18-1671

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TRACEY SMITH-KILPATRICK,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PRINCIPAL BRIEF FOR DEFENDANT-APPELLANT TRACEY SMITH-KILPATRICK

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STATEMENT REGARDING ORAL ARGUMENT

Ms. Smith-Kilpatrick asks this Honorable Court to grant oral argument in this case. *See* 6th Cir. R. 28(b)(1)(B) & 34(a). This appeal presents critical constitutional questions related to hearsay evidence and sentencing concerns involving evolving policy guidance. It arises out of a significant drug-conspiracy trial involving thousands of pages in the district-court record. Oral argument would give counsel the opportunity to answer the Court's questions, address concerns based on the evolving case law and sentencing policy in these areas, and explore points of interest from the record for the Court.

JURISDICTIONAL STATEMENT

The district court exercised jurisdiction over Ms. Smith-Kilpatrick's proceedings under 18 U.S.C. § 3231, which gave that court original jurisdiction over offenses against the laws of the United States. This Honorable Court may exercise jurisdiction over this appeal under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291, which authorize review of sentences and the final judgments of district courts, respectively. The government filed a superseding indictment against Ms. Smith-Kilpatrick on September 20, 2017, charging her (and three co-defendants) with conspiring to distribute heroin and cocaine base. RE. 86: Superseding Indictment, PageID # 201-02. Ms. Smith-Kilpatrick stood trial in this matter, and a jury found her guilty on January 12, 2018. RE. 175: Verdict, PageID # 679-80. The district court imposed sentence on June 7, 2018, assigning a sentence of 96 months of imprisonment, 4 years of supervised release, and a $100 special assessment. RE. 262: Sent. Trans., PageID # 2471-73. The district court also entered its judgment on June 7, 2018. RE. 244: Judgment, PageID # 2396-2402. Ms. Smith-Kilpatrick filed a timely notice of appeal on June 11, 2018. RE. 247: Notice of Appeal, PageID # 2408. She now appeals her conviction and sentence.

STATEMENT OF ISSUES

I. Whether the district court erred in admitting certain hearsay evidence under Rule 803(6) when the records the government proffered constituted testimonial hearsay and were also unauthenticated on the crux point of transactor identity.

II. Whether the district court erred in admitting alleged co-conspirator statements when the evidence failed to show that Ms. Smith-Kilpatrick was a conspirator.

III. Whether the evidence at trial failed to support Ms. Smith-Kilpatrick's conviction when key witnesses testified they did not know Ms. Smith-Kilpatrick or anything about her alleged involvement in the supposed conspiracy.

IV. Whether Ms. Smith-Kilpatrick's 96-month sentence is procedurally and substantively unreasonable for this mother of three with minimal criminal history given the excessive, unreliable drug-quantity determination.

STATEMENT OF THE CASE

A. Ms. Smith-Kilpatrick did not participate in drug distribution; she simply involved herself romantically with a manipulative man who was dealing drugs.

At trial, the government characterized this case as one involving a "family business." RE. 195: Trial Trans. Vol. V, PageID # 1808. This characterization ignores the complexities of the family part of that supposed equation. Ms. Tracey

Smith-Kilpatrick is a 41-year-old mother of three and a widow. *See* RE. 220: Final PSIR, PageID # 2213, 2239. After her husband died suddenly of a heart attack in 2005, Ms. Smith-Kilpatrick eventually began dating a man named Mr. James Wilson, one of the people who became a co-defendant with her in this case; he is the father of two of her children. *See* RE. 220: Final PSIR, PageID # 2239.

Sadly, Mr. Wilson was involved with a group of manipulative drug dealers looking to make money. *See, e.g.*, RE. 195: Trial Trans. Vol. V, PageID # 1834, 1838. These individuals took advantage of one another. RE. 195: Trial Trans. Vol. V, PageID # 1834. Mr. Wilson himself had the reputation for being manipulative. *See, e.g.*, RE. 194: Trial Trans. Vol IV, PageID # 1629. He was known as "Slick." *See* RE. 195: Trial Trans. Vol IV, PageID # 1834; *see also* RE. 86: Superseding Indictment, PageID # 201.

Ms. Smith-Kilpatrick, however, was not a part of this cadre. She did not deal drugs with Mr. Wilson. In letters submitted for consideration before the sentencing hearing in this matter, those close to Ms. Smith-Kilpatrick described a loving woman who cared for her disabled step-son and aging parents. RE. 224-2: Exhibit A to Def. Sent. Memo., PageID # 2286-87. These supporters spoke of Tracey's commitment to her children RE. 224-2: Exhibit A to Def. Sent. Memo., PageID # 2289. Tracey's mother described Tracey's protectiveness of her after Tracey's father died of pancreatic cancer when Tracey was seven years old. RE. 224-2: Exhibit A to Def.

Sent. Memo., PageID # 2290. Tracey's daughter described Tracey's giving heart and RE. 224-2: Exhibit A to Def. Sent. Memo., PageID # 2292.

During Tracey's trial, the witnesses who had participated in drug dealing failed to "get their stories straight" on multiple occasions. *See, e.g.*, RE. 195: Trial Trans. Vol. V, PageID # 1840, 1844 (pointing out discrepancies). The alleged co-conspirators and drug users and dealers who testified took the witness stand hoping to receive sentencing benefits from the government and sentencing judge. *See, e.g.*, RE. 195: Trial Trans. Vol. V, PageID # 1843-44. Yet the testimony they presented included significant discrepancies.

The government essentially alleged that Ms. Smith-Kilpatrick had worked with Mr. Wilson to distribute heroin and crack cocaine in Michigan's Upper Peninsula from December 2014 to April 2016. *See* RE. 86: Superseding Indictment, PageID # 201; RE. 150: Gov. Tr. Br., PageID # 483-84; RE. 195: Trial Trans. Vol. V, PageID # 1809, 1812 (government's closing argument). Yet the evidence failed to establish any such action by Ms. Smith-Kilpatrick.

B. With her romantic connection to Mr. Wilson, and the sharing of things like phones that comes with such a connection, the government indicted and tried Ms. Smith-Kilpatrick.

The government filed a superseding indictment, which included Ms. Smith-Kilpatrick as a defendant, on September 20, 2017. RE. 86: Superseding Indictment, PageID # 201. In that indictment, the government charged Ms. Smith-Kilpatrick, and

three others, with conspiring to distribute, and possessing with the intent to distribute, heroine and powder cocaine (in violation of 21 U.S.C. §§ 841(a)(1) and 846) from December 2014 to April 2016 in Michigan's Upper Peninsula. RE. 86: Superseding Indictment, PageID # 201. The case proceeded toward trial, and the government filed, on December 8, 2017, a motion to admit what the government described as business records. RE. 140: Motion to Admit Business Records, PageID # 365.

In this motion, the government moved the district court to allow it to present at trial phone records, MoneyGram records, wire-transfer records, hotel records, and rental-car records. RE. 141: Memo in Support of Gov. Motion to Admit Business Records, PageID # 367-68. In support of its motion, the government offered certifications from record custodians. *See* RE. 141-1: Attachment to Memo in Support of Gov. Motion to Admit Business Records, PageID # 372-81. The government also moved to admit certain summaries. RE. 146-1: Memo in Support of Gov. Motion to Admit Summaries, PageID # 405-10.

