TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
----------X

UNITED STATES OF AMERICA,

-against- **10-3185**

LYNNE F. STEWART,

Defendant-Appellant.

----------X

REPLY BRIEF FOR DEFENDANT-APPELLANT LYNNE F. STEWART

PRELIMINARY STATEMENT

This brief is respectfully submitted in reply to the Brief for the government filed June 29, 2011 ("Gov't. Br.").

The government's brief conveniently ignores the plain truth: Only two things distinguish the basis for the District Court's first sentence of Lynne Stewart of 28 months and its re-sentencing four years later of 120 months. The first is Ms. Stewart's constitutionally protected speech – her gratitude to the Honorable John G. Koeltl for his initial sentence and her commitment to providing competent criminal defense counsel to the downtrodden. The second is the opinion of this Court with the ensuing volley of individual opinions published with the denial of rehearing *en banc*. Neither support the 400 percent increase in Ms. Stewart's

sentence. The 2010 sentence is procedurally and substantively unreasonable. The sentence should be vacated and returned again to the District Court.

POINT I

LYNNE STEWART'S STATEMENT TO THE PUBLIC ON THE STEPS OF THE FEDERAL COURTHOUSE CONCERNING HER 28-MONTH SENTENCE WAS PROTECTED BY THE FIRST AMENDMENT AND WAS MISCONSTRUED. THUS, IT CANNOT BE USED TO ENHANCE HER PUNISHMENT AT A SUBSEQUENT SENTENCING

No one much remembers or even celebrates the day it all began for Lynne Stewart -- October 16, 2006. But, the ideals of Free Speech, reflected in her remarks on that bright autumn day, will live on forever. Lynne Stewart stood on the steps of the United States Courthouse and, exercising her right to Free Speech, she expressed her unbounded relief over not having been sentenced to <u>life imprisonment</u> -- the sentence requested by the government. Logically, her extraordinary relief resulted from not having to suffer the terrifying consequences of a life sentence. And, her speech, to that effect, represented the exercise of a constitutionally guaranteed right under the First Amendment.

When "standing on my head" was said, she quoted a colloquialism used by her clients to describe a modest sentence.[1] Consequently, of one thing we can be certain, those words were never meant to trivialize or mock the 28-month sentence she received. In fact, she said, in the clearest of terms, that she was not looking forward to serving two years in prison (A.336a).

With the filing of the government's brief, we are able to place these critical constitutional issues in proper perspective. However, it is best to begin by reviewing several fundamentals of the First Amendment overlooked by the government. Our federal sentencing system is expected to operate within the limits of the First Amendment. Thus, where a person dispenses information of public significance, government officials may not punish the exercise of that constitutionally protected right by the imposition of criminal sanctions -- absent a need to further a state interest of the "highest order." *See, e.g., Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979).

Here, in Lynne Stewart's case, it is undisputed that her statement concerning her own sentence was of great consequence to the public and was protected under the First Amendment. Moreover, there was no governmental

[1] At resentencing the district court seized on Lynne Stewart's statement, "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," and used that speech as a basis for enhancing her punishment (A.336a).

_____, of the "highest importance," to warrant enhancing her punishment by a harrowing eight years merely because, after the case was over, she commented publicly on her original sentence.

Thus, we urged that where a person, such as Lynne Stewart, dispenses to the public and press information of social significance, it violates the First Amendment to punish her for those remarks. This constitutional principle stems from the preferred position the First Amendment occupies in our hierarchy of constitutional values. Nevertheless, the trial judge enhanced Lynne Stewart's sentence by 400 percent because he believed that, in a public speech, made immediately after her original sentence, she "trivialized" his earlier sentence. This constituted a massive impeachment of her First Amendment rights.

Lynne Stewart's Statements and Beliefs About Her Case, Expressed in a Speech to the Public, after the Termination of the Sentencing Proceedings, Do Not Constitute "Relevant Conduct" or "Events" that Can be Used to Increase Her Punishment at Resentencing

The government's reliance on *United States v. Bryce*, 287 F.3d 249 (2d Cir. 2002), for the proposition that a sentence can be increased by "affirmatively identifying relevant conduct or events that occurred subsequent to the original sentencing proceeding," is seriously misplaced. Gov't. Br. at 27. All would agree that the exercise of the constitutionally ensured right to freedom of speech is

certainly not "relevant conduct" or an "event." Significantly, in *Bryce* the rather potent "event," which justified an enhanced sentence, was a new witness coming forward, after the initial sentencing, and implicating the defendant in a murder! *Bryce*, and our courts, never contemplated that a defendant's protected speech, about her own sentence, could constitute "relevant conduct" or an "event," that could be used to enhance her sentence.

