10-3185-cr

United States Court of Appeals

for the

Second Circuit

UNITED STATES OF AMERICA,

Appellee,

– v. –

AHMED ABDEL SATTAR, AKA Abu Omar, AKA Dr. Ahmed,
YASSIR AL-SIRRI, AKA Abu Ammar, MOHAMMED YOUSRY,

Defendants,

LYNNE STEWART,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR DEFENDANT-APPELLANT

LAW OFFICES OF JILL R. SHELLOW
111 Broadway, Suite 1305
New York, New York 10006
(212) 792-4911

– and –

LAW OFFICE OF ROBERT J. BOYLE
299 Broadway, Suite 806
New York, New York 10007
(212) 431-0229

Attorneys for Defendant-Appellant

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ISSUES PRESENTED

I. Whether it was error for the lower court to utilize Lynne Stewart's First Amendment protected statements to enhance her sentence?

II. Whether the lower court erred when it enhanced Lynne Stewart's offense level under the advisory Sentencing Guidelines for

obstruction of justice and/or abuse of a position of trust where there was insufficient evidence that Ms. Stewart testified falsely that at the time of her visits with Dr. Abdel Rahman in 2000 and 2001 she believed that the Special Administrative Measures (SAMs) gave her discretion to issue the public statements from her client in the course of her representation of him?

III. Whether the four-fold increase in Ms. Stewart's sentence, from 28 months to 120 months, was unsupportable and therefore substantively unreasonable?

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
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UNITED STATES OF AMERICA,

-against-

LYNNE F. STEWART,

Defendant-Appellant.

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BRIEF AND SPECIAL APPENDIX FOR DEFENDANT-APPELLANTLYNNE F. STEWART

JURISDICTIONAL STATEMENT PURSUANT TO RULE 28 (A)(4), FED. R. APP. P.

(i) Jurisdiction was conferred in the United States District Court for the Southern District of New York by the filing of a Superseding Indictment on November 19, 2003, charging appellant Lynne F. Stewart with conspiracy to defraud the United States in violation of 18 U.S.C. § 371, conspiracy to provide material support to a terrorist activity in violation of 18 U.S.C. § 371 and the substantive count of providing material support to a terrorist activity in violation of 18 U.S.C. § 2339A, and two counts of making false statements in violation of 18 U.S.C. § 1001, and which was assigned docket number 02-CR-395 (JGK).

(ii) Jurisdiction is conferred in this Court pursuant to 28 U.S.C. § 1291 and Rule 4(b), Fed. R. App. P. This is an appeal from a Judgment Including Sentence entered on July 29, 2010 by the Honorable John G. Koeltl, United States District Judge, Southern District of New York, convicting appellant of all the charges identified in (i), *supra*, and sentencing her to 120 months imprisonment, two years supervised release and the mandatory assessment. A timely Notice of Appeal was filed was filed on July 29, 2010. (JA 463).[1]

(iii) This is an appeal from a final order disposing all issues between the parties.

STATEMENT PURSUANT TO RULE 28 (A)(6), FED. R. APP. P.

This is an appeal from an order of the United States District Court for Southern District of New York (Koeltl, J.), following a trial by jury, convicting appellant Lynne F. Stewart of violating 18 U.S.C. § 371 (conspiracy to defraud the United States), 18 U.S.C. § 371 (conspiracy to provide material support to a terrorist activity), 18 U.S.C. § 2339A (providing material support to a terrorist activity) and 18 U.S.C. § 1001 (two counts of

[1] "JA" refers to the Joint Appendix filed herewith. "T" refers to the trial transcript. "GX" refers to Government's Exhibit admitted at trial. "PSR" refers to the Presentence Report. All other documents are referenced by date and subject matter.

making false statements). In an opinion dated December 23, 2009, this Court affirmed the judgment of conviction but remanded the case for resentencing. *United States v. Stewart*, 590 F.3d 93 (2d Cir. 2009). On February 23, 2009, the mandate issued and three separate opinions by six judges were filed by members of the Court following a *sua sponte* poll on whether to consider Ms. Stewart's sentence *en banc*. Two opinions concurred in the denial of *en banc* review, one was in dissent. *See United States v. Stewart*, 597 F.3d 514 (2d Cir. 2010). After further briefing a new sentencing hearing was held on July 15, 2010 resulting in the foregoing sentence.

PRELIMINARY STATEMENT

The events that formed the core of Ms. Stewart's prosecution – Ms. Stewart's conduct during the course of providing legal representation to Dr. Omar Abdel Rahman (convicted in 1995 of conspiring to bomb various New York City landmarks) – took place in 2000 and 2001 before the horrific attacks of September 11, 2001. The world was a different place then.[2] Her actions and the propriety of her good faith beliefs should be evaluated in the context of those times.

[2] Attorney General John Ashcroft announced Ms. Stewart's indictment from the ashes of the World Trade Center towers. Although all the might of the United States could not find let alone bring Osama Bin Laden to his knees, Mr. Ashcroft announced that they had found someone to indict – Ms. Stewart, a bombastic lawyer, a thorn in their side, and the advocate for someone who had already been convicted of terrorism.

Ms. Stewart fought tirelessly for free speech and devoted her life to representing the poor, the forgotten, the hated, as well as ordinary people in their efforts to seek and receive justice in the state and federal courts. After indictment, trial, conviction, and sentencing, she was disbarred and everything she had spent a lifetime working to achieve was tarnished by her conviction.

When she was sentenced in October 2006, following a year of radiation treatment for breast cancer, the District Court ordered that she spend 28 months in prison. At the time of her second sentencing in July 2010, Ms. Stewart, who had been incarcerated for over six months with serious medical problems, was 70 years old and in fragile health. Yet the court more than quadrupled her sentence: from 28 months to 120 months. In so doing, the court made three procedural errors, each of which independently requires that her sentence be vacated. First, the court improperly used Ms. Stewart's statements on the courthouse steps and in media interviews – statements plainly protected by the First Amendment – to enhance her sentence. The second and third procedural errors were committed when the District Court improperly evaluated the relevant evidence in responding to the directions of this Court on remand to consider whether Ms. Stewart committed perjury and thereby obstructed justice and

abused a position of trust. Each of these procedural errors requires that the 120 month sentence be vacated. Moreover, the 120 month sentence is manifestly unjust and a violation of the tenants of 18 U.S.C. § 3553(a). Nothing changed between the first and second sentences to warrant a four-fold increase in the punishment meted out. Accordingly, the sentence is substantively unreasonable. The sentence must be vacated and Ms. Stewart resentenced.

Somewhere in the almost four years between her first sentence in October 2006 and the opinions issued in connection with the denial of *en banc* review in February 2010 the personhood of Ms. Stewart was lost. She was not a stranger to this Court or to the judges in the Southern and Eastern Districts before whom she had appeared frequently and several of whom she once counted among her friends (and even clients). Moreover, she was not a defendant whose acts of charity and civic duty started on the day of indictment with an eye toward mitigating the charged conduct. She had spent a lifetime devoted to finding the good because it was the right thing to do – not only for the community – but for Ms. Stewart. As a lawyer, a mother, a wife, and a political activist, she always put the needs of others before her own. Now she is paying for that selfless devotion to others with her life.

The first part of the Statement of Facts reviews those material aspects of Ms. Stewart's history and character that are essential to evaluate her claim that the 120 month sentence is not substantively reasonable. After all, it is only by knowing the human being to be sentenced that this Court evaluate the reasonableness of the sentence. The Statement of Facts then recites only that record evidence from the trial and sentencing proceedings that is necessary for this Court to evaluate Ms. Stewart's claims of procedural deficiencies and substantive unreasonableness. In sum, the Statement of Facts makes clear that while convicted of lying to the United States government and providing material support to terrorist ends by giving voice to her client, Ms. Stewart is not a terrorist, and she has never sympathized with the Muslim fundamentalist doctrine espoused by Dr. Abdel Rahman, the client whose representation brings her to this Court.

The next two sections lay bare the District Court's improper reliance on Ms. Stewart's First Amendment protected speech to support her longer sentence and its flawed analysis of Ms. Stewart's trial testimony. The substantive unreasonableness of the District Court's sentence is reserved for the last section, as it is the last word. There is no legal or principled reason for quadrupling the sentence imposed. Nothing changed between the first and second sentencing to alter the sentencing court's calculus of what would

be "sufficient but not greater than necessary" to achieve society's goals in imposing criminal punishment.

STATEMENT OF FACTS

Lynne Stewart Was Trained Early In Life To the Core Values That Made Her the Person and Lawyer She One Day Would Become

Ms. Stewart was raised in Bellerose, Queens – a stone's throw from the Nassau County line – in an intact working class family where both parents became New York City public school teachers. The first inkling of what the future would portend might well have been the B'nai Brith award Ms. Stewart won in high school for the best essay on the Constitution (T. 7479).

Ms. Stewart's first law firm job, long before she went to law school, was working summers at Cravath, Swaine & Moore. She started as the person who put the carbon paper in between the sheets for the secretaries and later worked her way up to a job in the law library (T. 7480). Ms. Stewart was always one of the peons, never one of the powerful, but nonetheless the firm taught her that lawyers are the tools to protect their clients.

Ms. Stewart's college years were educational, but not only in the traditional way. For sure she was a bright student who mastered the

curriculum, but at Hope College in Holland, Michigan, she experienced first-hand the hypocrisy of those who on the one hand professed to respect God's will, while on the other hand held steadfast to racist, sexist, and classist prejudices (T. 7481). In her junior year, Ms. Stewart was, as a political science honors student, invited to spend a semester in Washington, D.C., where she attended lectures by among others Justice William O. Douglas, and Secretary of State Dean Acheson (T. 7481). She learned the power of free speech by picketing President Eisenhower's motorcade after he boasted of using military aircraft to spy on the Soviet Union, and she demonstrated with her fellow students at the Woolworth's in downtown Washington that refused to seat Black patrons at its lunch counters.

Ms. Stewart was made aware of and personally had to confront the effects of institutional racism when she worked in 1962 as a school librarian in Harlem. There she met Ralph Poynter, a fellow teacher and a leader in the nascent movement for community control of the public schools and abolition of the New York City Board of Education, who would become her life partner (T. 7483-86). Together they became part of the movement for racial and social justice within the Harlem schools intent on improving the lives of their students and their educational community. Over time, they became more than comrades in the battle for educational justice, they

became a team in everything, and even through hard times, have remained so for over 40 years.

Ms. Stewart took the first steps toward fulfilling her long-held dream of becoming a lawyer in 1971 when she enrolled in Rutgers Law School, known as the People's Law School because faculty members such as Arthur Kinoy and Frank Askin taught that the law can be as much a tool to achieve social justice for the minority as it can to protect the riches of the ruling class (T. 7487-94).

While in school and after admission to the bar, Ms. Stewart worked for two criminal defense lawyers, Stanley Siegel and Herman Graber. She did all the legal writing for the office, including briefs and motion practice (T. 7495). After six years, she started her own solo practice, working in an office above Mr. Poynter's motorcycle shop in Greenwich Village (T. 7496). She represented anyone who walked in the door whether they could pay her or not. She concentrated on representing battered wives, people who wanted to divorce, and criminal defendants. Sadly, she also represented – mostly for free – lots of the young people from her Lower East Side neighborhood (including her former students) who got in trouble (T. 7497). Many people wrote to Judge Koeltl at the time of Ms. Stewart's first sentence about these early years of her practice. The overwhelming sense was that Ms. Stewart

was not only the consummate lawyer, she was the legal advocate and personal support system for each of her clients. She was "always prepared and dedicated to giving her clients the very best defense possible … courteous, cordial and cooperative with co-counsel, prosecutors, judges and court personnel" wrote Michael Stokamer, a former New York County ADA. (JA367).

To Sean Gilmore, one of the young men from her neighborhood she was "an important role model in our neighborhood …. [she] help[ed] so many people in our neighborhood with legal problems, and a lot of them she did for free or very little money at all…. This is the kind of person that Lynne Stewart is…" (JA364).

Eileen Regan, a retired NYC police officer and self described "conservative Republican," was represented pro bono by Ms. Stewart after her abusive ex-husband charged her with wrongful eviction. She wrote to Judge Koeltl, "I remember how I knew justice would be served because Lynne was there to fight for me … I don't know where I would be today were it not for Lynne Stewart." (JA365).

And then there was Carmyn Levasseur, the child of a co-defendant of one of Ms. Stewart's later political clients in the 1980s. Ms. Stewart took Ms. Levasseur and her sisters, as children, to visit their parents in prison.

Unfortunately, in her early 20s, Ms. Levasseur had to confront a serious drug abuse problem with in-patient treatment. When Ms. Levasseur finished the program, Ms. Stewart took her into her home and provided her with the structure, nurturing and love she needed to continue to with the positive steps she had taken to face the future.

> Lynne graciously opened her doors to me. She treated me like her own daughter, even insisting I call her when I was coming home late. Once again Lynne was giving me the structure and support I needed in a very hard time. Living at Lynne's house, I was able to start Queens College and complete one year of out patient treatment. I have since graduated Queens College, and am starting my second year of graduate school at New York University.

(JA374).

In the early 1980s, Ms. Stewart, whose reputation was growing and who had developed an expertise in criminal law, started looking for more challenging cases in line with her never abandoned political visions. She represented a defendant arrested for protesting the then-apartheid South African all-white Rugby team that had been invited to play in the United States (T. 7498). This was the first in a long series of cases where her clients would be motivated by their personal beliefs rather than addiction or monetary gain. Along with these political cases, Ms. Stewart became a member of the CJA panel for Eastern District as well as the 18-B panel in

State court. By the time of her arrest in 2002, she had a high-volume criminal defense practice with approximately 70 active pending cases (T. 7499).

When Ms. Stewart needed to get away, relax and refuel her soul, she and Mr. Poynter headed to Franklin County – almost as far North as the St. Lawrence River. But she never really got away from her calling. In anticipation of the 2006 sentencing, Harold Scudder, wrote

> I have known Mrs. Stewart and her husband for the better part of twenty years. I have seen her and her husband's acts of kindness to the working poor in the county of Franklin in Northern New York. I have seen them buy groceries, purchase heating oil for furnaces for people who couldn't afford it. I have seen her (Lynne) do pro bono work for people, myself included.

(JA369).

As Jonathan Beal, a Maine attorney described it to Judge Koeltl, Mr. Scudder was a truck driver from upstate New York who had been totally and permanently disabled making a delivery in Maine. His injuries were compounded by the negligence and incompetence of his first lawyer. When Ms. Stewart learned how he had been

> ignored and misled by his attorney, she vigorously [and at no gain for herself] interceded for him: gathering evidence, traveling to Maine for a bar discipline hearing, and creating such a record that

> not only was the attorney disciplined, but he voluntarily withdrew from the practice of law.
>
> Meanwhile, she asked me to assist the truck driver in pursuing his legal remedies, and I was able to vindicate his rights. Working with Ms. Stewart, I was impressed by her straightforward commitment to helping the helpless, and her lack of focus on the financial bottom line. She seemed to me to be one of those lawyers who lived her beliefs, and who give our profession a good name.

(JA370).

Although dedicated to her work and clients, Ms. Stewart's most compassionate spirit has been on display when she assumed responsibility as the matriarch of her extended family. She has two children, Mr. Poynter has four, and together they have a daughter. As of this writing, these offspring have produced 14 grandchildren, and in July 2011 Ms. Stewart is expecting her first great-grandchild – a boy.

Many members of Ms. Stewart's family provided telling insights to Judge Koeltl before the 2006 sentencing, but nowhere do the two poles of Ms. Stewart's character – her professionalism and her maternal love – come through more clearly than in the words of her children and grandchildren. Geoffrey described his mother as "selfless." As an attorney she "always found it impossible to turn anyone away who needed help … even when economically it made no sense." She was "literally the glue which keeps a

wide flung array of grandchildren, step-siblings and great aunts and uncles together…. She is the driving force behind family gatherings in which the true American Dream unfolds, a multiracial, multiethnic, multireligious celebration which is her family and her legacy." (JA371). From Brenna – her oldest – "[t]wo of my mother's greatest gifts to me have been the courage to fight against injustice and an appreciation for literature, beauty in the written word." (JA375-376). With her family, Ms. Stewart enjoyed cooking for family get-togethers, hearing an author read at the 92nd St. T, attending her grandchildren's sporting events, attending estate sales or just staying home and baking an apple pie (JA 376) And so it was that Ernesto, her grandson then in 9th grade, wrote to Judge Koeltl and asked him to be merciful.

> I am not sure what will happen to us if she is not around. Life will go on but it will not be as good. Our family gets together a lot and without her we probably won't. I feel even more sad to think of her in jail. She is too old and too good for that.

(JA377).

Dr. Abdel Rahman Was Lynne Stewart's Client, Not Her Cause

In October 1994, former United States Attorney General Ramsey Clark called Ms. Stewart and asked her to join with him and Abdeen Jabara in representing Dr. Omar Abdel Rahman, known to many as the "Blind

Sheikh," who was one month away from being tried for a conspiracy that had it been successful would have destroyed not only many lives, but the very fiber and being of New York City (T. 7463). She did not immediately say yes. She understood Dr. Abdel Rahman to be a devout Muslim fundamentalist whose religion was blatantly anti-feminist, and while she found him to be brilliant and charismatic, there remained major differences in their belief systems (T. 7468-72). Nonetheless, she agreed to serve as trial counsel, and as she learned about the government's evidence she became convinced he was being prosecuted for his ideas and words rather than any actions. After Dr. Abdel Rahman was convicted in 1995, Ms. Stewart stayed on as co-counsel, representing him through all stages of his appeals and thereafter.

