EXHIBIT A

Case No. 19-10746-C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ASHA R. MAURYA,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

Defendant-Appellant Asha R. Maurya's Brief

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Case No. 19-10746-C
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AMENDED CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1, Maurya certifies that the following persons or entities may have an interest in the outcome of this case:

- Alston & Bird LLP

  [law firm for Fidelity National Financial, Inc.]

- Anand, Justin S., Magistrate Judge, U.S. District Court for the Northern District of Georgia

  [Magistrate Judge who conducted various proceedings in this Action]

- Barron, Lynsey M.

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- Bondurant, Mixson & Elmore, LLP

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- Chandler, Douglas V.

  [subpoenaed witness and movant to quash subpoena]

Case No. 19-10746-C
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- LandCastle Title, LLC

  [entity owned by MHSLAW, Inc. and sibling-entity to Hardwick Schneider, LLC]

- Loeb, Robin N.

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Case No. 19-10746-C
United States v. Maurya

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  [Appellant]

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  [counsel for Arthur Morris]

- MHSLAW, Inc.

  [entity that owned the law firm Morris Hardwick Schneider, LLC]

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- Moody, Alexander R.

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- Moore, Bret

  [counsel for Douglas V. Chandler]

- Morris, Arthur

  [victim and objector]

- Morris Hardwick Schneider, LLC

  [victim]

Case No. 19-10746-C
United States v. Maurya

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  [District Court Judge assigned to this action]

- Salinas, Catherine M., Magistrate Judge, U.S. District Court for the Northern District of Georgia

  [Magistrate Judge assigned to this this Action]

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  [appellee]

- Wittstadt, Gerard

  [victim]

- Wittstadt, Mark

  [victim]

STATEMENT ON ORAL ARGUMENT

This is a direct appeal of an 84-month prison sentence. Appellant Asha R. Maurya pled guilty to one count of conspiracy to commit wire fraud and fully cooperated with the government as promised under her plea agreement.

At sentencing, over Maurya's objection, the district court applied a two-level substantial financial hardship enhancement pursuant to § 2B1.1(b)(2)(A)(iii) of the United States Sentencing Guidelines. And based in part on that enhancement, the court determined that Maurya's range of imprisonment under the Guidelines was 33 to 41 months. Nonetheless, the court sentenced Maurya to over double the upper end of that range—84 months in prison.

For at least three reasons, Maurya requests oral argument in this appeal from the district court's 84-month prison sentence and believes oral argument would significantly assist the Court in its decision-making process.

First, this appeal concerns the interpretation and scope of a relatively new sentencing enhancement—the substantial financial hardship enhancement. This enhancement was added to the Guidelines in 2015, and it appears that this Court has addressed its scope in only one published opinion. *See United States v. Castaneda-Pozo*, 877 F.3d 1249 (11th Cir. 2017). Further, this appeal presents issues that are not squarely controlled or resolved by *Castaneda-Pozo*. Consequently, oral argument may assist the Court by providing it with a better

opportunity to understand the parties' arguments before deciding any previously unresolved issues concerning the interpretation and scope of the substantial financial hardship enhancement.

Second, this appeal involves a lengthy prison sentence—84 months, more than double the upper end of Guidelines range calculated by the district court—for a defendant who (1) pled guilty; (2) fully cooperated with the government; and (3) had a much smaller role in the underlying scheme than her Co-Defendant, Nathan Hardwick. Moreover, at this point, Maurya is indigent, and the Court has granted her motion to proceed *in forma pauperis* and appointed undersigned counsel pursuant to the Criminal Justice Act. In light of these factors, the substantial length of Maurya's prison sentence warrants careful and thorough review of the district court's sentencing decisions.