The government also tries to escape the powerful force of the First Amendment by urging that in sentencing "no limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense." Gov't. Br. at 28, *citing* 18 U.S.C. § 3661. Obviously, speech of governmental significance does not fall within those limited categories of "background, character and conduct."

The Severe Punishment of Lynne Stewart's Protected Speech Will "Chill" the Speech of Others by Inevitably Inhibiting them from Speaking Out on Topics of Significant Public Interest

The government argues that although Lynne Stewart has the right to say what she did, the judge had the right to consider her statements in gauging the appropriate punishment to impose on her. See Gov't. Br. at 29. Alarmingly, the government endorses the doctrine that a court can enhance a person's punishment

by eight years based upon what that person says, after the case is over and outside the precincts of the judicial forum.

However, the government fails to distinguish between a "prior restraint" on speech -- prohibiting a person from speaking before the fact -- and the hazards inherent in punishing a person for what they say. The First Amendment is violated by the imposition of punitive measures for speaking out against the government, regardless of whether the sanctions are imposed before or after the statement is made. Perhaps most importantly, Lynne Stewart had every right to believe that, in a free society, outside the courthouse and after the conclusion of the judicial proceedings, she could express her views and opinions to the public about the concluded proceedings without fear of punishment.

Under the Mandates of the First Amendment the Government Cannot Punish the Exercise of Free Speech by the Imposition of Criminal Sanctions

The government tries to sidestep the force of the First Amendment by stressing that the judge could use the truth of what Lynne Stewart said, in her speech to the public, in deciding the severity of her punishment without infringing First Amendment values. But, this argument is gravely flawed.

Simply put, if Lynne Stewart can have her punishment so severely enhanced based upon her speech about her own sentence, then she is effectively barred from commenting on the exercise of one of government's most dangerous powers.

Increasing Lynne Stewart's punishment by eight years, because of a speech she made to the public, offends everything the First Amendment stands for.

The First Amendment is most desperately needed to protect speech which addresses governmental misconduct or "over-reaching" (A.336a). Since the arguments advanced by the government to sustain Lynne Stewart's sentence are woefully insufficient to justify the consequential encroachments on her First Amendment rights, her sentence should be vacated.

Furthermore, consistent with the philosophy of the First Amendment, if a judge seeks to enhance a sentence, based upon the exercise of Free Speech, he must, at the very least, conduct the "balancing test" of *Daily Mail Publishing Co.*, to weigh a defendant's First Amendment rights against the government's interest in administering punishment. 443 U.S. at 103. But, sadly, here the trial judge utterly failed to engage in that indispensable balancing test. Instead, he rejected, out of hand, Lynne Stewart's assertion of her First Amendment claims altogether and sentenced her to an astonishing ten years in prison. We urge, most respectfully, that this Court, ever sensitive to the affinities of the First Amendment, should examine the tensions created by these two competing interests in the context of the sentencing process.

"In Areas of Doubt and Conflicting Considerations, it is Thought Better to Err on the Side of Free Speech"

Here, in balancing free expression against the government's punitive action, there can be no dispute that the "significant" information Lynne Stewart dispensed to the press and public, concerning the government's exercise of one of its most awesome powers, was fully protected by the First Amendment. And, just as important, the public had a right to hear an informed reaction to a sentence imposed upon a prominent lawyer, who enjoys an outstanding reputation for representing the poor and unpopular in highly controversial cases.

Nevertheless, the government claims that Lynne Stewart's statements could be used to enhance her sentence because they "bore directly" on her "lack of remorse, her respect (or lack thereof) for the law, and the degree to which her sentence adequately reflected the seriousness of her offenses and just punishment." Gov't. Br. at 29. But, this is not so.

In evaluating Lynne Stewart's statements, and conducting the critical balancing test necessary to nourish the free flow of ideas in a civilized discourse, our courts have always interpreted ambiguous statements in favor of the speaker. Thus, because of the paramount importance of the First Amendment, "[i]n areas of doubt and conflicting considerations, it is thought better to err on the side of free

speech." *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir. 1977) (emphasis supplied).

Moreover, because the right to speak freely concerning government-misconduct enjoys a greater utility than other speech, it is entitled to a much higher measure of protection as well. *Landmark Communications Inc. v. Virginia*, 435 U.S. 829, 838 (1978). For example, this Court recently held that the slightest infringement of First Amendment interests will not be tolerated. *See Jackler v. Byrne*, No. 10-0859-cv, 2011 WL 2937279 (2d Cir. July 22, 2011) (a police officer had a strong First Amendment interest in refusing to make a report that was dishonest because the content of his remarks were directed at matters of public concern).