Ms. Stewart and Dr. Abdel Rahman developed a strong bond – not unusual between lawyer and client after a nine-month trial. Many explanations have been put forth about why and how Ms. Stewart finds herself convicted of a crime and appealing to this Court. Mr. Jabara probably comes closest to articulating it:

> One other reflection about Dr. Abdel Rahman is an extraordinary one—his relationship to a woman lawyer. Much has been made of the fact in popular western culture that women are subordinate to men in Muslim culture and not fit for professional life. The fact that Lynne was a woman, a professional

> and a non-Muslim never interfered with Sheikh Abdel Rahman's respect for and consideration of her. This was not, in my estimation, just a chance development but what I thought was Dr. Abdel Rahman's growing appreciation of the fact that Lynne was genuinely concerned about his welfare and his physical well-being and his legal situation. It was abundantly clear that Dr. Abdel Rahman was very dependent on Lynne. As a non-English speaking, blind, diabetic, incarcerated religious figure with no relatives close at hand and only one 15 minute phone call with family in Egypt a month, Lynne was his significant connection with humanity and no doubt important to his emotional survival.

(JA242-243).

Roger Stavis, who represented a co-defendant in the Rahman trial, attributed the bond to Ms. Stewart's eternal optimism and generous spirit:

> It was during the trial that I noticed a very unique quality about Lynne: her ability to see the humanity in even the most "inhuman" of clients. Lynne can empathize with a client even though the rest of the world may find that client, or the crimes for which he stands accused, to be utterly repulsive. Where others saw Sheik Omar Abdel Rahman as a terrorist; Lynne saw him only as a warm and generous old man afflicted by blindness and diabetes. She couldn't bear the thought of him dying in prison. I recall that immediately following the verdict, as the attorneys gathered in our "make shift" office at the Courthouse, Lynne had tears streaming down her cheeks as she told me: "I failed him."

(A378).

After Dr. Abdel Rahman's Appeals Were Exhausted, Messrs. Clark And Jabara Were His Only Regular Contact With The Outside World – Ms. Stewart Was Not Actively Involved – Thus She Assumed They Complied With The Special Administrative Measures (SAMs) When She Testified To Her Belief In The Leeway Afforded To The Lawyers

In 1997, Dr. Abdel Rahman was effectively cut off from the outside world. Imprisoned in a midwestern BOP medical facility, he was unable to communicate with his jailers who spoke no Arabic, without a radio, and unable to read because diabetes had destroyed the tactile sensation in his fingertips leaving him unable to use Braille. Moreover, in April 1997 the government imposed highly restricted Special Administrative Measures (SAMs) that allowed him only limited telephone access to his lawyers and immediate family in Egypt. Isolated and deprived of virtually all vital sensory input, Dr. Abdel Rahman became obsessed with sensory hallucinations.

This situation was profoundly upsetting to all of Dr. Abdel Rahman's attorneys – but the tasks of talking to him on the telephone, negotiating with the Bureau of Prisons (BOP) about his horrendous prison conditions, and attempting to secure his repatriation to Egypt fell almost exclusively to Messrs. Clark and Jabara. Despite her sadness at his deteriorating condition and the close personal relationship she had developed with him as a result of

the months they spent together during the trial, Ms. Stewart did not have time to address his needs because her high-volume criminal law practice in state and federal court demanded all of her time.

Throughout Ms. Stewart's prosecution the government has portrayed her as "the hub" or "the center" of a "communications network," (*See, e.g.*, Govt. 6/10/2010 Sentencing Memorandum at 2, 16, 139). In one memorandum the government emphasized – 17 times– that Ms. Stewart's conduct was "repeated" or happened "repeatedly." (*Id.* at 5, 15, 20, 22, 130, 142, 143, 145, 147, 149, 150). In reality, after Dr. Abdel Rahman was sentenced Ms. Stewart's personal contact with him was minimal.[3]

As Ramsey Clark pointed out in his October 2006 letter to Judge Koeltl, the government could point to only six contacts between Ms. Stewart and Dr. Abdel Rahman between January 1996 when he was sentenced and July 2001: *three* prison visits (March 1999, May 2000 and July 2001) each separated by 14 months, and *three* telephone calls in June of 2000. (JA246). This is not by any stretch of the imagination a "hub," which is defined as a "center of activity."

[3] Mr. Clark and his law partner Lawrence Schilling prepared Dr. Abdel Rahman's appeals.

In connection with both Ms. Stewart's first and second sentences, Mr. Clark described for the District Court his role as defense counsel for Dr. Abdel Rahman and his activities after he signed his affirmation to abide by the SAMs. Messrs. Clark, Jabara, and Schilling participated in literally hundreds of telephone calls with Dr. Abdel Rahman, with an average of two telephone calls per week.[4] Mr. Clark cataloged his many contacts with the press and international figures on behalf of Dr. Abdel Rahman that were expressly forbidden by the SAMs. (JA245-JA260). As Mr. Clark concluded, "[i]f there was a functioning communication hub for Dr. Abdel Rahman it was my office." (JA246).

According to Mr. Clark, "[a]ll involved in Dr. Abdel Rahman's defense…tried to occupy him with thoughts of the outside world," (JA248) and reading news from Arab language newspapers – a clear SAMs violation - was a part of every scheduled visit and monitored telephone call. (JA255-JA256). On at least 38 separate occasions, Mr. Clark authorized the translator, Mohammed Yousry, to read the news to Dr. Abdel Rahman during a visit or telephone call (JA274-JA277). Mr. Jabara authorized such reading at least 45 times. (JA278-JA282). Messrs. Clark and. Jabara both

[4] At her re-sentencing, Ms. Stewart provided the District Court with a chart summarizing the prison telephone calls between Dr. Abdel Rahman and his lawyers from June 23, 2000 through March 22, 2002. It amply demonstrates that Ms. Stewart was a participant only twice. (JA273).

permitted Dr. Abdel Rahman to dictate responses to news articles, made numerous press statements on his behalf, read him letters from third parties and permitted him to dictate responses to those letters. *Id.*

More significantly, in 1997 Mr. Clark disseminated Dr. Abdel Rahman's views on the Egyptian ceasefire to the media – strikingly similar conduct to that with which Ms. Stewart was charged. (JA289-JA290; GX 22). In addition, that year Mr. Clark helped Dr. Abdel Rahman draft a statement that Mr. Clark was to deliver to leaders of the Arab world, (JA291-JA293), and in January 1998, Mr. Clark facilitated an interview by *Il Corriere della Sera*, the leading Italian newspaper, of Dr. Abdel Rahman that included his views on the ceasefire, violence, and President Mubarak. (JA307-JA316).

Furthermore, during visits with Dr. Abdel Rahman in August 1997 and February 1998, Mr. Clark, accompanied by Mr. Yousry, brought in letters from Ahmed Sattar and others and permitted Dr. Abdel Rahman to dictate responses to those letters. (JA285, JA286, JA287, JA288, JA317-JA318, JA319, JA321, JA322-JA328).

On May 5, 1998, the SAMs were amended to expressly prohibit Dr. Abdel Rahman from communicating with third parties or the media. (GX 2). Nonetheless, Mr. Clark continued to speak to the press giving voice to Dr.

Abdel Rahman's views. In November 1999, Mr. Clark spoke to the press about the ceasefire and the formation of a political party (GX 1034X). In January 2000, Mr. Clark facilitated a written interview of Dr. Abdel Rahman by Japanese Public Television.[5] (JA335-JA336). During Ms. Stewart's trial, then Assistant United States Attorney Patrick Fitzgerald, acknowledged that Mr. Clark's actions were clear violations of the SAMs (T. 2581-82).

Mr. Clark assumed responsibility for making statements to the press on behalf of Dr. Abdel Rahman. The lawyers were concerned, pursuant to the plain language of the SAMs affirmations, that if the government determined that the SAMs had been violated, their ability to communicate with Dr. Abdel Rahman could be severely restricted if not terminated. Thus they decided to insulate Mr. Jabara because he was the only one of them who spoke Arabic. In that way they could ensure that if such a sanction were ever imposed, an Arabic-speaking attorney would still have access to Dr. Abdel Rahman. (*See*, *e.g.*, JA284).

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[5] Mr. Clark testified that he signed only two Attorney Affirmations in connection with versions of the SAMS – April 1997 (shortly after they were first required) and January 2001. (JA144-JA145). While he did not sign any of the revisions promulgated between April 1997 and January 2001, the government nonetheless permitted Mr. Clark to participate in legal calls with Dr. Abdel Rahman and visit him in prison.

Ms. Stewart's first visit at FMC Rochester with Dr. Abdel Rahman in March 1999 was not recorded. During the visit, translator Mohammed Yousry secured Ms. Stewart's approval to ask Dr. Abdel Rahman, in response to an article appearing in Al-Hayat, his opinion about forming a Muslim Political Party. (*See* GX 2415-6T). Ms. Stewart approved this question for potential use in Mr. Yousry's dissertation. There is no evidence that Ms. Stewart had any knowledge that Dr. Abdel Rahman's responses would subsequently be disseminated.

When Ms. Stewart and Mr. Yousry next visited Dr. Abdel Rahman at FMC Rochester on May 19 and 20, 2000, Ms. Stewart had not been in touch with Dr. Abdel Rahman for more than a year; she had not been participating in the regular legal telephone calls and had not kept up with the legal representation. At the time of this visit, Ms. Stewart was on trial in a Class A-1 narcotics felony case in New York state court with a potential life sentence. For the three weeks before the visit she had been working 18 hour days. Totally distracted, she flew to Rochester, sat with Dr. Abdel Rahman for 4-5 hours on each day, flew back to New York, and returned to trial the next day. (JA119). During the visit, her mind was occupied elsewhere. While Mr. Yousry talked to Dr. Abdel Rahman, she continued her trial

preparation and worked on a pre-sentence memorandum for another client who was soon to be sentenced in federal court.

For much of the May 2000 visit, Mr. Yousry read to Dr. Abdel Rahman in Arabic from materials that Mr. Yousry had previously translated for her and that she had approved. (JA133-JA134; JA140-JA141). There was little discussion in English of their content. At no time was "Taha" by that or any other name, discussed in English in Ms. Stewart's presence. When Mr. Yousry read to Dr. Abdel Rahman the statement from Taha about the Al-Azhar student demonstrations, he did not tell her specifically what he was reading. He merely told her that he planned to read a student press communiqué on the subject:

> **Yousry:** There is also a statement by the Al-Azhar Students Union.
>
> **Stewart:** Al-Azhar?
>
> **Yousry:** Yeah, the students in Al-Azhar University had riots and what not –
>
> **Stewart:** They did, indeed.
>
> **Yousry:** -and demonstrating and stuff. And these are the-
>
> **Stewart:** Shooting too, right?
>
> **Yousry:** Shooting, yes, some of them were killed. These are the official uh, students' organizations uh, uh, press

communiqué?

Stewart: Right-

Yousry: They get them off the internet.

(GX 1706 p. 55).

At trial, Mr. Yousry testified that he did not tell Ms. Stewart that Abu Yasir was the same person as Rifa'i Taha. He explained that Ms. Stewart simply "knew that this letter contains writings, suggestions of political leaders of the Islamic movement in Egypt regarding the situation in Egypt and the situation of Omar Abdel Rahman himself…Ms. Stewart knew that those names are leaders, there was no need to tell her specifically." (T. 9828-9829). Thus, while Ms. Stewart had been provided a general sense of the type of material read in Arabic to Dr. Abdel Rahman, e.g., whether the materials were from Islamic movement leaders, Mr. Yousry did not discuss with her specifically who those leaders were or what roles they played.[6]

During the second day of the May 2000 visit, Dr. Abdel Rahman dictated a letter to his Egyptian lawyer, Muntasir Al-Zayat, stating that he

[6] Ms. Stewart does not speak or read any Arabic language. Arabic writing is foreign to her, as are the many ways in which Arabic names are rendered into the Roman alphabet. Thus, her knowledge of the precise content of everything that was said and read to Dr. Abdel Rahman, as well as the precise content of his responses, was filtered through those who did speak the Arabic languages.

did not personally support the Egyptian ceasefire any longer. Mr. Yousry suggested to Dr. Abdel Rahman that the letter be given to the press and publicized. "I was thinking when Muhammed Salah calls Lynne, she tells him to call Muntasir and to publish it."[7] (GX 1710TA p. 82). Dr. Abdel Rahman concurred.

After Ms. Stewart returned to New York, she agreed to relate Dr. Abdel Rahman's views on the ceasefire to the press. On June 13, with Mr. Sattar on the call, Ms. Stewart spoke by telephone with Esmat Salaheddin, a Reuters reporter in Cairo. (T.5569-72, 5605-06).[8] Ms. Stewart told Mr. Salaheddin that "Abdel Rahman is withdrawing his support for the ceasefire that currently exists" adding at the end that "[p]rison authorities may bar me from visiting him because of this announcement." (T5574, 5617).

Dr. Abdel Rahman's statement caused controversy and conflict within the Islamic Group with some claiming that the statement was not his. Accordingly, on June 21, Ms. Stewart clarified for Mr. Salaheddin that Dr. Abdel Rahman's view was that he "did not *cancel* the ceasefire…I did

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[7] Muhammed Salah was a reporter for Al Hayat based in Cairo (T. 5493). Muntasir Al-Zayat was Dr. Abdel Rahman's Egyptian lawyer. (T. 7024).

[8] Ms. Stewart's limited familiarity with the issues is demonstrated by her surprise at discovering that the reporter with whom it had been arranged she would speak was not in New York. She had expected an in-person interview, not a telephone conversation with someone in Egypt. *See* GX 1102X.

withdraw my support for the initiative. I expressed my opinion and left it to my brothers to examine it and study it because they are the ones who live there…I also ask them not to repress any other opinion within the [IG]." (First Appeal Joint Appendix at 1534-1538) (emphasis in original).

Ms. Stewart agreed to talk to Mr. Salaheddin because "it was a communication that we felt was necessary to maintain his posture within the support group in Egypt." (JA136).

> It was my belief, my underlying belief…that…I needed to keep him in the public eye, that the worst thing that could happen to him was to be…locked in a box in Minnesota with no support whatsoever. (JA121, *See also* JA123, JA124, JA135).[9]

Ms. Stewart was nonetheless clear that she did not support the goals of the Islamic Group or share Dr. Abdel Rahman's politics:

> Q. Did your representation of him in your view involve furthering his political goals?
>
> A. No. I'm my own person. I have my own politics. They are not fundamentalist.

(T. 7472).

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[9] Keeping Dr. Abdel Rahman in the public eye was part of the lawyers' long-term strategy for seeking his repatriation to Egypt in the event of a change in that country's government. At trial, the prosecution ridiculed that idea, asserting that change in Egypt could not come through non-violent means. Recent events have proved the government wrong.

Ms. Stewart's conversation with Mr. Salaheddin did not occur in a vacuum. Just a few months earlier, Mr. Clark himself facilitated dissemination of the very same information to Taha. During a visit with Dr. Abdel Rahman in September 1999, Mr. Clark permitted Mr. Yousry to convey questions from Mr. Sattar and Taha about the ceasefire to Dr. Abdel Rahman. He then permitted Dr. Abdel Rahman to dictate a response and then facilitated communicating his response to Mr. Sattar and Taha which granted permission to avoid the ceasefire and take up arms in self-defense. (*See* GX 2204AT, "*Permission to take up arms is hereby given to those who have been attacked because they have been wronged*"). Contrary to the government's arguments below, Mr. Clark did not "refuse" to issue Dr. Abdel Rahman's statement to the press. As Mr. Clark stated to the District Court, "I have never refused to issue a press release concerning withdrawal from the ceasefire because of the SAMs." (JA254). Indeed, two months after his September 1999 visit, Mr. Clark spoke with a reporter and, in an another apparent violation of the SAMs, conveyed Dr. Abdel Rahman's views on the formation of a Muslim political party in Egypt (GX 1034X).

Thus, both Mr. Clark and Dr. Abdel Rahman were perplexed when, after the June 2000 conversations with Reuters, Ms. Stewart was barred from

visiting Dr. Abdel Rahman. After Mr. Clark told Dr. Abdel Rahman that Ms. Stewart's visit had been rejected, the following exchange ensued:

> **Rahman:** Hum. Okay. I want to tell him…why Lynne? Why is the government taking this position? In light of the fact that Abdeen held a press conference and you held tens of press conferences after you met with me. Huh?
>
> **Yousry:** Yes, sir.
>
> **Rahman:** And nothing happened. The government didn't say anything [loud static] [UI].
>
> **Yousry:** [E] He wants to know [loud static][UI]
>
> **Clark:** I think in part because... eh... this time it got certainly more [UI] than the other times... it's gotten more than [UI] coverage and then was the one major [loud static][UI] you know, I guess they [UI a good opportunity [loud static] [UI].
>
> **Yousry:** [A} Mr. Ramsey is telling you, sir that this time is different because of the [loud static] [UI].
>
> **Rahman:** Tell him that just because he is protected from the government and no one would touch him... he also has to protect the other lawyers...the lawyers that work with him...our lawyers.