Third, in addition to this sentencing appeal, Maurya has also appealed the district court's $40 million restitution order. That related appeal is pending in this Court as Case Number 19-12108-C, and on November 4, 2019, this Court consolidated that restitution appeal with this sentencing appeal. Moreover, Co-Defendant Hardwick has also appealed his conviction, his prison sentence, and the district court's restitution order. Oral argument would be an efficient way for counsel to help the Court sort through the various arguments being made in these related appeals and to assist the Court in efficiently finding the relevant record

materials and legal principles. *Cf. Okruhlik v. Univ. of Ark.*, 395 F.3d 872, 875 (8th Cir. 2005) ("We expect, particularly in complicated, fact-intensive cases, that counsel will aid our understanding of the record[.]").

For those reasons, Maurya requests oral argument.

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STATEMENT OF JURISDICTION

The district court had jurisdiction over this action because Maurya was charged with violating United States criminal law. *See* 18 U.S.C. § 3231. This Court has jurisdiction over this appeal because the district court entered judgment on February 20, 2019, DE331, and Maurya timely filed a notice of appeal on February 26, 2019, DE333. *See* 28 U.S.C. § 1291; 18 U.S.C. § 3742.

On November 4, 2019, this Court consolidated this appeal with Maurya's appeal of the district court's restitution order, which is pending in this Court as Case Number 19-12108-C.

STATEMENT OF THE ISSUES

This appeal presents the following three issues:

(1) Did the district court improperly apply a substantial financial hardship enhancement to Maurya's sentence under U.S.S.G. § 2B1.1(b)(2)(A)(iii)?

(2) Did the district court violate Maurya's constitutional rights under the Ex Post Facto Clause of the United States Constitution?

(3) Is the district court's 84-month prison sentence, more than double the upper end of the sentencing range, substantively unreasonable?

The answer to all of these questions is yes. Based on the evidence presented by the government, the district court's imposition of the substantial financial hardship enhancement was legally erroneous. Alternatively, if the substantial financial hardship enhancement was warranted, then the district court violated Maurya's constitutional rights under the Ex Post Facto Clause. Because the enhancement was added to the United States Sentencing Guidelines in 2015, the version of the Guidelines that the district court used to sentence Maurya (the 2018 version) provided a higher sentencing range than the version of the Guidelines in place at the time of Maurya's offense (the 2013 version). Finally, the 84-month prison sentence rendered by the district court is substantively unreasonable.

STATEMENT OF THE CASE

1. Statement of District Court Proceedings

On February 9, 2016, a grand jury returned a 34-count indictment against Nathan E. Hardwick and Asha R. Maurya. DE1. Hardwick and Maurya were charged with (1) conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349 (Count 1); (2) wire fraud in violation of 18 U.S.C. §§ 1343 & 2 (Counts 2–19); and (3) mail fraud in violation of 18 U.S.C. § 1341 (Counts 24–34). *Id.*

On May 11, 2017, Maurya agreed to plead guilty to Count 1. DE112. Meanwhile, the action against Hardwick continued. On December 5, 2017, the grand jury returned a 25-count superseding indictment against Hardwick. DE126. Hardwick proceeded to trial, and the jury found him guilty on 23 of the 25 counts. *See* Presentence Investigation Report ("PSR") ¶ 77.[1]

The district court conducted Maurya's sentencing hearing on February 12, 2019. *See* DE340. Ultimately, the court sentenced Maurya to 84 months in prison. DE340 at 62; DE331. Maurya is currently incarcerated.

2. Statement of Facts

2.1. Background

MHSLAW, Inc. owned and operated a law firm, Morris Hardwick Schneider, LLC, and a title insurance agency, LandCastle Title, LLC (collectively,

[1] Pursuant to Eleventh Circuit Rule 30-1(a)(14), Maurya's PSR will be included "under seal in a separate envelope" with the Appendix.

"MHS"). PSR ¶ 2(a). MHS specialized in residential real estate closings and default and foreclosure matters. *Id.*

Until his resignation in August 2014, Hardwick was the majority shareholder of MHSLAW, the managing partner of Morris Hardwick Schneider, and the CEO of LandCastle Title. *Id.* ¶ 2(b). From 2013 onwards, MHSLAW had two other shareholders: Mark Wittstadt, and Gerard Wittstadt. *Id.* ¶ 27 n.1. Hardwick ran the closing division of MHS's business, *id.* ¶ 30, and the Wittstadts ran MHS's default and foreclosure division. DE113 at 22.

