

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2011

4 (Argued: February 29, 2012 Decided: June 28, 2012)

5 Docket No. 10-3185

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7 UNITED STATES OF AMERICA,

8 Appellee,

9 - v -

10 AHMED ABDEL SATTAR, also known as Abu Omar, also known as Dr.  
11 Ahmed, YASSIR AL-SIRRI, also known as Abu Ammar, MOHAMMED YOUSRY,

12 Defendants,

13 LYNNE STEWART,

14 Defendant-Appellant.

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16 Before: WALKER, CALABRESI, and SACK, Circuit Judges.

17 Appeal from a judgment of the United States District  
18 Court for the Southern District of New York (John G. Koeltl,  
19 Judge), on remand from this Court, see United States v. Stewart,  
20 590 F.3d 93 (2d Cir. 2009), sentencing defendant Lynne Stewart  
21 principally to 120 months' imprisonment on her convictions for  
22 conspiracy to defraud the United States, in violation of 18  
23 U.S.C. § 371; conspiracy to provide and to conceal the provision  
24 of material support to a conspiracy to kill and kidnap persons in

1 a foreign country, in violation of 18 U.S.C. § 371; providing and  
2 concealing the provision of material support to a conspiracy to  
3 kill and kidnap persons in a foreign country, in violation of 18  
4 U.S.C. § 2339A & § 2; and making false statements to the United  
5 States Department of Justice and the Bureau of Prisons, in  
6 violation of 18 U.S.C. § 1001.

7 Affirmed.

8 Appearances: ANDREW S. DEMBER, Katherine Polk Failla,  
9 Assistant United States Attorneys, for  
10 Preet Bharara, United States Attorney  
11 for the Southern District of New York,  
12 New York, NY, for Appellee.

13 HERALD PRICE FAHRINGER, Fahringer &  
14 Dubno, New York, NY (Jill R. Shellow,  
15 Law Offices of Jill R. Shellow, New  
16 York, NY; Robert J. Boyle, Law Offices  
17 of Robert J. Boyle, New York, NY, on the  
18 brief), for Appellant.

19 SACK, Circuit Judge:

20 Appellant Lynne Stewart appeals from a judgment of the  
21 United States District Court for the Southern District of New  
22 York (John G. Koeltl, Judge) sentencing her principally to 120  
23 months' imprisonment following our vacatur on grounds of  
24 procedural error of her previous sentence of 28 months and remand  
25 of the district court's previous judgment insofar as it imposed  
26 that sentence. The details of this case were recounted at length  
27 in our prior opinion, United States v. Stewart, 590 F.3d 93, 100-

1 08 (2d Cir. 2009) ("Stewart I"). We repeat them here only  
2 insofar as we think it necessary to explain our judgment.

3 **BACKGROUND**

4 In October 1995, Sheikh Omar Ahmad Ali Abdel Rahman  
5 ("Abdel Rahman") was convicted in the United States District  
6 Court for the Southern District of New York of a variety of  
7 crimes including "soliciting the murder of Egyptian President  
8 Hosni Mubarak while he was visiting New York City; attacking  
9 American military installations; conspiring to murder President  
10 Mubarak; conspiring to bomb the World Trade Center in 1993, which  
11 succeeded; conspiring subsequently to bomb various structures in  
12 New York City, including bridges, tunnels, and the federal  
13 building containing the New York office of the Federal Bureau of  
14 Investigation . . . , which did not succeed; and conspiring to  
15 commit crimes of sedition." Id. at 101. His conviction was  
16 affirmed by this Court in 1999, United States v. Rahman, 189 F.3d  
17 88, 104 (2d Cir. 1999) (per curiam), and his petition for a writ  
18 of certiorari was denied by the United States Supreme Court the  
19 following year, United States v. Rahman, 528 U.S. 1094 (2000).

20 Stewart had been a member of Abdel Rahman's legal team  
21 during his trial and his appeal. Her conviction stemmed from her  
22 repeated violations of the "Special Administrative Measures," or  
23 "SAMS," to which she agreed to be, and was, subject as a member  
24 of Abdel Rahman's legal team while he was incarcerated after his

1 conviction had become final. Stewart executed various  
2 affirmations, under penalty of perjury, in which she agreed to  
3 abide by the terms of the SAMs, among them that she would not  
4 "use [her] meetings, correspondence or phone calls with Abdel  
5 Rahman to pass messages between third parties (including, but not  
6 limited to, the media) and Abdel Rahman." Stewart I, 590 F.3d at  
7 103 (alteration in original; internal quotation marks omitted).<sup>1</sup>

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On May 1, 1998, [Stewart] signed a document entitled "Attorney Affirmation," in which she affirmed, under penalty of perjury, the truth of specified statements regarding the then-applicable SAMs: that she had read the May 11, 1998, version of the SAMs; that she "underst[ood] the restrictions contained in that document and agree[d] to abide by its terms"; that during her visits to Abdel Rahman she would "employ only cleared translators/interpreters and [would] not leave [any] translator/interpreter alone with inmate Abdel Rahman"; and that she would "only be accompanied by translators for the purpose of communicating with inmate Abdel Rahman concerning legal matters." Stewart also affirmed that neither she nor any member of her office would "forward any mail received from inmate Abdel Rahman to a third person" nor would she "use [her] meetings, correspondence or phone calls with Abdel Rahman to pass messages between third parties (including, but not limited to, the media) and Abdel Rahman." On May 16, 2000, and again on May 7, 2001, Stewart signed similar affirmations under penalty of perjury, again affirming that she had read the most recent versions of the SAMs, and that she would not use her contact with Abdel Rahman to pass messages between him and third parties, including members of the media.

Stewart I, 590 F.3d at 102-03 (alterations in original; citations

1 Despite and contrary to those obligations, Stewart smuggled  
2 messages to and from the incarcerated Abdel Rahman, while  
3 purportedly acting in her capacity as his lawyer.<sup>2</sup> See id. at  
4 105-08. Most of the messages related to the continuance of a  
5 ceasefire that an Egyptian militant group, al-Gama'a,<sup>3</sup> had  
6 declared with regard to its violent efforts to overthrow the  
7 Egyptian government. The group sought Abdel Rahman's advice on  
8 whether to continue the ceasefire. See id.

9 On May 19 and 20, 2000, Stewart visited Abdel Rahman in  
10 the Rochester facility. There he dictated several messages to  
11 Stewart's translator and co-defendant, Mohammed Yousry, including  
12 "a letter to an al-Gama'a lawyer who favored the cease-fire,  
13 asking him to allow others in al-Gama'a to criticize it, and  
14 another to [a leader of the group] asking him to 'escalate the  
15 language' of criticism of the cease-fire." Id. at 106. Stewart  
16 smuggled these messages out of the prison. Id. at 107.

17 On June 13, 2000, Stewart spoke to a Cairo-based  
18 Reuters reporter, telling him that Abdel Rahman "is withdrawing

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omitted).

<sup>2</sup> Abdel Rahman was at all times relevant to the present proceedings incarcerated under heavy security in the Federal Medical Center in Rochester, Minnesota.

<sup>3</sup> "In November 1997, . . . a group associated with al-Gama'a attacked, killed, and mutilated the bodies of more than sixty tourists, guides, and guards at the Hatshepsut Temple in Luxor, Egypt." Stewart I, 590 F.3d at 103.

1 his support for the ceasefire that currently exists." Id.  
2 (internal quotation marks omitted). On June 20, 2000, after  
3 participating in a conference call with Abdel Rahman, Stewart  
4 sent a fax to the Reuters reporter reaffirming Abdel Rahman's  
5 previous statement withdrawing his support for the ceasefire.  
6 Id.

7 On April 8, 2002, Stewart was indicted for her actions  
8 related to Abdel Rahman's communications to and from prison. A  
9 superseding indictment was filed on November 19, 2003. Id. at  
10 108. On February 10, 2005, following a jury trial, Stewart was  
11 convicted of conspiring to defraud the United States in violation  
12 of 18 U.S.C. § 371 by violating SAMs imposed upon Abdel Rahman to  
13 which she had agreed to be bound; providing and concealing  
14 material support to a conspiracy to kill and kidnap persons in a  
15 foreign country, in violation of 18 U.S.C. § 2339A and 18 U.S.C.  
16 § 2; conspiracy to provide and conceal such support, in violation  
17 of 18 U.S.C. § 371; and making false statements in violation of  
18 18 U.S.C. § 1001. Id.

19 Stewart appealed from the judgment of conviction; the  
20 government cross-appealed as to her sentence. We affirmed the  
21 judgment in all respects, except insofar as we concluded that the  
22 district court had committed procedural error in the course of  
23 Stewart's sentencing. We remanded for her resentencing. Id. at

1 151-52.<sup>4</sup> We instructed the district court to determine whether  
2 Stewart had committed perjury during her trial, which might  
3 warrant a sentencing enhancement for obstruction of justice  
4 pursuant to the United States Sentencing Guidelines  
5 ("Guidelines"). Id. at 151. We also directed the court to  
6 "consider whether Stewart's conduct as a lawyer triggers the  
7 special-skill/abuse-of-trust enhancement under the Guidelines."  
8 Id.