The government suggested that Ms. Smith-Kilpatrick rented cars for the alleged conspiracy and that she was involved with wire transfers. *See* RE. 150: Gov. Tr. Br., PageID # 488; *see also* RE. 146-2: Attachment to Memo in Support of Gov. Motion to Admit Summaries, PageID # 419. The case proceeded to trail from January 8, 2018, through January 12, 2018, when the jury reached its verdict. *See*

RE. 174: Minutes, Jury Trial, Day 5, PageID # 678. Ms. Smith-Kilpatrick moved the district court for a judgment of acquittal at the end of the government's proofs. RE. 194: Trial Trans. Vol. IV, PageID # 1767. The court denied the motion. RE. 194: Trial Trans. Vol. IV, PageID # 1772-73. The jury found Ms. Smith-Kilpatrick guilty of participating in the conspiracy, but held her responsible for fewer than 100 grams of heroin and 28 grams or more of cocaine base. RE. 175: Jury Verdict, PageID # 679.

The defense objected to admission of the hearsay evidence multiple times. *See, e.g.*, RE. 191: Trial Trans. Vol. I, PageID # 737-43. The defense objected to admission of the evidentiary summaries the government proffered. RE. 191: Trial Trans. Vol. I, PageID # 744. It also objected to admission of alleged co-conspirator statements. RE. 191: Tr. Trans. Vol. I, PageID # 750-51. The defense reiterated its objections throughout the trial. *See, e.g.*, RE. 191: Trial Trans. Vol. I, PageID # 947 (objecting to admission of wire-transfer records insufficiently connected to Ms. Smith-Kilpatrick), 959 (alleged co-conspirator statements); RE 192: Trial Trans. Vol. II, PageID # 972; RE. 193: Trial Trans. Vol III, PageID # 1292, 1408, 1412-13, 1415; RE. 194: Trial Trans. IV, PageID # 1679, 1687, 1708 (phone records), 1717 (phone), 1724-25 (hotel), 1728 (phone), 1731 (phone). The district court ultimately overruled the objections. *See* RE. 194: Trial Trans. Vol IV, PageID # 1567-68, 1735 (vehicle records presented), 1766 (alleged co-conspirator statements admitted).

The government relied on the hearsay records in making its case. During its closing argument, it emphasized the car-rental, phone, and wire-transfer records. RE. 195: Trial Trans. Vol. V, PageID # 1819-20, 1821, 1823.

With the entry of the verdict, the case proceeded toward sentencing. The probation office filed a final presentence investigation report (PSIR) on May 29, 2018. RE. 220: Final PSIR, PageID # 2211-50. At the sentencing hearing on June 7, 2018, the district court found a final total offense level of 32, a criminal-history category of I, and an advisory sentencing guideline range of 121 to 151 months. RE. 262: Sent. Trans., PageID # 2461. The court did grant a downward variance and sentenced Ms. Smith-Kilpatrick to 96 months of incarceration. RE. 262: Sent. Trans., PageID # 2471. The court entered its judgment on June 7, 2018. RE. 244: Judgment, PageID # 2396-2402. Tracey filed her Notice of Appeal on June 11, 2018, and now appeals her conviction and sentence. RE. 247: Notice of Appeal, PageID # 2408.

SUMMARY OF ARGUMENT

Ms. Smith-Kilpatrick lost her husband to a heart attack. A single mother trying to find her way, she began dating Mr. James Wilson, a man with a reputation for being a "slick" manipulator. She and Mr. Wilson now have two children together. The problem for Ms. Smith-Kilpatrick is that her relationship with Mr. Wilson led to her being swept up in allegations surrounding his drug trafficking. Despite a

dearth of evidence related to Ms. Smith-Kilpatrick in any way, the government indicted her and she stood trial. In the course of that trial, the district court erred in admitting hearsay evidence under Rule 803(6) (the exception for business records) because the records the government proffered constituted testimonial hearsay and were unauthenticated in terms of transactor identity. The court also erred in admitting alleged co-conspirator statements because the evidence failed to show that Ms. Smith-Kilpatrick was a conspirator. This lack of evidence means that Ms. Smith-Kilpatrick's conviction rests on insufficient evidence. Given this lack of evidence, the drug quantity attributed to her because of Mr. Wilson's dealings, and the advisory sentencing guidelines' failure to account for her circumstances, including an extremely minimal criminal history, Ms. Smith-Kilpatrick's 96-months sentence is procedurally and substantively unreasonable. It is out of touch with her situation, even the allegations against her, and out of sync with the cultural trends away from lengthy incarceration periods.

STANDARDS OF REVIEW

Regarding evidentiary issues, courts review for clear error, as questions of fact, issues such as whether the government met its burden to prove the conspiracy factors and in deciding whether admission of an alleged co-conspirator's statement was erroneous. *United States v. Martinez*, 430 F.3d 317, 326 (6th Cir. 2005). Courts review the ultimate decision to admit a statement under Federal Rule of Evidence

801(d)(2)(E) for abuse of discretion; a trial court abuses its discretion when it applies an incorrect legal standard, misapplies the correct standard, or relies on clearly erroneous findings of fact. *Id.*

For the constitutional issues involved in evidentiary challenges, courts look at the questions de novo. *See United States v. Ford*, 761 F.3d 641, 652 (6th Cir.2014) (addressing the Confrontation Clause).

In considering sufficiency-of-the-evidence claims, this Court asks whether, after viewing the evidence presented at trial in the light most favorable to the government, *any* rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Id*. at 330.

Regarding sentencing, this Court reviews sentences for reasonableness. *Rita v. United States*, 551 U.S. 338, 341 (2007). This review involves an abuse-of-discretion standard. *United States v. Studabaker*, 578 F.3d 423, 430 (6th Cir. 2009).

ARGUMENT

I. The supposed business records and summaries the government presented at trial did not qualify for admission under the hearsay exception for business records under Rule 803(6)—they were testimonial hearsay and were also unauthenticated/unverified on the crux point of transactor identity.

As this Court well knows, hearsay evidence (out-of-court statements offered for the truth of the matter asserted) may not be admitted at trial unless a specific exception to the ban on hearsay applies. *See* 6 Cir. Evid. 801(c) & 802. In Ms. Smith

Kilpatrick's case, the government offered the supposed business records at issue here (namely phone, MoneyGram, wire-transfer, hotel, and car-rental records) under Federal Rule of Evidence 803(6), which excepts business records from the hearsay prohibition. *See* RE. 141: Memo in Support of Gov. Motion to Admit Business Records, PageID # 367.

