13-3162-cr(L)

13-3303-cr

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

BETTEJANE HOPKINS,

Defendant,

JILL PLATT, DONNA BELLO,

Defendants-Appellants.

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

BRIEF FOR DEFENDANT-APPELLANT
DONNA BELLO

NORMAN PATTIS
DANIEL ERWIN
PATTIS LAW FIRM, LLC
649 Amity Road
Bethany, Connecticut 06524
(203) 393-3017

Attorneys for Defendant-Appellant
Donna Bello

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JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this matter under 18 U.S.C. §3231. Judgment entered after a trial by jury and sentencing proceedings on August 15, 2013. A timely notice of appeal was filed on August 26, 2013. This Court has jurisdiction pursuant to 28 U.S.C. Section 1291.

ISSUES PRESENTED

I. Whether Ms. Bello was deprived of her right to equal protection of the law, and potential jurors were deprived of their right to serve on a jury, by the Government's use of peremptory challenges exclusively against women in violation of *Batson v. Kentucky* 476 U.S. 79 (1986) and *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

II. Whether the trial court committed reversible error in permitting irrelevant, speculative and highly prejudicial testimony from an attorney who purportedly advised others, but not Ms. Bello.

III. Whether Ms. Bello was deprived of her right to present a defense by the Government's selective grant of immunity, effectively placing beyond reach material testimony directly necessary to the defense.

IV. Whether the trial court committed reversible error by permitting an expert to testify on the ultimate issue in the case.

V. Whether Ms. Bello was improperly punished in violation of her Sixth Amendment right to a trial by jury because she elected to assert a defense at trial rather than to plead guilty.

VI. Whether Ms. Bello's sentence should be vacated as substantively and procedurally unreasonable.

BRIEF SUMMARY OF THE ARGUMENT

Three women, each a grandmother and none having criminal records of any kind, were indicted for wire fraud, filing false tax returns, and impeding the Internal Revenue Service's ability to ascertain taxable income. Two of the defendants, Donna Bello and Jill Platt, elected trial by jury, and were convicted, resulting in sentences of imprisonment of six years and four-and-one-half years, respectively. The third, Bettejane Hopkins, entered a plea of guilty and was sentenced to no time in prison whatsoever.

The charged defendants were among scores, if not hundreds, of other women who participated in something known as "gifting tables." The Government proceeded at trial on the theory that these tables were a pyramid scheme, and chose to ignore or minimize the substantial eleemosynary activities of participants. The tables operated in the following manner: women (each participant was required to be a woman) were given an opportunity to join a table by making a $5,000 gift to the head of the table. Initial entrants became part of a rank of eight women, called the appetizers. As the appetizer rank was filled, women advanced to a rank of four, the so-called soup and salad level. As additional women joined, participants then moved to the third rank, the entrée, filled by two women. Each entrant hoped to reach the fourth rank, the dessert level, at which point they would receive

a $5,000 gift from new entrants. A woman at the dessert level stood to receive $40,000. Upon receipt of these gifts, the woman at the top would leave the table and either join another table at the appetizer level or leave altogether.

Participants were told that each gift they received was a non-taxable event because the gift amount was below the threshold amount triggering taxable income under the IRS Code. Participants were also told that lawyers and accountants had vetted the gifting the tables, and found them both lawful and a bona fide source of non-taxable income. Indeed, among the witnesses the Government called at trial were table participants who were practicing lawyers—one such lawyer told other participants she taught law. There was also testimony that a federal law enforcement agent was an active table participant, a claim corroborated a trial. The agent was reported to have told participants the tables were legal.

The Government thought otherwise and instituted charges.

During jury selection, the Government used each peremptory challenge it made to strike women from the panel. Counsel for Ms. Bello raised a challenge, pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), and the Government offered reasons for its use of challenges. On appeal, the defendant contends, as she did in the district court, that the Government's

reasons are pretextual and fail to account for its use of challenges in a facially discriminatory manner.

Once evidence commenced, the Government produced an expert from the Federal Trade Commission who testified about pyramid schemes, the mathematical certainty that pyramids collapse and that late entrants are left without a return of their funds. The expert did not analyze the actual tables in this case or how tables operated with respect to their handling of funds. Nor did he examine the participants' social and eleemosynary purposes. The Government called dozens of participants who testified that they enjoyed their times on the tables, regretted that the tables no longer functioned, and would participate again if they could do so without Government interference.

The Government called three lawyers whom it claimed the participants had either consulted, or otherwise been advised by, about the legality of the tables. In the case of one lawyer, there was no testimony he ever met, much less consulted, Ms. Bello. The other two lawyers, a father-daughter duo with political ambitions, offered vague, and sometimes contradictory advice, never asserting that tables were, in fact, a violation of federal law. The Government argued that participants had been advised that the tables were not, in fact, lawful. The defendants sought to offer the testimony of several women who were prepared to testify that at least one of

the lawyers, a tax attorney, had said no such thing. Each of the women called by the defense refused to testify, invoking her Fifth Amendment right to avoid inculpating herself. The defendants asked that the Court compel the Government to grant these women immunity, as the Government had done for one of its witnesses who expressed Fifth Amendment concerns. The Court refused to do so, depriving the jury of vital evidence of the defendants' good faith belief that what they were doing was lawful.

In roughly three weeks of evidence, the Government produced scores of table participants, each of whom told largely the same tale: they learned of the tables and they joined with the hope and expectation that they too would advance through the ranks to the dessert position. Almost all testified they knew advancement was not guaranteed; other participants would be required to join and each participant would be required to ask others to join. Almost all of the witnesses testified that in addition to the exchange of funds, the tables represented a meaningful social outlet for the women, many of whom testified they were empowered and spiritually enriched by participation.

The Government—ignoring the very real social bonds the women formed—offered a handful of emails from among the thousands it reviewed,

carefully emphasizing isolated, and often de-contextualized comments, in an effort to paint the tables as nothing more than a business enterprise.

Although Ms. Bello, Ms. Platt, and Ms. Hopkins were each regarded by the Government as leaders of a vast conspiracy, only Ms. Bello and Ms. Platt were sentenced to imprisonment, victims of an implicit trial tax imposed upon them as a result of their decision to assert their Sixth Amendment rights to a trial by jury. Ms. Hopkins, by contrast, also a leader, walked out the courthouse door, a recipient of both the court's and Government's generosity for pleading guilty and sparing them the trouble of trial.

At sentencing, the initial loss amount generated in the presentence report was in excess of $2.7 million. After a hearing pursuant to *United States v. Fatico*, 603 F.2d 1053 (2d Cir.1979) *cert. denied* 444 U.S. 1073 (1980), and brief argument, the trial court lowered the loss amount for Ms. Bello to $1.7 million. At sentencing, the court imposed a non-guidelines sentence on Ms. Bello of six years. On appeal, Ms. Bello contends that the trial court erred, both substantively and procedurally, in the manner in which it imposed sentence. She seeks reversal for errors pertaining to guilt or innocence but seeks a remand for recalculation of sentence contingent upon the disposition of her pre-verdict claims.

Thereafter, Ms. Bello filed a notice of appeal, and perfected this appeal in accord with the rules of this Court. A related appeal, pertaining to her co-defendant, Jill Platt, is also filed simultaneously. Ms. Bello incorporates, pursuant to Federal Rules of Appellate Procedure 28(i), certain of the arguments made by Ms. Platt as well as Ms. Platt's statement of the facts.

STATEMENT OF THE CASE

After a sixteen-day trial, Donna Bello and her co-defendant, Jill Platt, were convicted of all counts. As to Ms. Bello, the jury found her guilty of the following: one count of conspiracy to defraud Internal Revenue Service, in violation of 18 U.S.C. § 371[1]; one count of filing a false return for the year 2008, in violation of 21 U.S.C. § 7206(1); one count of filing a false return for the year 2009, in violation of 21 U.S.C. § 7206(1); eleven counts of wire fraud, based primarily on emails sent on diverse dates, in violation of 18 U.S.C. § 1343; and one count of conspiracy to commit wire fraud, in

[1] The statute reads in pertinent part as follows: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any matter or for any purpose, and one or more persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both." All three defendants in this case were sentenced based on a conviction on this statute.

violation of 18 U.S.C. § 1349. Trial Transcript, hereinafter "TT," Feb. 20, 2013, pp. 4068-4070.

Despite the calling of more than 50 witnesses and nearly four weeks of trial, the underlying case is not complex.

At issue was the defendants' organization and participation in "gifting tables" that the Government presented as a pyramid scheme. Ms. Bello and Ms. Platt defended on the grounds that they had a good-faith belief their conduct was lawful.

Table participants sought to avail themselves of a tax exemption for monies received as gifts pursuant to 26 U.S.C. § 2501. TT, p. 143. During the tax years in question, individuals could give and receive gifts not to exceed $12,000 or $13,000, depending on the year, without incurring tax liability. TT, pp. 79-80.