(JA283). A few lines later, Mr. Clark explained to Dr. Abdel Rahman that "this is just harassment. It does work. We have to be very careful or they'll cut off all the lawyers." (JA284).

Ms. Stewart did not visit Dr. Abdel Rahman again for 14 months, and in the interim, Messrs. Clark and Jabara continued their regular legal telephone calls with Dr. Abdel Rahman. Before her visit in July 2001, Ms. Stewart signed and faxed to the United States Attorneys' Office an affirmation that provided that she would abide by the terms of the then-operative SAMs (JA259-JA260).

The Indictment And Trial

Ms. Stewart was arrested April 8, 2002, on an indictment that charged her, Mr. Sattar, Mr. Yousry, and Yassir Al-Sirri, with, *inter alia*, providing material support to a terrorist organization in violation of 18 U.S.C. § 2339B and conspiracy to commit the same. After motion practice that resulted in partial dismissal of the indictment, a superseding indictment was returned on November 19, 2003 that charged Ms. Stewart with conspiracy to defraud the United States (18 U.S.C. § 371), conspiracy to provide material support to terrorist activity (18 U.S.C. § 371), providing and concealing material support to terrorist activity (18 U.S.C. § 2339A), and two counts of making false statements in violation of 18 U.S.C. § 1001.

The trial began on May 19, 2004 and ended with a jury verdict on February 10, 2005 convicting Ms. Stewart on all counts in which she was named. Ms. Stewart testified for nearly nine days. Of relevance to this

appeal, she testified that she believed that the SAMs imposed on Dr. Abdel Rahman gave all of Dr. Abdel Rahman's lawyers, herself included, leeway in the course of their legal representation to communicate his views to others. She further testified that during the period 1996 to 2000, she was unfamiliar with "Taha," a leader of the Islamic Group in Egypt.[10]

Post-Verdict Developments

In September 2005, Ms. Stewart was diagnosed with breast cancer – invasive ductal carcinoma, *in situ* carcinomas, and ductal carcinoma *in situ*. From mid-April 2006 through June 2006, Ms. Stewart underwent radiation therapy, and she continues to take estrogen-inhibiting drugs (Arimidex) to stave off a recurrence. Nonetheless, doctors informed her that the risk that cancer will return is substantial. As presented to the lower court, the (now) 71 year old Ms. Stewart also suffers from diabetes, hypertension and sleep apnea.

The October 16, 2006 Sentencing

Judge Koeltl first sentenced Ms. Stewart on October 16, 2006. Judge Koeltl adopted the factual findings in the presentence report, except as noted, and then calculated the sentence that would obtain under the advisory

[10] As more fully addressed *infra*., at the July 15, 2010 resentencing the lower court found that the testimony in both areas was false and warranted an obstruction of justice enhancement.

Sentencing Guidelines, stating that this calculation was the required starting point. The court first addressed application of the Guidelines' terrorism enhancement. Ms. Stewart had argued that while the offense conduct arguably fell within the sections' literal wording, it should not be applied because her sole motive was to secure her client's repatriation to Egypt and therefore outside of the "heartland" of terrorism cases (JA210).[11] The lower court overruled that objection. In addition, the court denied Ms. Stewart's motion to depart laterally from Criminal History Category VI, the category mandated by the terrorism enhancement (JA212), and denied Ms. Stewart's other motions for Guideline departures, premised on U.S.S.G. § 5H1.4 (extraordinary medical conditions), U.S.S.G. § 5K2.11 (lesser harms) and U.S.S.G. § 5K2.20 (aberrant behavior).

The court then addressed the government's motion for a Guidelines enhancement pursuant to U.S.S.G. § 3C1.1, obstruction of justice, based on Ms. Stewart's purported perjurious trial testimony. The government argued that Ms. Stewart testified falsely when she (1) stated that she believed the SAMs gave her leeway to communicate Dr. Abdel Rahman's views to others in the course of her representation (the so-called "bubble") and (2) denied

[11] As Ms. Stewart said in her letter to the court, "[m]y actions were intended only to foster the possibility that my client might one day be permitted to return to Egypt even as a prisoner of the current regime or one akin to it." (Quoted at JA210).

knowing "Taha," was a leader of the Islamic Group. While Judge Koeltl noted that "[t]here is evidence to indicate that these statements were false, for two reasons he found it unnecessary to determine whether Ms. Stewart's testimony constituted perjury. First, even without any enhancements, the advisory Guideline sentence was 360 months, the statutory maximum. An obstruction enhancement, therefore, could not raise the Guideline range. Second, even if the enhancement was appropriate, the court had nonetheless determined that it was going to downwardly vary from the advisory Guideline range (JA214). Judge Koeltl determined that under the advisory Sentencing Guidelines Ms. Stewart's total offense level was 41 and her Criminal History Category was VI. This resulted in an advisory Guidelines imprisonment term of 360 months, the statutory maximum (JA215).

The court turned its attention to the remaining § 3553(a) factors and the determination of a sentence that would be "sufficient, but not greater than necessary" to accomplish the statutory goals. Relying on the advisory Guideline sentence as its "benchmark," the court observed that Ms. Stewart's "is an atypical case for the terrorism enhancement." "A number of factors" weighed in favor of a substantial downward variance (JA216). First, the charges themselves were unique. Even the government could not point to more than a few cases "where the thrust of the violation was the

provision of a co-conspirator to a terrorist conspiracy." Second, there was no evidence that anyone was harmed as a result of Ms. Stewart's actions (JA216). Third, the increase from Criminal History Category I to Category VI was "dramatically unreasonable in the case of Ms. Stewart" as it "overstates the seriousness of [her] past conduct and the likelihood that [she] will repeat the offense." (JA216).

To illustrate this point, Judge Koeltl noted that without the terrorism enhancement the sentence called for by the advisory Sentencing Guidelines, even including a two-level enhancement for obstruction of justice, would have been 97 to 121 months – far lower than the 360 months he was using as his starting point (JA217).

Judge Koeltl then recited his findings after evaluating the factors required by § 3553(a) he was required to consider, *i.e.*, the "history and characteristics of the defendant." He proceeded to list the following characteristics of Ms. Stewart that "argue strongly in favor of a substantial downward variance." (JA217):

> [Ms. Stewart] is now [i.e. in 2006] 67 years old. She was a teacher at inner city schools before becoming a lawyer.
>
> For over 30 years she has practiced law concentrating on criminal law. In the course of that practice, while she has become well known and celebrated as an excellent lawyer, she did not

> use the practice of law to earn personal wealth. She has represented the poor, the disadvantaged and the unpopular, often as a Court-appointed attorney.
>
> Indeed, she was appointed by the Court to represent Sheikh Omar Abdel Rahman, and thus it was through initially responding to a call for representation of a very unpopular client that she became involved in the crimes of conviction.
>
> Having spent her professional career often representing the poor, she is now, at the end of her career, financially destitute.
>
> By providing a criminal defense to the poor, the disadvantaged and unpopular over three decades, it is no exaggeration to say that Ms. Stewart performed a public service not only to her clients but to the nation.

(JA218-JA219). Unlike some defendants, Ms. Stewart "did not [turn] to charity in response to an indictment…[She] built a record of accomplishment over more than three decades…[warranting] a substantial downward variance." (JA219).

Ms. Stewart's advanced age and deteriorating health also supported a substantial downward variance. Even without a life-threatening illness, Judge Koeltl found that "imprisonment will be particularly difficult for [Ms. Stewart] and will represent a greater portion of her remaining life than for a younger defendant." (JA220).

Judge Koeltl did not mince words in describing the offense conduct leading to the conviction. He stressed that there was "an irreducible (sic) core of extraordinarily severe criminal conduct," including Ms. Stewart's abuse of her position as a lawyer (JA221). He concluded that her actions "went beyond any bounds of zealous advocacy and they were knowing violations of the law." He acknowledged that while Ms. Stewart "is entitled to credit for a lifetime of dedicated service but that credit does not extend to the knowing violation of the law." (JA222).

In the end, after considering the advisory Sentencing Guidelines, Ms. Stewart's personal history and characteristics, and the conduct of which she was found guilty, Judge Koeltl concluded that a 28 month prison sentence was "sufficient but no greater than necessary" to accomplish the purposes of 18 U.S.C. § 3553(a)(2).

At Ms. Stewart's request, and without opposition from the government, the District Court continued Ms. Stewart's bail pending appeal.

The First Appeal

Ms. Stewart filed a timely notice of appeal from the judgment of conviction and the government filed a cross-appeal of the 28-month prison sentence. In an opinion issued on November 17, 2009, and amended on

December 23, 2009, this Court affirmed the judgment of conviction but remanded the case to Judge Koeltl for resentencing.[12]

Like the District Court, this Court was "impressed by the factors that figured in Stewart's modest sentence, particularly her admirable history of providing at no little cost to herself proficient legal services in difficult cases to those who could not afford them." *United States v. Stewart*, 590 F.3d at 148. Nonetheless, this Court ruled that two procedural errors required resentencing.

The first error that this Court identified was the District Court's failure to make a final determination of whether to apply a two-level enhancement for obstruction of justice based upon Ms. Stewart's purported perjury at trial to the calculation of her sentence under the advisory Sentencing Guidelines. While this Court agreed that the enhancement would not alter the advisory Guideline range, the court nonetheless committed procedural error because a perjury finding might be relevant to a consideration of an overall sentence under 3553(a). Thus, it was unclear to this Court whether the District Court had taken into consideration the alleged perjury when determining the sentence imposed. Accordingly, this Court

[12] The Court affirmed the convictions and sentences of Ms. Stewart's co-defendants, Messrs. Yousry and Sattar.

directed the District Court on remand to determine the issue of perjury "and to re-sentence Stewart to reflect that finding." *Id.* at 151.

The second procedural error found by this Court involved the terrorism enhancement required as part of the calculations of the advisory Sentencing Guideline. Notwithstanding that the lower court had (1) denied all of Ms. Stewart's departure motions, including a motion that her actions fell outside the "heartland" of terrorism cases, (2) ruled that the terrorism enhancement applied, and (3) adopted an advisory Guideline term of 360 months, this Court concluded that it was still "possible" that the lower court did not apply the terrorism enhancement. This Court opined that it was possible that Judge Koeltl (1) rejected the enhancement when he stated that it would be more appropriate to consider Ms. Stewart's downward departure motion in the context of the § 3553(a) factors, or (2) calculated correctly the sentencing range, but then, having determined the enhancement inapplicable, recalculated the applicable sentencing range without it. *Id.* at 150 n.37. At resentencing, the lower court was directed to begin with the terrorism enhancement and take it into account when determining an appropriate sentence.[13] In conclusion, this Court announced that while it had "serious

[13] In advance of the October 2006 sentencing, neither the Probation Department nor the government sought an enhancement under U.S.S.G. § 3B1.3 for "abuse of trust." This Court stated that the lower court "may

doubts" that the 28-month prison term was reasonable, it expressly declined to reach this issue. *Id.* at 151.

This Court ordered that notwithstanding Ms. Stewart's scheduled surgery, its judgment was to be immediately enforced. Thus, on November 19, 2009, Ms. Stewart surrendered to the United States Marshal. Initially incarcerated at the Metropolitan Correctional Center in the Southern District of New York, because of her serious medical problems, in December 2010 BOP designated and transferred her to the Carswell Federal Medical Center in Fort Worth, Texas, where she currently remains.

Denial of Rehearing En Banc

The Panel's amended opinion was issued on December 23, 2009. However, it was not followed in due course by a mandate. Two months later, on February 23, 2010 this Court issued an order denying *en banc* review after the active judges of this Court *sua sponte* requested a poll on whether the case should be reheard. *United States v. Stewart*, 597 F.3d 514 (2nd Cir. 2010).

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address this issue on remand." *United States v. Stewart*, 590 F.3d at 148 n.36.

Three opinions were written. There were two concurrences in the order denying rehearing, and one dissent. Chief Judge Jacobs, writing for himself and Judges Wesley and Hall concurred in the order denying rehearing because "[t]he panel majority opinion makes no law with which I disagree…". *Id.* at 517. In Chief Judge Jacobs view, however, the panel's decision was "a missed opportunity, and fail[ed] to give the district court sufficient guidance…it does not make law for other cases; it scarcely makes law of the case." *Id.* Chief Judge Jacobs urged the district court to consider Ms. Stewart's post-sentencing public statements (discussed *infra*) at Ms. Stewart's resentencing because in his view they are relevant in determining a sentence "sufficient but not greater than necessary" to comply with 18 U.S.C. §3553(a)'s purposes. *Id.* at 518.

Judge Pooler also concurred in the order denying *en banc* review but wrote separately. Judge Pooler expressed concern that Chief Judge Jacobs' concurring opinion "mistakenly asks the district court to apply the panel's dissenting opinion." *Id.* at 519. An unsuccessful request for *en banc* review, Judge Pooler observed, "becomes an occasion for any active judge who disagrees with the panel to express a view on the case even though not called upon to decide it… This amounts to an exercise of free speech rather than an exercise of any judicial function." *Id.*

Judge Cabranes, writing for himself and Judge Raggi, would have granted *en banc* review. Judge Cabranes opined that "[t]he unreasonableness of [Ms. Stewart's] sentence for a crime whose ultimate object-terrorism- threatens countless innocent lives, would appear obvious." *Id.* at 521. "If there was ever a case that afforded the opportunity to further develop the 'abuse of discretion' and 'shocks the conscience' standard," Judge Cabranes wrote, " it was this case where the District Court sentenced to only 28 months in prison a member of the bar who aided a particularly nefarious and notorious terrorist to continue pursuing his deadly objectives." *Id.* at 524.

The Resentencing

After the government and Ms. Stewart filed additional briefs and the Probation Department updated the Presentence Report, a sentencing hearing was held on July 15, 2010.

The government argued that two public statements by Ms. Stewart warranted a significantly longer jail term than had been imposed originally. The first statement, "[a]s my clients say to me 'I can do that time standing on my head'" was made outside the courthouse immediately after the October 16, 2006 sentencing and was quoted in this Court's opinion. See

United States v. Stewart, 590 F.3d at 108 n.9. But the government took the statement out of context. What Ms. Stewart said was:

> This is a moment that I share with every supporter that came, that called, that sent me a card, that stopped me in the street. It's the cab drivers who gave me the thumbs up this morning. It's everybody who had some role to play in this. I am very grateful to the judge that he gave me time off for good behavior, and he gave it to me in advance of the sentence, when he said that my extraordinary work meant that I could not get a sentence that the government wanted. They were disappointed, but I tell you, he did a fair and right thing and I am grateful to him…
>
> I am standing here with three of my 14 grandchildren. My lawyers pointed out to the judge that under new regulations, the government could have forbade me to ever see them again. This is how we have come in this country. And I hope the government realizes their error, because I am back out and I am staying out until after an appeal that I hope will vindicate me, that I hope will make me back into the lawyer I was.
>
> Any regrets? I don't think anybody would say that going to jail for two years is something you look forward to, but as my clients have said to me, I can do that standing on my head. No, the circle continues. We are going to go on. We have more struggle there. This is a time that cries out for renewed resistance to a government that is not only overreaching in a case like mine – I am point person-but to a government that overreaches into all out lives. (JA336)

The government also relied upon a second statement made by Ms. Stewart on November 19, 2009 – the morning of the day she surrendered to the U.S. Marshal to begin serving her prison sentence – on the radio news program "Democracy Now." When asked whether she would do anything differently, she replied

> I don't – I'd like to think I would not do anything differently, Amy. I made these decisions based on my understanding of what the client needed, what a lawyer was expected to do. They say you can't distinguish zeal from criminal intent sometimes. I had no criminal intent whatsoever. This was a considered decision based upon the need of the client.

(JA340)

Early in the July 15, 2010 re-sentencing proceedings Ms. Stewart addressed the foregoing post-sentencing statements that had caused such fury:

> I … want to speak to you personally and directly on two subjects that were remarked upon by the Circuit Court and included in the government's arguments. First, I, of course, refer to [“] standing on my head [”], my remarks upon leaving the courthouse on October 16, 2006, after the first sentencing. Second I refer to my answer to the question [“]would I do it again ?[”]
>
> First, I have learned that no one, and especially not this 70-year-old woman in questionable health, can do 28 months standing on her head, not in prison. I was wrong. Over the last eight months prison

has diminished me. Daily I confront the prospect of death, death by cancer that I fear may reappear, death as a result of the length of the sentence requested by the government. I endure medical procedures with nothing to distract me from the unknowns to come.

I sense myself losing pieces of my personhood. My sense of inquiry has been replaced by a sense of wariness. My sense of compassion is subordinated to expediency. Once I could think creatively and clearly. Now I see my thoughts are becoming regimented to match institutional regulation. I feel my world, once filled with love and laughter, kindness and work in the company of my husband, surrounded by my children and grandchildren slipping away, a widening rift. And there is so little I can do about it.

***

My fears now are about losing touch with those I love and suffering some unknown medical complication, hospitalized with no one to hold my hand. Each day my hope is that I will make it till tomorrow.

When I stood outside this courthouse after you imposed your original sentence, I was exhausted, mentally drained, but overjoyed. The government wanted me, as it does now, to spend the rest of my life in prison. They asked for 30 years. Today they ask for 15 to 30. Either way it's a potential death sentence.