9 We further noted a lack of clarity in the record as to  
10 whether the district court had actually applied the terrorism  
11 enhancement in its Guidelines calculation. We observed, however,  
12 that "in light of the facts of this case and the judgments of  
13 conviction . . . , [it] plainly applies." Id. at 150.

14 "Finally, [we directed that] the district court . . .  
15 further consider the overall question whether the sentence to be  
16 given is appropriate in view of the magnitude of the  
17 offense . . . ." Id. at 151. While we did not preclude the  
18 imposition of a non-Guidelines sentence, "we [did] require that  
19 such a sentence, selected after the reconsideration we [had]

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<sup>4</sup> Stewart's co-defendants Sattar and Yousry were convicted of related crimes. Although we found no procedural or substantive error in connection with their sentencing, we nonetheless remanded their cases too in order to provide the district court with the freedom to change their sentences in connection with the resentencing of Stewart. Stewart I, 590 F.3d at 151-52. The district court decided not to alter their sentences. Neither their convictions nor their sentences are at issue on this appeal.

1 directed, begin with the terrorism enhancement and take that  
2 enhancement into account." Id.

3 We noted our "serious doubts that the sentence given  
4 was reasonable" in light of our view of the seriousness of the  
5 crimes. Id. But we elected to allow for resentencing before  
6 reaching the question of substantive reasonableness. Id.

7 After remand, on July 15, 2010, the district court  
8 resentenced Stewart. It explicitly applied the terrorism  
9 enhancement, explaining that Stewart's actions were "calculated  
10 to affect the conduct of the Egyptian government through  
11 intimidation and coercion," and that the jury had found that  
12 Stewart "possessed the specific intent to provide Abdel Rahman as  
13 a coconspirator in a conspiracy to kill." Tr. of Sentencing  
14 Hearing in United States v. Stewart, No. 02 CR 395(JGK) (S.D.N.Y.  
15 July 15, 2010) ("Stewart II"), at 41-42.

16 The court then concluded that the obstruction-of-  
17 justice enhancement applied because "[t]he defendant [had] made a  
18 series of statements at trial that were clearly false concerning  
19 a material matter that were made with the willful intent to  
20 provide false testimony." Id. at 45-52. The court also  
21 determined that the abuse-of-trust enhancement was applicable  
22 inasmuch as Stewart "was able to participate in smuggling  
23 messages into and out of the prison because of the trust placed  
24 in her as the attorney for Sheikh Rahman." Id. at 53. Taking



1 these enhancements into account, the court determined that  
2 Stewart's Guidelines sentence was 360 months, which was also the  
3 statutory maximum.

4 After evaluating the applicability of the terrorism  
5 enhancement, the perjury it found that Stewart had committed, the  
6 abuse of trust it found she had engaged in, and statements she  
7 made indicating, in the view of the district court, a lack of  
8 remorse on her part, and suggesting that she regarded her  
9 previous sentence as trivial, and then balancing those factors  
10 against significant mitigating factors, the court concluded that  
11 a non-Guidelines sentence of 120 months -- one-third of the  
12 Guidelines sentence -- was "sufficient but no greater than  
13 necessary" to meet the sentencing objectives of section 3553(a).  
14 Id. at 73.

15 Stewart appeals from the imposition of that sentence,  
16 arguing primarily that the district court's consideration of her  
17 post-sentencing statements violated her First Amendment right to  
18 freedom of speech, and additionally that the court erred in  
19 applying the obstruction-of-justice and abuse-of-trust  
20 enhancements. Stewart also argues that the 120-month sentence is  
21 substantively unreasonable.

22 We disagree in each respect, and therefore affirm.



1 imposition of her original sentence.<sup>5</sup> She urges that such an  
2 increase based on the contents of her protected speech "strikes  
3 at the heart of the First Amendment and is constitutionally  
4 intolerable." Def.'s Br. at 53.

5 Stewart made the first statement at issue in front of  
6 the courthouse on October 16, 2006, immediately after she was  
7 originally sentenced to 28 months in prison. Stewart II, at 61;  
8 J.A. 336a. As widely reported (and occasionally misreported),  
9 see Stewart I, 590 F.3d at 108 n.9, she said, in part, "Any  
10 regrets? I don't think anybody would say that going to jail for  
11 two years is something you look forward to, but as my clients

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<sup>5</sup> "[T]he district court [is] required to resentence [a defendant] in light of the circumstances as they [stand] at the time of [her] resentencing." Werber v. United States, 149 F.3d 172, 178 (2d Cir. 1998); see also United States v. Bryce, 287 F.3d 249, 257 (2d Cir. 2002) ("A sentencing authority may justify an increased sentence by affirmatively identifying relevant conduct or events that occurred subsequent to the original sentencing proceeding." (internal quotation marks, alterations, and emphasis omitted)). This principle applies to mitigating considerations with equal force as it applies to aggravating ones. See Pepper v. United States, 131 S. Ct. 1229, 1241 (2011) ("In light of the federal sentencing framework described above, we think it clear that when a defendant's sentence has been set aside on appeal and his case remanded for resentencing, a district court may consider evidence of a defendant's rehabilitation since his prior sentencing and that such evidence may, in appropriate cases, support a downward variance from the advisory Guidelines range.").

1 have said to me, 'I can do that standing on my head.'"<sup>6</sup> J.A.  
2 336a.

3 During her resentencing proceedings, Stewart  
4 characterized these remarks as "intemperate at best," but  
5 contended that they were taken out of context -- they were meant  
6 to indicate only that she was relieved at being given a sentence  
7 that was such a small fraction of her Guidelines sentence.  
8 Stewart II, at 61. But the district court understood them to  
9 "indicate[] that the defendant did indeed view the sentence as a  
10 trivial sentence." Id. Referring to the language of 18 U.S.C.  
11 § 3553(a)(2)(A), the court explained that a sentence viewed as  
12 trivial "would not be sufficient to reflect the seriousness of  
13 the offense, promote respect for the law and provide just  
14 punishment for the offense as required by law." Id.

15 Stewart made the second statement during a November 18,  
16 2009, television interview. She was asked: "[W]ould you do  
17 anything differently back then, if you knew what you knew today?"  
18 She responded:

19 I think I should have been a little more  
20 savvy that the government would come after  
21 me. But do anything differently? I don't --  
22 I'd like to think I would not do anything  
23 differently . . . . I made these decisions  
24 based on my understanding of what the client  
25 needed, what a lawyer was expected to do.

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<sup>6</sup> A video recording of the statement is available at <http://www.youtube.com/watch?v=jVfQyfXsYmY> at 4:31 (last visited June 26, 2012).

1           They say you can't distinguish zeal from  
2           criminal intent sometimes. I had no criminal  
3           intent whatsoever. This was a considered  
4           decision based on the needs of the client.  
5           And although some people have said press  
6           releases aren't client needs, I think keeping  
7           a person alive when they are in prison, held  
8           under the conditions which we now know to be  
9           torture[,] . . . totally held without any  
10          contact with the outside world except a phone  
11          call once a month to his family and to his  
12          lawyers, I think it was necessary. I would  
13          do it again. I might handle it a little  
14          differently, but I would do it again.<sup>7</sup>

15        J.A. 340-41 (emphasis added).

16                At her subsequent resentencing, Stewart explained that  
17        when she said she would "do it again," "'it' has always been  
18        about representing my clients with selfless . . . compassion,  
19        putting their needs before my own. . . . Would I do it again?  
20        When the 'it' means compassionately represent my client, the  
21        answer is, I would." Stewart II, at 12-13. The district court  
22        concluded that her statement "indicate[d] a lack of remorse for  
23        conduct that was both illegal and potentially lethal," and  
24        supported a finding "that the original sentence was not  
25        sufficient to accomplish the purposes of section 3553(a)(2),  
26        including to reflect the seriousness of the offense and to  
27        provide adequate deterrence."<sup>8</sup> Stewart II, at 62.

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<sup>7</sup> A video recording and transcript of the statement are available at [http://www.democracynow.org/2009/11/18/exclusive\\_civil\\_rights\\_attorney\\_lynne\\_stewart](http://www.democracynow.org/2009/11/18/exclusive_civil_rights_attorney_lynne_stewart) at 24:33 (last visited June 26, 2012).

<sup>8</sup> Stewart also points to an interview she gave to George Packer of The New York Times, which was referenced in the

1           Stewart argues that by taking these statements into  
2 account in imposing her sentence, the district court violated her  
3 constitutional right to freedom of speech. Cobbling together  
4 scraps of First Amendment doctrine and dicta for support, she  
5 contends that she was punished for what she said, and that such  
6 punishment runs afoul of the First Amendment. She asserts that  
7 the district court's taking these statements into account for  
8 that purpose will have a "chilling effect" on future public  
9 statements on matters of public interest by others, and was  
10 therefore unconstitutional. She also urges us to adopt a rule  
11 that would prohibit the district court from construing ambiguous  
12 public statements on matters of public concern against a  
13 defendant when sentencing her.