The tables operated under the rubric of written guidelines. Government's Exhibit 41, TT, p. 200. The alleged conspiracy revolved around participation in individual tables organized in four tiers. Eight women, and only women could join, TT, p. 270, were invited to participate on a given table if they were prepared to give a $5,000 gift to another woman occupying the single-member top rank of the table. Participants advanced from the rank of eight, referred to as "appetizers," to a rank of four,

referred to as "soup and salad," then to a rank of two, known as "entrees", before occupying the top, or dessert, slot. Once an occupant in the dessert slot had received a gift of $5,000 from each appetizer, the table would close, with each entrée becoming the top spot on a new table. TT, pp. 201-202.

Table participants were required to sign gifting statements, declaring under oath that they were giving gifts without expectation of return, attesting that "[m]y intention is to give a gift to another individual, given out of detached and disinterested generosity,…" TT, pp. 221-222. Table guidelines informed participants of the relevant sections of the Tax Code on which participants relied, TT, p. 274, and asserted that the tables had been approved by lawyers and accountants: "Many women have had their lawyers and accountants review the guidelines and all have received the same answer." TT, pp. 206-7. The guidelines also advised on steps to take to avoid making the gifts sound like investments. Ms. Bello's good faith defense was buttressed by the testimony of IRS agents who stated that interpretation of the tax code was far from straightforward.

The Government's position at trial was that the defendants did not rely either upon the advice of attorneys or accountants, and that Ms. Bello did not possess a good faith belief in the lawfulness of her conduct. In fact, the Government contended, the defendants knew that what they did was

wrong. An individual tax preparer for Ms. Bello was called to say she was never consulted or informed about gifts the women had received. However, this testimony scarcely met the test of admissibility as she recalled little, if anything, about her meeting with Ms. Bello. TT, pp. 348, 371. One witness, Mary Jo Walker, an enrolled agent with the IRS with the authority to prepare returns and represent clients in disputes with the IRS, and 30-year friend of Ms. Bello's, testified she told Ms. Bello she could not participate in the tables because the IRS would view the gifts as taxable. TT, p. 436. The defense impeached Ms. Walker by showing she told a grand jury only that she informed Ms. Bello that the IRS "could" regard the income as taxable. TT, p. 500.

An economist from the Federal Trade Commission testified that in his view the tables were a pyramid scheme: later entrants paid funds that benefitted earlier entrants. He testified that regardless of whether the tables had a fixed membership, with the same people always occupying the recipient positions, or had a floating membership, with tables splitting, as did the gifting tables, no more than 12.5 percent of participants stood a statistical chance of making money; everyone else would lose money. TT, pp. 542-554. Significantly, he made no effort to estimate the economic value of the goodwill generated by the tables, or to estimate the value derived by

the women flowing from the camaraderie offered by participation in the tables. Id., p. 602. In other words, he made no effort to address the possibility that a financial windfall was an ancillary component of the tables and that the primary draw of the tables was sororal bonding. He could not recite a single reported criminal case that found gifting tables to be unlawful. *Id.*, pp. 580-584.

Dozens of lay witnesses, many themselves participants on the tables and recipients of gifts, testified. Economy prohibits a summary of each witness's testimony. Almost all of the witnesses testified that they understood there was no guarantee that the tables would yield a financial return; virtually all expected, and all but a handful actually enjoyed, their times on the table as spiritually or socially satisfying. For examples see, TT, 678, 683, 699, 670, 837-838. Each was informed prior to joining that participation raised potential tax issues, and that the tables were not a pyramid scheme based in part on the fact that no one remained at the top, or receiving, position. For examples see, TT, 698, 845.

Ms. Bello was convicted of each count. The District Court imposed a total effective sentence of six years in prison—60 months incarceration on Count 1, conspiracy to defraud the Internal Revenue Service in violation of 18 USC § 371; 36 months each on Counts 2 and 3, filing of a false tax return

in violation of 26 USC § 7206; 72 months each on Counts 6 and 8-17, wire fraud in violation of 18 USC § 1343 and 72 months on Count 18, conspiracy to commit wire fraud 18 USC § 1349, to run concurrently. Restitution in the amount of $32,000 was assessed jointly and severally on Ms. Bello and Ms. Platt – Ms. Hopkins was relieved of any financial liabilities. The Court ordered Ms. Bello to pay back tax, including penalties and interest, of approximately $34,500 were imposed. Ms. Bello was also fined $15,000.

I. THE DISTRICT COURT ERRED IN DENYING THE DEFENDANTS' CHALLENGE TO THE GOVERNMENT'S USE OF PEREMPTORY CHALLLENGES AGAINST VENIRE PERSONS 516, 620, 531, AND 174 MADE PURSUANT TO *BATSON V. KENTUCKY*, 476 U.S. 79 (1986) and *J.E.B. V. ALABAMA*, 511 U.S. 127 (1994).

At jury selection, the Government used each of its peremptory challenges to strike female venire persons. In a case with female defendants, almost all female witnesses, and centered around women's groups that dealt with personal finances—a sector of human relations historically fraught with gender issues[2]—the effort to systemically exclude females from the jury offends our constitutional commitment to equal protection of the law.

[2] In fact, there was testimony about women in abusive marriages saving and hiding money from their husbands to make an escape (TT pp. 879-80, JA 351; p. 3023, JA 890) or otherwise trying to avoid the problems a wife's income might cause in a failing or chauvinistic marriage. TT p. 1262, JA 448.

"[D]iscrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability to impartially consider evidence presented at a trial. A person's race simply 'is unrelated to his fitness as a juror.' As long ago as *Strauder* [*v. West Virginia*, 100 U.S. 303 (1880)], therefore, the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror." (Internal citations omitted) *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).

The Supreme Court has extended the logic and holding of *Batson* to intentional gender discrimination. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994)("We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality). "As these cases make clear, discriminatory jury selection harms not just the parties to the case but also the prospective jurors as well as 'the entire community' as it 'undermine[s] public confidence in the fairness of our system of justice.' *Batson*, 476 U.S. at 87." *United States v. Martinez*, 621 F.3d 101, 107 (2d Cir.2010). Selective use of peremptory challenges taints the entire proceedings "with racial bias, that 'overt wrong…casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial…'"

Miller-El v. Dretke, 545 U.S. 231, 238 (2005) quoting *Powers v. Ohio*, 499 U.S. 400, 412 (1991). The taint is so significant that "[i]nvoking the Equal Protection Clause and federal statutory law, and relying upon well-established principles of standing, [the Supreme Court has held] that a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded jurors share the same race." *Powers*, 499 U.S. at 402.

The various interests of justice the Supreme Court has are identified are so compelling that a *Batson* error is structural: the mere fact of an error requires reversal and harmless error analysis is inapplicable. *See Vasquez v. Hilary*, 474 U.S. 254, 263 (1986)(plurality opinion)(racial discrimination in selection of grand jury a structural error); *Tankleff v. Senkowski*, 135 F.3d 235, 248 (2d. Cir. 1998)(holding that *Batson* error is a structural error).

> In *Arizona* v. *Fulminante*, 499 U.S. 279…(1991), we divided constitutional errors into two classes. The first we called 'trial error,' because the errors 'occurred during presentation of the case to the jury" and their effect may 'be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt.' These include 'most constitutional errors.' The second class of constitutional error we called 'structural defects.' These 'defy analysis by 'harmless-error' standards' because they 'affec[t] the framework within which the trial proceeds,' and are not 'simply an error in the trial process itself.'

United States v. Gonzalez-Lopez, 548 U.S. 140, 144 (2005). The error complained of, herein, is structural and requires an immediate reversal upon a finding for the defendant.

This Court, following *Batson*, elucidated the burden shifting framework set forth by the Supreme Court in raising a so-called *Batson*-challenge:

> The defendant first must show that he is a member of a cognizable racial group,…, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their [sic] race.

United States v. Alvarado, 891 F.2d 439, 442 (2d Cir. 1989). The trial judge serves as the trier of fact as to whether this prima facie case has been established and, later, on the ultimate issue of whether the peremptory challenge is improper. *Id*. 443. In *Batson*, the Supreme Court stated that a pattern of strikes against a cognizable group can support an inference of discrimination. *Id*. 444.

> In articulating the three-stage, burden-shifting analysis for resolving whether a peremptory strike has been exercised in a racially discriminatory manner, the Supreme Court has not held that a trial judge must explicitly adjudicate the credibility of a party's race-neutral explanation for its challenge to a prospective juror. If anything,

> the Supreme Court has suggested that a credibility adjudication rendered in implicit form may suffice under certain circumstances.

Reyes v. Greiner, 340 F.Supp.2d 245, 258 (E.D.N.Y. 2004) relying on *Hernandez v. New York*, 500 U.S. 352, 357 n.7 (1991). The record in this case amply demonstrates a suspect pattern of peremptory challenges, and the issue is preserved for review.