As Ms. Smith-Kilpatrick emphasized in her objections and in her motion for a new trial, the records at issue did not qualify as business records under Rule 803(6) because they were not offered to prove some business-related point, such as an amount paid or the time of a transaction. *See* RE. 184: Motion for New Trial, PageID # 694. Rather, the government offered these records to prove identity, and this offer of evidence came without any additional evidence to authenticate the records as accurate on the issue of identity (for example, video footage from one of the businesses showing that Ms. Smith-Kilpatrick was indeed the person transacting business). Multiple times at trial, the defense cited the lack of corroborating identity evidence. *See, e.g.*, RE. 195: Trial Trans. Vol V, PageID # 1828-29 (lack of video corroboration). Defense counsel also pointed out the lack of recipient information on the MoneyGram records. RE. 195: Trial Trans. Vol V, PageID # 1829. The summaries the government presented, and to which the defense objected, compounded the problems.

The proffered records simply did not qualify for the Rule 803(6) hearsay exception. They constituted testimonial evidence subject to the dictates of the Confrontation Clause. Ms. Smith-Kilpatrick had a right to cross-examine the preparers of the records if such records were going to be introduced properly at trial. Without such an opportunity for cross-examination, Ms. Smith-Kilpatrick suffered a violation of her Sixth Amendment rights.

A. Admission of the records violated Ms. Smith-Kilpatrick's confrontation rights under Crawford *and the Sixth Amendment.*

The government tried to use these testimonial records to forge a link between Ms. Smith-Kilpatrick and the alleged conspiracy. Yet it failed to present any witnesses to make such a connection. As will be discussed even further in subsection ii. below, this failure to present a connecting witness is fatal to admission of such records under the case law on the point, even beyond the confrontation issue.

Here, the government offered no witnesses to allow Ms. Smith-Kilpatrick her right to cross-examine, so the admission of the records amounted to a violation of her confrontation rights. Under the Confrontation Clause and *Crawford v. Washington*, 541 U.S. 36 (2004), Ms. Smith-Kilpatrick had a right to cross-examine on crux issues, especially issues related to record keeping and identity, such as how the companies maintaining the records knew she, as opposed to an imposter, engaged in the alleged transactions. *See* RE. 191: Trial Trans. Vol 1, PageID # 740. In the age of electronics and rampant identity theft, such inquiries are especially critical.

Without a witness with personal knowledge to face cross-examination, the defense was left without confrontation rights, in violation of the Sixth Amendment.

The Supreme Court has not equivocated on these points: "Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 68. While the Court has not defined all aspects of the meaning of "testimonial evidence," it has offered some post-*Crawford* analysis, and lower courts have considered the issue in contexts similar to the one at hand. *See id.* (acknowledging the Court was leaving "for another day" the defining of "testimonial").

i. Supreme Court precedent affirms the appropriateness of finding the records at issue testimonial and subject to the strictures of the Confrontation Clause.

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 307 (2009), the Supreme Court considered whether affidavits could be "testimonial," thus "rendering the affiants 'witnesses' subject to the defendant's right of confrontation under the Sixth Amendment." The Court found that the certificates the state had offered into evidence qualified as affidavits and that affidavits are "testimonial" in nature. *Melendez-Diaz*, 557 U.S. at 310. The fact at issue in that case was whether the substance found in the defendant's possession "was, as the prosecution claimed, cocaine—the precise testimony the analysts would be expected to provide if called

at trial." *Id.* The "certificates" the state offered were "functionally identical" to live, in-court testimony, and did exactly what a witness does on direct examination, namely stated that the substance was cocaine. *Id.* at 308, 310-11.

The Supreme Court has rejected the idea that an affiant is not subject to confrontation if not accusing a defendant of wrongdoing. *Id.* at 313. Testimony taken together with other evidence, such that a link is forged between a defendant and contraband, may be testimonial. *See id.* A witness provides testimony *against* a defendant by proving a fact necessary for conviction. *Id.* The text of the Sixth Amendment contemplates two kinds of witnesses: those against a defendant and those in his or her favor. *Id.* The prosecution *must* produce the former, and the defendant *may* call the latter. *Id.* at 313-14. No third category of witnesses—those helpful to the prosecution, but somehow immune from confrontation—exists. *Id.* at 314.

The Court's reasoning in *Melendez-Diaz* supports Ms. Smith-Kilpatrick's position here. These records were not simply business records, as contemplated under Rule 803(6). They offered testimony on the issue of whether Ms. Smith-Kilpatrick entered into the transactions at issue with rental cars and wire transfers. They sought to establish that it was Ms. Smith-Kilpatrick, as opposed to someone using her identity, who participated in the exchanges. As the Supreme Court pointed

out in *Melendez-Diaz*, however, "[c]onfrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well." *Id.* at 319.

The records here were incompetent. They were incompetent to affirm that Ms. Smith-Kilpatrick, as opposed to someone stealing her identity, conducted the business to which the records testified. The *Melendez-Diaz* Court pointed out the problems of conclusory statements in the forensic-science context, statements that do not go into the nature of tests performed or the reliability of the results. *See id.* at 320. The same concerns arise with records purporting to establish a person's participation in a transaction when no actual proof appears to affirm that the person did indeed so participate—it is too easy this day and age to imagine scenarios in which an imposter engages in identity theft, even by simply offering another's name.

The *Melendez-Diaz* Court made clear that not all business records are admissible as such despite being hearsay. *Id.* at 321. If the business records arose in anticipation of trial, they are not admissible under the business-records exception to the hearsay rules. *Id.* Business records "are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for_the purpose of establishing or proving some fact at trial—they are not testimonial." *Id.* at 324. Whether or not records qualify as business records, the

creator of the records is subject to confrontation under the Sixth Amendment if the records were prepared specifically for use at trial. *Id.*

In Ms. Smith-Kilpatrick's case, the records may have arisen as ordinary business records, but in the context of the trial, the records memorialized transactions, not the transactors' identities. They were never meant to prove *identity*. In being presented as records of the identity of an actor, they were obtained and annotated (as in the summaries) in *anticipation of trial*. It is interesting to note that the defendant did not dispute the analysts' results in *Melendez-Diaz*, which found the tested substances to be cocaine. *See id.* at 340 (Kennedy, J., dissenting). In Ms. Smith-Kilpatrick's case, she *is* disputing the accuracy of the records. These records do not bear any indicia of reliability because they involve third-party contributions and do not rest solely on business record keeping. Ms. Smith-Kilpatrick has consistently disputed her alleged participation in the transactions, and thus the accuracy of the records as they relate to the identity of the transactor. *See* RE. 191: Trial Trans. Vol I, PageID # 740.

The Supreme Court's decision in *Williams v. Illinois*, 567 U.S. 50 (2012), does not undercut Ms. Smith-Kilpatrick's position. While *Williams* somewhat muddies the *Melendez-Diaz* waters, it does not muddy the waters here. In *Williams*, the Court divided sharply, with a plurality of four justices and a concurrence by Justice Thomas reaching the case's conclusion that there was no Confrontation Clause

violation. The *Williams* plurality decided the DNA report in the case did not fall within the pale of the Confrontation Clause because it was not the sort of extrajudicial statement the Clause was meant to reach: "[t]he report was sought not for the purpose of obtaining evidence to be used against petitioner, who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose," and the report was not inherently inculpatory. *Williams*, 567 U.S. at 58.