You gave me back the promise of a future, a future I could share with my family in the company of the world of my friends and the world outside. Twenty-eight months set a horizon. It was a journey I had to make and one I thought I could

> complete. I could see where I was going and I had an event I could anticipate: Freedom. You gave me back the promise of my life. That's all I meant to say. Twenty-eight months, I will live through this, not standing on my head…
>
> To understand the ["]do it again["] response, I ask you please focus on the "it." To me it has always been about representing my clients with selfless, I hope, compassion, putting their needs before my own. It was the client as a human being, not his cause, that I represented. He was old and blind. After years of diabetes he had lost his sense of touch. He could no longer read Braille. The prison regulations forbade him from communicating with anyone, even his jailers. He did not participate in the communal rights of his religion. His conditions of confinement compelled me, not his politics.
>
> Times have changed. And with hindsight, Ramsey Clark is right when he said that we should have gone to court at the first rumblings of government disapproval…I should have followed that course. That should have been my instinct, but it wasn't.
>
> Would I do it again? When the "it" means compassionately represent my client, the answer is, I would. When the it means abiding by unfair and arbitrator (sic) regulations that seriously compromise my ability to represent my client, I would do it differently. A license to practice law is a license to use our best judgment on behalf of those who need us. In this I did not succeed, and this I would do differently…

(JA389-JA391). Ms. Stewart also emphatically denied having committed perjury. (*Id.*)

After hearing from the government, Judge Koeltl began once again with a calculation of the sentence under the advisory Guidelines. With respect to application of the terrorism enhancement, he stated "[a]t the original sentencing, the Court found and [now] reaffirms" that the enhancement applies (J419-JA420). "[T]here is no dispute that the terrorism enhancement applies. This Court found it to be so initially." (JA420-JA421) Then, before addressing whether other enhancements were appropriately applied, the court determined Ms. Stewart's offense level to be 41 and her Criminal History Category VI with a resulting advisory Guideline sentence of 360 months, the statutory maximum. (JA421).

Judge Koeltl next addressed this Court's direction that it consider the Guideline enhancements for obstruction of justice and abuse of trust. It noted that "these enhancements cannot increase the guideline sentencing range, which is already capped at 360 months…" but that they could be considering when applying the 18 U.S.C. § 3553(a) factors. (JA422).

As it had in 2006, the government argued that two aspects of her testimony were perjurious and warranted the enhancement. First was her testimony that she believed that the SAMs afforded her a certain amount of leeway that permitted her in the course of her representation to communicate Dr. Abdel Rahman's views to the outside world. Second was her testimony

that during the period from 1996 to 2000 she was unfamiliar with "Taha," and didn't know him to be a leader of the Islamic Group in Egypt. The court found that Ms. Stewart testified falsely in both areas.

The court offered three reasons for finding the testimony about the SAMs false. First, it noted that the language of the SAMs was clear, a fact Ms. Stewart readily acknowledged at trial. Second, the court construed Ms. Stewart's statements of concern in June 2000 that the government might take adverse action against her if she spoke with the press as evidence that Ms. Stewart knew she was violating the SAMs. Third, the court found significant the fact that Ms. Stewart was never captured on government recordings verbalizing her belief in the so-called "bubble." (JA423-JA426). In the court's view, the unreprimanded and strikingly similar actions of Messrs. Clark and Jabara did not provide a basis for Ms. Stewart's belief in the legality of her actions because her actions "went further than those of either Messrs. Clark or Jabara by publicizing withdrawal from the ceasefire." (JA426).

The court added that the jury's verdict provided an additional basis to conclude that Ms. Stewart testified falsely when she opined on cross-examination that she did not "conspire" with anyone to defraud the United States, did not "believe" that there was a conspiracy involving Mr. Sattar to

kidnap or kill people in a foreign country and that she did not make Dr. Abdel Rahman available to that conspiracy. (JA427).

With respect to her testimony about Taha, the lower court found that the allegedly frequent mentions of him in newspaper articles and letters that she had "approved" for reading by Mr. Yousry to Dr. Abdel Rahman during her visits, proved that Ms. Stewart's testimony was knowingly false. (JA429-JA430).

The court also determined that the two level enhancement pursuant to U.S.S.G. § 3B1.3 for abuse of trust was also warranted. It made no new findings but instead relied upon findings made in October 2006. (JA431).[14]

Applying both the perjury/obstruction of justice and abuse of trust enhancements raised Ms. Stewart's offense to 45. With a Criminal History Category of VI, the advisory Guideline range nonetheless remained, pursuant to U.S.S.G. § 5G1.1A, 360 months, the statutory maximum. (JA433). The court noted that without including the terrorism enhancement,

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[14] In 2006, the court held that

> Ms Stewart abused her position as a lawyer to gain access to Sheikh Omar Abdel Rahman while he was in prison and used that access to smuggle messages to and from Sheikh Abdel Rahman while he was in prison and to make potential and lethal public statements on his behalf in violation of the SAMs. (JA221).

but with including the two enhancements, Ms. Stewart's offense level would be 28, her Criminal History Category I, which would have resulted in an advisory Sentencing Guideline range of imprisonment of 121-151 months. (JA433-JA434).

As it did in 2006, the Court began its sentencing analysis with the advisory Guideline term of 360 months. (JA434). The court acknowledged that in 2006, after using that term as a benchmark and then considering the remaining § 3553(a) factors, it had concluded that a substantial downward variance from the Guideline term would be appropriate and "initially determined" that a sentence of 28 months "satisfied [the] statutory criteria." (JA435). "[T]he Court did not view the sentence of imprisonment of 28 months for a recent breast cancer survivor in poor health, particularly in view of the defendant's entire history, to be a trivial sentence." (JA438).

As he had in 2006, Judge Koeltl recognized that Ms. Stewart's age, then 70, the fact that she continues to risk a significant chance of a cancer recurrence and that she suffers from other ailments would support a downward variance (JA438). Moreover, the letters of support received in 2006 and 2010 remained "a powerful testament to the defendant's previous contributions to the community." (JA438). Our system of justice, Judge Koeltl observed, depends on lawyers like Ms. Stewart who "represent those

who cannot afford representation, and our system depends on lawyers who are prepared to represent unpopular clients." (JA448). Ms. Stewart "built her career over three decades without a view toward personal profit and certainly without a view to establishing mitigating factors for the purpose of sentencing." (JA448).

The Court identified only one reason not to simply re-impose the 28 month term – Ms. Stewart's post October 2006 public statements. Judge Koeltl interpreted her statement made on the courthouse steps after the October 2006 sentencing, *i.e.*, that she could do the 28 months "standing on her head," as an expression of Ms. Stewart's opinion that the sentence to be served was a "trivial" one. "A trivial sentence would not be sufficient to reflect the seriousness of the offense, promote respect for the law and provide just punishment as required by law." (JA439).

The court concluded that her statement that she would do "it" again "indicated a lack of remorse for conduct that was both illegal and potentially lethal. These [two] statements indicate that the original sentence was not sufficient to accomplish the purposes of Section 3553(a)(2), including to reflect the seriousness of the offense and to provide adequate deterrence." (JA440).

The lower court neither addressed nor acknowledged Ms. Stewart's explanations and efforts to place both statements in context. Rather, the court nearly quadrupled Ms. Stewart's prison sentence, imposing a sentence of 120 months on Count Five, and 60 months on Counts One, Four, Six, and Seven (all to run concurrently) and a two year term of supervised release. (JA440).

SUMMARY OF ARGUMENT

The judgment of the lower court should be vacated and the case remanded for resentencing.

First, the four-fold increase in Ms. Stewart's sentence was imposed in violation of her right to free speech and expression as guaranteed by the First Amendment. Acknowledging that there were no other changes in circumstances between 2006 and 2010, the lower court explicitly relied on public statements made by Ms. Stewart – themselves taken out of context – to enhance her term of incarceration.

Second, procedural error was committed when the District Court enhanced Ms. Stewart's offense level under the advisory Guidelines for obstruction of justice and abuse of trust. Given the government's tacit approval of the prior actions of her co-counsel in violation of the Special Administrative Measures (SAMs), it was reasonable for Ms. Stewart to believe that they afforded her discretion to take the actions that she did. Accordingly, she did not commit perjury and did not abuse a position of trust.

Finally, the 120-month term imposed by the lower court is manifestly unjust. Confronted with virtually identical facts in 2006, the District Court determined that a 28-month term was "sufficient, but not greater than

necessary" to satisfy the goals of sentencing. The four-fold increase in Ms. Stewart's prison term to 120 months was almost certainly occasioned by the advisory opinions of this Court, including the opinions concurring and dissenting from the order denying *en banc* review. Ms. Stewart is a 71 year old woman in poor health who has devoted the bulk of her life to representing the poor and unpopular for little or no remuneration. The term imposed is far greater than necessary to achieve the goals set forth in 18 U.S.C. § 3553(a) and creates a real possibility that she will spend the rest of her life in prison.

ARGUMENT

POINT I

LYNNE STEWART'S STATEMENTS AFTER HER CONVICTION AND SENTENCING WERE PROTECTED BY THE FIRST AMENDMENT AND IT WAS ERROR TO USE THEM TO ENHANCE HER PUNISHMENT

It has been said that justice can be calculated in many ways. For the convicted person, however, its truest measure lies in the fairness of the sentence she receives. The primary issue raised by this appeal is the unfair enhancement of Ms. Stewart's sentence based on her speech to supporters and the press after her conviction and immediately after the original sentence was imposed.

The cruel harvest of that speech – the increase of her sentence from 28 months to 10 years imprisonment – strikes at the heart of the First Amendment and is constitutionally intolerable. That simple statement suggests the solemnity of the occasion that returns us to this Court seeking a re-sentencing for this veteran campaigner for social justice who fought so tirelessly for free speech and the legal needs of the poor and disadvantaged.

Standard of Review

When reviewing a sentence imposed by the District Court, this Court reviews legal issues *de novo* and factual findings for clear error. *United States v. Thorn*, 446 F.3d 378, 387 (2nd Cir. 2006).

The Facts Are Largely Undisputed

The sequence of events that frames this issue is unencumbered by any serious factual disputes. Thus, it can be introduced to the Court in a summary fashion.

At Lynne Stewart's initial sentencing, she was staring down the barrel of a life sentence. After carefully examining the comprehensive volume of materials submitted by the Probation Department, the government and the defense, as well as more than 400 letters seeking leniency from prominent members of the community, family, former clients and other people touched by Ms. Stewart's extraordinary life, Judge Koeltl rejected the government's request of life imprisonment. Instead, he imposed a much more humane sentence of 28 months.

As a consequence, Ms. Stewart was relieved. This relief animated her words when she spoke to the crowd that had gathered outside the courthouse. She thanked the judge for considering her life's work. She

declared, "I tell you, he did a fair and right thing, and I am grateful to him." (JA336a).

In an effort to buoy the spirits of her supporters – and in a display of her indomitable will – she quoted the vernacular, commonly used by prison inmates – her clients – by saying that she could do her sentence "standing on my head." (*Id).*

At resentencing, the judge had before him essentially the same materials that were presented at the earlier sentencing. And, because there had been no unaddressed deficiencies in the Court's first sentence, and there had been no significant change in Ms. Stewart's circumstances, the defense urged that she was entitled to have the original sentence re-imposed.

The government urged that she should be sentenced to prison for at least 15 years, in part because of the public statements after her conviction and original sentencing. The trial judge accepted the government's claims and used Lynne Stewart's words to enlarge her sentence from 28 months to ten years.

The District Judge Relied on Lynne Stewart's Remarks To Increase Her Sentence

It is apparent from the Judge's comments at the resentencing that he relied on Ms. Stewart's comments when he enhanced her sentence. The court stressed:

> It is plain that the original sentence cannot simply be reimposed. *First, the comments that the defendant made immediately after the sentence indicated that the defendant did indeed view the sentence as a trivial sentence.*

(JA439) (emphasis supplied).

The court's calculated use of the word "[f]irst" demonstrates the primacy and importance of its reliance on Ms. Stewart's expression in altering its sentence. Although the defense argued that her comments to the press had been taken out of context, the judge nevertheless seized upon Ms. Stewart's speech and, with piercing authority, said,

> [a]fter the sentence and statement submitted by the government, the defendant has said that she made a considered decision based *on the needs of her client and would do it again*. The defendant has also said that she would like to think she would not do anything differently.

(JA439).

The court concluded that:

> These statements indicate a lack of remorse for conduct that was both illegal and potentially lethal. These statements indicate that the original sentence was not sufficient to accomplish the purposes of Section 3553(a)(2), including to reflect the seriousness of the offense and to provide adequate deterrence.

(JA439-JA440).

This confirmed that Ms. Stewart's remarks exerted a profound influence on the subsequent enhanced sentence imposed upon her. It is clear that the court relied on her protected speech when he imposed the sentence of 10 years.

The only new component in the second sentencing was Ms. Stewart's remarks made in the wake of the original sentencing. Ms. Stewart is not unmindful of this Court's decision to require reconsideration of other sentencing factors identified by the Court. Nonetheless, it bears repeating that the judge considered those factors at the original sentence. For instance, the court applied the "terrorist enhancement" and properly calculated the applicable Guidelines range, before rendering the original sentence of 28 months. (JA209-JA211; JA215). He also discussed her abuse of a position of trust and the government's request for an enhancement based on its claim that she gave false testimony at her trial. Nonetheless, the court was convinced that 28 months was sufficient to satisfy the dictates of § 3553(a).

Lynne Stewart's Statements on the Courthouse Steps About Her Sentence Were Protected Under the Mantle of the First Amendment

The First Amendment protected Ms. Stewart's public remarks, made on the steps of the federal courthouse, concerning her original sentence. It also protected her other post-conviction public statements, including those

made to the press. Because of the high position free speech occupies in our hierarchy of constitutional values, Ms. Stewart's views concerning her sentence and conviction could not be used to enhance her punishment at a future sentencing. This constitutional violation requires that the sentence be vacated.

One of the chief utilities of the First Amendment is the citizen's right to freely comment on the actions of the government – and to do so without fear of penalty. *Snyder v. Phelps*, _____ U.S. _____, 131 S. Ct. 1207, 1215 (2011).[15]

It is hard to imagine a brand of speech that enjoys greater protection than a defendant's comments on her own sentence. Great importance must be attached to the fact that what Ms. Stewart said was (1) after her conviction; (2) outside the confines of a courtroom; and (3) to the press. She was entitled to speak freely and publicly on a subject of great interest to many.[16] It was also important for the public to hear from Ms. Stewart, who

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[15] In *Snyder*, the Supreme Court reaffirmed that "speech on matters of public concern ... is at the heart of the First Amendment's protection." *Synder v. Phelps*, 131 S. Ct. at 1215.

[16] Lynne Stewart's out-of-court comments about her case made after sentence was imposed, could not pose any threat to the administration of justice. *See Butterworth v. Smith*, 494 U.S. 624 (1990) (law which punishes a grand jury witness for disclosing his own testimony after the term of the grand jury has ended violates the First Amendment).

was the subject of this highly celebrated case and learn her reactions to her sentence.

Fairly viewed, Ms. Stewart expressed her deep gratitude for the leniency of the sentence imposed and added that the sentence would not deter her from representing people involved in unpopular and controversial causes. Under the protections of the First Amendment, this certainly was something that the public was entitled to know and that she had a right to say.

The enhanced punishment imposed on Ms. Stewart is not only a private grievance between her and the government. When the constitutional right to speak freely, on a subject of public importance, is taken from Ms. Stewart, it is taken from all of us.

It is well settled that a defendant may not be subjected to a higher sentence for invoking her constitutional rights. *See United States v. Tin Yat Chin*, 476 F.3d 144, 147 (2d Cir. 2007). This is, of course, because punishing someone for doing what the law plainly permits constitutes a "due process violation of the most basic sort." *See Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

Utterances that contribute to the free interchange of ideas and ascertainment of truth deserve protection. *Garrison v. Louisiana*, 379 U.S.

64, 73 (1964). And words that may sound extreme to some still enjoy the protection of the First Amendment. *See, e.g.*, *Hustler Magazine v. Falwell*, 485 U.S. 46, 53 (1988) ("in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment").

As a consequence, courts have universally held that a sentence, which is based on activity or beliefs protected by the First Amendment, is unconstitutional. For example, in *United States v. Lemon,* 723 F.2d 922, 937 (D.C. Cir. 1983), the court underscored that the First Amendment makes ineligible for consideration in sentencing views expressed under the protective regime of the First Amendment. Moreover, in *United States v. Bangert*, 645 F.2d 1297, 1308 (8th Cir. 1981), the court stressed that consideration of political beliefs, as distinguished from criminal conduct, "would clearly be impermissible in determining" a defendant's sentence.

This Court has always exercised anxious care over prison sentences that are influenced by unpopular beliefs. For instance, in *United States v. Brown*, 479 F.2d 1170, 1174 (2d Cir. 1973), this Court acknowledged that it

would be impermissible for a judge to base a sentence on a defendant's unpopular political beliefs.[17]

Simply put, the unifying strategy of all these cases is that consideration of political expression, as compared to criminal activity, is constitutionally impermissible in determining a defendant's sentence. This is because such considerations would seriously intrude upon a defendant's First Amendment rights and cast a harrowing chill over the free speech rights of others.