14   A. Constitutionality of the District Court's  
15   Use of Stewart Statements in Sentencing  
16

17           Stewart asserts that the First Amendment forbade the  
18 district court from using her public statements on public issues  
19 as a basis for punishing her. She refers to the court's actions  
20 as, in substance, punishment for her protected speech, which is  
21 generally forbidden by the First Amendment. But Stewart was not  
22 punished for violating a governmental restriction on speech. The

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government's pre-sentencing submission. She alleges that this  
interview was used "to inflame the sentencing judge." Def.'s Br.  
at 65. The district court made no reference to this interview at  
sentencing. There is no indication in the record of proceedings  
in the district court that the court relied on it in resentencing  
Stewart, or was otherwise "inflame[d]" by its contents.

1 district court did not treat her speech as a violation of any law  
2 -- it considered the content of that speech to be helpful in  
3 enabling the court to craft a sentence "sufficient, but not  
4 greater than necessary, to comply with the purposes set forth"  
5 elsewhere in the statute. 18 U.S.C. § 3553(a). These "purposes"  
6 include "to reflect the seriousness of the offense, to promote  
7 respect for the law, and to provide just punishment for the  
8 offense." Id. at § 3553(a)(2)(a). She was punished, in light of  
9 that assessment, not for unlawful speech, but for her crimes of  
10 conviction: conspiracy to defraud the United States; conspiracy  
11 to provide and to conceal the provision of material support to a  
12 conspiracy to kill and kidnap persons in a foreign country;  
13 providing and concealing the provision of material support to a  
14 conspiracy to kill and kidnap persons in a foreign country; and  
15 making false statements to agencies of the United States.<sup>9</sup>

16 We begin with several principles that are well-settled  
17 or, we think, self-evident. First, a district court is required  
18 to sentence a convicted defendant based in part on his or her  
19 "history and personal characteristics." See United States v.  
20 Perez-Frias, 636 F.3d 39, 43 (2d Cir. 2011). Second, a person's  
21 history and personal characteristics can often be assessed by a

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<sup>9</sup> A rough analogy to a person who confesses to murder may be apt. That person may be punished for murder as a result of the contents of her truthful statement that she killed someone, but that is not punishment for the statement itself.

1 sentencing court only or principally through analysis of what  
2 that person has said -- in public, in private, or before the  
3 court. But, third, the First Amendment generally assures  
4 citizens "the freedom of speech" from encroachments by federal or  
5 state government.

6           There is an apparent tension between the first and  
7 second principles, on the one hand, and the third principle on  
8 the other. It lies at the heart of the First Amendment argument  
9 made by Stewart here. For where, as here, a district court seeks  
10 to assess a convicted defendant's history and personal  
11 characteristics through consideration of his or her speech and  
12 sentences in part based on the content of that speech, the court  
13 may be portrayed as trenching upon the defendant's  
14 constitutionally guaranteed fundamental right to speak her mind  
15 on public questions.

16           We conclude, though, that irrespective of any such  
17 limitation on Stewart's ability to speak as she wished, her First  
18 Amendment rights were not abridged. The sentencing judge was  
19 determining the characteristics of the defendant, which were  
20 legally relevant to a determination of the appropriate sentence  
21 to impose on Stewart, through the contents of statements she  
22 voluntarily and publicly made. "The First Amendment 'does not  
23 erect a per se barrier' to the admission at sentencing of  
24 evidence regarding the defendant's [otherwise protected beliefs,



1 association, or speech]. A sentencing court may consider such  
2 evidence so long as it is 'relevant to the issues involved' in  
3 the sentencing proceeding." United States v. Kane, 452 F.3d 140,  
4 142 (2d Cir. 2006) (per curiam) (quoting Dawson v. Delaware, 503  
5 U.S. 159, 164-65 (1992)).<sup>10</sup> The district court's reading of 18  
6 U.S.C. § 3553(a)'s broad constellation of factors to be assessed  
7 in the course of imposing sentence as permitting review of the  
8 defendant's public statements indicating that she considered her  
9 sentence to be trivial, or exhibiting a lack of remorse, does not  
10 violate her right to speak under First Amendment principles as we  
11 understand them.<sup>11</sup>

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<sup>10</sup> Although each court to have addressed this issue frames the "test" in a somewhat different manner, the touchstone is "relevance." See, e.g., United States v. Simkanin, 420 F.3d 397, 417-18 (5th Cir. 2005) ("Simkanin's beliefs and associations may be considered if they were sufficiently related to the issues at sentencing." (internal quotation marks omitted)); Kapadia v. Tally, 229 F.3d 641, 648 (7th Cir. 2000) ("Nothing in the Constitution prevents the sentencing court from factoring a defendant's statements into sentencing when those statements are relevant to the crime or to legitimate sentencing considerations."); United States v. Curtin, 489 F.3d 935, 953-54 (9th Cir. 2007) (en banc) ("[T]he Supreme Court has held on many occasions in other contexts that opinions and other information that otherwise might be entitled to First Amendment protection are not immune from discovery and use as evidence in court, as long as they are relevant to an issue in a given case.").

<sup>11</sup> Sentences are not governmental regulations. The case law does not require courts to scrutinize them, as they ordinarily would statutory or regulatory restraints on speech, to ensure that any incursion on the freedom to speak is "narrowly tailored" to address a specific, articulable, and compelling governmental interest. See Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011); see also Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2817 (2011) ("[S]trict

1           In Kane we addressed an argument similar to Stewart's.  
2     There, the defendant claimed that the sentencing court violated  
3     the First Amendment by "weighing [the defendant's] prior  
4     published writings against the mitigating character evidence he  
5     offered at sentencing." 452 F.3d at 141. Kane had pled guilty  
6     to a scheme to defraud the Federal Housing Administration and  
7     Department of Housing and Urban Development. In support of his  
8     request for a probationary sentence, Kane submitted letters  
9     testifying to his good character. The government, in response,  
10    submitted excerpts of books Kane had written that explained,  
11    among other things, how to manipulate financial records in order  
12    to receive housing subsidies. Id. at 142.

13           We observed:

14           [Although] the government may not offer proof  
15           of a defendant's abstract beliefs merely for  
16           the purpose of demonstrating that those  
17           beliefs, and by extension the defendant, are  
18           morally reprehensible . . . [h]ere, the  
19           District Court considered Kane's writings  
20           only to the extent that they rebutted his

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scrutiny . . . requires the Government to prove that the  
restriction furthers a compelling interest and is narrowly  
tailored to achieve that interest." (internal quotation marks  
omitted)).

We need not decide whether strict, intermediate, or some  
other level of scrutiny would apply if Stewart were challenging a  
government regulation here. "Deciding whether a particular  
regulation is content based or content neutral is not always a  
simple task. . . . As a general rule, laws that by their terms  
distinguish favored speech from disfavored speech on the basis of  
the ideas or views expressed are content based." Turner  
Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 642-643 (1994).

1 mitigating evidence. The First Amendment  
2 does not bar the government from putting the  
3 lie to a defendant's proof at sentencing.

4 Id. at 143 (internal quotation marks omitted). "[B]ecause much  
5 of Kane's writings concerned illegal real estate schemes, which  
6 related directly to his offense of conviction, the writings also  
7 may indicate the increased likelihood of recidivism or a lack of  
8 recognition of the gravity of the wrong." Id. (internal  
9 quotation marks omitted).

10 In United States v. Bangert, 645 F.2d 1297 (8th Cir.  
11 1981), the circuit court examined the sentences of two  
12 individuals who had been convicted of theft and destruction of  
13 government property for stealing a United States flag from a  
14 flagpole on a federal building and later burning it "to protest  
15 involvement of the United States in the internal affairs of  
16 Iran." Id. at 1300. Both defendants received the maximum  
17 sentence -- one year's imprisonment and a \$1,000 fine. Id. at  
18 1306.

19 The court explained that "[c]onsideration of political  
20 beliefs, as distinguished from criminal activity, would clearly  
21 be impermissible in determining defendants' sentences, because it  
22 would impair the rights of the defendants under the First  
23 Amendment, protecting public expression of their political  
24 beliefs, by words and symbols." Id. at 1308. In that case,  
25 however, the district court was explicit:

1 [The defendants'] sentence . . . has nothing  
2 to do with [their] political beliefs or  
3 [their] membership in whatever organizations  
4 [they] belong to or the fact that [they] were  
5 expressing [them]selves in a peaceful  
6 demonstration[.] And [they] are surely not  
7 being sentenced because of [one of the  
8 defendant's], at least, feeling about the  
9 Vietnam War, because certainly any thinking  
10 person, from time to time, has doubts about  
11 actions that may have been taken.