The role of an appeals court in reviewing a *Batson* challenge is clear. "On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008).

> [T]he rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it. It is true that peremptories are often the subjects of instinct, *Batson v. Kentucky*, supra, at 106 (Marshall, J., concurring), and it can sometimes be hard to say what the reason is. But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson*, challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown as false.

(Internal citations omitted) *Miller-El*, 545 U.S. 231 at 251-52 (reversing Court of Appeals when it upheld convictions based upon post facto rational that prosecutors did not articulate); *Rice v. Collins*, 546 U.S. 333, 338-339 (2006); *Hernandez*, 500 U.S. 352 at 346-66.

In this case, the Government's use of peremptory challenges exclusively against women offends the integrity of the system and the equal protection rights of both the defendant and the stricken jurors: reversal is required.

Jury selection in Ms. Bello's case took place on January 22, 2013 and yielded 39 venire persons. The Government exercised five peremptory challenges and the defendants exercised ten. Of the thirty-nine venire people, twenty were female and nineteen were male. The final jury consisted of seven women and five men.

Each venire person was asked the same twenty-one questions, via a questionnaire, prior to being placed in the "box" for selection. TT, 1/22/2013, pp. 31-35, Joint Appendix (hereinafter "JA") JA, 59-60. If a venire person answered "yes" to one of the questions on the questionnaire, they were invited to a private discussion at sidebar. The Court made inquiries of each venire person followed by the counsel for the parties. Each of the Government's peremptory challenges was used to strike female venire persons from the panel. *Id*., 295-307. The defense raised *Batson* challenges following the Government's third consecutive peremptory strike against a female venire person and against each Government peremptory challenge thereafter. *Id*., 296.

The Government offered justifications for each strike: none was sufficient on its own nor cumulatively. Additionally, several male venire persons gave answers that, were the government's professed concerns genuine, would have been the basis for peremptory challenges. The defendant addresses each female venire person *seriatim* followed by similarly situated male venire persons cumulatively.

A. The Five Women Struck by the Government

1. Venire Person 516 (TT, pp. 125-128, 263-64, 295)–A Strike Because She Worked In A Hospital In A Profession Dominated By Females

Prospective juror number 516 answered "yes" only to one question—she or someone close to her had been the victim of a crime or a complainant in a criminal case. *Id.*, 32, 125. She stated that would not influence her decision-making process. *Id*., 126. Prospective juror number 516 was also a registered nurse. *Id*., 127. The Government represented that a number of the witnesses would be registered nurses. *Id*. The venire person stated that she was confident that she would not be sympathetic to a witness who shared her occupation. *Id*., 127. She did not prepare her own taxes. *Id.*, 264. Her hobbies include "anything outside, sewing, reading, [and] gardening." *Id*. Her brother in-law was a retired corporate lawyer and she also worked as a secretary in a law firm in the early 1980's. *Id*.

The Government exercised a peremptory challenge against prospective juror number 516. *Id*., 295. Following three Government peremptory challenges against women, the defendant raised a *Batson* challenge. *Id*., 296. The Government stated:

> [H]er fiancé was killed in 1986. She's an RN at Saint Francis. We are going to call a lot of nurses.[3] Honestly, Your Honor, I can say her gender has nothing to do with it. We're going to call a number of witnesses and we were concerned that her—she would feel—she would feel sympathy for some of the witnesses who we intend to call.

Id., 297. In response to further defense argument—that it was peculiar for the Government to show so much concern about a juror's being too sympathetic to its own case—the Government changed course and indicated that it was concerned that the prospective juror might be "sympathetic" to the defendants since, like other nurses, she might be attracted to the tables.

The Government placed prospective juror 516 in a class whose membership was predominantly female. This Court flatly prohibited this kind of discrimination in *United States v. Martinez*, 621 F.3d 101 (2d Cir.

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[3] Adding only further suspicion to the Government's claim is that it chose nursing as the profession that may influence a juror's sympathies. It needs no citation to show that nursing has historically been stereotyped as a feminine profession. Furthermore, the numbers indicate that it remains a female dominated profession: of the "3.5 million employed nurses in 2011, about 3.2 million…were female and 330,000 male." American Community Survey Highlight Report, "*Men In Nursing Occupations*," February 2013, 2, *available at*, http://www.census.gov/people/io/files/Men_in_Nursing_Occupations.pdf; *see also Mississippi University for Women v. Hogan*, 458 U.S. 718, 727-31 (1982).

2010). In *Martinez*, a defendant was charged with various counts related to sex trafficking young women and teenage girls. *Id*. 103. In *Martinez*, the victimized class, with respect to the crimes alleged, was young and teenage women: there, defense counsel sought to exercise peremptory challenges on the basis of gender, a practice this Court proscribed.

> Women feel about this case very, very, very differently from men. And probably the major factor in how a juror will approach this case is her gender. And having reached that conclusion, I intend to make gender *one of the primary—one of my primary reasons for striking jurors*. I would doubt that I will exercise a peremptory against a male juror. My objective here is to get as many jurors on the jury as I can, because I think that they will be fairer to [the defendant] than female jurors will be.

Id. 104. The Government's rational was not meaningfully different than the one advanced by defense counsel in *Martinez*: the class it sought to exclude was female health-care workers, upon the belief the apparent belief that class members could not think for themselves, the very sort of invidious discrimination *Batson* and its progeny prohibit.

2. Venire Person 579 (TT, pp. 133-138, 295)

Prospective juror 579 answered "yes" to three of the twenty-one voir dire questions. *Id.*, 133. She had read about the case in the newspaper, had a significant other who was vociferous about his opposition to the income tax system, and had a sister-in-law who was a police officer. *Id*.,133-35. The venire person was confident that none of these factors would influence

her ability to impartially consider the evidence. *Id*. She was employed by the state Department of Education as an administrator. *Id*., 264. She coordinated a "national assessment" and "serve[d] as a liaison between the U.S. Department of Ed and the Connecticut State Department of Ed and all the local school districts." *Id*., 264-65. Her significant other was an environmental consultant who focuses on outdoor air quality. *Id*. Her sister-in-law was a local police officer. *Id*.

The Government exercised a peremptory challenge against her. *Id*., 295. Defense counsel stated that he had "no claim" as to this use of a challenge that was undoubtedly influenced by the venire person's lover's opposition to the income tax. *Id*. at p. 296. The defendant recites this strike only insofar as it helps demonstrate the Government's use of peremptory challenges against women, and women only.

3. Venire Person 620 (TT, pp. 144, 266-68, 294, 296) – A Strike for a Flimsy Reason, Save for Gender

Prospective juror 620 answered "yes" to two questions: She was in substance abuse recovery and she "[came] in contact with a lot of people who have been convicted of a lot of crimes." In response to an inquiry about whether those convictions resembled the charges in the present case, she stated that "[t]here is one that [I] believe it was embezzlement. I don't know

anything about the case." *Id.*, 145. Additionally, her daughter had been the victim of a crime having been sexually assaulted. *Id*., 145.

Prospective juror 620 was unemployed at the time of voir dire. *Id.*, 266. She had a history of work as a "certified home health aide" but was no longer working as such as a result of an injury. *Id*. Her grandfather was a police chief of a small town and her sister worked for an organization called "DMR." *Id*. She did her own billing for her home healthcare work and was briefly self-employed. *Id*. Her hobbies were sewing crocheting and "upcycling" furniture. *Id*. She knew several lawyers and her husband's uncle was a probation officer. *Id*., 267.

The Government, in response to a challenge merely stated: "[s]he says she comes in contact with those convicted of a crime, somebody who was involved in embezzlement. She talked about being in recovery and unemployed." *Id*. 296. The flimsy and meandering nature of this response is inherently suspect.

4. Venire Person 531 (TT, pp. 195, 273, 302) – A Strike For Being Too Thoughtful

Prospective juror 531answered "yes" to two questions. *Id.*, 195. She had read something about the case in *The Hartford Courant* but could not recall precisely what, if any information, she learned. *Id*.,196. She answered defense counsel's questions regarding potential knowledge of the

case. *Id*., 196-97. The Government did not ask a single question of her. *Id*., 197.

Once placed in the box, prospective juror 531 told the district court that she was an administrative assistant for an early childhood preschool and that she lived with an electrical engineer for the Otis Elevator company. *Id.*, 273. Her father was a police officer in the early 1980's. *Id*., 273. She and her husband were self-employed in the early 1980s. *Id*. She did bookkeeping, payroll, and used Quickbooks as part of her job duties. *Id*. Her household prepared its own taxes but had used a tax preparer in the past. Her hobbies were quilting, cooking, and gardening. *Id*. She got her news from The Hartford Courant, the internet, and television. *Id*., 274. She had no prior experience as a juror. *Id*. She had been a plaintiff in a personal injury suit that settled. *Id*. Her son was a patent attorney at a large Connecticut law firm. *Id*.