To fund its operations, MHS maintained bank accounts at multiple financial institutions. PSR ¶ 2(d). And as part of its real estate closing practice, MHS also maintained escrow accounts. *Id.* The purpose of the escrow accounts was to hold the closing funds for each closing in trust until the funds were required to be disbursed per the directions of the parties to each closing. *Id.* ¶¶ 2(d)–(e). At any given time, and especially during high-volume periods, a single MHS escrow account could contain millions of dollars. *Id.* ¶ 2(e).

Maurya worked for MHS from 2009 until her termination in November 2014. *Id.* ¶ 2(c). Maurya was initially hired to be MHS's escrow account controller, but eventually became Chief Financial Officer of MHS's closing division in January 2014. *Id.* ¶¶ 2(c) & 31. Maurya was supervised by, and reported directly to, Hardwick. *Id.*

Beginning in 2011 or earlier, Hardwick directed and caused Maurya to divert funds from MHS's operating and escrow accounts to or for the benefit of Hardwick. DE113 at 23. These payments exceeded the share of MHS profits to which Hardwick was entitled, *id.*, and included payments to casinos, private jet charter companies, and Hardwick's ex-wife. PSR ¶ 4(a)–(b). In total, between late 2010 and August 2014, Hardwick received approximately $26 million in wire transfers from MHS's operating and escrow accounts. *Id.* ¶ 43.

Hardwick used a variety of lies, omissions, and half-truths to conceal this scheme from the other shareholders. *Id.* ¶ 50. As part of this concealment effort, Hardwick directed and caused Maurya to distribute false information, such as shareholder distribution reports that understated the money Hardwick was receiving from the firm's accounts. DE113 at 23.

The scheme was discovered in 2014. Specifically, one of MHS's title insurance underwriters brought an altered bank statement for one of MHS's escrow accounts to the attention of Hardwick and Alyce Ritchie, MHS's executive administrative partner. PSR ¶¶ 51–53. Hardwick told Ritchie that Maurya had admitted to falsifying the bank statement, *id.* ¶ 54, and Ritchie—along with Randy Schneider (a retired MHS shareholder) and Bob Driskell (MHS's former CFO)—investigated further. *Id.* ¶ 57.

Over the next week, Ritchie, Driskell, and Schneider uncovered documents showing large wire transfers from the firm's escrow accounts to Hardwick or for his benefit. *Id.* Schneider told Hardwick to notify the Wittstadts, and when Hardwick did so, he blamed Maurya and asserted that she had "over disbursed" him. *Id.* ¶¶ 57, 59–60. Hardwick also attempted to dissuade Mark Wittstadt from speaking to Maurya directly, but on August 13, 2014, Wittstadt met with Maurya in person. *Id.* ¶ 61. At that meeting, Maurya stated that Hardwick had directed her to send him money and to alter shareholder distribution reports to make them look "more in line." *Id.*

MHS hired a forensic accounting investigator to determine how much money was missing from the firm's escrow accounts, and investigator found that those accounts were missing approximately $37 million. *Id.* ¶ 68. MHS immediately informed Fidelity National Financial Corporation—MHS's leading title insurance underwriter—about this shortfall, and Fidelity brought in a team of forensic auditors the next day. *Id.* ¶¶ 68–69. Fidelity also interviewed Maurya, and once again, Maurya stated that Hardwick had instructed her to make transfers to him or for his benefit and to alter shareholder distribution reports. *Id.* ¶ 69.