The records in Ms. Smith-Kilpatrick's case, on the other hand, were sought by the government in anticipation of trial and in an attempt to use them to establish the identity of the transactor, which was not part of their business function—and in fact involved third-party, non-business contributions of information. That use arose only because of the trial. In these circumstances, the records are testimonial. As this Court explored in *United States v. Martinez*, 430 F.3d 317, 329 (6th Cir. 2005), anticipating that a statement could be used in prosecution will render the statement prosecutorial. A reasonable person could certainly anticipate these records being used for prosecution.

Another fact distinguishing the circumstances at hand from those in *Williams* involved the live testimony of an expert: in *Williams*, an expert testified about the DNA profiles matching. *Williams*, 567 U.S. at 63. Ms. Smith-Kilpatrick had no such opportunity to face any witness. The *Williams* Court also took pains to emphasize that the disputed evidence was *not* offered to prove the truth of the matter asserted,

and that the trial was a bench trial—the Court made clear that it would have ruled differently had a jury been involved. *See id.* at 72-73.

The *Williams* Court felt its conclusions were consistent with those in *Melendez-Diaz*. *Id.* at 79. In *Melendez-Diaz*, the Court pointed out, "the forensic reports were introduced into evidence, and there is no question that this was done for the purpose of proving the truth of what [was] asserted," . . . namely "that the substance in question contained cocaine." *Id.* Nothing comparable happened in *Williams*. In that case the "report was not introduced into evidence"; the "expert witness referred to the report not to prove the truth of the matter asserted in the report, *i.e.*, that the report contained an accurate profile of the perpetrator's DNA, but only to establish that the report contained a DNA profile that matched the DNA profile deduced from petitioner's blood." *Id.* Thus the report was not to be considered for its truth but only for a distinct and limited purpose. *Id.* The relevance of the DNA match was later established by independent circumstantial evidence. *Id.*

The *Melendez-Diaz* decision better fits application to Ms. Smith-Kilpatrick's case and, as Justice Breyer said in his concurrence in *Williams*, *Williams* did not help define the outer limits of testimonial statements. *See id.* at 86 (Breyer, J., concurring) (counsel notes that Justice Breyer also stated that he would adhere to the dissent in *Melendez-Diaz*). Justice Breyer draws attention to the ambiguity *Crawford* created—that *Crawford* has redefined the hearsay rules and may have sundered

"traditional" hearsay exceptions. *Id.* at 93 (Breyer, J., concurring). This acknowledgement did not equate to philosophical agreement—Justice Breyer suggested reasons for leaving old hearsay exceptions intact—but it does show that *Crawford* redrew the evidentiary lines and that Rule 803(6) is not a safe haven for admission of records that stand in the place of identification testimony. *See id.* (with Justice Breyer's suggestions in favor of not extending *Crawford*).

As Justice Breyer pointed out in his concurrence in *Williams*, traditional hearsay exceptions supposedly rest on "alternative features" and "situations" that "help to guarantee [a statement's] accuracy." *See id.* at 95. But this view of hearsay exceptions cannot help testimonial hearsay escape the Confrontation Clause jurisprudence of *Melendez-Diaz*. In the circumstances of Ms. Smith-Kilpatrick's case, for example, the government used the records to "testify" as to the alleged identity of someone engaged in renting cars and participating in wire transfers. But these records bore no indicia of reliability on that subject. They "accused" Ms. Smith-Kilpatrick, bringing them within the ambit of the Confrontation Clause according to Justice Thomas's reading of the *Williams* plurality. *See id.* at 114 (Thomas, J., concurring) (reading the plurality to apply the Confrontation Clause to out-of-court statements made to accuse a particular defendant). And they did so without any showing of reliability on that point.

The *Williams* dissent emphasized the need to give the defense the opportunity to cross-examine the producer of a statement against a defendant. *See id.* at 119-20 (Kagan, J., dissenting). As that dissent pointed out, in the context of forensic science, science may be "technical," but it is only as accurate as the people performing the tests; thus, the defense may want to cross-examine on issues of an analyst's experience, past mistakes, use of the correct sample, sample contamination, and such. *Id.* at 137 (Kagan, J., dissenting). The exact same logic applies to records like those in Ms. Smith-Kilpatrick's case: they may have been created to facilitate business, but there is no reason to believe they are infallible on topics such as true identity—cross-examination is necessary to flesh out possible errors. And this need is heightened when, as here, they involve third-party, non-business contributions of information. In the end, the question does not revolve around reliability; it revolves around the procedure prescribed by the Confrontation Clause: cross-examination. *Id.* at 138 (Kagan, J., dissenting). Ms. Smith-Kilpatrick's right to such cross-examination was violated by admission of the records at issue.

ii. As Ms. Smith-Kilpatrick pointed out in the trial court, persuasive authority militates in favor of finding error in admission of the disputed records.

While the trial court in Ms. Smith-Kilpatrick's case attempted to discount it, *United States v. Ekiyor*, 90 F. Supp. 3d 735 (E.D. Mich. 2015), represents persuasive authority on this issue. *See* RE. 194: Trial Trans. Vol IV, PageID # 1568-70 (trial

court attempting to distinguish *Ekiyor*). In that case, the trial court faced a very similar issue and sustained the defense's objection to admission of airline baggage records, in part because the records were testimonial. The court pointed out several points relevant to the circumstances at hand. First, the baggage records did not qualify for admission under Rule 803(6) (as business records) because they appeared to have been culled from a larger underlying database and began with a statement indicating they represented the defendant's luggage transactions. *Ekiyor*, 90 F. Supp. 3d at 742. They ended with a statement related to the specifics of the luggage and the defendant's seat number. *Id.* This defendant-specific nature of the records suggested that the records had been prepared specifically for use in the case, so they were not 803 business records. *Id.* The same infirmities may be found in the records at issue in Ms. Smith-Kilpatrick's case, especially in light of the disputed summaries the government presented.

Next, and more importantly for the issue at hand, the records qualified as testimonial in the wake of *Crawford* because they made affirmative assertions linking the baggage to the defendant. *Id.* at 743-44. By seeking to introduce the records to forge the link between the defendant and the bags, the government ran afoul of the defendant's confrontation rights. *Id.* at 744. The defendant had a right to question the basis for the government's assertion, made through the proposed introduction of the baggage log, that the defendant checked the bag in question onto

the plane—as opposed to the bag getting on the plane in some other manner. *Id.* at 745. The defendant had a constitutionally guaranteed means for raising such questions: cross-examination. *Id.* Without a real witness, the government would violate the defendant's right to that cross-examination. *Id.* The court was quick to point out that *Williams* offered little, if any, guidance. *See id.* at 741. The *Williams* decision simply failed to assist in defining "testimonial." *Id.*

The Third Circuit made similarly helpful observations about Facebook records in *United States v. Browne*, 834 F.3d 403 (3rd Cir. 2016). The government had offered the records with a certificate saying they were Facebook business records under Rule 803. *Browne*, 834 F.3d at 406. The court acknowledged that the authentication of social-media records was an issue of first impression for it. *Id.* at 408. The court concluded that the records were not "self-authenticating" business records. *Id.*

The problem was that of relevance: the government failed to introduce sufficient evidence to show that the defendant had himself written the Facebook messages—they were only relevant if written by the defendant. *Id.* at 410. The records custodian could only say that the messaging occurred between the two Facebook accounts. *Id.* Facebook, as a business practice, does not rely on the substance of messages. *Id.* The business-record hearsay exception may properly allow for introduction of records to establish things like dates and times, but it cannot

reach the substance/authorship of statements in messages and letters. *See id.* at 410-11.