The Sentencing Court Rejected Lynne Stewart's First Amendment Claims

Ms. Stewart extensively briefed to the District Court her objections to the government's efforts to convert her speech into criminal conduct in support of a longer sentence. Ms. Stewart's Reply Memorandum, specifically urged that her "statements to the press are constitutionally protected and were taken out of context" (*See* Defendant's Reply Memorandum, dated 6/26/10 at 22).

The district judge rejected the Defendant's First Amendment claims as having "no merit." (JA440). Judge Koeltl relied on *United States v. Kane*,

[17] In *Brown* the sentence was upheld precisely because it was not based on the defendant's objections to the Vietnam War and belief that the war oppressed African Americans. This stands in marked contrast to the case at bar where Lynne Stewart's sentence was radically increased based on her statements.

452 F.3d 140 (2d Cir. 2006), and *United States v. Martinucci*, 561 F.3d 533 (2d Cir. 2009), to support his view that he could consider the "truth" of Ms. Stewart's comments when imposing a new sentence. (JA440). This reliance was completely misplaced.

In *Kane*, the defendant had a long history of defrauding the Federal Housing Administration as well as the Department of Housing and Urban Development. *United States v. Kane*, 452 F.3d at 141. The defendant's scheme included buying homes that were financially insured by the federal programs and then collecting rent from unsuspecting tenants. Kane then fraudulently transferred the properties thereby causing third parties to default on their mortgages. The defendant's conduct prompted foreclosures and a loss to the federal programs of more than $700,000. *Id.* at 142.

At sentencing, Kane used character letters in an effort to portray himself as a "fair and honest man." *Id.* In response, the government submitted excerpts from books the defendant wrote before his conviction where he advised readers how to perpetrate similar frauds, including how to manipulate financial records. *Id.* The sentencing judge also considered the defendant's prior writings about "Mastering the Art of Male Supremacy." *Id.*

On appeal, Kane urged that his First Amendment rights were violated because the sentencing judge weighed the defendant's prior published writings against his mitigating character evidence. In affirming Kane's 24-month sentence, this Court noted that the First Amendment does not create a *per se* barrier to a sentencing court's consideration of a defendant's beliefs. *Id.* at 142, *citing Dawson v. Delaware*, 503 U.S. 159, 165 (1992). However, such evidence may only be considered if it is "relevant to the issues involved" in the sentencing proceeding. *Id.*[18]

Significantly, in *Kane* the trial court only considered the defendant's writings to the extent that they "rebutted his mitigating character evidence." *Id.* at 143. Thus, the court only took into account evidence that refuted Kane's claims of "honesty, charity, and tender devotion to his wife." *Id.* As a consequence, this Court found that Kane's prior writings were relevant, in that unique case, because the sentencing court had carefully confined its analysis to the "particular character issues" asserted by the defense. *Id.*

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[18] Moreover, even though a particular piece of evidence may be relevant in certain ways, the "government may *not* offer proof of a defendant's 'abstract beliefs' merely for the purpose of demonstrating that those beliefs, and by extension the defendant, are 'morally reprehensible.'" *United States v. Kane*, 142 F.3d at 143, *citing United States v. Dawson*, 503 U.S. at 166-167.

In marked contrast, Ms. Stewart's speech was not used to rebut mitigating evidence of specific claims of honesty, charity or devotion to her family. Instead, her speech was broadly exploited to address specific criteria codified in 18 U.S.C. § 3553(a)(2): "deterrence" and "promoting respect for the law." Thus, the District Court considered Ms. Stewart's words for general sentencing purposes rather than to address particular character issues.

Furthermore, in *Kane* the defendant's writings involved illegal real estate schemes related directly to his offense of conviction. Here, Ms. Stewart's speech was made after her trial was completed and was unrelated to the conduct that gave rise to her offenses of conviction.

Judge Koeltl's reliance on *United States v. Martinucci,* 561 F.3d 533 (2d Cir. 2009), to increase Ms. Stewart's sentence was also error. The District Court cited *Martinucci* for the proposition that the court "can consider the defendant's writings to the extent relevant, at sentencing." (JA440). *Martinucci* is, however, wholly irrelevant to Ms. Stewart's First Amendment claims.

The defendant in *Martinucci* repeatedly raped a 10-year-old girl, and videotaped the conduct. *Id.* at 534. At sentencing the judge considered depositions given by other children who had been similarly victimized by

the defendant. In affirming the enhanced sentence, this Court noted that a sentencing court may consider hearsay evidence in determining the appropriate sentence when that evidence is sufficiently reliable. *Id.* at 535. Thus, *Martinucci* provides no basis for justifying the substantial increase in Ms. Stewart's sentence based upon her extra-judicial post-conviction and post-sentencing statements to the press and public.

The Government Used Lynne Stewart's Protected Speech to Inflame the Sentencing Judge

The government's pre-sentencing submission highlighted isolated portions of an interview that Ms. Stewart gave for an article published in the NEW YORK TIMES, six months after her indictment to create a false impression that she shared the Islamic Group's violent views. S*ee* Government Sentencing Memorandum, Jun. 11, 2010 *(*"Gov't 6/11/10 Pre-Sentencing Memorandum at 4; See also Defendant's Reply Br. at 23; JA139).[19]

Rather than endorsing any violence or terrorist activities as the government tried to portray, Ms. Stewart was merely predicting, accurately as time would tell, the recent overthrow of Egypt's corrupt government in

[19] Lynne Stewart's comments were part of an interview that she gave to George Packer about her representation of Dr. Abdel Rahman, published Sept. 22, 2002.

her compellingly idealistic observation that the "people who feel the boot of oppression" will in time prevail (Defendant's Reply Br. at 23; JA139). Moreover, there is not the slightest suggestion that Ms. Stewart's language would cause any harm or that she actually sought its occurrence. Nevertheless, the profound prejudice caused by the government's calculated focus on other statements by Ms. Stewart, taken out of context, adds weight to the claimed constitutional error.

The Chilling Effect of Enhancing Lynne Stewart's Punishment Based On Her Constitutionally Protected Speech

One of the imperatives of free speech is that those who make unpopular or controversial speeches are protected so that others, who have complaints against our government, will not be inhibited from registering their complaints as well. Certainly, a free people have the right, if not the obligation, to voice concerns on important public issues, even if the side they choose is unpopular. This is a matter of constitutional necessity because debate on public issues should be "uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Watts v. United States*,

394 U.S. 705, 708 (1968); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). *See also Snyder v. Phelps*, 131 S. Ct. at 1215.[20]

Ms. Stewart's expression involved a view of her own sentence and her deep relief that she did not receive the life sentence demanded by the government. She had an absolute right to make such a statement without fear of official retribution.

An important aspect of free speech is the collateral doctrine of "Chilling Effect." This critical canon recognizes that sanctioning those who speak out inevitably inhibits others from speaking freely on similar issues of public concern. This coefficient of the First Amendment adds much to its force. *See, e.g., Levin v. Harleston*, 966 F.2d 85, 89-90 (2d Cir. 1992) ("It is the chilling effect on free speech that violates the First Amendment, and it is plain that an implicit threat can chill as forcibly as an explicit threat").

Because Ms. Stewart's resentencing was so widely publicized, it was, in effect, a warning that all who in the future may comment on his or her own sentence face the same risk in the event an appeal is pursued and

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[20] Because passions often arise in public discourse, the language of the discourse is often emotional and volatile, but that does not alter its protected status. *See, e.g., Watts*, 394 U.S. at 708.

resentencing ordered.[21] It is also a chilling caution to any attorney who may choose to represent radical defendants.[22]

If we allow these constitutionally protected words to be used against Ms. Stewart in a sentencing proceeding, it will inevitably discourage the exercise of free speech by others because they will fear that their comments may subject them to the same consequences.

Lynne Stewart's Expression of Relief Over Not Receiving a Life Sentence Should Not be Construed as Trivializing Her 28-Month Sentence

The sentencing court's error in relying on Ms. Stewart's protected speech is compounded by its misinterpretation of her remarks. This

[21] *See, e.g.*, J. Eligon, *A Defendant Pays the Price for Talking to Reporters*, N.Y. TIMES, Jul. 17, 2010, at A17 ("[w]hat is particularly striking about Ms. Stewart's media blunder is that it came at a moment when one would think would be the safest to open up -- after your punishment is handed down"); M. Hamblett, *Stewart Gets a New 10-Year Prison Sentence*, N.Y.L.J., Jul. 16, 2010, at 1 ("[a] stunned Lynne Stewart was resentenced to 10 years in prison yesterday, in part because she crowed that she could handle the initial 28-month sentence ordered by Southern District Judge John Koeltl in 2006 'standing on my head'").

[22] P. Bartosiewicz, *Chill the Lawyers : The Stewart Case is Meant to Intimidate Attorneys Who Defend Controversial Clients*, L.A. TIMES, Jul. 15, 2010, at 25 ("[b]y seeking what is tantamount to a death sentence for Stewart, who is now a 70-year-old grandmother, it seems clear the Justice Department is intent on making an example of her. This is not just because she breached the rules but because she has remained largely unapologetic for her transgressions").

significant error, which is manifest on the face of the record, lends considerable support to Ms. Stewart's claim that the 120-month sentence must be vacated. To understand the true meaning of Ms. Stewart's words and thus, the magnitude of the District Court's error, requires an understanding of the context in which her comments were made.[23]

On October 16, 2006, Ms. Stewart was spared a life sentence. Thus when she walked out of the courthouse and encountered a battery of reporters who began questioning her, an overwhelming joy buoyed her answers. Her "standing on my head" remark, which was widely quoted in the press and referred to by this Court,[24] was taken out of context which is clear from the totality of her statement:

> This is a moment that I share with every supporter that came, that called, that sent me a card, that stopped me in the street. It's the cab drivers who gave me the thumbs up this morning. It's everybody who had some role to play in this. I am very grateful to the judge that he gave me time off for good behavior, and he gave it to me in advance of the sentence, when he said that my extraordinary work meant that I could not get a sentence [of life imprisonment] that the

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[23] When making a determination regarding the nature of speech, courts should look at the context in which the words were uttered, the conditional nature of the statement and the listener's reaction. *Watts*, 394 U.S. at 708.

[24] *See United States v. Stewart*, 590 F.3d at 108 n.9.

> government wanted. They were disappointed, but I tell you, he did a fair and right thing, and I am grateful to him.

(JA336a).

Always a fighter, and deeply relieved about not having received a life sentence, Ms. Stewart continued:

> Any regrets? I don't think anybody would say that going to jail for two years is something you look forward to, but *as my clients have said to me*, I can do that standing on my head. No, the circle continues. We are going to go on. We have more struggles there. This is a time that cries out for renewed resistance to a government that is not only overreaching in a case like mine -- I am the point person -- but to a government that overreaches into all our lives (emphasis supplied).

(*Id.*)

When the questioned statement "standing on my head" is read with the rest of her remarks, it is at once apparent that Ms. Stewart was merely quoting her clients, who have used that common prison vernacular when facing a sentence lighter than expected.

Realizing that she was facing the dire threat of being sentenced to imprisonment for the rest of her natural life, as requested by the government, Ms. Stewart was tremendously relieved when the judge, instead, imposed a sentence of 28 months. Thus, her jubilation came from avoiding a *life sentence* -- *not* from the 28-month sentence that was imposed.

"When I Stood Outside this Courthouse After You Imposed Your Original Sentence, I was Exhausted, Mentally Drained, But Overjoyed"

Ms. Stewart's elation at averting life in prison is confirmed by her statement to the court at the July 15, 2010 resentencing. Ms. Stewart explained with seasoned dignity her emotionally heightened statements, made on the courthouse steps:

> [w]hen I stood outside this courthouse after you imposed your original sentence, *I was exhausted, mentally drained, but overjoyed*. The government wanted me then, as it does now, to spend the rest of my life in prison. They asked for 30 years. Today they ask for 15 to 30. Either way, it's a potential death sentence.

(JA389) (emphasis supplied).

Ms. Stewart then described the emotionally draining experience that she had then endured and her overwhelming relief when a much more lenient sentence was imposed.

> You gave me back the promise of a future, a future I could share with my family in the company of the world of my friends and the world outside. Twenty-eight months set a horizon. It was a journey I had to make and one I thought I could complete. I could see where I was going, and I had an event I could anticipate: Freedom. You gave me back the promise of my life

(JA389-390).

Still today you can hear the hurt in every syllable; the terror she felt at the prospect of being incarcerated for life. Avoiding that horror is what gave rise to Ms. Stewart's sense of great relief. For one who has never experienced imprisonment, certainly a sentence of 28 months is anguishing. But, when compared to life in prison, its impact is greatly diminished.

"I Have Learned that No One, and Especially Not this 70-year-old Woman in Questionable Health, Can do 28 Months Standing on Her Head, Not in Prison"

Ms. Stewart further explained to the sentencing court that her statement about being able to do 28 months standing on her head related to being able to survive that period of imprisonment. (JA390) ("I said 28 months, I will live through this; not standing on my head. That, I know for sure. Just surviving").

By July 15, 2010, after enduring eight grueling months at MCC, Ms. Stewart had learned that she was wrong. "[N]o one, and especially not this 70-year-old woman in questionable health, can do 28 months standing on her head, not in prison" (JA388). Ms. Stewart also acknowledged that she "was wrong" to have made the statement and she has been "diminished" by her imprisonment. *Id.*

The Sentencing Judge Misconstrued Lynne Stewart's Post Conviction Statement that "I Would Do It Again"

The trial judge also relied on a statement that she made in November 2009 just before she surrendered to start serving her prison sentence. He concluded that Ms. Stewart did not show remorse for her conduct (JA440) .

Specifically, the journalist asked Ms. Stewart:

> Lynne, would you do anything differently today, or would you do anything differently back then, if you knew what you knew today?

Underscoring the need for the representation of unpopular defendants, who often have no one to voice their cause, Ms. Stewart responded:

> I think I should have been a little more savvy that the government would come after me. But do anything differently? I don't, I'd like to think I would not do anything differently, Amy. I made these decisions based on my understanding of what the client needed, what a lawyer was expected to do. They say that you can distinguish zeal from criminal intent sometimes. *I had no criminal intent whatsoever* (emphasis supplied).

She continued, in compelling words, that

> This was a considered decision based on the need of the client. And although some people have said press releases aren't client needs, I think keeping a person alive when they are in prison, held under the conditions which we now know to be torture, totally incognito, not incognito, but totally held without any contact with the outside world except a phone call once a month to his family and to his

> lawyers, I think it was necessary. I would do it again. I might handle it a little differently, but I would do it again.[25]

At resentencing, Ms. Stewart explained that her words meant that she would continue to represent the poor and disadvantaged. She demonstrated that the word "it" in her comments to the press meant "abiding by unfair and arbitr[ary] regulations that seriously compromise[d] [her] ability to represent [her] client" (JA391)). Ms. Stewart also explained that what she would have done differently was to succeed in using her best judgment on behalf of those who need her representation. *Id.* Clearly, "do it again" meant that she would continue to represent zealously highly unpopular clients, not that she would engage in criminal conduct.

Nevertheless, the sentencing judge seized onto those post-conviction remarks taken from the press interview and erroneously held that these "statements indicate that the original sentence was not sufficient to accomplish the purposes of Section 3553(a)(2), including to reflect the seriousness of the offense and to provide adequate deterrence" (JA440).

No one can seriously question that Ms. Stewart had a right to reaffirm publicly her commitment to representing the friendless and the outcasts of

[25] Ms. Stewart made a similar comment during a presentation at Hofstra Law School in 2007 adding "I know I did not do it exactly the right way." (JA349, JA 359).

our society. Nevertheless, the judge refused to even acknowledge Ms. Stewart's concession that perhaps her speech was "intemperate at best" and that her words were taken "taken out of context" (JA439).

The government's highly varnished interpretation of Ms. Stewart's remark – that she would "do it again," suggesting that she would commit the offense again – must be rejected out of hand. She clearly explained what she meant. She would continue her representation of clients who are unpopular and controversial. Nothing more.

Finally, because of the importance of free speech, Ms. Stewart is certainly entitled to the benefit of the doubt where there are two conflicting views or interpretations of what she said. Under the First Amendment, any ambiguities must be resolved in favor of sustaining the protected speech.

In conclusion, two things are unambiguous: (1) the judge relied upon Ms. Stewart's protected speech, made after her conviction and first sentence, as the decisive factor in enhancing her sentence; and (2) he gravely misconstrued what she said. Worse yet, he refused to accept, and indeed did not even address, her plausible explanations that undercut the impact of the government's highly questionable interpretation of her remarks.

It is Error for a Judge to Determine Whether a Sentence Satisfies the Admonitions of 18 U.S.C. § 3553(a) Based on a Defendant's Subjective Statements

Judge Koeltl misinterpreted Ms. Stewart's comments when, based on Ms. Stewart's speech, he concluded that she considered the 28-month sentence to be "trivial." As a consequence, he committed error when he based his evaluation of the factors mandated by § 3553(a) and his determination of a sentence that would be "sufficient but not greater than necessary" on such inherently unreliable and subjective comments.