Fidelity decided to replenish the entire shortage in MHS's escrow accounts in exchange for LandCastle and an assignment of MHS's claims relating to the fraud. *Id.* ¶¶ 71, 83. In total, Fidelity infused over $29,000,000 into MHS's escrow

accounts to cover the shortage. *See id.* ¶ 78. MHS and Fidelity announced this arrangement on August 25, 2014, and then filed a joint lawsuit against Hardwick seeking $30 million in damages. *Id.* ¶ 72. However, even with the cash infusion, MHS was unable to survive. *Id.* ¶ 73. In early 2015, the law firm filed for bankruptcy in the Eastern District of Virginia. *Id.*

2.2. The PSR's Sentencing Recommendations

Among other things, the PSR recommended (1) a twenty-level increase to Maurya's offense level under U.S.S.G. § 2B1.1(b)(1) for causing a loss amount between $9,500,000 and $25,000,000; and (2) a two-level increase under § 2B1.1(b)(2)(A)(iii) because Maurya's offense purportedly resulted in "substantial financial hardship" to one or more victims. *Id.* ¶¶ 90–91.

As to § 2B1.1(b)(1), the PSR calculated a loss amount of $22,207,431 based on what Fidelity expended to cover MHS's escrow shortages ($29,530,391) and what Fidelity was later able to recoup ($7,322,960). *Id.* ¶¶ 78, 90.

And as to the substantial financial hardship enhancement, the PSR's recommendation was based on a statement that Mark Wittstadt emailed to the government's counsel "to explain the extent of financial hardship he has suffered." DE318 at 9. In that email, Wittstadt stated that he had lost a substantial amount of income as a result of MHS's collapse, and in support, he listed the income that he reported on his federal tax returns from 2013 to 2017: $2,295,122.00 in 2013;

$876,683.00 in 2014; $369,239.00 in 2015; $106,781.00 in 2016; and $172,758.00 in 2017. DE318-3 at 1–2. Wittstadt further stated that from 2010 to 2012, he "made in excess of 1.4 million each year." *Id.* at 3. The PSR recited these annual income figures and summarized Wittstadt's financial hardship statement, and then concluded that "this enhancement should apply" because Maurya's "activity caused the collapse of a law firm and significantly affected Mr. Wittstadt's income." PSR ¶ 91.

2.3. Maurya Objects to the PSR's Sentencing Recommendations.

In her sentencing memorandum, Maurya objected to both of these recommendations. With respect to loss amount, Maurya contended that neither the government nor Fidelity had provided specific and reliable evidence that the entire escrow shortage that Fidelity decided to fund resulted from Defendants' scheme. *See* DE319 at 4–5. Instead, Maurya argued for a loss amount of $900,000—which was the amount of money that the indictment alleged she took from MHS in the mail fraud counts—and a corresponding fourteen-level enhancement. *Id.* at 8; *see* PSR ¶ 21. And for its part, the government asserted in its sentencing memorandum that Maurya helped Hardwick take at least $9.5 million from MHS that he was not entitled to. DE318 at 4–5.

With respect to the substantial financial hardship enhancement, Maurya argued that although sizable monetary losses were incurred, no individual victims

suffered "substantial hardship" as a result of those losses—primarily because the individual victims at issue (Mark and Gerard Wittstadt) were "relatively wealthy." DE319 at 9–10. The government took the opposing position that "the financial status of the victim should not matter" for purposes of the substantial financial hardship enhancement. DE318 at 8. And in support of the enhancement, the government drew attention to the fact that MHS's dissolution caused the Wittstadts to lose their jobs, and that Mark Wittstadt "went from an income of almost $2.3 million in 2013 to $172,758 in 2017." *Id.* at 9 (citing Wittstadt's financial hardship statement).

2.4. Maurya Requests a Downward Variance.

Maurya also requested in her sentencing memorandum a downward variance from her Guidelines range. DE319 at 14–20. In support, Maurya pointed to a number of factors, including her prompt admission of guilt, her cooperation with Fidelity and the government, her subservient role in the scheme, and the significant injuries that she sustained while on the job in June 2017, including a torn rotator cuff that still required surgery. *Id.* at 14–16, 20.[2] Maurya acknowledged that she had a history of stealing from her employers, *id.* at 16, and that she was arrested in 2015 for using one of her former employer's company credit cards. *See id.* (citing

[2] *See also* PSR ¶ 117 (stating that Maurya was injured by a pallet jack and suffered a torn rotator cuff, a torn muscle in her right hip, and 4 cracked vertebrae); DE319-9 & DE319-10 (Maurya's medical records).