At Ms. Smith-Kilpatrick's trial, the government used the disputed records to establish identity, even though these records made no claims to have confirmed identity. The government presented no confirmation of identification documents or even security video footage. *See* RE. 195: Trial Trans. Vol V, PageID # 1828-29. No evidence confirmed that the persons who engaged in the transactions actually were the people *alleged* to be engaging in those transactions. As the *Browne* court pointed out, "authentication of electronically stored information in general requires consideration of the ways in which such data can be manipulated or corrupted." *Id.* at 412. The same is true of authentication of identity data now, in an age of rampant identity theft and technology that allows for such theft with identification documents that are almost impossible to spot as fake. Just as it takes little effort to pose as someone else on social media, it is very easy to steal someone's identity with false documents (counsel need not cite for the Court the volume of identity-theft cases the Court sees or the prevalence of false documents). *See id.*

In *Browne*, the court concluded that the government had presented adequate evidence to authenticate most of the records. *Id.* at 413. The government presented evidence of the messages' accuracy and of a link to the defendant. *Id.* While authenticity sits as an issue distinct from whether records are testimonial, the two

issues dovetail. In Ms. Smith-Kilpatrick's case, the records were testimonial, especially in their use as a link to identify the transactor of the car rentals and participant in the wire transfers. The government presented no witness or evidence to attest to the accuracy of the identification or the means by which it was achieved and verified. Introduction of the records thus deprived Ms. Smith-Kilpatrick of her Sixth Amendment confrontation rights and rendered the records inadmissible under the business-records exception.

The cases the lower court discussed in ruling against Ms. Smith-Kilpatrick do not support that court's negative ruling. *See* RE. 194: Trial Trans. Vol. IV, PageID # 1570. In *United States v. Brown*, 822 F.3d 966 (7th Cir. 2016), for example, the court's conclusions actually affirm and support Ms. Smith-Kilpatrick's position. In *Brown*, the defendants maintained "that the involvement of a third party in creating the MoneyGram and Western Union records—namely, the customer making the wire transfer—remove[d] those records from the ambit of Rule 803(6)." *Brown*, 822 F.3d at 972. The *Brown* court implicitly recognized the potential strength of the reasoning behind the defendants' contentions, stating: "But third-party involvement is not *inevitably* fatal." *Id.* (emphasis added).

In relying on older precedent, the court pointed out that in the earlier cases "additional sources of corroboration" were recognized as potentially "curing" the "hearsay problem" that third-party involvement in creating a business record

introduces. *Id.* The court specifically pointed to a case where the defendant had argued that bank records of alleged drug-money transactions, ostensibly conducted by him, were inadmissible because an imposter could have been impersonating him at the bank. The earlier court had "found his argument unavailing because the bank president testified that he *recognized the defendant* as a customer, and the bank's regular practice was to request an identification and account number before completing a transaction." *Id.* (emphasis added). This finding goes straight to Ms. Smith-Kilpatrick's position: No one in her case recognized her.

The *Brown* court noted the contrast with an older case in which a police report was *inadmissible* as a business record precisely "because it included information provided by a bystander, rather than facts personally known by the officer making the record." *Id.* As the *Brown* court emphasized, it has been "critical for admissibility" that a bank require an ID and *have a witness* who can confirm identity.

Citing another earlier case, the *Brown* court noted that hotel records had been admissible in that case because "the hotel's practice was to verify identification *and witnesses testified that they met the person at the hotel*." *Id.* (emphasis added). In upholding admission of the records in the case before it, the *Brown* court highlighted that "the record contains more than certifications: we have the *testimony of the witnesses* about their recollections of actually conducting the transactions, and that testimony fills any gap left by the certifications." *Id.* at 973 (emphasis added).

In considering a *Crawford* challenge to admission of the MoneyGram and Western Union records, the *Brown* court applied plain-error review because the defense had not raised the issue in the lower court. *Id.* at 973-74. It found that "[b]usiness records are *generally* nontestimonial." *Id.* at 974 (emphasis added). The lack of discussion on the issue renders the case less than helpful on that point. The court did not consider the specific issue of identity in that context. *See id.*

A First Circuit decision follows somewhat similar reasoning on the identity issue, although it involved an even greater lack of identification than that in *Brown*. *See United States v. Vigneau*, 187 F.3d 70 (1st Cir. 1999). In *Vigneau*, the defendant's "strongest claim [wa]s that the district court erred in allowing the government to introduce, without redaction and for all purposes, Western Union 'To Send Money' forms, primarily in support of the money laundering charges." *Id.* at 74. Those forms, "as a Western Union custodian testified, are handed by the sender of money to a Western Union agent after the sender completes the left side of the form." *Id.* That completion involved writing the sender's name, address, and telephone number; the transfer amount; and the intended recipient's name and location. *Id.* The Western Union clerk would then sign, date, and list the transfer amount and fee, and he or she would add a computer-generated control number. *Id.* The clerk, at that time, would not require independent proof of a sender's identity. *Id.*

The defendant's "most plausible objection, which was presented in the district court and [wa]s renewed on appeal, [wa]s that his name, address and telephone number on the 'To Send Money' forms were inadmissible hearsay used to identify [him] as the sender." *Id.* While the forms literally complied with the business-records exception, "the business records exception does not embrace statements contained within a business record that were made by one who is *not* a part of the business if the embraced statements are offered for their truth." *Id.* at 75. The supposed "safeguards" of regularity and "business checks" relied on in excepting business records from the ban on hearsay do to exist when a third party is involved in preparing the record. *See id.* at 75. No checks "assure the *truth* of a statement *to* the business by a stranger to it, such as . . . that made by the money sender who gave the form containing his name, address, and telephone number to Western Union." *Id.* at 75-76. Based on this evidentiary problem, the court vacated the defendant's conviction. *Id.* at 77-78, 82. Ms. Smith-Kilpatrick's case presents similar infirmities and warrants the same treatment of vacating the conviction.

B. The government offered no evidence to authenticate these disputed records, so those records were irrelevant and inadmissible under Rules 401 and 402.

"Authenticity is elemental to relevance," as the Third Circuit has said. *Brown*, 834 F.3d at 409 n.6. A business record's alleged self-authentication will not eliminate the relevancy requirement. *Id.* at 410. Some link must exist to tie a

defendant to evidence and make that evidence relevant to the defendant. *Id.* A defendant with a common name, for example, does not automatically have a tie to a driver's license and work permit with that name. *Id.* The government had the obligation of proving that the records truly related to Ms. Smith-Kilpatrick; it failed to do so. *See* Fed. R. Evid. 104(b). Counsel will not repeat the arguments presented above, but Ms. Smith-Kilpatrick wishes to make clear her points under Rules 401 and 402. Without proof of authenticity, without proof of an actual link to Ms. Smith-Kilpatrick, the records were not relevant. Without the witness testimony discussed by the Seventh Circuit in *Brown*, the records were not relevant and lacked a showing of authenticity in relation to Ms. Smith-Kilpatrick.