12 Id. The circuit court concluded that the district court had not  
13 rested its sentencing decision on the defendants' speech, but  
14 instead upon the defendants' "lack of truthfulness and lack of  
15 remorse." Id. (emphasis added).<sup>12</sup>

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<sup>12</sup> Courts have also denied challenges akin to Stewart's, based on a court taking into account statements (albeit ones made in court) questioning the illegality of the crimes of conviction. See Simkanin, 420 F.3d at 417-18 (concluding that it was proper to consider in sentencing the defendant's "specific beliefs that the tax laws are invalid and do not require him to withhold taxes or file returns (and his association with an organization that endorses the view that free persons are not required to pay income taxes on their wages) [because they are] directly related to the crimes in question and demonstrate a likelihood of recidivism"); see also United States v. Bone, 433 F. App'x 831, 835 (11th Cir. 2011) (rejecting challenge to the denial of a downward variance when defendant filed a "notice and declaration of certificate of sovereign status" and asked for immediate release where the district court "reasoned that the statements were evidence of Bone's refusal to accept responsibility for his acts, his unpreparedness to return to society, the danger to himself and to others of returning him to society, and his lack of respect for the law. These points are proper sentencing considerations . . . ."); United States v. Smith, 424 F.3d 992, 1016 (9th Cir. 2005) (rejecting a defendant's arguments that the First Amendment prevented the court from considering in sentencing his diatribe on the court's "lack of jurisdiction" and contesting the existence of the United States because "the district court made it clear that it was increasing the sentence based on [the defendant's] lack of remorse [which is a] legitimate sentencing factor[]").

1           In United States v. Lemon, 723 F.2d 922 (D.C. Cir.  
2 1983), relied upon by Stewart, the Court of Appeals for the D.C.  
3 Circuit explained, in a manner echoed by the views we later  
4 expressed in Kane and United States v. Fell, 531 F.3d 197 (2d  
5 Cir. 2008), that "a court may not punish an individual by  
6 imposing a heavier sentence for the exercise of first amendment  
7 rights. . . . A sentence based to any degree on activity or  
8 beliefs protected by the first amendment is constitutionally  
9 invalid." Lemon, 723 F.2d at 937-38.<sup>13</sup>

10           The court overturned the defendant's sentence because  
11 the prosecution did "little more than . . . attempt to establish  
12 guilt by association through an accumulation of uncorroborated  
13 suspicions. It [did] not appear from the record that the  
14 government [was able to] demonstrate a single direct link between  
15 the defendant and illegal activity by known members of [the

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<sup>13</sup> The Lemon court considered the role a defendant's association with a group called the Black Hebrews could play in sentencing. All parties agreed that the Black Hebrews was a religious organization, but the government argued that the group was also involved in illegal activities, and therefore the defendant could be punished for assisting the group in furthering those activities. The court concluded that "the first amendment proscribes punishment of an individual for membership in a protected organization unless the organization has illegal aims and the individual intends to further those aims." Id. at 939-40. "[M]ere membership would be an impermissible factor in sentencing. . . . [T]here must be sufficiently reliable evidence of the defendant's connection to illegal activity within the Black Hebrews to insure that he is not being given a harsher sentence for mere association with the group and its legitimate aims and activities." Id.

1 organization of which the defendant was a member]." Id. at 941.  
2 The court thus identified a First Amendment violation. But it  
3 explicitly acknowledged (albeit necessarily in dicta) that the  
4 defendant's otherwise protected association could have been  
5 considered in sentencing if that association was specifically  
6 tied to illegal aims. In other words, the district court was not  
7 barred from considering what it might have otherwise legitimately  
8 considered -- the defendant's support for illegal activity --  
9 solely because that support might have been related to beliefs or  
10 association otherwise protected by the First Amendment.

11 We again emphasize the complete bar on the use of  
12 protected speech, belief, or association at sentencing for the  
13 purpose of punishment based on the feature that warrants its  
14 First Amendment protection. It is impermissible to sentence a  
15 defendant more harshly based on associations that do not relate  
16 to specific criminal wrongdoing, for example, or for beliefs that  
17 some might find morally reprehensible, or for critical statements  
18 made in public because they were made in public.<sup>14</sup> While "[t]he

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<sup>14</sup> The "rule" set out here turns on a factual inquiry into the purposes for which what might be considered protected speech or conduct is used at sentencing. But such ad hoc inquiries are not uncommon when dealing with discretionary action in the First Amendment context. See, e.g., FCC v. Pacifica Found., 438 U.S. 726, 746 (1978) ("If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content -- or even to the fact that it satirized contemporary attitudes about four-letter words -- First Amendment protection might be required. But that is simply not this case.").

1 First Amendment forbids the uncabined reliance on a defendant's  
2 'abstract beliefs' at sentencing . . . the government may  
3 introduce evidence of beliefs or associational activities, so  
4 long as they are relevant to prove [permissible sentencing  
5 factors, such as] motive or aggravating circumstances, to  
6 illustrate future dangerousness, or to rebut mitigating  
7 evidence." Fell, 531 F.3d at 228; see also United States v.  
8 Brown, 479 F.2d 1170, 1174 (2d Cir. 1973) ("[B]as[ing] [a]  
9 sentence on . . . revulsion arising out of [a defendant's] social  
10 or political views . . . would be improper."); Bangert, 645 F.2d  
11 at 1308 (similar).<sup>15</sup>

12 Stewart does indeed argue that she was prosecuted and  
13 punished for her political beliefs. The most obvious -- and  
14 fatal -- shortcoming in Stewart's argument in the context of this  
15 appeal is that there is not a hint in the record of any fact to  
16 support an assertion that the district court did so. And we are,  
17 parenthetically, at a loss to understand why Stewart thinks that  
18 the district judge's views of her politics changed drastically

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<sup>15</sup> An extreme version of Stewart's argument was made by the defendant in United States v. Tapanes, 284 F. App'x 617 (11th Cir. 2008). There, the defendant, during the course of a boat chase, made an obscene gesture directed to the United States Coast Guard officials in pursuit. Over a First Amendment objection, the court found no error in considering the gesture in sentencing because it "was relevant to [the defendant's] sentencing [as it] reflected upon [the defendant's] history and characteristics, and, specifically, [his] lack of respect for the law . . . ." Id. at 621.

1 for the worse between 2006, when he gave her a sentence so light  
2 compared with her Guidelines sentence that she expressed her  
3 profound relief (as reflected in her public "I can do that  
4 standing on my head" comment), and 2010, when the court imposed  
5 the higher sentence, still one-third of the Guidelines minimum,  
6 of which she now complains. The court was properly concerned  
7 about whether she considered her previous sentence to have been  
8 "trivial," and whether she had remorse for her acts adjudged to  
9 be serious crimes, not about any political views of hers that may  
10 or may not have played a part in her commission of the crime or  
11 her reaction to her conviction and sentence.

12 Finally, underlying Stewart's argument is the  
13 suggestion that her sentence was set at a higher level  
14 principally because of her public statements. The significance  
15 of that assertion is questionable -- it is not clear why a  
16 considerable increase in sentence based entirely on the  
17 defendant's lack of remorse and her consideration of a lower  
18 sentence as "trivial" would be improper. But in any event, the  
19 suggestion is false. In Stewart I, we remanded with the explicit  
20 direction that the district court would apply the terrorism  
21 enhancement, determine whether the abuse-of-trust and  
22 obstruction-of-justice enhancements applied, and "consider the  
23 overall question whether the sentence to be given is appropriate  
24 in view of the magnitude of the offense." Stewart I, 590 F.3d at



1 151. The district court was permitted to consider Stewart's lack  
2 of remorse and view of the seriousness of her previous sentence  
3 in arriving at an appropriate new sentence pursuant to  
4 section 3553(a), as we have explained, but the increase in her  
5 sentence was based on consideration of myriad other factors not  
6 properly or fully addressed at her previous sentencing. Of the  
7 42 pages of transcript containing the district court's  
8 resentencing and its statements of the reasons therefor, barely  
9 more than a page, Stewart II at 61-62, is devoted to a discussion  
10 of the speech at issue here and its consequences for sentencing  
11 purposes.

12 B. The "Chilling Effect"

13 Stewart argues that her statements at issue were on  
14 matters of "public concern," Def.'s Br. at 58 & n.15, and "speech  
15 on matters of public concern is at the heart of the First  
16 Amendment's protection." Snyder v. Phelps, 131 S. Ct. 1207, 1215  
17 (2011) (internal quotation marks and alterations omitted).  
18 Because of the public's interest in defendants speaking out in  
19 the manner in which Stewart did, the Court should be wary of  
20 stifling similar speech, which, she argues, would be the result  
21 of allowing the stiffer sentence she received here to stand. To  
22 make this point, she relies upon related First Amendment  
23 jurisprudence. She cites, for example, Hotchner v. Castillo-  
24 Puche, 551 F.2d 910 (2d Cir. 1977), a case in which we held that

1 the plaintiff in a defamation and invasion of privacy suit had  
2 failed to establish "actual malice," for the assertion that  
3 "[a]ny risk that full and vigorous exposition and expression of  
4 opinion on matters of public interest may be stifled must be  
5 given great weight. In areas of doubt and conflicting  
6 considerations, it is thought better to err on the side of free  
7 speech." Id. at 913; see also Def.'s Reply Br. at 8-9.<sup>16</sup> And,  
8 Stewart asserts, the use of her statements as a basis for  
9 increasing her sentence will deter future speech by others.  
10 Indeed it is easy to imagine that sometime in the future at least  
11 one lawyer will use the story of Stewart's resentencing as an  
12 object lesson as to the kind of statements his or her client  
13 should avoid making while awaiting sentencing, thus "chilling"  
14 that person's speech.