The Government offered the following as its reason for striking prospective juror 531:

> And this juror cuts both ways for us. Her father was a former police officer, but what she said and talked about tended to mull over a hundred times on a decision whether to—and I think, right, she seemed very indecisive in terms of making a decision.

Id., at p.302.

If this venire person had a fault, in the Government's eyes, it was that

she was too thoughtful—not to mention that decisiveness is too often stereotyped as a masculine quality.

5. Venire Person 174 (TT, pp. 233, 279, 298) – Another Strike Without Reason

Prospective juror 174 answered several questions in the affirmative. *Id.*, 233. Her deceased ex-husband had been audited, in the early 1990s, by the IRS for not paying withholding taxes. *Id*. Although some of their joint-accounts were levied, she said she could be fair and impartial. *Id*. She had a sister-in-law that was a lawyer. *Id*., 234. The Government asked one question of her—whether she could be fair in light of her experiences and the allegations. *Id*., 236. She stated that she could: she worked "in the field of insurance and [was] accustomed to putting feelings out of analyzing problems." *Id*., 237.

Once placed in the box, her statements were repetitive of her early responses. *Id*. at p. 279. She added that she had served on a jury in a sexual assault case that had been unable to reach a verdict. *Id*.

B. Comparable Concerns Raised By Male Jurors Selected.

The Government identified four general concerns in its stated reasons for its peremptory strikes of women: indecision, proximity to relatives with strong opinions about the tax system, proximity to convicts, and the

similarity of a venire person's career with that of potential witnesses. These concerns were present with some male jurors to which the Government did not object. "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack[4] who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." *Miller-El*, supra, 545 U.S. at 241. In this case, there were five male jurors that raised similar concerns—and in some cases to a greater extent—than female jurors in the same position.

The most glaring instance was prospective juror 583. He reported that his wife was a physician at St. Francis Hospital. *Id.*, 275. He also stated that he answered yes to question number one question because his "cousin's been in and out of jail since I've known him, since he was 14. He's still locked up." *Id.*, 213.

Given the concerns the Government articulated when striking women, prospective juror 583 would a have been a prime candidate for a peremptory challenge. His wife not only worked at a hospital but worked at St. Francis—the same hospital that employed prospective juror 516. The prospective juror's wife was a hospital worker who could have been asked to

[4] Given the Supreme Court's holding in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994), the defendant-appellant treats references to race based and gender based discrimination as interchangeable.

join the tables—at least according to the Government's logic. *Id.*, 297. What is more, his cousin had a lengthy history as a criminal defendant and in that respect he was no different than prospective juror 516 or 620: he had contact with people convicted of crimes—and in this case a relative and not just a random member of a support group. Using either factor, he should have been challenged by the Government. But no such challenge occurred. The Government's failure to object to this prospective juror demonstrates the pretextual quality of the reasons it offered when it sought to eliminate as many women as possible from the jury.

The pretextual gamesmanship did not stop there. Prospective juror 564 stated his younger brother had been convicted of crime and served time in prison. *Id.*, 66-67. Nonetheless, the Government asked no questions of him once he was placed in the box and subject to voir dire. *Id*., 252. The Government did not strike him and he was placed on the regular jury. *Id*., 303. He was not, in this regard, distinct from prospective juror 620. Similarly, prospective juror 557 stated that he had twice been a defendant in a civil suit but, adding a layer of ambiguity, stated that "[o]ne [he] actually had to *plead* no contest." *Id*., 263. His answer went farther than any female juror's response to question three—even if his actual answer was "no"—he

gave reason to believe that he had actually plead guilty to a crime. The Government did not strike him either.

Prospective juror 576[5] reported that he was "an engineer and analytical, not very subjective." *Id.*,104. This is no different, in substance, than a person who tends to mull things over, as reported by prospective juror 531. Both were self-reported ruminators: the Government was willing to accept the quality in a male and not in a female. Similarly, prospective juror 603[6] had been involved in a civil case that was unable to reach a verdict. *Id.*, 72, 253. Additionally, prospective juror 478 had a prior jury experience and had been a member of a jury that reached a split, compromise verdict in a sexual assault case. *Id.*, 178, 269-70.

C. The Government's Threadbare Explanations for Its Use Of Strikes are Insufficient to Overcome the Suspicion That Gender Played a Role in its Use of Challenges

The Government's use of peremptory challenges offends equal protection and tells the defendant and the public that, in this case, gender mattered. In a trial centered on a women's group and women's views on money and finances, the Government used its challenges to keep women out of the jury box. This undoubtedly harmed the defendant, it harmed the

[5] The defendant also exercised a peremptory challenge against this prospective juror.
[6] The defendant exercised a peremptory challenge against this prospective juror.

otherwise qualified female jurors who were stricken, and it harmed a public that needs to know that judicial outcomes are the result of social consensus—not the gendered-based profiling of prospective jurors.

The striking of a *single* venire person on prohibited grounds is cause for reversal. *Snyder*, supra, 552 U.S. at 478; *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994). Because the Government sought to eliminate women from this jury— a structural defect, not just once, but multiple times, reversal is required.

II. THE TRIAL COURT ERRED IN PERMITTING IRRELEVANT, SPECUALTIVE AND HIGHLY PREJUDICIAL TESTIOMY FROM AN ATTORNEY WHO PURPORTEDLY ADVISED OTHERS, BUT NOT MS. BELLO, ABOUT THE LEGALITY OF THE GIFTING TABLES.

Pursuant to Federal Rules of Appellate Procedure Section 28(i), Ms. Bello adopts the arguments of her co-appellant, Ms. Platt, as found captioned Argument I, pp. 19-26. Both Ms. Platt and Ms. Bello were identically situated at trial as to this issue.

III. MS. BELLO WAS DEPRIVED OF HER RIGHT TO PRESENT A DEFENSE BY THE SELECTIVE GRANTS OF IMMUNITY, EFFECTIVELY PLACING BEYOND TESTIMONIAL REACH MATERIAL TESTIMONY DIRECTLY NECESSARY TO THE DEFENSE.

Pursuant to Federal Rules of Appellate Procedure Section 28(i), Ms. Bello adopts the arguments of her co-appellant, Ms. Platt, as found

captioned Argument II, pp. 26-30. Both Ms. Platt and Ms. Bello were identically situated at trial as to this issue.

Because this panel is bound by *United States v. Ebbers*, 458 F.3d 110 (2d Cir. 2006), Ms. Bello does not challenge the test set forth in that case for an improper use of the Government's immunity power. However, in the event the convictions are affirmed, she reserves her right to do so in a petition for rehearing *en banc* or a petition for certiorari to the United States Supreme Court.

Although *Ebbers* holds that appellate courts are to review a trial court's refusal to compel immunity for abuse of discretion, *see id.* at 118, the Fourth and Ninth Circuits have held that such decisions involve mixed questions of law and fact and are subject to *de novo* review. *See United States v. Washington*, 398 F.3d 306, 310 (4th Cir. 2005); *United States v. Alvarez*, 358 F.3d 1194, 1216 (9th Cir. 2004). We respectfully submit that *Ebbers* was wrongly decided. Whether a district court's refusal to compel immunity for defense witnesses violates a defendant's due process rights requires the application of fundamental constitutional principles to specific facts. Indeed, in analogous circumstances implicating other constitutional rights of criminal defendants, this Court applies *de novo* review. *See, e.g.*, *United States v. Simmons*, 560 F.3d 98, 103 (2d Cir. 2009) ("The existence

of reasonable suspicion to support a stop is a mixed question of law and fact that is reviewed de novo."); *United States v. Rodriguez*, 356 F.3d 254, 257-58 (2d Cir. 2004) ("[I]n evaluating the district court's findings on an issue of custody for *Miranda* purposes, we review finding of fact for clear error, and legal conclusions *de novo*." (citations omitted)).

IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY PERMITTING AN EXPERT TO TESTIFY ON AN ULTIMATE ISSUE IN THE CASE.

Pursuant to Federal Rules of Appellate Procedure Section 28(i), Ms. Bello adopts the arguments of her co-appellant, Ms. Platt, as found captioned Argument III, pp. 30-37. Both Ms. Platt and Ms. Bello were identically situated at trial as to this issue.