The Cases Cited by the Government are Readily Distinguishable

The government relies on *United States v. Kane*, 452 F.3d 140 (2d Cir. 2006), for the proposition that a sentencing court may consider evidence concerning a defendant's beliefs so long as it is "relevant to the issues involved" in the sentencing proceeding. Gov't. Br. at 28. *Kane* is readily distinguishable, however, from Lynne Stewart's case. In *Kane*, the defendant, who had a long history of defrauding federal housing authorities, tried to recast himself as a "fair and honest man." In response, the government used excerpts from his books that

instructed readers how to perpetrate similar frauds. The defendant's prior writings were admissible, in that unique case, because the sentencing court carefully confined its analysis to the "particular character issues" asserted by the defense.

Here, however, Lynne Stewart's speech was not used to rebut any mitigating evidence of specific claims of honesty, charity or devotion to her family. Instead, the court erroneously considered her speech for general sentencing purposes, rather than addressing any particular character issues. Furthermore, *Kane* did not involve a resentencing.[2]

Lynne Stewart Never "Trivialized" Her Sentence and the Government Has Completely Misconstrued What She Actually Said

The government also claims that, in the course of her remarks, Lynne Stewart "criticized the Government for its prosecution of her and trivialized the sentence she had just received." Gov't. Br. at 25. However, this implicates serious concerns under the First Amendment, as well as a most unfortunate misinterpretation of what Lynne Stewart actually said.

On October 16, 2006, Lynne Stewart faced the horror of a life sentence. However, Judge Koeltl rejected the government's request of such a draconian

[2] Lynne Stewart's statements were made after the case was concluded. In stark contrast, Kane's statements were made at the time of the offense or prior to the criminal conduct.

sentence and, instead, imposed a much more humane sentence of 28 months. As a consequence, having been spared a savage life sentence, Lynne Stewart was enormously relieved and buoyant. Thus, when addressing the public on the courthouse steps she announced, "I tell you, [the judge] did a fair and right thing, and I am grateful to him." Rather than trivializing her sentence, she expressed her gratitude that she had not been sentenced to imprisonment for the balance of her natural life!

Moreover, Lynne Stewart prefaced her statement with "as my clients have said to me" (A.336a). Therefore, it is at once apparent that Lynne Stewart, putting on a brave face for the crowd, was merely using her clients' common vernacular -- "standing on my head" -- to mean that she could survive such a sentence. Given the context of the statement it is clear that Lynne Stewart did not want to spend two years in prison but she was deeply relieved at having been spared a life sentence.

As developed above, under the First Amendment, where there is any ambiguity concerning what a speaker said or meant, the speaker's explanation is entitled to great weight unless there is strong evidence to the contrary. This is especially so when her explanation is both plausible and logical. *See Hotchner*, 551 F.2d at 913 ("[i]n areas of doubt and conflicting considerations, it is thought better to err on the side of free speech").

And, most significantly, the district judge also never questioned the sincerity of Lynne Stewart's heartfelt explanation, nor did he make any findings that her explanation was false or unsupported by the record.[3] Nevertheless, he grafted his own interpretation onto her words to elevate her sentence from 28 months to ten years.

Lynne Stewart's Plausible Explanation to the Court that "I Would Do It Again" Meant She Would Continue to Undertake the Representation of Unpopular Causes

Lynne Stewart also explained that when she said she would "do it again" (A.340-41), she meant she would continue to undertake the representation of such an unpopular client again. The government misconstrues her statement to mean that the original sentence was not sufficient to reflect the seriousness of the offense or to provide adequate deterrence. Gov't. Br. at 29-30. This distortion of her statement is simply not authenticated by the record. Instead, at resentencing, this remarkable lawyer for outcasts and the disadvantaged, who has a long legacy of representing dissident individuals and causes, explained that she would continue to represent controversial and unpopular defendants. (JA 391).

[3] Here, Lynne Stewart explained, at resentencing, that the comment "standing on her head" related solely to her ability to "survive" that period of imprisonment. See Sent. Tr. 7/15/10 at 12. She meant, "I will live through this; not standing on my head. That, I know for sure. Just surviving" (emphasis supplied).

This, more than anything else, underscores the hazards of construing words uttered under the protections of the First Amendment. And, as indicated, under the presiding spirit of the law governing Free Speech, all ambiguities should be resolved in favor of the speaker. *Hotchner*, 551 F.2d at 913. Otherwise, the real danger is that others will refrain from speaking out on such subjects for fear of suffering the same terrible fate. For the simple truth is, few would ever speak out against government misconduct if they thought, for one moment, that they would be imprisoned for an additional eight years based upon their remarks.