15 As we have noted, though, if the question before us  
16 were permissibility of a statute or other governmental regulation

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<sup>16</sup> She might better have referred to Justice O'Connor's opinion for the Supreme Court in Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986). There, the Court concluded that under the First Amendment, plaintiffs must bear the burden of falsity in defamation suits about matters of public interest "[t]o ensure that true speech on matters of public concern is not deterred." Id. at 776. "Because such a 'chilling' effect would be antithetical to the First Amendment's protection of true speech on matters of public concern, we believe that a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant. To do otherwise could only result in a deterrence of speech which the Constitution makes free." Id. at 777 (internal quotation marks omitted).

1 under which Stewart's speech had indeed been punished, "strict  
2 scrutiny" might well be applicable, see supra note 11, and the  
3 deterrent -- "chilling" -- effect of the restriction might  
4 require our careful consideration. That is not this case,  
5 however, and Stewart's repeated cries of "chilling effect"  
6 therefore avail her little.<sup>17</sup>

7           Although employed by courts for more than fifty  
8 years,<sup>18</sup> the term "chilling effect" is hardly precise. It  
9 ordinarily seems to refer to the deterrent effect an overbroad  
10 statute or government regulation (including the availability of  
11 civil cause of a action) may have on speech because the mere  
12 possibility that the statute or regulation may be employed  
13 against some future protected speech might deter individuals from  
14 making such protected statements. See Dombroski v. Pfister, 380  
15 U.S. 479, 486-87 (1965). "The chilling effect upon the exercise

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<sup>17</sup> The analogy to a hypothetical person who confesses to murder, to which we have adverted, may be appropriate. See supra note 9. Punishment of such a person for murder may well deter ("chill") future speech in the form of confessions -- public or private -- but it hardly follows that punishment for the murder is a violation of her First Amendment right to speak truthfully about the crime, a matter of undoubted public interest.

<sup>18</sup> A Lexis search indicates that the term was first employed by the Supreme Court in Times Film Corp. v. City of Chicago, 365 U.S. 43, 74 n.11 (1961) (quoting Paul A. Freund, The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 539 (1951)), although the underlying principle seems to have been identified at least as early as Justice Frankfurter's concurring opinion in Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring).

1 of First Amendment rights may derive from the fact of the  
2 prosecution [based on such a restriction], unaffected by the  
3 prospects of its success or failure." Id. at 487.

4 Professor Schauer offered a "tentative definition" of  
5 the term: "A chilling effect occurs when individuals seeking to  
6 engage in activity protected by the first amendment are deterred  
7 from so doing by governmental regulation not specifically  
8 directed at that protected activity." Frederick Schauer, Fear,  
9 Risk and the First Amendment: Unraveling the "Chilling Effect",  
10 58 B.U. L. Rev. 685, 693 (1978) (emphasis omitted). He used as  
11 an example "a statute which is directed at hard-core pornography  
12 [that] has the actual effect of deterring an individual from  
13 publishing the Decameron or Lady Chatterly's Lover." Id.

14 There is no such "governmental regulation" of speech at  
15 issue here,<sup>19</sup> nor is there the prosecution of a civil suit based

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<sup>19</sup> Stewart does not argue that she was prosecuted (as opposed to sentenced) for engaging in speech protected by the First Amendment. Nor does she point to anything reasonably resembling a "governmental regulation" that allowed the district court improperly to consider the contents of her public speech. To do that, she would have had to attack section 3553 on the basis that it is unconstitutional because it permits inquiry based on a defendant's public speech of public interest. She has not done so.

This is not to say that no such argument is possible. It has been asserted in the academy that there are First Amendment objections to factoring a defendant's remorse into a sentence at all, under section 3553 or otherwise, even when it is based on in-court statements or failure to make an appropriate such statement. See Carissa Byrne Hessick & F. Andrew Hessick, Recognizing Constitutional Rights at Sentencing, 99 Cal. L. Rev.

1 on such a restriction. Thus the term "chilling effect" as used  
2 descriptively by Stewart does not appear to fall within the  
3 meaning of "chilling effect" as it has historically been used by  
4 the courts.

5 It is not the law that any action by an agent of  
6 government that has a collateral deterrent effect on protected  
7 speech ipso facto violates the First Amendment. There is no  
8 authority for the general proposition that underlies Stewart's  
9 argument: that the government cannot use the contents of  
10 voluntary public speech to the speaker's disadvantage despite the  
11 likelihood that someone will subsequently think twice about  
12 making a similar public statement.

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47, 66-71 (2011). But that is not the law of this Circuit --  
evidence of lack of remorse is regularly used in imposing  
sentence. See Watkins, 667 F.3d at 260; United States v.  
Martinucci, 561 F.3d 533, 535 (2d Cir. 2009) (per curiam); see  
also United States v. Barresi, 316 F.3d 69, 75 (2d Cir. 2002)  
(assuming that "lack of remorse" can properly be used as a basis  
for an upward departure from a Guidelines sentence, but  
concluding that there was an "absence of any grounds in the  
record that could persuasively warrant [such a] finding."). As  
noted, she has in any event not made this argument.

Neither are we aware of any defendant who has attacked  
section 3553, successfully or otherwise, on the basis that its  
chilling effects on speech require First Amendment scrutiny.  
This is not surprising. "Nearly all the ways that defendants  
speak in court are heavily regulated and potentially punishable  
without raising First Amendment claims." Alexandra Natapoff,  
Speechless: The Silencing of Criminal Defendants, 80 N.Y.U. L.  
Rev. 1449, 1484 (2005). While Stewart is, of course, challenging  
the use of her out-of-court statements at sentencing, the court  
took them into account in the same manner as it would have been  
entitled to had she expressed the same lack of remorse in  
testimony or otherwise in court.

1 C. The Ambiguity of Stewart's Statements

2           Stewart makes a related argument to the effect that the  
3 district court was forbidden to interpret her statements as it  
4 did -- to indicate a lack of remorse and her view that the  
5 sentence she received was trivial -- in light of her alternative  
6 explanations as to the meaning of those statements. "[B]ecause  
7 of the importance of free speech, Ms. Stewart is certainly  
8 entitled to the benefit of the doubt where there are two  
9 conflicting views or interpretations of what she said. Under the  
10 First Amendment, any ambiguities must be resolved in favor of  
11 sustaining the protected speech." Def.'s Br. at 75.

12           Assuming the statements were ambiguous -- a  
13 questionable proposition, especially with regard to the meaning  
14 of the statement "I would do it again" -- we know of no law or  
15 legal principle to support a conclusion that the district court  
16 was not permitted to use its informed best judgment in  
17 determining whether the speech in question disclosed that Stewart  
18 considered a 28-month sentence "trivial," or demonstrated a lack  
19 of remorse for the crimes she committed -- clearly a factor that  
20 the court was permitted to take into account in sentencing. See,  
21 e.g., Martinucci, 561 F.3d at 535; United States v. Fernandez,  
22 443 F.3d 19, 33 (2d Cir. 2006).<sup>20</sup>

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<sup>20</sup> As we have noted, Stewart does not contend that section 3553 is unconstitutional. See supra note 19. Neither does she argue that under the particular circumstances of her sentence,

1           Wide latitude is afforded to sentencing courts in  
2     crafting sentences "sufficient, but not greater than necessary"  
3     to achieve the sentencing objectives set forth by Congress.  
4     18 U.S.C. § 3553(a); see 18 U.S.C. § 3553(a)(2)(A)-(B) ("[The  
5     district court] shall consider the need for the sentence imposed

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lack of remorse should not be a factor because it usually relates to concerns about recidivism and rehabilitation, neither of which may be seriously at issue in her case in light of her age and disbarment, as the district court noted. Stewart II, at 65, 68. Instead she asserts that the statement in question does not evidence lack of remorse. See Def.'s Br. at 73-75; Stewart II, at 12-13.

The district court's view was that "[t]hese 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." Stewart II, at 62. The court was apparently referring to general deterrence, in light of its remarks regarding the very limited potential for recidivism on Stewart's part. We think that these reasons were sufficient and proper. See Fernandez, 443 F.3d at 33 ("Section 3553(a)(1) . . . is worded broadly, and it contains no express limitations as to what 'history and characteristics of the defendant' are relevant.").

To be sure, there is room for debate on the function that consideration of remorse serves when recidivism or rehabilitation are not at issue, or if it is effective in addressing those goals. Compare Bryan H. Ward, Sentencing without Remorse, 38 Loy. U. Chi. L.J. 131, 140 (2006) ("[C]ourts rely on remorse simply because, historically, courts always have."), with Stephanos Bibas & Richard A. Bierschbach, Integrating Remorse and Apology into Criminal Procedure, 114 Yale L.J. 85, 125 (2004) ("The values served by remorse and apology should be more integral parts of the process of prosecution and punishment. For the criminal law to regulate society effectively and morally educate, it must serve the values of remorse and apology in addition to deterring crimes, inflicting retribution, and protecting defendants' rights."). Inasmuch as the issue has not been raised on this appeal, we have no cause to engage in that debate.