V. MS. BELLO WAS IMPROPERLY PUNISHED IN VIOLATION OF HER SIXTH AMENDMENT RIGHT TO TRIAL BECAUSE SHE ELECTED TO ASSERT A DEFENSE AT TRIAL, RATHER THAN TO PLEAD GUILTY

Although commentators decry the "trial tax," it appears the courts are reluctant to address its application in the day-to-day world of sentencing in the criminal courts.[7] In part, this is due to the unique difficulty of perfecting

[7] A sample of law review articles reveals broad awareness of the problem by scholars and practitioners: "The plea-bargaining process is infamously coercive, … If a defendant refuses to plead guilty and waive his constitutional rights, a `trial tax' is exacted upon conviction: a sometimes grossly excessive penalty for exercising his rights." Luna, Erik, "Symposium

a record for review, given the furtive, and inadmissible, character of most plea negotiations. This case is different: It offers three co-defendants who, but for their decisions to go to trial or to plead guilty, are similarly situated. This Court has the opportunity to draw justified inferences from the stark differences in sentences imposed and it should do so. At issue is whether imposition of such a trial tax by the sentencing court amounts to a denial of a defendant's Sixth Amendment trial rights because the tax punishes those who assert with vigor the full range of their Sixth Amendment rights, including the very right to go to trial at all, to confront the witnesses against them, and to have the assistance of counsel for their defense.

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on Overcriminalization: Prosecutorial Decriminalization, Summer 2012, 102 J. CRIM. L. & CRIMINOLOGY, 785, 797; describing "that terrible attribute that defines our plea bargaining and makes it coercive and unjust: the sentencing differential by which the accused is threatened with an increased sanction for conviction after trial by comparison with that which is offered for confession and waiver of trial,…" Land Without Plea Bargaining: How The Germans Do It," 78 MICH L. REV. 204, 223(1979)(cited in, Bowers, Josh "Punishing the Innocent," 156 U. PA. L. REV. 1117, 1158 (2008); "Some defendants will plead not guilty. Their cases will be put on the trial calendar. If not resolved with dismissal or plea, they will go to trial and, if convicted, the defendant will pay the `trial tax' – a more severe sentence than he or she would have received as part of a plea bargain." Bright, Stephen, "Symposium: Cruel and Unusual Punishment: Litigating under the Eighth Amendment: The Failure to Achieve fairness: Race and Poverty Continue to Influence Who Dies," 11 U. PA. J. CONST. L. 23 (2008). Perhaps the best study of issues arising in the context of plea bargaining is Bibas, Stephanos, "Plea Bargaining Outside the Shadow of Trial," 117 HARV. L. REV. NO. 8 (2004). For an anecdotal account of the trial tax in operation, see, Bogira, Steve, *Courtroom 302: A Year Behind the Scenes in an American Criminal Courthouse*, 38, 83 (2005).

In two recent cases, the Supreme Court focused on the centrality of guilty pleas as a means of resolving criminal cases. *Missouri v. Frye*, 566 U.S. ____ (2012), 132 S.Ct. 1399; *Lafler v. Cooper*, 566 U.S. __, 132 S.Ct. 1376 (2012). The focus of these cases was on pre-trial proceedings, to wit, plea-bargaining. "Ninety seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." *Missouri v. Frye*, 566 U.S. ___ (2012), citing, Dept. of Justice, Bureau of Justice Statistics, Table 5.22.2009, http://www.albany.edu/sourcebook/pdf/t5222009.pdf. Our criminal justice system "is for the most part a system of pleas, not … trials." *Lafler*, at 11. As a result, the court concluded that "[t]he reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages." *Frye*, at 7.

Both *Lafler* and *Frye* arose in the context of post-conviction claims for relief in which there was a record that shed light on the pre-trial proceedings: In *Frye*, defense counsel failed to convey a plea offer to his client. In *Lafler*, defense counsel gave bad advice to a client on whether to

accept a plea, so poorly relating the evidence to the elements of the offense charged that his client was misadvised on whether to take a plea or go to trial. But for the habeas corpus petitions perfected, no record would have existed to review these claims. The communications between the petitioners and their counsel were initially cloaked in the attorney-client privilege. Discussions between defense counsel and the prosecution, in cases in which the privilege is waived, are typically inadmissible as the product of settlement negotiations. *Federal Rules of Evidence*, Rule 408. It is rare that this issue will have a record sufficient for review on direct appeal. But this case is different.

Sixth Amendment rights attach once adversarial proceedings commence. *Rothgery v. Gillespie County*, 554 U.S. 191 (2008). While it is permissible for the government to attempt to purchase a guilty plea by an offer of a reduced sentence, *United States v. White*, 869 F.2d 822 (1989, C.A. 5), cert. denied 490 U.S. 1112 (1989) and 493 U.S. 1001 (1989), a trial judge may not punish a defendant who chooses to exercise his right to trial by jury. "The `augmentation of sentence' based on a defendant's decision to `stand on [his] right to put the Government to its proof rather than plead guilty' is clearly improper. *United States v. Araujo*, 539 F.2d 287, 291-92 (2d Cir), *cert. denied*, 429 U.S. 983 (1976)." *United States v. Hutchings*, 757 F.2d 11,

14 (1985), *cert. denied*, 472 U.S. 1031 (1985); *see also*, *United States v. Medina-Cervantes*, 690 F.2d 715 (C.A.9, 1982). "It is well settled that an accused may not be subjected to more severe punishment simply because he exercised his right to stand trial. *United States v. Capriola*, 537 F.2d 319, 321 (9th Cir. 1976); *United States v. Stockwell*, 472 F.2d 1186, 1187 (9th Cir.), *cert. denied*, 411 U.S. 948 (1978). The `courts must not use sentencing power as a carrot and stick to clear congested calendars, and they must not create the appearance of such a practice.' *United States v. Stockwell*, 472 F.2d at 1187." *Medina-Cervantes*, 690 F.2d at 16 (parallel citations omitted).

In *Hutchings*, supra., 757 F.2d 11, for example, the apparent imposition of a trial tax was clear and constituted error. The record was transparent and obvious. Immediately after the jury returned its verdict of guilty, the judge said, on the record in open court: "[This trial was] a total waste of public funds and resources … there was no defense in this case. This man was clearly and unquestionably guilty, and there should have been no trial." *Hutchings*, 757 F.2d at 13. The judge then asked if he could consider "needless expenditure of public funds at sentencing." *Id*. When he asked whether the defendant could be "taxed for the expenses of this prosecution," defense counsel responded: "Mr. Hutchings has a constitutional right to have a trial in a criminal matter." *Id*. The judge

responded that he thought he could take the waste into consideration, but then said: "If I cannot, if the indications are that I cannot, I will not. But I certainly will if I have the right to do so...." *Id.*, 14. The case was remanded for resentencing so that the trial court could clarify what factors he relied upon at sentencing.[8]

The record here is absent remarks comparable to those in *Hutchings*, but the grossly dissimilar sentencing outcomes speak volumes: the controlling factor behind sentence length was the decision to go to trial. Three defendants, all characterized as leaders of the conspiracy; countless participants who might well be considered unindicted co-conspirators; two defendants hold the government to its burden of proof and one pleads; those who elect trial receive significant prison terms; she who acquiesced to the government walks. Surely the culpability curve cannot be this steep. The only cogent explanation is that Ms. Bello and Ms. Platt were not just punished for their crimes but for daring to go to trial. This circumvention of the Sixth Amendment is an outrage that demands relief.

As plead in the indictment each defendant faced the following charges: Ms. Bello—one count of conspiracy to defraud the IRS, one count

[8] Sentence was imposed prior to the imposition of the Comprehensive Crime Control Act of 1984 and the enactment of federal Sentencing Guidelines at a time in which a judge was not required to state the reasons for the sentence imposed. *See, United States v. Golomb*, 754 F.2d 86, 90-91 (2d Cir., 1985)

of conspiracy to commit wire fraud, and 11 counts of wire fraud; Ms. Platt – one count of conspiracy to defraud the IRS, one count of conspiracy to commit wire fraud, and four counts of wire fraud; Ms. Hopkins – one count of conspiracy to defraud the IRS, one count of conspiracy to commit wire fraud, and eight counts of wire fraud. At trial, Ms. Bello and Ms. Platt were convicted of all counts. Ms. Hopkins was put to plea on one count, presumably as consideration for her plea, and the remaining counts against her were dismissed. (Docket Entry 284, JA 33).

The appellant does not contend that Ms. Hopkins was not entitled to consideration for her prompt plea of guilty. The Federal Sentencing Guidelines contemplate a modest reduction in the total offense level in exchange for a guilty plea: they authorize a two point reduction in those cases in which the total offense level is less than 16 points, and permit a third point in reduction, on the government's motion, for cases in which the total offense level is 16 or more. Federal Sentencing Guidelines, Section 3E1.1. "The United States Sentencing Commission recognized the importance of preserving predictably more lenient sentences for defendants who admit guilt, and included a sentencing credit for `acceptance of responsibility' that has functioned as a discount for waiving trial." King, Nancy J., et al., "When Process Affects Punishment: Differences in

Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States," 959 COLUM. LAW R. 961 (2005).