The remarks of a defendant, made at a different time and place from his or her sentence, may involve an element of artificiality motivated by a wide range of reasons or emotions that are especially unreliable. For example, out of a false bravado or swaggering, a defendant might claim that a particular sentence could be served without difficulty. Another defendant might urge that incarceration for a even single day would be unbearable and constitute cruel and inhumane punishment.[26] But, surely, no one would

[26] Most of us at some point have experienced a sense of enormous relief when a possible horrible happening somehow does not come to pass. We may, in our joy, make hyperbolic statements that say more about our physical state – the rush of adrenalin – than about our rational thoughts. "I'm so hungry I could eat a horse" should not lead the authorities to call the SPCA because an animal is in real danger. The government's position that Ms. Stewart's statement somehow trivializes the original sentence, adopted by the sentencing court, demonstrates a lack of perspective.

argue that the factors enumerated in § 3553(a) should be determined by a defendant's reactions to the sentence. This is, after all, because of the high likelihood that the remarks are deeply biased and, thus, unreliable. *United States v. Prescott*, 920 F.2d 139, 143 (2d Cir. 1990)(to make a defendant's due process rights meaningful "a sentencing court must assure itself that the information upon which it relies is reliable and accurate.") Clearly, the factors used by a court to determine the sufficiency of an individual's sentence under § 3553(a) must be required to bear greater indicia of reliability.

In sum, the enhanced sentence violates Ms. Stewart's free speech rights, protected by the First Amendment and as a consequence, it must be vacated and the matter remanded for re-sentencing.

POINT II

LYNNE STEWART DID NOT COMMIT PERJURY, NOR DID SHE ABUSE A POSITION OF TRUST ACCORDINGLY, THE LOWER COURT ERRED WHEN IT ENHANCED HER U.S.S.G. OFFENSE LEVEL

Obstruction Of Justice

Judge Koeltl found that Ms. Stewart's trial testimony warranted a two-level enhancement for obstruction of justice. That finding was based on two aspects of her testimony that were allegedly false: (1) that she believed that there was leeway in the SAMs (a "bubble") that was based on the government's inaction in the face of unmistakable and repeated SAMs violations by her co-counsel Ramsey Clark and Abdeen Jabara; and (2) that she did not recognize the name Rifa'i Taha, a leader of Islamic Group. Neither basis for the enhancement is supportable. Accordingly, this Court should vacate the sentence imposed and remand for resentencing.

Standard Of Review

This Court reviews the facts supporting a District Court's obstruction of justice finding for clear error and its legal conclusion that the established facts constituted obstruction *de novo*. *United States v. Onumonu*, 999 F.2d 43, 45 (2d Cir. 1993); *United States v. Shoulberg*, 895 F.2d 882, 884 (2d Cir. 1990).

Legal Standard For Obstruction Under U.S.S.G. § 3C1.1

When a defendant's testimony at trial is used as the basis for an obstruction enhancement, the testimony must encompass all the elements of perjury. *United States v. Dunnigan*, 507 U.S. 87, 95 (1993). The government must establish by clear and convincing evidence that the defendant gave (1) "false testimony" (2) "concerning a material matter" that was (3) "with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." *Id.* at 94. *See also United States v. Savoca*, 596 F.3d 154, 159 (2d Cir. 2010) (applying clear and convincing evidence standard to obstruction arising from trial testimony). Inaccuracies or inconsistencies in testimony that do not rise to the level of perjury cannot provide the basis for an obstruction enhancement. *United States v. Monteleone*, 257 F.3d 210, 219 (2d Cir. 2001) *citing United States v. Sanchez*, 969 F.2d 1409, 1414-1415 (2d Cir. 1992). As the Supreme Court has noted, "false testimony can result from faulty recollection as opposed to intentional lying." *James v. Illinois*, 493 U.S. 307, 314, n.4 (1990).

Moreover, to constitute perjury, the testimony must be knowingly false. Accordingly, there must be sufficient proof that the witness believed that the testimony she gave was false. *United States v. Lighte*, 782 F.2d

367, 372 (2d Cir. 1986). "The [witness's] knowledge of the falsity of the statements at the time [s]he made those statements is essential to [a finding of] perjury." *United States v. Sweig*, 441 F.2d 114, 117 (2d Cir. 1971). *See also United States v. Winter*, 348 F.2d 204, 211 (2d Cir. 1965) ("It is the belief of the individual in the verity of his own testimony that is crucial"). When determining whether the government has satisfied its burden a District Court must "resolve in favor of the defendant those conflicts about which the judge, after weighing the evidence, has no firm conviction." *United States v. Cunavelis*, 969 F.2d 1419, 1423 (2d Cir. 1992).

Ms. Stewart's Testimony That She Believed There Was Leeway In The SAMs Was Not Perjury

The lower court found that the following testimony was knowingly false and therefore perjurious: (1) that Ms. Stewart understood the SAMs contained a "bubble" that permitted Dr. Abdel Rahman's attorneys to issue press releases (JA423-JA424 *citing* JA118, JA128, JA137-JA138)); (2) that she did not believe that she violated the SAMs or the language of the SAMs and therefore she kept her promise to abide by them (JA424 *citing* JA118, JA129); (3) that she did not believe that she violated any "command" of the United States of America (JA424 *citing* JA132); and (4) that she never signed a false attorney affirmation (referring to her affirmation where she

agreed to abide by the provisions in the SAMs) (JA424 *citing* JA126-JA127).

The purported falsity of each instance above turns on the her 2005 trial testimony that in 2000 and 2001, when she was visiting Dr. Abdel Rahman, she believed that the SAMs afforded her discretion . *United States v. Lighte*, 782 F.2d at 372; *United States v. Hairston*, 46 F.3d 361, 375 (4th Cir. 1995) (testimony that is literally true is not perjury even if it can be construed as misleading). *Cf. Bronston v. United States*, 409 U.S. 352, 356 (1973) (perjury conviction cannot be premised upon unresponsive, though concededly truthful testimony).

There was no evidence that Ms. Stewart's testimony regarding her belief in 2000 and 2001 in the SAMs' leeway was unreasonable let alone perjurious. Ms. Stewart testified both on direct and cross-examination that notwithstanding the language in the attorney affirmations signed by the lawyers that they, and she, believed that the lawyers had a certain amount of discretion to make public statements about Dr. Abdel Rahman's views that they believed were necessary to provide him with effective representation. There was evidence that Ms. Stewart knew that in the five years that she had represented Dr. Abdel Rahman under the SAMs, Ramsey Clark and Abdeen

Jabara openly and notoriously violated the SAMs with impunity. There were no negative consequences, not even a reprimand.[27]

Her trial lawyers prepared for her testimony accordingly. In response to this Court's direction to make findings with respect to the obstruction of justice enhancement, Ms. Stewart's lead trial counsel, Michael E. Tigar, submitted an affirmation to the District Court about how the lawyers prepared Ms. Stewart's testimony (JA234-JA239). He makes clear that he came to believe that given the practices of Messrs. Clark and Jabara, Ms. Stewart's belief that there was a certain amount of leeway in the SAMs was reasonable.

Mr. Tigar pointed out that it was at Mr. Clark's urging that Ms. Stewart became involved with Dr. Abdel Rahman's case. Mr. Clark's experience, therefore, "was the most important guide to her." (JA235) Thus,

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[27] As Ms. Stewart testified,

> [I]ndeed the practice by my co-counsel, Mr. Clark and Mr. Jabara, seemed to indicate or at least indicated definitely to me that press releases were within that bubble, that making press releases in his name was not something that was actionable under the SAMs.

(JA128)).

when the government permitted Mr. Clark and Mr. Jabara to interpret the SAMs and act in much the same way as Ms. Stewart later did, without consequence, it

> could rationally be seen as creating a kind of estoppel against the government if it sought to apply a harsher, contrary, interpretation to her. That is, whatever a legal rule may eventually be held to mean, observable enforcement patterns with respect to it will surely influence the conduct of those subject to the rule.

(JA236). Ms. Stewart's belief was reinforced when the government negotiated with and permitted her to return to Rochester for another legal visit with Dr. Abdel Rahman even after her June 2000 statement to Reuters. The government's conduct thus confirmed her belief that the SAMs, while facially clear within the four corners of the paper, in practice were interpreted by the government to give her discretion.

The actions of Messrs. Clark and Jabara after they signed their attorney affirmations, further signaled to Ms. Stewart their belief that the SAMs did not totally prohibit the lawyers from providing to Dr. Abdel Rahman outside information and communications and recording and disseminating his responses.

As part of its submission to the sentencing court for the resentencing, Ms. Stewart submitted several charts demonstrating the many SAMs

violations of Messrs. Clark and Jabara that provided the foundation for Ms. Stewart's belief in a "bubble." (JA274-JA282). Ms. Stewart also filed excerpts from the notebooks that Mohammed Yousry maintained – his contemporaneous records of the legal telephone calls and visits with Dr. Abdel Rahman as well as transcripts of recorded legal telephone calls.[28] This evidence makes clear that their conduct in violation of the SAMs was open and notorious, for all the government to see and, as Ms. Stewart knew, resulted in no government sanction. Without a doubt, their conduct influenced Ms. Stewart's beliefs about how she was required to conform her own conduct to the SAMs' restrictions.

During this time period, Messrs. Clark, Jabara and Schilling participated in hundreds of telephone calls with Dr. Abdel Rahman – an average of two per week. (*See* 10/2/2006 Clark Letter, JA246) According to Mr. Clark, reading news from Arab language newspapers was a part of every legal call. (JA255-JA256). As demonstrated in the charts, on at least 18 separate occasions during this time period, Mr. Clark authorized reading the news to Dr. Abdel Rahman; Mr. Jabara authorized the reading of news to Dr. Abdel Rahman 12 times during a visit or legal call. (Clark: JA274-

[28] The transcripts of the legal telephone calls are voluminous as are Yousry's notebooks. Only those pages referenced in this brief are included in the appendix. (See JA283-JA284; JA285-JA336). The entire documents are part of the Record on Appeal.

JA277; Jabara: JA278-JA282). In addition, both Messrs Clark and Jabara permitted Mr. Yousry to read to Dr. Abdel Rahman letters from third parties and to dictate responses to those letters (JA285, JA286, JA287, JA288, JA317, JA318, JA319, JA321-JA328).

The lower court totally discounted evidence of the conduct by Messrs. Clark and Jabara and the effect their actions might reasonably have had on Ms. Stewart's perception of how the government interpreted and enforced the SAMs. Judge Koeltl found that "[Ms. Stewart's] actions went further than those of either Messrs. Clark or Jabara by publicizing withdrawal from the ceasefire." (JA426). That finding is refuted by the record. Mr. Clark admitted, and irrefutable evidence supports, that he repeatedly disseminated Dr. Abdel Rahman's views to the outside world, including his views on the ceasefire, via the press and other means without so much as a government rebuke.

Mr. Clark first communicated Dr. Abdel Rahman's views on the ceasefire to the media in August 1997. (JA289-JA290; GX22) In October 1997, Mr. Clark helped Dr. Abdel Rahman draft a statement that Mr. Clark was to deliver to leaders of the Arab world. (JA293-JA303) In January 1998, Mr. Clark facilitated an interview between Dr. Abdel Rahman and *Il*

Corriere della Sera, the leading Italian newspaper, that included questions on the ceasefire, violence, and President Mubarak. (JA 307- JA 316)).

Even after the SAMs and the attorney affirmations were amended to expressly prohibit communications with third parties or the media, Mr. Clark continued to disseminate Dr. Abdel Rahman's views to the press. In November 1999, for example, he related Dr. Abdel Rahman's views on the formation of a political party, and two months later he facilitated Dr. Abdel Rahman's communication with Japanese Public Television. (GX 1034X; JA 335-JA336)).

Most compellingly, during a September 1999 prison visit, just months before Ms. Stewart's June 2000 conversation with Reuters, Mr. Clark permitted Mr. Yousry to convey to Dr. Abdel Rahman questions from Mr. Sattar and Taha about the ceasefire and then permitted Dr. Abdel Rahman to dictate a response. In so doing, Mr. Clark thus facilitated conveying Dr. Abdel Rahman's views – which granted formal permission to take up arms in self defense – to Mr. Sattar and Taha. (*See* GX 2204AT, "*Permission to take up arms is hereby given to those who have been attacked because they have been wronged*"). While Taha might have preferred to have Dr. Abdel Rahman's statements conveyed to the press by a lawyer does not alter the fact that Dr. Rahman's views were publicized within Egypt, with Mr.

Clark's permission and complicity, in violation of the SAMs' literal language. Yet the government took no adverse action.

In the lower court, the government asserted that "Clark – apparently aware that issuing Abdel Rahman's statement would violate the SAMs and endanger innocent lives – refused to issue Abdel Rahman's statement." (Govt. 6/11/2010 Sent. Memo. at 32). Mr. Clark himself categorically denies the government's interpretation of history. Mr. Clark did not "refuse" to issue Dr. Abdel Rahman's statement. As Mr. Clark wrote in his letter to the Court, "I am sure that I never refused to issue a press release concerning withdrawal from the ceasefire because of the SAMs." (JA 254).

Examples of other SAMs violations by Messrs. Clark and Jabara abound during the period after the SAMs first were imposed on Dr. Abdel Rahman in April 1997 and before Ms. Stewart spoke to Mr. Salaheddin. Both Mr. Clark and Mr. Jabara acted as regular conduits for Dr. Abdel Rahman's communications with third parties. In August 1997 and February 1998, Mr. Clark brought letters into the prison from Ahmed Sattar and others and permitted Dr. Abdel Rahman to dictate responses to those letters. (JA 285-JA 288; JA 317-JA 328). Similarly, Mr. Jabara permitted Dr. Abdel Rahman to receive and dictate responses to numerous letters and

other communications from Mr. Sattar,[29] Dr. Abdel Rahman's wife, other family members, and those such as Usama Tugby, Nabil El-Masry (the wife of Misbah el-Enani, the head of the Middle Eastern Institute for the blind in Saudi Arabia), Sa'id Mansour, Firas Jindali, Nasser Ahmed, and Dr. Mohammed Abdal Mun'im Nimr. (JA278-JA282). Moreover, in January 1999, Mr. Jabara permitted Dr. Abdel Rahman to dictate to Mr. Yousry his response to an article concerning the formation of a Muslim political party. (JA329, JA332).

The open and notorious violations of the SAMs by Messrs. Clark and Jabara – their statements to the press, their permission to read him the news, the letters that they permitted to be read and the responses that they permitted to be dictated all with the government's knowledge and inaction – show that the two lawyers who had the most direct contact at the time with Dr. Abdel Rahman believed that despite the literal words of the SAMs the government had interpreted them so as to permit them to facilitate communications that were in the legal interest of their client. Ms. Stewart's belief in a "bubble," or estoppel if you will, was entirely reasonable as it was in total accordance with the beliefs – and practices – of her unreprimanded co-counsel.

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[29] During the 12 months ended December 1999, Mr. Jabara permitted Dr. Abdel Rahman to draft no fewer than eight letters to Mr. Sattar.

The bona fides of her belief are underscored in a legal telephone call that Mr. Clark had with Dr. Abdel Rahman on September 15, 2000, three months after Ms. Stewart's conversations with Mr. Salaheddin. During this call, Mr. Clark and Dr. Abdel Rahman had explicitly discussed why, in Mr. Clark's view, Ms. Stewart had been barred from the prison following her contact with Reuters. First Mr. Clark tells Dr. Abdel Rahman that Ms. Stewart's request to make another visit was denied. Then the following exchange ensued where Mr. Clark attributes the government's action not to the violation of the SAMs, but rather to the publicity that the press statement received in Egypt:

> **Rahman:** Hum. Okay. I want to tell him…why Lynne? Why is the government taking this position? In light of the fact that Abdeen held a press conference and you held tens of press conferences after you met with me. Huh?
>
> **Yousry:** Yes, sir.
>
> **Rahman:** And nothing happened. The government didn't say anything [loud static] [UI].
>
> **Yousry:** [E] He wants to know [loud static][UI]
>
> **Clark:** I think in part because... eh... this time it got certainly more [UI] than the other times... it's gotten more than [UI] coverage and then was the one major [loud static][UI] you know, I guess they [UI a good opportunity [loud static] [UI].

> **Yousry:** [A] Mr. Ramsey is telling you, sir that this time is different because of the [loud static] [UI].
>
> **Rahman:** Tell him that just because he is protected from the government and no one would touch him... he also has to protect the other lawyers...the lawyers that work with him...our lawyers.

(JA 283-JA284). From this it is obvious that Mr. Clark did not believe Ms. Stewart had done anything qualitatively different from that which both he and Mr. Jabara had done. The difference, he explained to Dr. Abdel Rahman, was the wide coverage Ms. Stewart's announcement received.

The lower court pointed to concerns expressed by Ms. Stewart in 2000 that there might be adverse consequences to the Reuters interview as evidence that she harbored a belief that there was no leeway in the SAMs. ((JA425). The inference is unwarranted. Ms. Stewart's expression of concern that the government might take action to further isolate Dr. Abdel Rahman or even take action against her is not an admission that she herself believed that her conduct was wrong or that the government's actions, if taken, would be justified. It was simply an expression of her belief that the government might take action to further isolate Dr. Abdel Rahman by unfairly punishing those with whom he had contact.

Ms. Stewart testified that the judgment that she made with respect to the SAMs' meaning was based on how they operated in practice (JA 125, JA 128). She believed that had certain actions violated the SAMs, the government would, at a minimum, have informed counsel and/or taken action pursuant to them. The terms of the SAMs affirmations that Ms. Stewart and Dr. Abdel Rahman's other lawyers signed, specified that failure to abide by the SAMs could result in termination of all contact with her client. But that never happened. Thus, it was reasonable for Ms. Stewart to believe that she was not bound by the SAMs literal language and her testimony about her belief at the time was not, as the lower court erroneously determined, knowingly false. *United States v. Sweig*, 441 F.2d at 117; *United States v. Winter*, 348 F.2d at 211.