1 to reflect the seriousness of the offense, to promote respect for  
2 the law, and to provide just punishment for the offense [and]  
3 afford adequate deterrence to criminal conduct."). And "[n]o  
4 limitation [is permitted] on the information concerning the  
5 background, character, and conduct of a person convicted of an  
6 offense which a court of the United States may receive and  
7 consider for the purpose of imposing an appropriate sentence."  
8 18 U.S.C. § 3661.

9 The district court acknowledged this latitude in  
10 rejecting Stewart's argument that the First Amendment barred  
11 consideration of her post-sentencing statements. "[T]he Court  
12 can take into account, for purposes of sentencing, the truth of  
13 the defendant's comments about the sentence and the degree of her  
14 remorse in the way that courts allow defendants to speak at  
15 sentencing and consider those statements." Stewart II, at 62.  
16 Were we to read the Constitution to prohibit the consideration of  
17 a defendant's statements solely because they were only arguably  
18 unfavorable to the defendant's position, as Stewart urges, we  
19 would take away from the district court the ability fully to  
20 assess facts bearing on the defendant's state of mind in  
21 accordance with the requirements of section 3553, which enables  
22 the court to impose a sentence fair to both the defendant and  
23 society. We have been given no sound reason to do so.



1                   **III. Obstruction-of-Justice Enhancement**

2                   Stewart also argues that the district court erred in  
3 applying the obstruction-of-justice enhancement. The Guidelines  
4 allow for such a two-level enhancement if "the defendant  
5 willfully obstructed or impeded, or attempted to obstruct or  
6 impede, the administration of justice with respect to the  
7 investigation, prosecution, or sentencing of the instant offense  
8 of conviction." U.S.S.G. § 3C1.1. In order to impose the  
9 enhancement, "a sentencing court must find that the defendant 1)  
10 willfully 2) and materially 3) committed perjury, which is (a)  
11 the intentional (b) giving of false testimony (c) as to a  
12 material matter." United States v. Zagari, 111 F.3d 307, 329 (2d  
13 Cir. 1997). "A witness testifying under oath or affirmation  
14 [commits perjury] if she gives false testimony concerning a  
15 material matter with the willful intent to provide false  
16 testimony, rather than as a result of confusion, mistake, or  
17 faulty memory." United States v. Dunnigan, 507 U.S. 87, 94  
18 (1993).

19                   The district court must find each of the elements to be  
20 present by a preponderance of the evidence. See United States v.  
21 Salim, 549 F.3d 67, 75 (2d Cir. 2008). The court's findings of  
22 fact that, for example, a statement was intentional or false,  
23 must be upheld unless clearly erroneous. Id. at 74.

1           The district court outlined in detail seven statements  
2 that it concluded constituted perjury and warranted the  
3 obstruction-of-justice enhancement. They fall into three general  
4 categories: A) that Stewart believed, notwithstanding the literal  
5 language of the SAMs, that she was allowed to take the actions  
6 that she did; B) that she did not participate in a conspiracy  
7 with her co-defendants; and C) that she did not know the identity  
8 of Rifa'i Taha Musa ("Taha"), also known as "Abu Yasir," "a  
9 military leader of al-Gama'a, a follower of Abdel Rahman, and an  
10 unindicted co-conspirator," Stewart I, 590 F.3d at 103.

11 A. The SAMs

12           The first category of statements that the district  
13 court concluded were perjurious and warranted the enhancement  
14 related to Stewart's "assertion that she believed that she was  
15 complying with the SAMs because the attorneys operated in a  
16 'bubble' and that, consequently, she did not violate the SAMs or  
17 sign the false affirmation." Stewart II, at 45. Four specific  
18 statements supported the district court's finding: "that it was  
19 understood by the United States Attorney's Office and Abdel  
20 Rahman's attorneys that the SAMs contained a 'bubble' which  
21 permitted Abdel Rahman's attorneys to issue press releases  
22 containing Abdel Rahman's statements as part of their  
23 representation of him"; "that she kept her 'promise to abide by  
24 the plain language of the SAMs' and that she did not believe that

1 she violated 'the SAMs or the language of the SAMs'; "that she  
2 did not believe that she violated any 'command' or restriction of  
3 the United States of America"; and "that she never signed a false  
4 affirmation." Id. at 45-46 (citations to trial transcript  
5 omitted).

6           Stewart contends on appeal that because her issuance of  
7 press releases and her making of other statements to the public  
8 relaying Abdel Rahman's statements were incidental to her  
9 "effective representation" of Abdel Rahman, they were allowed  
10 "notwithstanding the language" of the SAMs. Def.'s Br. at 81.  
11 She asserts that she did not believe the literal language of the  
12 SAMs was binding because her co-counsel Ramsey Clark and Abdeen  
13 Jabara were "openly and notoriously" violating the SAMs, and had  
14 not been subject to repercussions for their violations. Id. at  
15 81-82. In addition, Stewart contends that her view was  
16 buttressed by the fact that, after her 2000 statement to Reuters,  
17 the government continued to allow her to visit Abdel Rahman. Id.  
18 at 83.

19           Stewart does not assert that her actions were allowed  
20 by the literal language of the SAMs. They were not. She argues  
21 instead that at the time she took actions in literal violation of  
22 the SAMs, a kind of "estoppel" applied, and that as a result, she  
23 could not be prosecuted for taking them. Therefore, she argues,

1 her statements to that effect were not false, and cannot support  
2 the obstruction-of-justice enhancement.

3 As the district court explained, Stewart's actions  
4 belied this argument. She repeatedly exhibited behavior  
5 demonstrating that she understood her actions to be in violation  
6 of the law and that she could face consequences, including  
7 criminal prosecution, as a result of them. For example, she made  
8 "covering noises while the messages were read or responses by  
9 Sheikh Rahman were dictated"; during the May 2000 prison visit  
10 she and Yousry acknowledged they would be "in trouble" if the  
11 guards discovered they were reading messages from Taha to Abdel  
12 Rahman, and upon their return for a second visit in May 2000 left  
13 a similar message in the car for fear of them being searched and  
14 it being discovered; she acknowledged when speaking to Reuters  
15 that the statement might cause her to be banned from visiting her  
16 client; and she told Yousry she was "risking her whole career" by  
17 issuing the press release. Stewart II, at 46-47. After  
18 receiving a letter from then-Assistant United States Attorney  
19 Patrick Fitzgerald informing her that her actions in publicly  
20 disclosing Abdel Rahman's withdrawal from the ceasefire were in  
21 violation of the SAMs, Stewart signed another affirmation  
22 agreeing to abide by them. In July 2001, she nonetheless again  
23 violated the SAMs. Id. at 48.

1           In light of these facts, the failure of the government  
2 to seek to prosecute Clark and Jabara has little relevance to the  
3 question whether Stewart is being punished inappropriately for  
4 violation of the SAMs. And some of their actions that Stewart  
5 points to, such as Clark's 1997 issuance of a press release  
6 expressing Abdel Rahman's support for the ceasefire, took place  
7 before the SAMs prohibited such actions. Clark and Jabara did  
8 indeed refuse to issue any public statement from Abdel Rahman  
9 withdrawing his support for the ceasefire. See Stewart I, 590  
10 F.3d at 105. As the district court explained, "the defendant's  
11 actions went further than those of either Messrs. Clark or Jabara  
12 by publicizing withdrawal from the ceasefire." Stewart II, at  
13 48.

14           Finally, the district court concluded that Stewart had  
15 testified falsely when she said she had not signed false  
16 affirmations pledging to abide by the SAMs. A statement of this  
17 type that is inconsistent with a jury's finding, as it was here,  
18 can support an obstruction-of-justice enhancement. See United  
19 States v. Bonds, 933 F.2d 152, 155 (2d Cir. 1991) (per curiam)  
20 (concluding that the jury finding the defendant acted with  
21 knowledge contradicted his factual assertion that he had not done  
22 so), superseded on other grounds by regulation as recognized in  
23 United States v. Castano, 999 F.2d 615, 617 & n.2 (2d Cir. 1993)  
24 (per curiam).

1           The district court considered Stewart's arguments and  
2 evidence to the effect that the statements it identified were not  
3 false because she genuinely harbored the belief that her conduct  
4 was not in violation of the SAMs, even if it was literally  
5 prohibited by them. The district court found by a preponderance  
6 of the evidence that her statements were false based largely on  
7 her contemporaneous statements and actions demonstrating her  
8 understanding that she was engaged in illegal activity, and the  
9 jury's finding that she acted with knowledge. We see nothing in  
10 the record to the contrary. The district court's findings were  
11 not "clearly erroneous."

12 B. Conspiracy

13           The district court also decided that the  
14 obstruction-of-justice enhancement was justified by Stewart's  
15 statements "that she did not believe that she 'conspired with  
16 anyone to defraud the United States of America, the Department of  
17 Justice and the Bureau of Prisons out of its right to have the  
18 SAMs applied and enforced,'" and "that she did not 'believe that  
19 there was a conspiracy that involved Mr. Sattar or this fellow  
20 Taha and others to kill or kidnap people in a foreign country'  
21 and did not make 'Abdel Rahman available to any conspiracy to  
22 kill or kidnap people.'" Stewart II, at 49. These statements,  
23 the district court concluded, "were necessarily inconsistent with  
24 the jury's finding of guilt and were false testimony concerning

1 material matters that cannot be ascribed to mistake, inadvertence  
2 or faulty memory." Id.