At sentencing, each of the defendants stood before the court guilty of the crime of conspiring to defraud the Internal Revenue Service in violation of 18 Section U.S.C. 371, an offense carrying a statutory maximum penalty of five years. Ms. Bello was sentenced to 60 months—the maximum—on that charge; Ms. Platt was sentenced to 54 months, a reflection, in the court's eyes, of a lesser role in the conspiracy. Ms. Hopkins, also an alleged leader, and more culpable than Ms. Platt given the number of charges she initially faced, was permitted to walk out the door and was given a sentence of three years of probation. It is difficult to comprehend the disparity in terms other than a *sub silencio* imposition of the trial tax on Ms. Bello and Ms. Platt. The disparity in sentences certainly exceeds anything contemplated by application of the guidelines alone.

The unifying count of conviction, conspiracy to defraud the IRS, carried no mandatory minimum and the court was therefore free in each case to use its discretion to sentence up to the maximum sentence of 60 months. The court was also free to give some consideration to acceptance of responsibility as a mitigating factor. But the break given to Ms. Hopkins cannot be accounted for in terms of acceptance of responsibility alone.

In this case the three-point reduction in total offense level for acceptance of responsibility called for in § 3E1.1 of the guidelines had a marginal value for each defendant: total offense levels do not increase uniformly. No defendant had a criminal history, and each was convicted of an offense carrying a maximum of 60 months. To determine the value of the three-point reduction, the total offense level for the conspiracy counts must first be anchored. In other words, is there a common point of reference somewhere between zero and 60 months, the sentencing range for the conspiracy count, that all three defendants share?

The Court clearly regarded this conspiracy as serious criminal conduct requiring harsh sentences. It gave Ms. Bello every month the law could muster on the conspiracy count – 60 months, following up with a 72-month concurrent sentence for the wire fraud counts. It sentenced Ms. Platt to 54 months for the same conspiracy count, and followed up with identical concurrent sentences under the wire fraud counts.

Under Criminal History Category I then, a benchmark for analysis would be to anchor each offense at the level encompassing the sentences imposed on Ms. Bello and Ms. Platt, Level 24, requiring a range from 51-63 months. A three-point reduction from this range would yield a Level 21, with a required range of 37 to 46 months. Put another way, the guidelines

offered Ms. Hopkins a sentence reduction of just less than two years in exchange for her prompt acceptance of responsibility. The guidelines did not contemplate a walk out the door, especially since, given the sheer number of counts each of the women faced, Ms. Hopkins was more culpable than Ms. Platt.

The record reflects no principled explanation for the fact that Ms. Bello and Ms. Platt received sentences at or near the statutory maximum of the range and Ms. Hopkins was politely escorted out the courthouse door. The only rational explanation is that they were punished for their decision to exercise their Sixth Amendment rights. It is not enough to say that in the post-*United States v. Booker*, 543 U.S. 220 (2005) era the trial court has the authority to impose a non-Guidelines sentence if it so chooses; the admonition of *United States v. Crosby*, 397 F3d. 103 (2d Cir. 2005), to judges in this Circuit to consider the guidelines was far from an invitation to smuggle prohibited considerations into sentencing calculations. The Ninth Circuit's dicta on avoiding the appearance of punishing a defendant for exercising her Sixth Amendment rights is instructive: "The `courts must not use sentencing power as a carrot and stick to clear congested calendars, and they must not create the appearance of such a practice.'" *United States v. Stockwell*, 472 F.2d at 1187. More offensive still, in this case, is the

government's decision to reward Ms. Hopkins with a motion to dismiss certain counts it insisted be tried to a verdict by the non-pleading defendants. It is similar to the "two-by-four to the forehead" style of justice decried in a recent decision by Judge Gleeson involving the use of prior felony informations to force guilty pleas. *United States v. Kupa*, 2013 U.S. Dist. LEXIS 146922, *8(E.D.N.Y. Oct. 9, 2013) ("Prior felony informations don't just tinker with sentencing outcomes; by doubling mandatory minimums and sometimes mandating life in prison, they produce the sentencing equivalent of a two-by-four to the forehead. The government's use of them coerces guilty pleas and produces sentences so excessively severe they take your breath away.") The joint message of court and counsel in this case was clear – try this case not just at the peril of conviction, but at the result that if convicted, the price will be inflated by many years.

The remarks by the Court at the sentencing proceedings of Ms. Hopkins and Ms. Bello are illustrative. In certain respects, the women are virtually identical.

At Ms. Bello's sentencing, the Court reviewed emails submitted as part of the government's case as "compelling evidence that the defendant did not act with a good faith belief that her conduct was legal." Bello Sentencing Transcript, hereinafter BST, 8/12/13, 48. "I guess I'm putting a fair amount

of weight on the characteristics of the defendant here…" *Id.,55.* On the basis of these emails, the Court concluded that Ms. Bello was "the key person, not just for the conspiracy, but for the gifting table activity in Connecticut;" that she was "motivated by monetary gain;" that she "knew the tables were illegal and that they would fail;" that she was "very aware of the large scope of the activity;" that she was "well aware that unsuspecting people would be hurt;" that she had not spoken with an attorney and knew that her tax preparer told her it was illegal; and that when people were really in trouble and they weren't her friends she "basically simply cut them loose or you were dismissive of them." *Id.*, 55-56.

The very next day, at the sentencing for Ms. Hopkins, the Court made similar observations about Ms. Hopkins using the same emails. The Court noted Ms. Hopkins had "traveled a certain path" and that "it appears…she was fully invested" in the scheme. Hopkins Sentencing Transcript, hereinafter "HST, 8/14/13, 25-6. In one email Ms. Hopkins states: "80k green beans is going to happen. It could also be about 120k. Who knows? This is awesome." *Id.*, 28. The Court further cited to Ms. Hopkins' involvement in the "hub" – a leadership group. *Id.*, 27.

Even when the Government tried to come to Ms. Hopkins' aid at sentencing, it damned her with faint praise. In response to the Court's

questioning in this area, the Government told the court that Ms. Hopkins was "candid" with the Government in their meetings and admitted to that "there came a time when she knew it was wrong and she liked making the money" and that she did it because "she was making good money" even though she knew it was wrong. *Id.*, 29, 32. The Government even confirmed the Court's characterization that Ms. Hopkins was "fully invested" and "fully aware that it was criminal" and was also "aware that they were doing things to conceal the activity from the IRS and she knew that was wrong but she continued to do it" and "engaged in this conduct over a long period of time." *Id.*, 30, 36. A comparison of Ms. Bello's and Ms. Hopkins' respective sentencing transcripts reveal that these are the *exact* same considerations which the court found so reprehensible about Ms. Bello's "character" and, upon which, the court placed "a fair amount of weight."

Just how factors reprehensible enough to warrant a significant sentence of imprisonment in Ms. Bello's case justified leniency in Ms. Hopkins is a mystery left unaddressed by the district court. The emails that the government contended demonstrated Ms. Bello's deficient character reflect similar flaws in Ms. Hopkin's: the Court cited to emails by Ms. Bello which stated, among other things, that while others were involved in the tables for friendships, she was involved in it as a business to make money.

BST, 50, 51. Ms. Hopkins fares no better when viewed through the prism afforded by the emails: she, too, was in it to make money and, indeed, liked making the money although she knew there were legal concerns about the table. HST, 28, 30, 36.

In Ms. Bello's sentencing, the Court also cited to emails that showed that she was aware there were issues with tables failing. BST, 49-50, 53. Ms. Hopkins also admits at her sentencing that she participated in and, indeed, recruited women to, the tables even after she "heard about the issues with the group in in Florida." HST, 23, *see also* 30. The Court further cited to Ms. Bello's awareness that the tables were illegal as a way of demonstrating her culpability. BST, 50-51, 53. However, similarly, the record also reflected, and, indeed, the government argued, that Ms. Hopkins also knew that they were doing things to conceal the activity from the IRS and that the tables were illegal. HST, 30.

Significantly, the Court found that Ms. Bello's statement of remorse at the sentencing was of little weight as a result of all of the statements in the emails over the course of years. However, despite being confronted with similar statements by Ms. Hopkins, the Court found that she "demonstrated a genuine and deep remorse." HST, 46. Once again, there is no principled

basis for drawing such vastly disproportionate conclusions from similar data other than the silent imposition of a trial tax.

The three defendants were all similarly situated, as they were the three whom the government had determined, after its investigation, were the most culpable parties in this scheme involving hundreds of participants. Ms. Hopkins chose to forego her trial rights and so was given special consideration in the form of an acceptance of responsibility reduction in her guideline range and a chance to plead only to a tax count. These factors led to a substantial reduction in Ms. Hopkins' guideline range, which was a range of imprisonment from 30 months to 41 months, with a potential maximum of five years. As such, Ms. Hopkins had already received consideration for her decision to plead guilty.[9] There is no explanation of the further reduction in her sentence other than a trial tax credit for pleading guilty.