II. The district court erred in admitting alleged co-conspirator statements; the evidence failed to show that Ms. Smith-Kilpatrick was a conspirator.

The government presented alleged co-conspirator statements ostensibly under Federal Rule of Evidence 801(d)(2)(E), which requires the government to show that the proffered statements were "made by the [defendant]'s coconspirator during and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E); *see also United States v. Martinez*, 430 F.3d 317, 325 (6th Cir. 2005) (the government bears the burden of showing, by a preponderance of the evidence, that a conspiracy existed, that the defendant participated in the conspiracy as a member, and that the statement at issue was made in the course and furtherance of the conspiracy). Ms. Smith-Kilpatrick objected to admission of these statements. *See, e.g.*, RE. 191: Trial Trans. Vol. I,

PageID # 750-51; RE. 194: Trial Trans. Vol IV, PageID # 1765-67 (admitting statements).

Ms. Smith-Kilpatrick did not have co-conspirators because she did not participate in a conspiracy. Case law like that in *United States v. Payne*, 437 F.3d 540, 544 (6th Cir. 2006), requires a preponderance of the evidence supporting admission of the proffered statements, a preponderance of the evidence showing that the defendant was a member of the alleged conspiracy. Mere conclusory statements will likely not suffice to support admission of such statements. *See United States v. Warman*, 578 F.3d 320, 335 (6th Cir. 2009).

As Ms. Smith-Kilpatrick pointed out at trial (and as she reiterates in the following section), the scant evidence against her arose from self-interested cooperating witnesses with drug problems and convictions, witnesses looking to curry favor with the government and receive sentencing benefits. *See, e.g.*, RE. 195: Trial Trans. Vol. V, PageID # 1825-28. The evidence the government presented did not prove that Ms. Smith-Kilpatrick wired money or rented cars, much less moved drugs. *See* RE. 195: Trial Trans. Vol. V, PageID # 1828-29 (pointing out the identity issues discussed above in Section I). The MoneyGram records did not even list recipients. RE. 195: Trial Trans. Vol. V, PageID # 1829.

Many of the witnesses the government presented had been housed together and given time together to gather their stories, yet even then, the stories told contained glaring discrepancies. *See* RE. 195: Trial Trans. Vol. V, PageID # 1831.

Mr. Wilson was the father of two of Ms. Smith-Kilpatrick's children. It only makes sense that Ms. Smith-Kilpatrick would have phone contact with him and would share a phone with him. *See* RE. 195: Trial Trans. Vol. V, PageID # 1831. The supposed calls Ms. Smith-Kilpatrick was making to "co-conspirators" occurred when Mr. Wilson had/could have had the phone. *See* RE. 195: Trial Trans. Vol. V, PageID # 1832. The evidence presented at trial simply failed to establish Ms. Smith-Kilpatrick's participation in any conspiracy, so admission of statements under Rule 801(d)(2)(E) constituted error.

III. The evidence at trial failed to support Ms. Smith-Kilpatrick's conviction; key witnesses testified they did not even know Ms. Smith-Kilpatrick or anything about her alleged involvement in the alleged conspiracy.

In considering sufficiency-of-the-evidence arguments, this Court asks whether, after viewing the evidence presented at trial in the light most favorable to the prosecution, *any* rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *United States v. Martinez*, 430 F.3d 317, 330 (6th Cir. 2005).

Here, a rational trier of fact would *not* have found the elements of conspiracy against Ms. Smith-Kilpatrick beyond a reasonable doubt. Ms. Smith-Kilpatrick

seems to have gotten swept into the dust bin of drug dealing surrounding the father of her children despite the fact the evidence did not establish beyond a reasonable doubt that she had any role in any such dealing. To sustain a conviction for conspiracy under 21 U.S.C. § 846, the government prove: 1) an agreement to violate drug laws (i.e. 21 U.S.C. § 841(a)(1); 2) knowledge and intent to join that conspiracy; and 3) participation in that conspiracy. *Martinez*, 430 F.3d 330. It need not prove a formal agreement; a tacit or material understanding will suffice. *Id.*

As this Court's pattern criminal jury instruction 14.05 explains, "proof that a defendant simply knew about a conspiracy, or was present at times, or associated with members of the group, is not enough" to sustain a conviction, even if the defendant "approved of what was happening or did not object to it"; and "because a defendant may have done something that happened to help a conspiracy does not necessarily make him[/her] a conspirator." Sixth Cir. Pattern Crim. Jury Ins. 14.05.

Here, Special Agent Sarah Hill testified that she did not work on Ms. Smith-Kilpatrick's case. RE. 191: Trial Trans. Vol. I, PageID # 928. She testified that during the period in which she oversaw and conducted controlled buys she was not investigating Ms. Smith-Kilpatrick at all. RE. 191: Trial Trans. Vol. I, PageID # 928.

Stephanie Hatch, a cooperating drug addict, testified that she did not know Ms. Smith-Kilpatrick. RE. 193: Trial Trans. Vol. III, PageID # 1279. Another cooperating witness, Corrie Ruth, a felon with a drug- and firearm-conviction

history, testified in same way: He did not know Ms. Smith-Kilpatrick. RE. 193: Trial Trans. Vol. III, PageID # 1340. Brandy Rupright testified she knew Ms. Smith-Kilpatrick only a little. RE. 194: Trial Trans. Vol. IV, PageID # 1622.

Evidence at trial failed to establish who received the money from the MoneyGrams. *See, e.g.*, RE. 192: Trial Trans. Vol II, PageID # 1219. And even beyond knowing who *actually* received the money, the MoneyGram records did not even show stated recipients. RE. 194: Trial Trans. Vol. IV, PageID # 1681-82, 1694. As discussed above in Section I, no evidence such as video footage, proved who conducted the transfers.

While the evidence contained all these unknowns, it also contained certain "well knowns." At multiple points, the evidence established that Mr. Wilson is "slick" and a manipulator—sly. *See, e.g.*, RE. 193: Trial Trans. Vol. III, PageID # 1379; RE. 194: Trial Trans. Vol. IV, PageID # 1629 (testimony of Brandy Marie Rupright). Ms. Smith-Kilpatrick's romantic relationship with James Wilson meant she had intimate connections with him. Testimony alleged she and Mr. Wilson used Charles Wheeler's phone (with Wheeler being an alias for James Wilson). RE. 194: Trial Trans. Vol. IV, PageID # 1717; *see also* RE. 194: Trial Trans. Vol. IV, PageID # 1752-53.

Ms. Smith-Kilpatrick's case does not involve testimony about her engaging in drug sales or introducing people making sales. *Cf. Martinez*, 430 F.3d at 331-32.