3           Stewart argues that these statements cannot support an  
4 obstruction-of-justice enhancement because they were expressions  
5 of opinion as to her guilt or innocence -- before she was in fact  
6 found guilty or acquitted of anything. To be sure, an  
7 obstruction-of-justice enhancement would have been in error had  
8 she done no more than proclaim herself "not guilty." See, e.g.,  
9 United States v. Scop, 940 F.2d 1004, 1012 (7th Cir. 1991)  
10 ("Statements relating to one's own guilt, prior to conviction,  
11 are considered statements of opinion and cannot be perjurious.");  
12 United States v. Endo, 635 F.2d 321, 323 (4th Cir. 1980) ("[A]  
13 [c]onviction for perjury cannot be sustained solely because the  
14 defendant gave inconsistent answers to the question, 'are you  
15 guilty?' To be false, the statement must be with respect to a  
16 fact or facts and the statement must be such that the truth or  
17 falsity of it is susceptible of proof." (internal quotation marks  
18 and alteration omitted)). Stewart's statements were not,  
19 however, limited to a denial of guilt -- they were directly  
20 related to specific underlying conduct: She denied knowledge of  
21 or participation in the conspiracy. The jury found to the  
22 contrary that she knowingly participated in it.

23           In Bonds, 933 F.2d at 155, we concluded that a  
24 defendant who testified that he did not know that money he

1 distributed was counterfeit could be found to have committed  
2 perjury based on a subsequent jury conviction for that crime.

3 [B]y finding [the defendant] guilty of  
4 knowingly distributing counterfeit money, the  
5 jury necessarily determined that [he] knew  
6 that the money he had distributed was  
7 counterfeit -- that is, unless the jury's  
8 verdict was unsupported by the evidence, in  
9 which case, of course, the remedy would be to  
10 reverse [his] conviction, not simply to  
11 disallow the two-level upgrade in sentencing.

12 Id. (emphasis omitted).

13 Here, as in Bonds, the jury's findings of guilt on  
14 Count One, charging conspiracy to defraud the United States, and  
15 Counts Four and Five, charging material support of terrorism,  
16 each required the jury to find that Stewart's actions were  
17 undertaken knowingly. The jury's findings contradicted  
18 Stewart's factual testimony to the effect that she did not engage  
19 in this conduct, or at least did not do so knowingly. The  
20 court's decision on this score was not clearly erroneous.

21 C. Taha

22 The district court also concluded that Stewart's  
23 testimony that between 1996 and 2000 she did not know the name  
24 "Taha," and that during the May 2000 prison visit she did not  
25 know who "Abu Yasir" was, supported the obstruction-of-justice  
26 enhancement. Stewart II, at 50. In making this finding, the  
27 district court noted that Stewart testified that she had seen the  
28 name Taha in an article in connection with her representation of



1 another defendant prior to 2000, but had filed the article away  
2 and forgotten about it. Id. Stewart acknowledged having  
3 arranged before her May 2000 visit to Abdel Rahman for  
4 translation of an article explaining that Taha and Abu Yasir were  
5 one and the same, and describing Taha's role in the Egyptian  
6 Islamic movement. Id. Stewart also acknowledged that Yousry  
7 translated all correspondence and documents that would be  
8 provided to Abdel Rahman in advance of each visit, as well as  
9 after each visit, all correspondence dictated by Abdel Rahman.  
10 During the May 2000 visit, Yousry read a statement from Abu Yasir  
11 identifying him as a leadership member of the militant group, and  
12 describing him as someone with "massive weight" who "the regime  
13 worries about" to the extent it worries about anyone. Id. at 51.  
14 One newspaper article that Stewart approved for reading to Abdel  
15 Rahman contained belligerent statements by Taha and explained who  
16 he was; another said that he was also known as Abu Yasir.  
17 Stewart also acknowledged having read an article, which she later  
18 sent to Sattar and Yousry, that described a videotape made by  
19 Osama bin Laden, Ayman al-Zawahiri, and Taha calling for the  
20 release of Abdel Rahman. Id.

21 Based on this evidence, the district court rejected  
22 Stewart's assertion that she did not remember who Taha was  
23 because she was a "busy lawyer." Id. "[T]he references to Taha  
24 were numerous enough and significant enough that her testimony

1 that she had not heard of Taha until the trial" constituted  
2 perjury sufficient to warrant the obstruction-of-justice  
3 enhancement, as were her statements "that she did not know who  
4 Abut Yasir was at the time of the May 2000 prison visit and that  
5 the name had no meaning for her." Id. at 51-52.

6 Stewart argues on appeal that "[n]owhere in the  
7 hundreds of hours of recordings or in any of the documents  
8 admitted at trial is there any direct evidence that Ms. Stewart  
9 knew Taha's connection to [al-Gama'a or] that anyone ever spoke  
10 of him and his role in English in Ms. Stewart's presence."  
11 Def.'s Br. at 94. She acknowledges that she approved articles  
12 for reading to Abdel Rahman, but contends those articles were  
13 subject only to her " cursory review," and in some instances were  
14 not given her prior approval at all. Def.'s Br. at 95-97. Of  
15 course, in applying the enhancement, the "district court [was]  
16 entitled to rely on circumstantial evidence and on all reasonable  
17 inferences that may be drawn from all of the evidence." United  
18 States v. Khedr, 343 F.3d 96, 102 (2d Cir. 2003).

19 The district court's conclusion that Stewart must have  
20 known who Taha was, and that his alias was Abu Yasir, finds  
21 sufficient support in the record. The district court noted the  
22 specific instances in which Stewart was known to have approved  
23 messages or articles containing information about Taha. It seems  
24 unlikely that Stewart was unaware of the existence and identity

1 of a person -- Taha -- who had appeared on a videotape with bin  
2 Laden and al-Zawahiri to demand Abdel Rahman's release. Taha was  
3 a key figure in the events unfolding in Egypt to which Abdel  
4 Rahman was a central player, and Taha was in direct contact with  
5 Stewart's co-defendant Ahmed Abdel Sattar. We conclude that the  
6 district court's finding by a preponderance of the evidence that  
7 Stewart's statements denying knowledge of Taha were false was not  
8 clearly erroneous.

#### 9 **IV. Abuse-of-Trust Enhancement**

10 Stewart objects to the district court's imposition of  
11 the abuse-of-trust enhancement, which applies "[i]f the defendant  
12 abused a position of public or private trust . . . in a manner  
13 that significantly facilitated the commission or concealment of  
14 the offense." U.S.S.G. § 3B1.3. The "applicability of a § 3B1.3  
15 enhancement turns on the extent to which the position provides  
16 the freedom to commit a difficult-to-detect wrong." United  
17 States v. Allen, 201 F.3d 163, 166 (2d Cir. 2000) (internal  
18 quotation marks omitted).

19 In imposing this enhancement, the district court  
20 explained that:

21 Access to Sheikh Rahman was limited and  
22 attorneys were given access for legal  
23 purposes. The defendant swore that she would  
24 abide by the SAMs and not use her access to  
25 pass messages between Sheikh Rahman and the  
26 media, but she failed to keep her word. The  
27 administration of the SAMs depended on trust  
28 placed in attorneys to keep their word. The

1 defendant was able to participate in  
2 smuggling messages into and out of the prison  
3 because of the trust placed in her as the  
4 attorney for Sheikh Rahman. Even after she  
5 had violated the SAMs, she was permitted to  
6 visit Sheikh Rahman again because she signed  
7 a new affirmation. But, again, she did not  
8 abide by that affirmation.

9 . . . Ms. Stewart abused her position as a  
10 lawyer to gain access to Sheikh Omar Abdel  
11 Rahman while he was in prison and used that  
12 access to smuggle messages to and from Sheikh  
13 Abdel Rahman while he was in prison and to  
14 make potential[ly] . . . lethal public  
15 statements on his behalf in violation of the  
16 SAMs.

17 Stewart II, at 53 (internal quotation marks and citation to  
18 transcript of original sentencing hearing omitted).

19 Stewart contends that "any finding that Ms. Stewart  
20 'abused trust' is dependent on whether the government explicitly  
21 or implicitly sanctioned the conduct upon which the enhancement  
22 is based." Def.'s Br. at 99. Stewart argues, as she did in  
23 contesting the obstruction-of-justice enhancement, that because  
24 she believed her actions to have been permitted, she did not  
25 abuse a position of trust. This argument fails here for the same  
26 reason it fails with respect to the obstruction-of-justice  
27 enhancement: the ample evidence that Stewart understood her  
28 actions to have been in violation of her obligations under the  
29 SAMs. Indeed, her attempts to evade detection when engaging in  
30 actions violating the SAMs during her visits to Abdel Rahman  
31 underscore her understanding that she was permitted to be in a

1 position of close contact with Abdel Rahman solely by virtue of  
2 her position of trust as his attorney, and demonstrate her  
3 knowing abuse of that trust. Stewart could not have committed  
4 the crimes of which she was found guilty had she not been placed  
5 in a position of trust.<sup>21</sup>

#### 6 **V. Substantive Reasonableness**

7 Finally, Stewart argues that her sentence is  
8 substantively unreasonable, principally because of the more than  
9 fourfold increase from her original sentence of 28 months'  
10 incarceration to the currently imposed sentence of 120 months.  
11 She asserts that aside from her public statements, "no change in  
12 circumstances or information available to the sentencing  
13 court . . . supported increasing Ms. Stewart's sentence by this  
14 magnitude." Def.'s Br. at 101. She also contends that the  
15 district court was not permitted to increase the sentence in  
16 response to suggestions that it do so in the dissent from our  
17 panel opinion, and in the dissents accompanying the denial of  
18 rehearing en banc. Def.'s Br. at 103. And she urges that in  
19 light of her personal characteristics, the sentence imposed on

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<sup>21</sup> The government contends that Stewart's claim on this enhancement is subject to plain error review because she did not object to the enhancement on the same grounds before the district court as she does here. Because Stewart's claim fails under either standard of review, we need not decide which applies in this instance.