In comparison, Ms. Bello's sentence is shockingly high. As outlined *supra*, very few differences separated the three defendants at sentencing. Ms. Hopkins differed from Ms. Bello in only three respects: (1) Ms. Hopkins, while a central figure, was not the "key" figure as found by the Court; (2)

[9] *See* King, Soule, Steen & Weidner, *Panel One: Prosecutorial Discretion and Its Challenges, When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guideline States*, COLUM. L. REV. Vol. 105 No. 4 at p. 961 (May 2005).

Ms. Hopkins pleaded guilty; and, (3) Ms. Hopkins paid restitution to individuals prior to her indictment. Otherwise, according to the verdict, both defendants engaged in the same conspiracy for an extended period of time—the primary goal of which, as determined by the Court—was to make money, and had a leadership position in the conspiracy. Both defendants, further, per the court, took evasive action to interfere with authorities' investigation of the conspiracy and contributed to a very high fraud loss involving many people. Ms. Hopkins was no mere innocent bystander in this case. She was a leader who introduced women to the tables, explained how the tables worked, made representations about the tables' lawfulness, and, on at least one occasion, even travel out of state to meet other table participants. For examples see, TT 693-94,703, 843.

The Court's sentencing conclusion was driven by the "characters" of the defendants as reflected in emails which, the Court concluded, showed that their primary concerns were money, that they knew the tables would fail and people would lose their money, and they knew their conduct was illegal. All three of these considerations were also present in Ms. Hopkins' case, but the disparity between the three defendants is staggering.

A court might be understandably reluctant to sail into this area of law absent buoys with which to navigate. Given the district court's broad

discretion in sentencing, how can a reviewing court reliably find evidence of the trial tax? What baseline measure can be used with which to assess whether a tax has been imposed on those who assert their trial rights?

Indeed, some may argue that the vagaries of the plea-bargaining process and the sometimes vastly disparate outcomes for similarly situated defendants are simply the reality of deal making, and might even call it the beauty of the system. Such a proponent of laissez-faire criminal justice ought to consider two ways in which the criminal justice system is distinct from a public marketplace or exchange First, no criminal defendant willingly enters the market to purchase what the Government sells. Court's implicitly recognize this. *See In re Altro*, 180 F.3d 372, 374-75 (2d Cir. 1999)(noting special due process concerns in in interpreting plea agreement given Government's superior bargaining power); *United States v. Kupa*, Lexis 146922, 9 (E.D.N.Y. 2013)(noting the endangered nature of federal criminal trial and sentences "so excessively severe they take your breath away" in drug cases). Second, it is implicit in the law that when the stakes are human life and liberty, a Court's interest in overseeing the fairness of the process is paramount—our society is civilized because it reserves some questions for courtrooms and not public markets.

The challenge, therefore, is to provide real time information about the value of a case—the years of human life gambled at the Court's poker table—to defendants and judges so that it remains clear to all that trials determine innocence or guilt, not punishment. Cases ought to be anchored to particular values—much the ways stocks are in exchanges—so that sentencing disparities among co-defendants are reasonable. The Court may accomplish this end with elegant simplicity.

In multiple defendant cases, those who plead guilty and do not go to trial can and should be sentenced first. Public confidence in the outcome would improve as the sentences imposed by early pleaders would be a product simply of the facts and circumstances known to the court at the time of the plea. Defendants convicted after trial would have some way to determine the value of previous plead counts of conviction.

Determining the center of gravity in single-defendant cases is difficult, but not impossible. In such cases, the Government ought simply to be required to file under seal the last best plea offer made to the defendant. In the event the defendant rejects the offer, and goes to trial, the offer can be unsealed after imposition of sentence by the trial court. A vast disparity between the requirements of justice for an early plea and what justice requires after a lengthy trial might shed useful light on the extent to which

the court and prosecutors punish defendants who elect trial. There ought to be a presumption that a gap far wider that can be accounted for by the acceptance of responsibility separating those who plead guilty from those who go to trial is a function of systemic and prohibited punishment of defendants who elect to assert the full range of their Sixth Amendment rights.

"The `augmentation of sentence' based on a defendant's decision to `stand on [his] right to put the Government to its proof rather than plead guilty' is clearly improper." *Araujo*, 539 F.2d 287, 291-92. There is ample evidence—six years worth—to suggest that occurred in this case. Justice requires, at the very least, a remand.

The trial tax is an issue worth reviewing separate from the reasonableness of a sentence. The defendant acknowledges that imposition of the trial tax likely yields a sentence that does not survive reasonableness review as established in a *United States v. Booker*, 543 U.S. 220, 245 (2005). But she asks a question different than *Booker* and its progeny. Reasonableness review questions whether the punishment fits the crime. A sentence imposed for a prohibited reason is certainly substantively and procedurally unreasonable. But when trial courts, the busiest guardians of fundamental rights, begin to impose sentences based upon the very exercise of the rights they are designed to protect, an odious and peculiar

wrong occurs. Hence, the defendant raises this issue separate and apart from the reasonableness of her sentence based on the obvious and unmistakable fact that the district court imposed a severe sentence based upon her exercise of her fundamental rights.

VI. MS. BELLO'S SENTENCE SHOULD BE VACATED

Ms. Bello appeared for sentencing as a first-offender. Despite the loss amount which served as a substantial basis for her sentence, she was a woman of modest means, unable to engage in her customary employment as a hairdresser due to chronic arthritis. PSR, para. 90, Docket Entry 246. The District Court sentenced her to the statutory maximum of 60 months on the count involving obstructing the Internal Revenue Service, and, after sentencing on the other counts of conviction, a total effective sentence of 72 months. The sentence is procedurally and substantively unreasonable. Yet despite the significant loss amount relied upon by the Court, the tax loss for a two-year period was only some $34,500, including tax, penalty and interest. The fraud loss amount is also inherently suspect: the Government sent letters to each potential victim after conviction, inviting each to make a claim of restitution. A handful of claimants emerged, with $15,000 sought of the $32,000 ordered by the Court going to one disgruntled participant-victim.

A. Standard of Review

Ms. Bello challenges her 72-month sentence of incarceration as both procedurally and substantively unreasonable in reliance upon *Gall v. United States*, 552 U.S. 38, 51 (2007)(procedural reasonableness) and *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009)(substantive reasonableness). "The procedural inquiry focuses primarily on the sentencing court's compliance with its statutory obligation to consider the factors detailed in 18 U.S.C. § 3553(a), while the substantive inquiry assesses the length of the sentence imposed in light of the § 3553(a) factors[.](Internal citations omitted)." *United States v. Verkhoglyad*, 516 F.3d 122, 127 (2d Cir. 2008).

Review of a sentence is for abuse of discretion. *Gall*, 552 U.S. at 46.

"A district court abuses its discretion when it (1) fails to afford consideration to relevant factors that were due significant weight, (2) gives significant weight to an improper or irrelevant factor, or (3) commits a clear error of judgment in considering the proper factors." *United States v. Campa*, 459 F.3d 1121, 1174 (11th Cir. 2006) (en banc). A district court commits a clear error of judgment when it considers the proper factors but balances them unreasonably. *See Ameritas Variable Life Ins. Co. v. Roach*, 411 F.3d 1328, 1330 (11th Cir. 2005).

B. Factual Basis

1. Ms. Bello's Personal Characteristics

Ms. Bello, a grandmother and high school graduate, was 56 years old at the time of sentencing. Her parents are in their 80's and reside together in Florida. The couple is heavily dependent on Ms. Bello for such financial support as she and her husband, Joel Schiavone, can provide. PSR, paras. 69 , 74.

Ms. Bello has had mixed luck in love. Her current marriage, to Mr. Schiavone, is her third. PSR, paras. 75-77. Her husband is considerably older than she is and has, since 2007, has suffered a variety of significant health issues requiring extensive care and rehabilitation. PSR, paras. 79, 80. Ms. Bello and Mr. Schiavone file separate tax returns. Despite these personal setbacks and difficulties, she has remained active in the community, and is a warm and loving presence in the lives of her two sons. PSR, paras. 82, 84. Her sentencing submissions reflect a warm and loving woman who was, at worst, credulous.

Reports from a treating psychologist and a forensic psychologist concluded that Bello "did not have a tendency to exploit others," "did not test as an entitled individual who over-values her personal worth," is not "preoccupied with herself" or that she "selfishly focuses on her own needs at the expense of concern about the needs and well-being of others." BST, 18. One doctor noted Bello has "strong family ties" and is "involved in her

community," including "extensive support of charitable causes and participation in volunteer activities that benefit those in need." *Id.*, 19.

The District Court either ignored or minimized these characteristics, reducing Ms. Bello to the sum of her worst moments, as portrayed by a handful of emails introduced as exhibits by the government at trial, selected from the more than 4,500 emails seized by way of a search warrant. The Court sentenced a caricature, rather than a person, remarking after reading a series of emails into the record, that the emails presented "compelling evidence that the defendant did not act with a good faith belief that her conduct was legal." BSR, 48. "I guess I'm putting a fair amount of weight on the characteristics of the defendant here…" *Id*, 55.