And she, unlike a defendant in *Martinez*, *does* deny any drug dealing. *Cf. id.* at 332. In contrast to *Martinez*, where this Court upheld the convictions, Ms. Smith-Kilpatrick's case involved extremely tenuous testimony from self-interested cooperating drug abusers, and a situation where Ms. Smith-Kilpatrick's children's father was dealing in narcotics. His presence in her life did not mean she was doing the same.

IV. Ms. Smith-Kilpatrick's 96-month sentence is procedurally and substantively unreasonable to serve the purposes of sentencing as applied to this mother of three with minimal criminal history, especially in light of the excessive, unreliable drug-quantity determination.

This Court reviews sentences for reasonableness. *Rita v. United States*, 551 U.S. 338, 341 (2007). And that review involves an abuse-of-discretion standard. *United States v. Studabaker*, 578 F.3d 423, 430 (6th Cir. 2009). Regardless of whether a sentence falls inside or outside the advisory guideline range, this "court must review the sentence under an abuse-of-discretion standard." *Id.* A reviewing court "must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range." *Id.*

A. Ms. Smith-Kilpatrick's sentence is procedurally unreasonable because of the excessive, unreliable drug-quantity determination made in this case.

Under § 2D1.1(c), drug quantity is a major driver of the guidelines when one stands convicted of a drug offense. This Court has admonished sentencing courts to err on the side of caution in calculating drug quantity. *See, e.g.*, *United States v. White*, 563 F.3d 184, 196 (6th Cir. 2009). And when a defendant objects to a sentencing factor, a sentencing court may not summarily adopt factual findings in a PSIR or simply declare that the facts are supported by a preponderance of the evidence. *United States v. Fletcher*, 259 F. App`x 749, 755 (6th Cir. 2008). Some sort of evidence must support the determination—by a preponderance of the evidence. Under § 1B1.3, in a conspiracy case, a defendant can only be held liable for drug quantities that he or she could have reasonably foreseen and that fell within the scope of his or her jointly undertaken criminal activity. U.S.S.G. § 1B1.3(a)(1)(B); *see also* U.S.S.G. § 1B1.3, comment. (n.3(D)).

Leading up to sentencing, Ms. Smith-Kilpatrick objected to the drug-quantity determinations made in the PSIR. *See* RE. 220: Final PSIR, PageID # 2246; *see also* RE. 262: Sent. Trans., PageID # 2441. The sentencing court denied this objection. RE. 262: Sent. Trans., PageID # 2456. At sentencing, the court filed and cited a drug-quantity chart. *See* RE. 246: Quantity Chart, PageID # 2407; RE. 262: Sent. Trans., PageID # 2444. This chart arose from Mr. Wilson's sentencing. *See* RE. 262: Sent.

Trans., PageID # 2444. Ms. Smith-Kilpatrick countered the court's chart and argued for a finding of 127.5 grams of cocaine base and a base offense level of 26. RE. 262: Sent. Trans., PageID # 2444.

The problem with the court's quantity findings, as Ms. Smith-Kilpatrick argued at sentencing, is that, even if she was involved in some sort of drug trafficking (which she does not concede), she could not have foreseen the extent of Mr. Wilson's dealings and she did not jointly undertake all of his activity with him; thus, she should not be held responsible for *his* drug quantity. *See* RE. 262: Sent. Trans., PageID # 2459. The sentencing court conceded it was treating Ms. Smith-Kilpatrick comparably to the undoubtedly far more culpable Mr. Wilson. RE. 262: Sent. Trans., PageID # 2460.

Also, much of the evidence related to alleged drug quantities came from self-serving cooperating witnesses with lengthy drug-abuse histories. These witnesses' allegations could hardly be considered as meeting the preponderance-of-the-evidence standard to establish drug quantity. *Cf. White*, 563 F.3d at 196 (discussing arguments about exaggerations). The drug-quantity determination in this case thus represents procedural error. It fails to meet the standards of § 1B1.3, requiring foreseeability, and it represents an unreliable determination resting on less than a preponderance of the evidence.

As the Eighth Circuit discussed in *United States v. Spotted Elk*, 548 F.3d 641, 674 (8th Cir. 2008), a conspiracy conviction "does not make [a] defendant responsible under § 1B1.3 for all reasonably foreseeable" conduct by others, conduct like bribes paid by co-conspirators. Such conduct "must also fall within the scope of the defendant's joint undertaking." *Spotted Elk*, 548 F.3d at 674. Actions of a co-conspirator "that a particular defendant does not assist or agree to promote are generally not within the scope of that defendant's jointly undertaken activity." *Id.*

The *Spotted Elk* court explained that, in the specific context of §1B1.3 and a drug-distribution conspiracy, "a defendant's conviction for conspiracy does not automatically mean that every conspirator has foreseen the total quantity of drugs involved in the entire conspiracy," and along with "membership in the conspiracy, the district court must find the scope of the individual defendant's commitment to the conspiracy and the foreseeability of particular drug sale amounts from the individual defendant's vantage point." *Id.* In *Spotted Elk*, the court remanded for resentencing because the district court misinterpreted § 1B1.3 and the evidence could have supported a different finding. *Id.* at 679. The same reasoning applies here and militates in favor of the same outcome of a remand for Ms. Smith-Kilpatrick.

B. Ms. Smith-Kilpatrick's sentence is substantively unreasonable because it fails to account accurately for the § 3553(a) factors, gives undue weight to allegations made by drug addicts looking to curry favor with the government, and fails to reflect Ms. Smith-Kilpatrick's circumstances.

If this Court determines that "the district court's sentencing decision is procedurally sound," the Court would then consider the substantive reasonableness of this sentence under an abuse-of-discretion standard. *See Studabaker*, 578 F.3d at 430. When conducting such review, courts should take into account the totality of the circumstances, including the extent of any variance from the advisory guidelines range. *Id.* If a sentencing court selects a sentence arbitrarily, bases a sentence on impermissible factors, fails to consider relevant sentencing factors, or gives an unreasonable amount of weight to any pertinent factor, the resulting sentence is substantively unreasonable. *See United States v. Collins*, 828 F.3d 386, 388 (6th Cir. 2016).

A sentence may qualify as substantively unreasonable simply because it is too long to fit the circumstances of a case—a reviewing court may consider the length of a sentence in conducting its review. *United States v. Wilms*, 495 F.3d 277, 280 (6th Cir. 2007) (length is a factor for consideration in reviewing the reasonableness of a sentence). Ultimately, a sentence must be sufficient, but not greater than necessary, to serve the purposes of 18 U.S.C. § 3553(a)(2). *Id.* at 281; *see also* 18 U.S.C. § 3553(a). Ms. Smith-Kilpatrick's sentence is substantively unreasonable

because it is excessive in light of the case circumstances and the purposes of sentencing, places excessive weight on the guidelines, and fails to account for a number of sentencing factors.