History has taught us that Free Speech is maintained by the perilous means with which we grant it to our enemies. It is speech that is uncongenial with our own values -- or, put more bluntly, the speech we hate -- that most needs the First Amendment's protection if the worthy ideals of that great amendment are to be fully realized. Moreover, this constitutional safeguard is not self-enforcing. It must be fearlessly implemented by the government and its exercise must be respected and tolerated by the rest of us if the high purpose of that freedom is to flourish.

We know from experience that the greatest threat to this most prized freedom is fear. During times of economic uncertainty and social distress, especially in the aftermath of "9/11," which brought such an awful harvest of terror, there is a natural tendency to exaggerate the importance of national security over that of liberty. The force of this raw fear erodes our faith in this important

safeguard so essential to a free society. However, we must tolerate virtually all speech, no matter how distasteful it may seem to some, in order to sustain the freedoms inherent in a democratic society.

Lynne Stewart has distinguished herself as an advocate for the oppressed and a vocal critic of those she believes have been wronged or mistreated by government. But all her battles are fought with only her pen and voice -- never with force or might. We urge, most respectfully, that it is utterly repugnant to both the First and Eighth Amendments, and deprives her of due process, to increase Lynne Stewart's punishment for expressing her honestly held beliefs to the public and the press. Because the enhancement of her sentence violates the Constitution, and imperils freedom of speech, Lynne Stewart's sentence should be vacated.

POINT II

NOTHING IN THE DISTRICT COURT'S ANALYSIS ON RE-SENTENCING JUSTIFIES THE FIVE-FOLD INCREASE IN MS. STEWART'S SENTENCE

Other than Ms. Stewart's constitutionally protected speech, the government asserts the five-fold increase in Ms. Stewart's sentence is attributable to the District Court's purported failure in 2006 "to resolve whether Stewart had committed perjury (and thereby obstructed justice) or had abused a position of trust" and whether the court had essentially failed to give the terrorism enhancement any effect." (Gov't. Br. at 57). The assertions are specious. The record conclusively establishes that the court found that the terrorism enhancement applied, that Ms. Stewart committed perjury and that she abused a position of trust and explicitly took those findings into account when imposing the 28-month term (JA 214, 216, 221). That this Court found procedural error with the manner in which the District Judge articulated how he took them into consideration does not change the underlying facts. The District Court Judge took them into account in 2006 and determined that a sentence of 28 months was "sufficient but not greater than necessary." His re-articulation of these same considerations without something more that can constitutionally be used to enhance Ms. Stewart's sentence does not justify the five fold increase in Ms. Stewart's sentencing.

The government additionally argues that the 120 month prison sentence is substantively reasonable because it represents a two-thirds downward variance from the 360 month advisory guideline term. "The fact that Stewart wanted the District Court to vary even further," they argue, "does not render her sentence substantively unreasonable." (Gov't. Br. at 57). However, the substantive reasonableness of a sentence is not determined by variance from the advisory guideline term:

> Ás the Supreme Court stated in [*United States v.] Gall*, the amount by which a sentence deviates from the applicable guideline range is not the measure of how "reasonable" a sentence is. Reasonableness is determined instead by the district court's individualized application of the statutory sentencing factors. *See Gall* 552 U.S. at 46-47.

United States v. Dorvee, 616 F.3d 174, 184 (2d Cir. 2010). It is the consideration of the sentence in light of those factors that unquestionably demonstrates that Ms. Stewart's sentence is unreasonably harsh. Given Ms. Stewart's age, health, lack of criminal record and her unselfish devotion to zealous representation of the poor – her "service to the nation" as the District Court characterized it in both 2006 and 2010 – the 120 month prison term far exceeds what is "sufficient" to satisfy the goals of 18 U.S.C. §3553.

POINT III

THE GOVERNMENT'S HYPERBOLE AND MISCHARACTERIZATIONS DO NOT CONVERT A SUBSTANTIVELY UNREASONABLE SENTENCE INTO ONE THAT CAN BE ALLOWED TO STAND

Throughout this litigation, the government persistently mischaracterizes Ms. Stewart role, intent and her motives. Now they audaciously suggest that they can read what was in the mind of the District Court when it imposed the 120-month term.[4] The government steadfastly refuses to acknowledge that a decade after the conduct complained of, after the terror of September 11 and the fall of the Egyptian government – the 10 year sentence imposed on Ms. Stewart is substantively unreasonable.