1 her was so "shockingly high" as to render it substantively  
2 unreasonable.

3 The substantive unreasonableness standard "provide[s] a  
4 backstop for those few cases that, although procedurally correct,  
5 would nonetheless damage the administration of justice because  
6 the sentence imposed was shockingly high, shockingly low, or  
7 otherwise unsupportable as a matter of law." United States v.  
8 Rigas, 583 F.3d 108, 123 (2d Cir. 2009). We will only set aside  
9 a district court's sentence on substantive grounds "in  
10 exceptional cases where the trial court's decision cannot be  
11 located within the range of permissible decisions." United  
12 States v. Cavera, 550 F.3d 180, 189 (2d Cir. 2008) (en banc)  
13 (internal quotation marks omitted).

14 A. Increase without Justification

15 Stewart contends that the district court's decision to  
16 impose a fourfold increase in her sentence was unsupportable  
17 because the second sentence was imposed based on the same set of  
18 facts that led to Stewart's vacated 28-month sentence. Indeed,  
19 "if a district court were explicitly to conclude that two  
20 sentences equally served the statutory purpose of § 3553, it  
21 could not . . . impose the higher" sentence. United States v.  
22 Ministro-Tapia, 470 F.3d 137, 142 (2d Cir. 2006).

23 Here, however, we previously faulted the district court  
24 for its "failure to find particular facts." Stewart I, 590 F.3d

1 at 150-51. We directed the court to make specific findings with  
2 regard to whether Stewart had obstructed justice. Id. We also  
3 asked that the court explicitly consider application of the  
4 abuse-of-trust enhancement, and "reconsider the extent to which  
5 Stewart's status as a lawyer affects the appropriate sentence."  
6 Id. We noted that the terrorism enhancement "plainly applies"  
7 and that "[w]hether or not the district court gave appropriate  
8 consideration in its section 3553(a) analysis to whether support  
9 of terrorism is an aggravating factor in this case . . . may be  
10 subject to disagreement." Id. at 151. After identifying  
11 procedural error on the part of the district court, we instructed  
12 the court to "begin with the terrorism enhancement and take that  
13 enhancement into account," and to "consider the overall question  
14 whether the sentence to be given is appropriate in view of the  
15 magnitude of the offense." Id. at 151. And we explicitly  
16 expressed our "serious doubts that the [original] sentence . . .  
17 was [substantively] reasonable." Id.; see also id. at 149  
18 (referring to "the seriousness of Stewart's crimes and the  
19 seemingly modest sentence she received for it").

20 On remand, the district court punctiliously followed  
21 our instructions, and in doing so it arrived at the 120-month  
22 sentence it imposed on Stewart. That it did not calculate the  
23 same sentence the first time can be attributed largely to the  
24 errors we had identified. Stewart's contention that there was

1 nothing of significance that had changed between the first and  
2 second sentencing sufficient to support the greater sentence  
3 ignores this entire sequence of events -- most particularly the  
4 intervening decision of this Court.

5 The district court acted within its discretion in  
6 imposing the 120-month sentence after engaging in a careful  
7 consideration of the factors upon which we focused in our prior  
8 opinion, and the increase is therefore not "unsupportable as a  
9 matter of law." Rigas, 583 F.3d at 123.

10 B. Instruction from Non-controlling Opinions

11 Stewart asserts that the district court's sentence is  
12 also unsupportable because it was based on instruction from non-  
13 controlling opinions in the preceding appeal, particularly the  
14 panel dissent<sup>22</sup> and the opinions accompanying the denial of  
15 rehearing en banc. Stewart notes that Judge Pooler, in her  
16 concurrence in the denial of rehearing en banc, suggested that it  
17 was "inappropriate for other members of the Court to add their  
18 views as to what the district court should do on remand [as the]  
19 case may return to this Court on a subsequent appeal." United

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<sup>22</sup> The panel majority in Stewart I, 590 F.3d at 150, explicitly invited the district court, upon remand, to consider the views of the panel dissenter (as well as those of the concurring judge) with respect to the district court's consideration of the lack of actual physical harm resulting from Stewart's crimes in imposing sentence. We think that that was tantamount to a broader conclusion on our part that the district court could indeed consider the dissenting opinion when resentencing.



1 States v. Stewart, 597 F.3d 514, 519 (2d Cir. 2010) (Pooler, J.  
2 concurring in denial of rehearing en banc). Stewart argues that  
3 because of these non-controlling instructions the district court  
4 "concluded that the burden in any successive appeal should be on  
5 Ms. Stewart to defend herself and the original sentence, not on  
6 the Court." Def.'s Br. at 116.

7 But counsel conceded at oral argument that no authority  
8 supports this argument. And Stewart does not point to anything  
9 written by any judge of this Court who was not on the panel that  
10 had a demonstrable effect on the district court at resentencing,  
11 let alone anything that would warrant vacatur of the sentence.  
12 We read the transcript of the sentencing proceeding, as explained  
13 previously, to exhibit a close adherence to the instructions of  
14 the panel majority, and a sentence imposed in accordance with  
15 those instructions. That is exactly what was required of the  
16 district court on remand.

17 C. "Shockingly High" Sentence

18 Stewart argues, finally, that the sentence imposed was  
19 shockingly high. "Ms. Stewart was 70 years old and in ill-health  
20 at the time of the resentencing; 120 months is a life sentence  
21 with the realistic possibility she will die in prison. . . .  
22 [T]he length of the sentence is 'shockingly high' in light of Ms.  
23 Stewart's advanced age [and] fragile health," the lack of  
24 prosecution of co-counsel who she asserts engaged in activity

1 similarly violative of the SAMs, and in comparison with the  
2 sentences of her co-defendants. Def.'s Br. at 102-03. In  
3 imposing sentence, the district court explicitly recognized  
4 Stewart's "significant health problems," and recognized that she  
5 "did not use the practice of law to earn personal wealth";  
6 rather, "she represented the poor, the disadvantaged and the  
7 unpopular, often as a court-appointed lawyer." Stewart II, 68-  
8 69; see also Stewart I, 590 F.3d at 147-48 (this panel noting  
9 same).

10 As the district court also recognized in its initial  
11 sentencing, however, "[t]here is [at issue] an irreducible core  
12 of extraordinarily severe criminal conduct." Id. at 63 (internal  
13 quotation marks and citation to transcript of original sentencing  
14 hearing omitted). In Stewart I, we too specifically noted "the  
15 seriousness of Stewart's crimes and the seemingly modest sentence  
16 she received for it." Stewart I, 590 F.3d at 149. The 120-month  
17 resulting sentence fell a full twenty years below the minimum  
18 Guidelines sentence and statutory maximum. Considering all the  
19 appropriate factors, the district court determined that a 120-  
20 month sentence would be "sufficient, but no greater than  
21 necessary" to fulfill the sentencing objectives required under  
22 section 3553(a).

23 It is the "rare case" in which we will find a sentence  
24 substantively unreasonable, and we place "great trust" in a

1 sentencing court. Rigas, 583 F.3d at 123. In Stewart I, we  
2 expressly recognized and were "impressed by the factors that  
3 figured in Stewart's modest sentence -- particularly her  
4 admirable history of providing, at no little personal cost to  
5 herself, proficient legal services in difficult cases to those  
6 who could not otherwise afford them." Stewart I, 590 F.3d at  
7 147-48. But, nonetheless, she engaged in severe criminal conduct  
8 in aid of a terrorism conspiracy, and she did so by abusing the  
9 trust that the government had placed in her as a member of the  
10 bar. When confronted with these transgressions, she lied  
11 repeatedly under oath.

12 From the moment she committed the first act for which  
13 she was convicted, through her trial, sentencing, and appeals,  
14 Stewart has persisted in exhibiting what seems to be a stark  
15 inability to understand the seriousness of her crimes, the  
16 breadth and depth of the danger in which they placed the lives  
17 and safety of unknown innocents, and the extent to which they  
18 constituted an abuse of her trust and privilege as a member of  
19 the bar. We cannot agree with her that the sentence imposed on  
20 her was "shockingly high" so as to warrant a finding of  
21 substantive unreasonableness.

#### 22 CONCLUSION

23 For the foregoing reasons, the judgment of the district  
24 court is affirmed.