Ms. Stewart's Testimony Regarding Her Belief That She Had Not Committed Any Crimes Cannot Form A Legal Basis For A Perjury Enhancement Under the Sentencing Guidelines

In addition, the District Court found that Ms. Stewart committed perjury when she testified that she (1) "did not believe that she conspired with anyone to defraud the United States…;" (2) "did not 'believe that there was a conspiracy that involved Mr. Sattar…and others to kidnap people in a foreign country;'" and (3) "did not make Abdel Rahman available to any conspiracy to kill or kidnap people" (JA427). That testimony was given on

cross-examination in response to questions that tracked the wording of the Indictment. Her testimony was not an assertion of "fact." Rather, it was an expression of her opinion – a reiteration of her "not guilty" plea. Accordingly, this testimony cannot provide the basis for a perjury finding. *United States v. Endo*, 635 F.2d 321,323 (4th Cir. 1980). *See also United States v. Scop*, 940 F.2d 1004, 1012 (7th Cir. 1991) (statements relating to one's own guilt prior to conviction are considered statements of opinion and cannot be considered perjurious).

An analysis by a Michigan appellate court, which quotes *United States v. Endo, supra*, is exactly on point. In *People v. Longuemire*, 275 N.W.2d 12 (Mich. App. 1978), a defendant being tried for burglary, testified "I didn't commit no B&E." After he was convicted, this testimony was used as the basis of a perjury charge. On appeal, the court held that as a matter of law the testimony could not sustain a perjury charge.

> A careful distinction must be drawn between perjury as to basic adjudicative facts and perjury as to issues of ultimate fact or law mixed with fact. Basic adjudicative facts pertain to who did what, where, when, how and with what motive or intent…They may be proved for both substantive and impeachment purposes. Ultimate fact questions concern the legal definitions and effects ascribed to the basic facts or combinations of facts as found. F/N3

> F/N3 Ultimate facts encompass statements as to the noncommission of the crime charged or a legal element of the crime. Thus, statements such as "I didn't bribe Mr. X" or "I didn't break into that house" are statements of ultimate facts which cannot as a basis for perjury. Conversely, statements which indicate actual details of the crime charged such as "I didn't give Mr. X $50,000" or "I didn't force the door open" are adjudicative facts which can form the basis for a perjury charge.

> At common law, it is doubtful that false testimony as to the latter can ever be a basis for a perjury charge since a court would most likely construe it as mere opinion or as a conclusion of law beyond the realm of common knowledge. To such the extent that such a charge is valid at common law, it is constitutionally impermissible as it discourages defendants from exercising their rights to testify, without substantially benefiting the administration of justice.

The questions posed to Ms. Stewart sought to elicit her subjective opinion on the ultimate legal conclusion regarding her own guilt and the guilt of her co-defendants. She was asked to opine whether she believed that she *conspired* to defraud, believed that Mr. Sattar was involved in a *conspiracy* to kill, and/or whether she made Dr. Abdel Rahman available to that *conspiracy*. Like *Longuemire* and *Endo*, her answers were not assertions of fact but rather expressions of opinion on the ultimate legal

issue that the jury was asked to determine, *i.e.*, whether there was a conspiracy and whether Ms. Stewart (and/or Mr. Sattar) was a member of that conspiracy. Even though the jury did not later view Ms. Stewart's good faith belief that her conduct did not violate the SAMs as a defense to the charges against her, it is not tantamount to a finding that she committed perjury with an intent to obstruct justice. *Cf. United States v. Catano-Alzate*, 62 F.3d 41, 42-43 (2d Cir 1995) (obstruction enhancement for perjury not necessarily warranted where defendant, convicted of knowingly transporting drugs, testified that she was unaware that drugs were in the vehicle).

Testimony Concerning Taha

Nowhere in the hundreds of hours of recordings or in any of the documents admitted at trial is there any direct evidence that Ms. Stewart knew Taha's connection to the Islamic Group whether by the name Rifa'a Taha or any other name. Nor was there evidence that anyone ever spoke of him and his role in English in Ms. Stewart's presence.[30] The circumstantial evidence proffered by the government and relied upon by the lower court

[30] Ms. Stewart does not and has never been able to speak, understand or read Arabic.

was demonstrably inadequate to prove that that Ms. Stewart lied when she testified at the 2005 trial.

When finding that Ms. Stewart's testimony was knowingly false, the lower court relied upon the following: First, statements from Taha were read to Dr. Abdel Rahman in Ms. Stewart's presence. Second, she approved for reading to Dr. Rahman articles and letters mentioning Taha that the lower court deemed "memorable." (JA428-JA429). Neither supports the lower court's finding.

During Ms. Stewart's May 2000 visit with Dr. Abdel Rahman, Mr. Yousry orally read to Dr. Abdel Rahman a letter written in Arabic from Mr. Sattar. In the letter, Mr. Sattar said that "Abu Yasir" had "massive weight among the brothers," (See GX 1707X at 35) and mentioned that he had included a statement by Abu Yasir in response to the Al-Azhar student demonstrations. (see GX 1707X at 34). The statement that was enclosed is signed by Rifa'i Ahmad Taha (see GX1706X, p. 55). About one month later, during a legal telephone call with Dr. Abdel Rahman Mr. Yousry read a number of newspaper articles that mentioned Taha concerning the reaction to the first press statement. There were indications on the written articles that they had been approved by Ms. Stewart for reading to Dr. Abdel Rahman. (See GX 2312-45BT, 2312-49T, 2312-45AT).

Mr. Sattar's letter and Taha's press statement in response to the student demonstrations were written in Arabic and read to Dr. Abdel Rahman in that language. The videotape of this visit makes clear that even if Ms. Stewart knew what Mr. Yousry and Dr. Abdel Rahman were talking about, she was not paying attention when Mr. Yousry reads Taha's statement about Al-Azhar. She was busily going through paperwork. She is not part of their conversation other than to joke with Mr. Yousry and Sheik Rahman about unrelated and trivial matters (see GX 1707X at 32-35). Moreover, it is clear from the context that Mr. Yousry had not read Taha's statement to her and that she had not given it prior approval, as Mr. Yousry tells her only that he is reading a communiqué from the Al-Azhar students to Dr. Abdel Rahman. Mr. Yousry never mentions Taha. (GX 1706, p. 5).

On cross examination, Mr. Yousry was asked whether he ever told Ms. Stewart that Abu Yasir was another name for Rifa'i Taha, and his answer was "No I did not." He explained that Ms. Stewart simply "knew that this letter contains writings, suggestions of political leaders of the Islamic movement in Egypt regarding the situation in Egypt and the situation of Omar Abdel Rahman himself. So, that was the instruction, is this letter contain this. Yes, it did." He further explained, that "Ms. Stewart knew that those names are leaders of there was no need for me to tell her specifically."

T 9828-9829. Thus, while Mr. Yousry gave Ms. Stewart a general sense that the materials from which he would read were from Islamic movement leaders, she did not know their identities or roles. Her mere presence at the meeting does not give rise to an inference that she knew of Taha.

Ms. Stewart's "approval" in 2000 for reading to Dr. Abdel Rahman of these and other documents that mentioned Taha does not prove that she falsely denied knowing Taha's role in the Islamic Group when she testified in 2004.[31] For a mere reading of an article to sustain a perjury finding, there would also have to be proof that Ms. Stewart understood and appreciated the references to Taha and remembered those references when she testified almost five years later. No such proof was presented. A finding of perjury cannot be upheld merely because Ms. Stewart did not recall Taha or remember appreciating his significance based upon a few articles, orally translated from Arabic into English, that were subjected to her cursory review.

"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *United States v.*

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31 The government did not record the legal telephone call on June 20, 2000 during which these documents were allegedly read to Dr. Abdel Rahman.

United States Gypsum Co., 333 U.S. 364, 395 (1948). The issue here is not whether Ms. Stewart could have or even should have known who Rifa'i Taha was or what significance he had at the time of trial. Rather, it is whether her presence at a May 2000 meeting where Taha was discussed in Arabic and/or her "approval," in June 2000 for reading of a few news articles that mentioned him proved that her 2005 trial testimony was knowingly false. Viewed in the context of the "entire evidence," the evidence is patently insufficient to support the lower court's finding.

Ms. Stewart's Reasonable Belief That The SAMs Gave Her Discretion To Selectively Make Public Dr. Abdel Rahman's Statements To Further His Legal Representation Negates The Applicability Of The Abuse Of Trust Enhancement

U.S.S.G. § 3B1.3 provides that "if a defendant abused a position of public or private trust in a manner that significantly facilitated the commission or concealment of the offense," a two level enhancement may be employed. Judge Koeltl found that the enhancement applied utilizing the findings that the court had made in 2006:

> Ms. Stewart abused her position as a lawyer to gain access to Sheikh Abdel Rahman while he was in prison and used that access to smuggle messages to and from Sheikh Abdel Rahman while he was in prison and to make potential and lethal public statements on his behalf in violation of the SAMs.

(JA221). Like the enhancement for obstruction of justice, any finding that Ms. Stewart "abused trust" is dependent on whether the government explicitly or implicitly sanctioned the conduct upon which the enhancement is based. As set forth *supra* that is precisely what happened. For years Messrs. Clark and Jabara openly and notoriously violated the SAMs by, *inter alia*, facilitating the transmission of messages to and from Dr. Abdel Rahman. In addition, Mr. Clark transmitted Dr. Abdel Rahman's views, including those concerning the Egyptian ceasefire, to the press. Neither attorney was reprimanded much less sanctioned thereby signaling to all of Dr. Abdel Rahman's attorneys, including Ms. Stewart, that their actions were permissible. Thus, like Messrs. Clark and Jabara before her, Ms. Stewart did not abuse a position of trust.

POINT III

THE FOUR-FOLD INCREASE IN MS. STEWART'S SENTENCE FROM 28 MONTHS TO 120 MONTHS IS UNSUPPORTABLEAND SUBSTANTIVELY UNREASONABLE

In 2006, the District Court sentenced Ms. Stewart to 28 months in prison for her criminal conduct. The court correctly calculated the sentencing guidelines and then, based on Ms. Stewart's record of "public service to the nation" her age, her breast cancer, and the hardships that a lengthy sentence would work, determined that 28 months was sufficient, legal, and just punishment. (JA 218-JA219).

The court calculated the applicable advisory Sentencing Guideline which – including the terrorism enhancement – was the statutory maximum, proclaimed Ms. Stewart's conduct to have "an irreducible (sic) core of extraordinarily severe criminal conduct," (JA222-JA223) considered Ms. Stewart's testimony, condemned her conduct as a lawyer and member of the bar, performed the analysis required by 18 U.S.C. § 3553(a), assessed the need for specific and general deterrence, gauged the culpability of Ms. Stewart relative to her two co-defendants as well as Ramsey Clark and Abdeen Jabara considered that no one was injured by Ms. Stewart's conduct, and determined a 28 month sentence was a just sentence that was "sufficient but not greater than necessary" to fulfill the statutory goals of criminal

punishment as set forth in 18 U.S.C. § 3553(a)(2). (JA 223)

Almost four years later, the same judge sentenced Ms. Stewart to 120 months in prison. In the intervening four years, Ms. Stewart made a number of public statements. Elsewhere we argue that it was procedural error for the judge to use the content of those statements as a basis for increasing Ms. Stewart's sentence and request that the sentence be vacated and remanded for re-sentencing. Those arguments will not be repeated here. Otherwise, there was no change in circumstances or information available to the sentencing court that supported increasing Ms. Stewart's sentence by this magnitude.

The only other event to which the mammoth increase in Ms. Stewart's sentence can be attributed is the publication of the opinion of this panel and the expressions of support for the dissent expressed in advisory opinions by five members of this Court in response to a request that the Court be polled on the subject of whether to hear *en banc* the issues presented by the government's appeal of Ms. Stewart's sentence. This attempt by the Court of Appeals to second guess the District Court, which spent more than four years supervising the charging and trial of Ms. Stewart, to substitute its judgment for that of the District Court, and to sway the District Court to the logic of the dissent by the criticism of those who were not immersed in the

record changed none of the operative facts and should not be permitted to provide a legally cognizable foundation for increasing Ms. Stewart's sentence 4-fold. It totally undermines this Court's claim to "place 'great trust' in sentencing courts." *United States v. Dorvee*, 616 F.3d 174, 183 (2d Cir. 2010), *quoting United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009).

Ms. Stewart was 70 years old and in ill-health at the time of the re-sentencing; 120 months is a life sentence with the realistic possibility she will die in prison.

The touchstone of any analysis of substantive reasonableness is, in the totality of the circumstances, the length of the sentence. *United States v. Bonilla*, 618 F.3d 102, 109 (2d Cir. 2010). "It calls for a review of the overall sentence." *United States v. Stewart*, 590 F.3d at 159 (Calabresi, J., concurring).

The majority of this panel described the original sentence of 28 months imposed by the District Court as "strikingly low" and expressed "serious doubts about whether it was reasonable." *United States v. Stewart*, 590 F.3d at 148, 151. Judge Walker in dissent went further, opining that it "trivialize[d] Stewart's extremely serious conduct with a 'slap on the wrist' that is substantively unreasonable." *United States v. Stewart*, 590 F.3d at 163 (Walker, J., dissenting).

Following the remand, the District Court increased Ms. Stewart's sentence more than four-fold to 120 months. The pendulum has swung 180 degrees By imposing a sentence of 120 months the District Court went too far. Not only is the new sentence based on impermissible factors and therefore procedurally deficient, but it is substantively unreasonable in two respects.

It is "manifestly unjust" and an abuse of discretion for a sentencing court to increase a sentence four-fold without any factual change in circumstances or legal support or direction other than that contained in *dicta* in the majority opinion, the views expressed by the dissent, and/or the advisory opinions of judges opining on the decision not to review panel opinion *en banc*.

Moreover, the length of the sentence is "shockingly high" in light of Ms. Stewart's advanced age, fragile health, and her culpability not only relative to her co-defendants, but to other counsel for Dr. Abdel Rahman who were not charged and to establishment lawyers from a large law firm whose egregious and dangerous conduct in violation of court orders has not been subjected to criminal prosecution.

Just as a sentence can be substantively unreasonable because it is strikingly low, so too can it be substantively unreasonable when it is

excessive. *See, e.g. United States v. Dorvee*, 616 F.3d 174, 184 (2d Cir. 2010) (*en banc*). The purpose of reviewing challenges to substantive reasonableness is to permit the appellate tribunal to "provide a backstop" against sentences that are "shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *United States v. Rigas*, 583 F. 3d 108, 123 (2d Cir. 2009). It is not an "opportunity" for the Appellate Court to engage in "tinkering with sentences" with which it disagrees or to exercise judicial activism to substitute its judgment for that of the sentencing court in which it proclaims to "place great trust." *Id.*

A District Court's determination of a legally sufficient sentence will not be found to be substantively unreasonable unless it "cannot be located within the range of permissible decisions." *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (*en banc*), *quoting United States v. Rigas*, 490 F.3d 208, 238 (2d Cir. 2007). Such is the case here. Taking into account all that it knew about Ms. Stewart and her offense of conviction, the District Court fashioned a 28 month sentence and proclaimed it "sufficient but not greater than necessary" to meet the public policy goal embodied in the statute. Four years later to increase that sentence four-fold, based on no new

evidence, is "outside the bounds of permissible decision" and does not meet the requirement of substantive reasonableness.

At Ms. Stewart's initial sentencing, the District Court determined that pursuant to the advisory Sentencing Guidelines in effect at the time of the conduct, the applicable offense level was 41, the criminal history category was VI, and the guideline range was 360 months, the statutory maximum. (JA 215) . The District Court then, in what could be described as a treatise on how judges should explicate the 18 U.S.C. 3553(a) factors they took into consideration in determining a sentence after *United States v. Booker*, 543 U.S. 220 (2005), meticulously reviewed the criminal conduct on the one hand, the personal characteristics of the defendant on the other,[32] and the need to provide for both just punishment, deterrence and rehabilitation on the third.

In evaluating the seriousness of the offense, the Court found:

> "Ms. Stewart abused her position as a lawyer to gain access to Sheikh Omar Abdel Rahman while

[32] This Court does not "categorically proscribe any factor 'concerning the background, character, and conduct' of the defendant" that may be relied upon by the District Court in fashioned a procedurally correct and substantively reasonable sentence. *United States v. Cavera*, 550 F.3d at 190-191, citing 18 U.S.C. § 3661 ("[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence").

> he was in prison and used that access to smuggle messages to and from Sheikh Abdel Rahman while he was in prison, and to make potentially lethal public statements on his behalf in violation of the SAMs." (JA 221).
>
> Ms. Stewart "lied to the government when she made her affirmation under the SAMs to get access to Sheikh Rahman … [s]he understood the potential seriousness of her conduct at the time and acknowledged that she was putting her whole career at risk." *Id.*
>
> Ms. Stewart's "actions plainly went beyond any reasonable bounds of zealous advocacy and were knowing violations of the law." (JA 222).