Ms. Stewart testified that one legal strategy available to Dr. Abdel Rahman was to advocate publicly for a transfer to an Egyptian prison should there be a change in that country's government. To advance that effort it was necessary for him to remain a public figure. The government has ridiculed that strategy asserting

[4] The government suggests that when Judge Koeltl considered Lynne Stewart's statement on the courthouse steps following the first sentencing he "observed a defiant and energized Stewart lecturing the Government about its purported overreaching and mocking the sentence imposed." (Gov't. Br. at 31.) While the government for certain believes that Ms. Stewart was "defiant," "energized" and "lecturing" and "mocking" Judge Koeltl never stated that's what he thought. There is no basis to infuse district court's opinion with the government's hyperbole.

that change in Egypt would "necessarily" depend upon "violent" overthrow of the Mubarak regime (Gov't. Br. at 5). The government's brief, filed at the end of June 2011, amazingly evidences no awareness of the "Arab spring," a non-violent movement that has brought democratic change to Egypt and belied the government assertion that change in that country could only occur through violence.

Ms. Stewart was not the "hub" of communications between her client, Dr. Abdel Rahman, and his followers. Indeed, it is baffling that in the face of the scores of contacts between former Attorney General Ramsey Clark, Abdeen Jabara and Abdel Rahman that the government continues to insist that it was Ms. Stewart, who visited Abdel Rahman twice and participated in four telephone conversations over a period of more than three years, who was the "hub" of a communications network.

Moreover, nothing that Ms. Stewart did went "far beyond" the actions of Messrs. Clark and Jabara (Gov't. Br. at 49). Contrary to that often-repeated assertion by the government, Ramsey Clark himself told the court, he "never" refused to issue a press statement because of the Special Administrative Measures ("SAMs"). (JA254). Also omitted from the government's recitation of the evidence is that during a prison visit in September 1999, Mr. Clark knowingly facilitated a communication from Abdel Rahman to Taha that granted permission for those in Egypt to take up arms in self-defense, an act strikingly similar to Ms.

Stewart's (GX 2204AT). Yet Mr. Clark was never even reprimanded by the Department of Justice let alone charged with providing material support to a terrorist conspiracy.

Trial perjury regarding the so-called "bubble" was established, the government argues, because Ms. Stewart acknowledged during her testimony that the SAMs were "clear and unambiguous" on their face, and, after being barred from visiting Abdel Rahman for one year for issuing a public press release on his behalf, agreed to sign a new SAMs affirmation (Gov't. Br. 39). But Ms. Stewart never claimed that the literal language of the SAMs was not clear. She testified that at the time of her conduct she maintained a good-faith belief, based upon the government's tacit approval of similar conduct by Messrs. Clark and Jabara, that there was leeway in the SAMs notwithstanding their literal language. When former Assistant United States Attorney Patrick Fitzgerald accused Ms. Stewart of violating the SAMs and required her to sign a new affirmation to resume visiting Abdel Rahman, he did not require her to admit prior wrongdoing. Ms. Stewart merely had to acknowledge that she understood the important purposes that the government attached to them. Indeed, the government's failure to insist that any subsequent SAMs affirmation include an admission of wrongdoing and/or acknowledgment of the necessity for the SAMs only reinforces the fact that she maintained a good-faith belief that the SAMs gave her leeway.

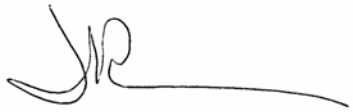
Both the government and lower court stressed that because Ms. Stewart made no contemporaneous statement concerning her belief that the SAMs contained leeway, her trial testimony that she maintained such a belief was false (Gov't. Br. at 40). Given that co-counsel Ramsey Clark and Abdeen Jabara violated the clear terms of the SAMs for years, there would have been no reason to make any such statements because it was the government's tacit approval of their practice, not any words, that gave rise to Ms. Stewart's belief. And while Ms. Stewart may not have been recorded while professing her belief in a "bubble," Ramsey Clark and Abdel Rahman were. During a post-June 2000 telephone call both expressed disbelief that Ms. Stewart had been barred from visiting Abdel simply for speaking with a reporter because former Attorney General Ramsey Clark had often done so notwithstanding the SAMs' restrictions. (JA 283-284).

CONCLUSION

Accordingly, for the reasons set forth above, as well as in Ms. Stewart's Initial Brief, it is respectfully submitted that Ms. Stewart's 2010 sentence should be vacated and remanded for re-sentencing.

Dated: July 29, 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

It is hereby certified that the foregoing Reply Brief is in compliance with this Court's Rules in that it was typed in Times New Roman 14-Point format and consists of 4,317 words, inclusive of footnotes, as measured by the word count function of Microsoft Word 2007.

JILL R. SHELLOW