, in its own words, was “fair, just and reasonable.” GA103. There is no reason to believe to the contrary.

**2. The district court’s decision not to depart downward is not appealable and, in any case, constituted a proper exercise of its sentencing discretion.**

The defendant next argues that the district court committed procedural error by failing to grant her a departure under U.S.S.G. § 5K2.0 based on her family circumstances, her charitable works, and her assertion that the loss amount overstated the seriousness of her offense. *See* Def.’s Br. at 50-58. The district court’s rejection of these arguments, however, is not reviewable. *Stinson*, 465 F.3d at 114. “When a district has discretion to depart from the sentencing range prescribed by the Guidelines and has declined to exercise that discretion in favor of a departure, its decision is normally not appealable.” *Ekhtator*, 17 F.3d at 55.

Here, the district court explicitly stated that it had considered the defendant’s departure arguments and even complimented defense counsel for his “very thoughtful” presentation. GA92. In light of this consideration, the experienced district court judge properly exercised his considerable discretion in refusing to depart. As the gov-

ernment pointed out in its sentencing memo, the defendant's departure arguments, either alone or together, did not present the extraordinary or exceptional circumstances that would warrant the drastic, 9-level departure that she sought. CA69-CA73. In the absence of clear evidence that the district court misapprehended its power to depart, there is no basis to review the court's refusal to depart. And on the record in this case, there is no doubt that the district court understood its discretion to depart downward.

Even if it the departure denial were appealable, the district court did not abuse its discretion in giving little or no weight to these arguments. The parties briefed and discussed these issues extensively in their sentencing memoranda and at sentencing. CA11-CA29, CA69-CA73; GA78-GA85, GA87-GA89, GA91-GA92, GA95-GA96. It was within the district court's prerogative, however, to discount the departure arguments and instead to focus on the serious nature of the offense conduct in fashioning an appropriate sentence under § 3553(a). And such a decision was well-supported by the largely undisputed factual record. There was no procedural error.

### **III. The sentence was substantively reasonable.**

#### **A. Relevant facts**

The facts pertinent to consideration of this issue are set forth in the Statement of Facts and Proceedings Relevant to this Appeal above.

#### **B. Governing law and standard of review**

With respect to appellate review of a sentence for substantive reasonableness, this Court has recognized that “[r]easonableness review does not entail the substitution of our judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of discretion. Thus, when we determine whether a sentence is reasonable, we ought to consider whether the sentencing judge ‘exceeded the bounds of allowable discretion[,] . . . committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact.’” *Fernandez*, 443 F.3d at 27 (citations omitted). A sentence is substantively unreasonable only in the “rare case” where the sentence would “damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law.” *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009). This Court recently likened its substantive review to “the consideration of a mo-

tion for a new criminal jury trial, which should be granted only when the jury's verdict was 'manifestly unjust,' and to the determination of intentional torts by state actors, which should be found only if the alleged tort 'shocks the conscience.'" *United States v. Dorvee*, 616 F.3d 174, 183 (2d Cir. 2010) (quoting *Rigas*, 583 F.3d at 122-23).

Although this Court has declined to adopt a formal presumption that a within-Guideline sentence is reasonable, it has "recognize[d] that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *Fernandez*, 443 F.3d at 27; *see also Rita v. United States*, 551 U.S. 338, 347-51 (2007) (holding that courts of appeals may apply presumption of reasonableness to a sentence within the applicable Sentencing Guidelines range); *United States v. Rattoballi*, 452 F.3d 127, 133 (2d Cir. 2006) ("In calibrating our review for reasonableness, we will continue to seek guidance from the considered judgment of the Sentencing Commission as expressed in the Sentencing Guidelines and authorized by Congress."), *abrogated in part on other grounds by Kimbrough v. United States*, 552 U.S. 85, 108 (2007). This Court will set aside only those "outlier sentences that reflect actual abuse of a district court's considerable sentenc-

ing discretion.” *United States v. Jones*, 531 F.3d 163, 174 (2d Cir. 2008).

### **C. Discussion**

The defendant argues that her sentence was substantively unreasonable because it contravened the parsimony clause of § 3553(a). *See* Def.’s Br. at 58-60. Though she may disagree with the district court’s weighing of the § 3553(a) factors or consideration of mitigating evidence she presented, her 24-month sentence is simply not one of the rare sentences that is so “shockingly high . . . or otherwise unsupportable as a matter of law” that would require this Court to vacate the district court’s sentence. *Rigas*, 583 F.3d at 123 (2d Cir. 2009). The defendant participated in a \$9 million mortgage fraud conspiracy for 15 months by purchasing five properties as a straw buyer, obtaining nearly \$1.5 million in fraudulent mortgages, and pocketing \$27,000. She fraudulently refinanced the mortgage on her own house and failed to report any of her illicit payments on her federal income taxes. CA63-CA65. Given this conduct, her sentence appropriately reflects the seriousness of her crime, the need for just punishment, and general deterrence, among other § 3553(a) factors. Her sentence was not “manifestly unjust” or one that “shocks the conscience.” *Dorvee*, 616 F.3d at 183 (quotation marks omitted).

Moreover, the defendant's sentence was consistent with those of similarly-situated co-defendants, including those of Angel Urena, a straw buyer who also received a 24-month sentence, and Jane Soulliere, a straw buyer who received a 21-month sentence. GA42. As the government explained to the district court, the defendant actually engaged in more serious offense conduct than Urena because she participated in more fraudulent transactions, received more money, and was involved in the conspiracy for a longer period of time. CA75; GA96. Indeed, Urena acted as the borrower in three transactions over a three-month period and received approximately \$25,000. GA140-GA141, GA182. As with the defendant, the government did not file a § 3E1.1(b) motion for Urena, and the district court sentenced him to 24 months in prison. GA42, GA133, GA147.

The district court's sentencing of Soulliere is also instructive. Similar to this defendant, Soulliere purchased five properties and received approximately \$28,000 for her participation in the conspiracy. GA221-GA222; GA225. Although she recruited another individual to purchase properties as part of the scheme and had a higher stipulated loss amount, GA214, GA221, she provided substantial assistance to the government and received credit for that assistance. GA226. The parties agreed to a 27 to 33 month advisory Guideline range in Soulliere's plea agreement,

and the district court ultimately sentenced her to 21 months in prison. GA214-GA215; GA42.

In light of the prison terms for Urena and Soulliere, both of whom engaged in similar conduct in the same conspiracy, the district court did not exceed its considerable discretion in sentencing the defendant to two years in prison. At bottom, the sentence was not beyond the “broad range of sentences that would be reasonable” for the defendant’s serious crimes. *Fernandez*, 443 F.3d at 27.

**Conclusion**

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: November 15, 2012

Respectfully submitted,

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DISTRICT OF CONNECTICUT

A handwritten signature in black ink, appearing to read "David T. Huang", written in a cursive style.

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**Federal Rule of Appellate Procedure  
32(a)(7)(C) Certification**

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 10,788 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

A handwritten signature in black ink, appearing to read "David T. Huang". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

DAVID T. HUANG  
ASSISTANT U.S. ATTORNEY

## **Addendum**

**U.S.S.G. § 3E1.1. Acceptance of Responsibility**

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.