In sum, "the offenses of conviction were serious, involved dishonesty and breach of trust, and had potentially lethal consequences which did not, however, actually transpire." *Id.*

On the other hand, the Court recognized that "the seriousness of the offense does not wipe out the three decades of service and the other characteristics of the defendant and the particular effects on the sentence on this defendant…." *Id.*

> "The increase in the Criminal History Category from I to VI as a result of the terrorism enhancement is … dramatically unreasonable in the case of Ms. Stewart… Criminal History Category VI overstates the seriousness of the defendant's past conduct and the likelihood that the defendant will repeat the offense." (JA 216).

> "[Ms. Stewart] did not use the practice of law to earn personal wealth. She has represented the poor, the disadvantages and the unpopular, often as a Court-appointed attorney…. By providing a criminal defense to the poor, the disadvantages ad unpopular over three decades, it is no exaggeration to say that Ms. Stewart performed a public service not only to her clients but to the nation…. A substantial downward variance is warranted based on Ms. Stewart's past work." (JA 218-219).

- At [then] 67 years old … "imprisonment will be particularly difficult on her because of her age. Moreover, she has suffered from cancer and underwent surgery and radiation therapy and is taking medication for the condition now. She has a statistically significant chance of recurrence…. Any sentence of imprisonment will be particularly difficult for the defendant and will represent a greater portion of her remaining life than for a younger defendant and provide increased punishment for the defendant." (JA 220).

The court thus imposed what it viewed to be a nontrivial sentence of 28 months. *See United States v. Stewart*, Transcript of Sentencing, Jul. 15, 2010 JA 438) (finding that 28 months was "sufficient but not greater than necessary to accomplish the purposes of Section 3553(a)(2) and did "not result in unwarranted sentencing disparities.") (JA 223).. The court concluded that it had "compared the sentence to the proposed sentencing[ ] of the other defendants in this case and ha[d] concluded that there is no unwarranted sentencing disparity even among co-defendants because of the

individual personal characteristics and roles played by each of the defendants." *Id.* As for specific deterrence, the Court observed "los[ing] the ability to practice law which has motivated and sustained [Ms. Stewart] for more than three decades" is itself a punishment and having lost her license to practice law, Ms. Stewart would not have "the occasion" to commit the crimes of conviction again. (JA 219, JA 217).

This panel first opined on Ms. Stewart's sentence in its decision issued on November 17, 2009. *See United States v. Stewart*, 2009 WL 381860 (2d Cir. Nov. 17, 2009). Five weeks later, on December 23, 2009, that opinion was amended and the operative majority opinion vacated the 28 month sentence and remanded to the District Court narrowly holding that the district judge had "procedurally erred" by "declining to decide whether Stewart committed perjury or otherwise obstructed justice." *United States v. Stewart*, 590 F.3d at 150. The District Court was directed "to determine the issue of perjury and if it finds such perjury, to resentence Stewart so as to reflect that finding." *Id.* at 151. Also, having concerns that the District Court's opinion was ambiguous on whether or how it may have applied the terrorism enhancement in determining Ms. Stewart's sentence, *Id.* , the majority directed that on re-sentencing "the District Court's section 3553(a) analysis must include consideration of whether support of terrorism is an

aggravating factor in light of the court's obligation to consider the 'nature and circumstances of Stewart's offense' and 'the need for the sentence imposed to reflect the seriousness of the offense." *Id.* at 151. Without directing the outcome, in precatory language, this panel strongly encouraged the sentencing court to explicate its consideration of "whether Stewart's conduct as a lawyer triggers the special-skill/abuse of trust enhancement under the guidelines and reconsider the extent to which Stewart's status as a lawyer affects the appropriate sentence." *Id.* It concluded that, the District Court "should further consider the overall question whether the sentence to be given is appropriate in view of the magnitude of the offense." *Id.* It directed the District Court to "begin with the terrorism enhancement and take that enhancement into account," and it concluded that it had "serious doubts that the sentence given was reasonable." *Id.*

For two more months Ms. Stewart and the District Court waited for the mandate to issue. On February 23, 2010, the reason for the delay was revealed in three opinions issued by six active judges, five of whom wrote in their advisory capacity to "ask[] the district court to apply the panel's dissenting opinion, rather than the panel's majority opinion." *United States*

v. Stewart, 597 F.3d 514, 519 (2d Cir. 2010) (Pooler, J. concurring in denial of *en banc* review).

On July 15, 2010, the District Court re-sentenced Ms. Stewart to 120 months. As required, the District Court started by calculating the applicable sentencing guidelines range. In so doing, he affirmed his original finding that "the terrorism enhancement applies" when calculating the applicable sentencing guidelines. (JA421). With the terrorism enhancement alone, he calculated that the offense level was 41, the criminal history category was VI and the sentencing guidelines range was 360 months, the statutory maximum. *Id.* He then turned to each of the enhancements discussed in the panel's opinion – the required consideration of Ms. Stewart's testimony and obstruction of justice, as well as the strong suggestion that he consider abuse of trust.

The court found that both enhancements applied, findings that are challenged elsewhere in this brief. But as neither enhancement could raise the Guideline imprisonment range, it remained at 360 months (JA423-JA 433)

In deciding that the 28 month sentence could not be reimposed, the District Court first considered Ms. Stewart's post-sentencing comments in media interviews and other public fora. (JA439-JA440). As set forth

above, we contend such consideration is procedural error, and will not repeat those arguments here. Second, the court acknowledged the direction from this panel, stating that its "decision *requires the Court, among other things*, to sentence the defendant in light of the perjury enhancement, the abuse of a position of trust and the terrorism enhancement." (JA 440) (emphasis added). The court then again engaged in a review and "application of the Section 3553(a) factors in this case much as it did in 2006, concluding that a substantial downward variance was warranted (JA 441). While the Court found that Criminal History Category VI grossly overstated Ms. Stewart's criminal history (JA 444), it determined that Ms. Stewart's age, health, and extraordinary public service as an attorney, which the court termed "exceptional", all were factors supporting a downward variance from the Guideline term (JA69, JA70-JA71). After addressing other factors it had also considered in 2006, such as "lack of harm" (to which the court attached little weight) and the fact that Ms. Stewart would no longer be in a position to use a law license to commit the instant offense, the court imposed a sentence of 120 months, a sentence nearly four times higher than the one it imposed in 2006 (JA 451).

Nowhere in the sentencing proceedings did the District Court identify any change of circumstances or analysis that supports an increase of this

magnitude. There was no re-weighing of the evidence, no discussion of previously unconsidered circumstances, and no acknowledgement of anything new. In fact, there is nothing to suggest that the District Court even considered the defense arguments that it was Mr. Sattar's ideas and Mr. Yousry's translating that made it possible for Ms. Stewart to commit the crimes of conviction because she was not otherwise involved with Mr. Sattar in matters of Egyptian politics and could not, without intervention, communicate directly with Dr. Abdel Rahman because he does not speak English and Ms. Stewart does not speak Arabic.[33] At the first sentencing, Ms. Stewart's sentence was almost 1/3 again as long as Mr. Yousry's, and approximately 1/10th of Mr. Sattar's. Following the second sentencing, without explanation, Ms. Stewart's sentence is now 5 times longer than Mr. Yousry's and about 43% of Mr. Sattar's.

Moreover, at resentencing the District Court did not consider the relevant implications of the government's decision to charge only Ms.

[33] Not for nothing it should be noted that Ms. Stewart testified that her goal in making the press statement that forms the core of her criminal conduct was to keep Dr. Abdel Rahman's name a present factor in Egyptian political circles so that one day, in the event of a change in leadership when Hosni Mubarak's regime might be replaced by one more hospitable to Dr. Abdel Rahman, he might be able to secure a prisoner transfer. Now, almost 11 years later, that change in power has occurred – a political accomplishment credited by democracies around the globe with unleashing an unprecedented wave of political change in the Middle East.

Stewart, not Ramsey Clark and not Abdeen Jabara. As Judge Calabresi observed, insofar as the Court of Appeals has given sentencing courts the discretion to impose a sentence that "reflects the extent to which the participants in a crime are similarly (or dissimilarly) situated" … "it is not much of an extension to permit the District Courts to exercise analogous supervision over those decisions as to which prosecutors enjoy the greatest discretion and that result in the greatest disparities: the decisions on whether to bring any charges at all." *United States v. Stewart*, 590 F.2d at 160-161 (Calabresi, J., concurring).

Also nowhere did the District Court appear to consider Ms. Stewart's argument that her punishment should be considered relative to the white shoe lawyers from Paul, Weiss who flagrantly violated Court Protective Orders and directly put the lives of American military personnel at risk and who were barely reprimanded. This was and should have been a relevant consideration. *See United States v. Stewart*, 590 F.2d at 161 (Calabresi, J., concurring) ("[t]he district court should not be barred from considering the relevance of prosecutorial discretion in a particular case … our legal system should take advantage of the district court's unique position to consider a defendant's sentence in its complete relevant context).

The only factor identified by the sentencing court other than Ms. Stewart's statements that caused it to determine her sentence and increase it from 28 months to 120 months are the views expressed – in dicta - in the majority opinion and the criticism expressed in the dissent and the advisory opinions of the five judges who wrote in connection with the denial of *en banc* review for purpose of urging the court to follow the dissent. *United States v. Stewart*, 597 F.3d at 519 (Pooler, J., concurring). The practice of issuing dissents from a denial of rehearing *en banc* is tantamount to inviting any active judge to "publish a dissent from any decision, although he did not participate in it and the Court has declined to review it en banc thereafter." *United States v. N.Y., New Haven and Hartford R.R. Co.*, 276 F.2d 525, 553 (2d Cir. 1960) (Friendly, J., concurring in denial of rehearing *en banc*). Not only do such opinions carry no force of law, it is a "practice which seems to us of dubious policy especially since, if the issue is of real importance, further opportunities for expression will assuredly occur." *Id.* This is precisely the point made by Judge Pooler who remarked that it is particularly "inappropriate for other members of the Court to add their views as to what the District Court should do on remand [as the] case may return to this Court on a subsequent appeal." *See also United States v. Tomasi*, 313 F.3d 653, (2d Cir. 2002) (Sotomayor, J., concurring) (urging the Court to restrain itself

from issuing opinions on the proper calculation of a sentencing matter when regardless of the pronouncement the outcome would not under any circumstance have an effect on an applicable guidelines range); *United States v. Rich*, 900 F.2d 582, 586 (2d Cir.1990) (same).

The law is clear that "if a district court were explicitly to conclude that two sentences equally served the statutory purpose of § 3553, it could not ... impose the higher" of the two. *United States v. Ministro-Tapia*, 470 F.3d 137, 142 (2d Cir.2006). In this instance, the sentencing court concluded that 28 months served the statutory purpose of 18 U.S.C. § 3553(a). Without sufficient legal basis, the sentencing court subsequently concluded that a sentence of 120 months was required. This is error.

"It is not the role of the appellate court to compare the district court's sentence to what the appellate court deems the 'correct sentence.'" *United States v. Stewart*, 590 F.3d at 185 (Walker, J., dissenting). Yet, this is precisely what the dissent and the opinions written upon the denial of en banc review have done. They put forward their assessment of the evidence, of the aggravating and mitigating circumstances, and opine that the District Court's original sentence was substantively unreasonable because they disagree with the result. Unfortunately, the sentencing court bowed to this judicial activism, accepted without critical review the substitution of the

judgment of judges from the Court of Appeals for its own, concluded that the burden in any successive appeal should be on Ms. Stewart to defend herself and the original sentence, not on the Court.

The second sentence should be vacated and the case remanded for new sentencing proceedings. This time, the panel should narrowly focus the District Court's task on fixing the procedural errors and instruct it – much as a trial judge instructs a jury that when it has heard evidence that is subsequently struck from the record – to disregard the tombs of dicta that have been written and focus determining a fair and just sentence supported by the law.

The imposition of punishment is the exercise of one of government's most dangerous powers. For that reason, that power has always been hemmed in by strict procedural rules and the heavy commands to guarantee the fairness. The 10-year sentence imposed on Ms. Stewart, which is tantamount to a life sentence for this 70-year-old cancer victim, who has no prior criminal history, is substantively unreasonable.

CONCLUSION

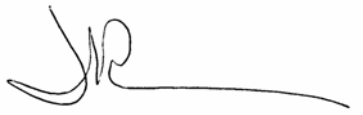
To sum it all up, Ms. Stewart is now sentenced to die in prison because she did no more than what Dr. Rahman's two other lawyers did and by their conduct suggested she ought do as well. These two other lawyers had far more experience over time than Ms. Stewart with this client and with the cultural context in which he lived. They were the lawyers who had summoned her for this court appointment in the first place. Not only do their candid letters to the sentencing court undermine any allegation that Ms. Stewart perjured herself, that they were not sanctioned underscores the objective unreasonableness of the sentence imposed on Ms. Stewart.

Accordingly, and for the reasons set forth above, Ms. Stewart respectfully submits that the District Court's judgment and sentence of July

15, 2010 should be vacated and a direction entered to hold new sentencing proceedings.

Dated: March 30, 2011
New York, New York

Respectfully submitted,



JILL R. SHELLOW
LAW OFFICES OF JILL R. SHELLOW
111 Broadway, Suite 1305
New York, New York 10006
212.792.4911
jrs@shellowlaw.com

ROBERT J. BOYLE
299 Broadway
Suite 806
New York, N.Y. 10007
(212) 431-0229
Rjboyle55@gmail.com

Attorneys for Appellant Lynne Stewart

Of counsel –

Herald Price Fahringer
Gideon Orion Oliver

CERTIFICATION

This brief is not in compliance with this Court's length limitations as it contains 25, 517 words, inclusive of footnotes as measured by the Word Count function of Microsoft Word. It is typed in 14 point, Times New Roman format.

ROBERT J. BOYLE

SPECIAL APPENDIX

SPA-1

%AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

SOUTHERN District of NEW YORK

UNITED STATES OF AMERICA
V.
LYNNE STEWART

JUDGMENT IN A CRIMINAL CASE

Case Number: S1 1:02CR00395-003 (JGK)

USM Number: 53504-054

JILL R. SHELLOW
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

X was found guilty on count(s) ONE, FOUR, FIVE, SIX AND SEVEN OF THE SUPERCEDING INDICTMENT after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC 371	CONSPIRACY TO DEFRAUD THE UNITED STATES	4/30/2002	1
18 USC 371	CONSPIRACY TO PROVIDE MATERIAL SUPPORT TO TERRORIST ACTIVITY	4/30/2002	4
18 USC 2339A	PROVIDE AND CONCEAL MATERIAL SUPPORT TO TERRORIST ACTIVITY	4/30/2002	5
18 USC 1001	FALSE STATEMENTS	5/31/2000	6
18 USC 1001	FALSE STATEMENTS	5/31/2001	7

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

X Count(s) ALL OPEN COUNTS ☐ is X are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

JULY 15, 2010
Date of Imposition of Judgment

John G. Koeltl
Signature of Judge

JOHN G. KOELTL, UNITED STATES DISTRICT JUDGE
Name and Title of Judge

7/28/10
Date

USDS SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 7/29/2010

SPA-2

AO 245B (Rev. 06/05) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: LYNNE STEWART
CASE NUMBER: S1 1:02CR00395-003 (JGK)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

120 MONTHS, TO BE IMPOSED AS FOLLOWS: 120 MONTHS ON COUNT 5, AND 60 MONTHS ON COUNTS 1, 4, 6 AND 7, ALL TO RUN CONCURRENTLY.

THIS IS A RESENTENCE OF THE DEFENDANT, WHO WAS ORIGINALLY SENTENCED ON OCTOBER 16, 2006.

X The court makes the following recommendations to the Bureau of Prisons:
1) That the defendant be incarcerated at FCI Danbury, CT, so that she can be close to her family. 2) That the defendant be designated Care Level 2 by the Bureau of Prisons and, to the extent possible, her care continue to be monitored by Dr. Glover. 3) That the defendant continue to be held at the Metropolitan Correctional Center, NY, for 60 days to allow her to participate in the preparation of any appeals, and that she continue to be held there during the briefing of any appeal if any appeal is taken.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SPA-3

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 3 — Supervised Release

DEFENDANT: LYNNE STEWART
CASE NUMBER: S1 1:02CR00395-003 (JGK)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

2 YEARS TO RUN CONCURRENTLY ON COUNTS ONE, FOUR, FIVE, SIX AND SEVEN.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

X The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

X The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPA-4

Judgment — Page 4 of 5

DEFENDANT: LYNNE STEWART
CASE NUMBER: S1 1:02CR00395-003 (JGK)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 500.00	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$ 0	$ 0

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SPA-5

DEFENDANT: LYNNE STEWART
CASE NUMBER: S1 1:02CR00395-003 (JGK)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____ , or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F X Special instructions regarding the payment of criminal monetary penalties:

–THE SPECIAL ASSESSMENT SHALL BE DUE IMMEDIATELY.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

AFFIDAVIT OF CM/ECF SERVICE

I, Maryna Sapyelkina, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age.

On March 30, 2011

deponent served the within: **Brief and Special Appendix for Defendant-Appellant**

upon:

UNITED STATES ATTORNEY'S OFFICE
SOUTHERN DISTRICT OF NEW YORK
One St. Andrews Plaza
New York, New York 10007
(212) 637-2200

Attorney for Appellee

via the CM/ECF Case Filing System. All counsel of record in this case are registered CM/ECF users. Filing and service were performed by direction of counsel.

Sworn to before me on March 30, 2011

Mariana Braylovskaya
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2014

Job # 235486