In this case, the guidelines treated Ms. Smith-Kilpatrick as though she were a mastermind of this scheme, like Mr. Wilson was. *See, e.g.*, RE. 262: Sent. Trans., PageID # 2464. The guideline range far overstated Ms. Smith-Kilpatrick's alleged culpability. The sentence imposed hardly reflects the circumstances of a mother in criminal-history category I. The guideline amendments that will take effect the day after this brief is filed reflect a presumption in in favor of non-custodial sentences for non-violent first-time offenders. U.S. Sentencing Commission, *Amendments to the Sentencing Guidelines* 75 (Apr. 30, 2018), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20180430_RF.pdf. While Ms. Smith-Kilpatrick would not technically qualify for this presumption because she has a criminal-history point and is in higher zones of the sentencing table, it still bears noting that the sentencing pendulum is decidedly swinging away from the lengthy, non-rehabilitative prison sentences of the past.

An entire cultural movement has risen around the topic of mass incarceration. Lay people and legal scholars and practitioners all agree that mass incarceration represents flawed policy. *See, e.g.*, PEN America, *Writing for Justice Program*

(artists speaking out against mass incarceration), details of the program available at https://pen.org/writing-justice/; U.S. Sentencing Commission, *Federal Alternative-to-Incarceration Court Programs* 1 (Sept. 2017) (noting widespread support for alternatives to incarceration), *available at* https://www.ussc.gov/sites /default/files/pdf/research-and-publications/research-publications/2017/20170928_ alternatives.pdf; U.S. Sentencing Commission, *Report to Congress: Career Offender Sentencing Enhancements* 3 (Aug. 2016) (with the Commission recommending that the career-offender enhancement no longer apply to defendants with only prior drug convictions), *available at* https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf.

As discussed leading up to Ms. Smith-Kilpatrick's sentencing hearing, the often-cited work of Judge James S. Gwin of the Northern District of Ohio sheds light on these issues and underscores Ms. Smith-Kilpatrick's position. This Court addressed Judge Gwin's sentencing studies in *United States v. Collins*, 828 F.3d 386, 387 (6th Cir. 2016), where it considered a five-year sentence for receiving and distributing child pornography and for possessing child pornography. The guidelines in that case produced an advisory range of 262 to 327 months. *Collins*, 828 F.3d at 388. In relation to sentencing, Judge Gwin had polled the trial jury to gain insight into community sentiment regarding sentencing. *Id.* Jurors in the case recommended

sentences between 0 and 60 months, with the mean sentence falling at 14.5 months and the median being 8 months. *Id.* With one exception, every juror recommended a sentence less than half the mandatory minimum. *Id.* This Court upheld Judge Gwin's significantly-below-guidelines sentence. *Id.* at 391.

Judge Gwin has studied whether the advisory sentencing guidelines reflect community notions of just punishment. *See* Judge James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 Harvard L. & Policy Rev. 173 (2010). Based on a study of twenty-two cases, he has observed that "the median juror recommended sentence was only 19% of the median Guidelines ranges and only 36% of the bottom of the Guidelines ranges." *Id.* at 175. His work "suggests that the Guidelines are untethered to appropriate punishments as determined by jurors actually hearing the case." *Id.*

Related to drug cases, Judge Gwin's law-review article analyzes a case in which the jury convicted a defendant of possession with the intent to distribute approximately sixteen grams of cocaine base, of using or carrying a firearm during a drug-trafficking offense, and of being a felon in possession of a firearm. *Id.* at 190. That defendant had a significant criminal history, one that put him in criminal-history category VI. *Id.* The defendant faced two statutory mandatory minimum sentences of five years each, to be served consecutively. *Id.* The guidelines recommended a sentencing range of 120 to 150 months of imprisonment on the drug

offenses (again, with consecutive five-year mandatory terms of imprisonment for use of a firearm during the drug-trafficking charge). *Id.* Total, the advisory guidelines recommended a period of imprisonment of 180 to 210 months. *Id.* The jury received a list of the defendant's prior convictions, and when asked what sentence they believed appropriate, "the jurors gave a median recommended sentence of 36 months, with a standard deviation of 12." *Id.* While each juror privately and anonymously completed his or her recommendation, without discussing that recommendation with other jurors, six jurors all recommended a sentence of 36 months. *Id.* This recommended sentence "stands in stark contrast to the median Guidelines recommendation of 195 months." *Id.* Given Judge Gwin's findings, it seems likely that the jurors in Ms. Smith-Kilpatrick's case would have recommended a similar deviation from the guidelines.

A 96-month sentence for a woman whose mistake was falling in love with a drug dealer represents an unreasonable sentence, one out of step with current thinking. It places excessive weight on the guidelines, results in unwarranted sentencing parity with the real culprit (Mr. Wilson), does not capture Ms. Smith-Kilpatrick's lack of criminal history, and fails to account for all the positive aspects of Ms. Smith-Kilpatrick's life and background.

CONCLUSION

For these reasons, Ms. Tracey Smith-Kilpatrick asks this Honorable Court to vacate her conviction and sentence and remand this case to the district court for further proceedings.

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CERTIFICATE OF SERVICE

Undersigned counsel certifies that he filed this appellate brief through the Court's CM/ECF electronic system on October 31, 2018. See Fed. R. App. P. 25(d)(1)(B); 6th Cir. R. 25(f)(2). Notice of this filing will be sent through the CM/ECF system to all parties indicated on the electronic filing receipt, namely Assistant United States Attorney Paul D. Lochner. Parties may access this filing through the CM/ECF system.

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rules of Appellate Procedure 28(a)(10), 32(a)(7)(B), and 32(g)(1), and Sixth Circuit Rule 32(a), Ms. Smith-Kilpatrick certifies that this brief contains fewer than 13,000 words. Undersigned counsel certifies that this brief contains 9,540 words, as counted using Microsoft Word's word-count function. *See* Fed. R. App. P. 32(g)(1).

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APPELLANT'S DESIGNATION OF RECORD

In accordance with this Circuit's Rules 28(b)(1)(A)(i) and 30(g)(1), Ms. Smith-Kilpatrick includes this designation of relevant documents from the trial court.

Description of Entry	Date	Record No.	Page ID
Docket Sheet			
Superseding Indictment	09/20/17	86	201-205
Government's Motion to Admit Business Records	12/08/17	140	365-366
Government's Memorandum in Support of Motion to Admit Business Records	12/08/17	141	367-381
Government's Motion to Admit Summaries	12/10/17	146	403-425
Government's Trial Brief	12/10/17	150	483-493
Minutes of Jury Trial	01/12/18	174	678
Verdict	01/16/18	175	679-682
Defendant's Motion for New Trial	01/26/18	184	692-703
Trial Transcript – Volume I	03/13/18	191	726-965
Trial Transcript – Volume II	03/13/18	192	966-1238

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Trial Transcript – Volume III	03/13/18	193	1239-1560
Trial Transcript – Volume IV	03/13/18	194	1561-1774
Trial Transcript – Volume V	03/13/18	195	1775-1880
Final Presentence Report	05/29/18	220	2211-2250
Defendant's Sentencing Memorandum	05/31/18	224	2269-2296
Judgment	06/07/18	244	2396-2402
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Sentencing Transcript	08/06/18	262	2438-2475