2. The loss amount and guidelines calculation

The District Court computed a total offense level of 30 with a criminal history category of I, for a guidelines range of 97 to 120 months. *Id.*, 15. Driving the offense level upward was the Court's finding as to the tax and fraud loss amounts. The Court concluded Ms. Bello's fraud loss was $1,328,300, and her tax loss, computed as 28 percent of the fraud loss, was $371,896, 2T1.1(a). *Id.*, 7-8. These sums were aggregated for a total loss of $1,700,096, yielding a base offense level of 22. *Id.*, 11. Eight additional points were added as follows: two for failing to report income in excess of

$10,000 in any year from the criminal activity charges, 2T.1(b)(1); two because Ms. Bello sought to encourage persons other than the co-conspirators to violate the Internal Revenue Code, 2T1.9(b)(2); and, four for an enhanced leadership role, 3B1.1. The Court also found that a potential fine could be imposed in the range of $15,000 to $150,000, and it ordered restitution in the amount of $32,300. *Id.*, 60. The Court elected to impose a non-guidelines sentence because it believed this case was not in the "heartland" of those contemplated by the guidelines. *Id.*, 48.

Ms. Bello objected at sentencing to the mammoth loss amount forecast by the initial PSR, which set her fraud loss at $2,162,375, with a corresponding tax loss of $605,465, for a total loss amount of more than $2.7 million. PSR, para. 42. After a *Fatico* hearing, at which an IRS Special Agent produced a chart showing some 40 individuals "associated" with the gifting tables and their "foreseeable gain" from the tables, the Court adopted a test that sounds impressive, but lacks any discernible methodology – only those participants with a "material connection" to Ms. Bello were held to have suffered foreseeable losses. *Id.*, 67.

Ms. Bello objected at the time of sentencing, and she maintains now, that this loss estimate is essentially speculative, and that it far overstates the significance of Ms. Bello's offense. (Bello Sentencing Memorandum, JA,

1623-1626). Indeed, even the author of the PSR suggested that the guidelines sentence far exceeded what was necessary to accomplish the ends of Title 18 U.S.C. Section 3553. PSR, para. 109.

The Court assumed, without analysis and without factual findings, that each participant in the tables was a co-defendant. If each recipient of funds were, in fact, a co-conspirator, they are, indeed, an odd class of "victims" – arguably none should have been entitled to restitution at all as each shared the risk of conviction for their unlawful conduct.

The Court determined that the guidelines overstated the significance of Ms. Bello's conduct, and sentenced her to a non-guidelines sentence because the conduct at issue did not fall within the "heartland" of the offense as contemplated by the guidelines. Even so, the downward departure was insufficient as the guidelines analysis yielded a loss amount bearing little relation to the realities of this case.

3. The stated basis for Ms. Bello's sentence.

The District Court correctly concluded that this case was outside the "heartland" of cases contemplated by the guidelines range. Ms. Bello was not at the apex of pyramid of a fixed structure and form, siphoning off a portion of every dollar that entered the conspiracy. The suggestion that there was a "hub" directing the activities of the tables is unsupported by the record.

At most, Ms. Bello advised other some table participants, cheering them on: she was a cheerleader, not a quarterback; it is a role she shared with Ms. Hopkins. She shared money on an equal basis with others. The result was a non-guidelines sentence.

However, the Court concluded that, unlike Ms. Hopkins, Ms. Bello did not feel genuine remorse. It sentenced her based on an assessment that she was driven by the money, all the while ignoring the substantial insights provided by treating and forensic psychologists, a sentencing consultant, family and friends.

Ms. Bello's sentence of 72 months reflects the court's overstated loss amount of $1.7 million. In these circumstances, substituting this loss amount for the original was tantamount to choosing between exaggeration and hyperbole—particularly in light of the fact that it is many times the court's restitution order of $32,000. A remand is necessary so a more realistic number can be established.

C. The Procedurally Unreasonable Sentence Imposed

1. The flawed loss calculation

Pursuant to Federal Rules of Appellate Procedure Section 28(i), Ms. Bello adopts the arguments of her co-appellant, Ms. Platt, as found captioned Argument IV(C), pp. 43-52. Both Ms. Platt and Ms. Bello were

similarly situated at trial as to this issue. Although slightly different charts were used to calculate the sentences of the two defendants, the same methodological shortcomings are inherent in both. "Material association" and mere association bleed into one. Other participants in the tables derived gain similar to Ms. Bello's and yet were uncharged.

2. Ms. Bello's sentence should be remanded for a new loss calculation.

Pursuant to Federal Rules of Appellate Procedure Section 28(i), Ms. Bello adopts the arguments of her co-appellant, Ms. Platt, as found captioned Argument IV(C)(2), pp. 52-54. Both Ms. Platt and Ms. Bello were identically situated at trial as to this issue.

3. The Sentence Should Be Remanded for the Court to Consider Two Bases for Downward Departure

Pursuant to Federal Rules of Appellate Procedure Section 28(i), Ms. Bello adopts the arguments of her co-appellant, Ms. Platt, as found captioned Argument IV(C)(3), pp. 54-56. Both Ms. Platt and Ms. Bello were identically situated at trial as to this issue.

D. Ms. Bello's Sentence Was Substantively Unreasonable

Pursuant to Federal Rules of Appellate Procedure Section 28(i), Ms. Bello adopts the arguments of her co-appellant, Ms. Platt, as found captioned Argument IV(D), pp. 56. Both Ms. Platt and Ms. Bello were

similarly situated. In addition to the claims raised by Ms. Platt, Ms. Bello relies upon the disparities in sentences between Ms. Hopkins and herself to claim the sentence imposed is substantively unreasonable.

The principal goal of the Guidelines is "to reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice." *Koon v. United States*, 518 U.S. 81, 113 (1996). That goal was abandoned in this case.

As argued in § V of this brief as to Ms. Bello's claim of being punished for standing on her Sixth Amendment trial rights, supra, pp. 36-54, the sentences imposed on Ms. Bello and Ms. Hopkins are remarkably different. Because the sentencing disparity is shocking in character, Ms. Bello's sentence should be vacated as substantively unreasonable and her case remanded for re-sentencing.

Courts of Appeals find substantive unreasonableness only where the sentence imposed is "shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *Rigas*, 583 at 123. A sentence is unreasonable "only in exceptional cases where the trial court's decision 'cannot be located within the range of permissible decisions.'" *Id*. at 238. There is no presumption of reasonableness for a sentence that falls within a

guideline range. *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir.2006). Rather, Courts conduct an analysis of the totality of the circumstances on a case by case basis using 18 U.S.C. § 3553(a), which directs sentencing courts to "impose a sentence sufficient, but not greater than necessary to comply with" the factors set out in 18 U.S.C. § 3553(a)(2), as a guide. *United States v. Dorvee*, 616 F.3d 174, 183 (2d Cir.2010).

As outlined, *supra*, the Court's sentencing conclusion was driven by the "characters" of the defendants as reflected in emails which show that their primary concerns were money, that they knew the tables would fail and people would lose their money, and they knew their conduct was illegal. All three of these considerations were also present in Defendant Hopkins' case, yet the disparity between the three defendants is staggering.

In addition to this argument is the argument as outlined, *supra,* that that a sentence within the Guideline range applied does not fall within the range of permissible outcomes because, first, the loss amount was miscalculated, and, even if it was not, it overstated the severity of the offense and lead to an unjust and disproportionate sentencing range.

Finally, Ms. Bello, like Ms. Platt, had shown respect for the law throughout her lifetime. A notable exception was an arrest where she objected to the way police treated her elderly husband. PSR, Docket Entry

246. That arrest resulted in the granting of a pre-trial diversion program, and ultimately dismissal. *Id.* In the end, Ms. Bello was denied the right to present a defense, and then sentenced as though she were a hardened criminal. The result is shockingly, even maddeningly, unjust.

CONCLUSION

Ms. Bello urges reversal for a new trial. Barring that, she requests remand for resentencing.

CERTIFICATION

This is to certify that a copy of the forgoing has been electronically served, and mailed postage pre-paid, this 24 day of March 2014 to:

Douglas Morabito
Office of the United States Attorney
450 Main Street
Room 328
Hartford, CT 06103

Alexandra Shapiro
Shapiro, Arato, & Isserles
500 Fifth Avenue, 40th Floor
New York, NY 10110

/s/ Norman Pattis
NORMAN PATTIS

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

The forgoing complies with Rule 32(a) and Motion Order 99 on March 19, 2014, permitting the filing of an oversize brief, in that it contains 15,000 words or fewer as shown by application of a word count function on Microsoft Word 2010 which reports 13,708 words of text in this brief.

/s/ Norman Pattis
NORMAN PATTIS