PSR ¶ 101).[3] However, Maurya explained that that arrest was a wakeup call that prompted her to confront her underlying issues and renounce her unlawful ways. *Id.*

Moreover Maurya's family members, loved ones, co-workers, and therapist submitted a total of eight letters on her behalf. DE319-1–DE319-8. In their letters, both Carrie Maurya (Maurya's sister-in-law) and Jeffrey Engberg (Maurya's therapist since 2008) detailed the considerable physical and emotional abuse that Maurya received from her father and brother when she was growing up, and her resulting anxiety and depression. *See* DE319-1 & DE319-2. Engberg also explained how that abuse negated Maurya's ability to set boundaries in her relationships, and how it also caused her to seek "out narcissistic superiors not . . . for the sake of gaining wealth, but to find her impossible 'Golden Ticket,' acceptance and approval." DE319-2 at 2. In turn, these distortions made Maurya "particularly susceptible" to participating in Hardwick's scheme. DE319 at 18.

Beyond that, almost all of the letters discuss how Maurya held herself accountable for her actions. For example, Engberg wrote that Maurya "expresse[d] deep shame, remorse and embarrassment" about her role in the fraud and "acknowledge[d] personal accountability for her actions and serious lack of sound

[3] Maurya pled guilty to one count of theft by taking under Georgia's First Offender Act, O.C.G.A. § 42-8-60 *et seq*. PSR ¶ 101. On December 21, 2018, after repaying the restitution amount of $12,992, Maurya was discharged of that offense. *Id.*

judgement." DE319-2 at 1. Similarly, Davita Shin, a former colleague of Maurya, explained that Maurya "has never minimized her responsibility" for the damage she caused and "expressed a staggering remorse for her participation" in the fraud. DE319-4 at 2.

Finally, four of the letters show that, after her 2015 arrest, Maurya held a job with a company called Shiftgig without incident from April 2016 until sentencing. *See* DE319 at 19 (citing DE319-5–DE319-8). Moreover, two of those letters were from Maurya's supervisors at Shiftgig, and both of them described Maurya as an exemplary employee who earned praise—and significantly, trust—through her work ethic and transparency about her criminal history. *See* DE319-5 at 1–2 (stating that Maurya was "the epitome of organization, efficiency, and communication excellence" who had been "very up front with Shiftgig's Human Resources and me personally about her legal situation"); DE319-6 at 1 (identifying Maurya as the team member "with the most integrity," and describing how Maurya "suggested the office hours should be modified to mirror our Clients' hours" and took the initiative to work "the early-bird hours" in order to better "serve . . . clients which do not have traditional business hours").

Indeed, when Shiftgig decided to move Maurya from the branch office to the field out of a concern "about [her] legal case," one of Maurya's supervisors "fought th[at] decision" because she "believed that [Maurya] had accepted the

responsibility for her actions and was prepared for the road ahead of her to fix the damage of the victims of fraud." DE319-5 at 1.

2.5. Maurya's Sentencing Hearing

2.5.1. The District Court Imposes the Substantial Financial Hardship Enhancement.

At the sentencing hearing, after sustaining Maurya's objection to the PSR's loss amount calculation and adopting her proposal to impose a fourteen-level loss amount enhancement, DE340 at 5–13, the district court heard from both sides about the substantial financial hardship enhancement. As in her sentencing memorandum, Maurya's counsel emphasized that the applicability of the enhancement depends, at least in part, on the relative wealth of the victims at issue. DE340 at 13–16. Counsel for the government likewise reiterated arguments from the government's sentencing memorandum, and highlighted the drop in Mark Wittstadt's income. *Id.* at 17–18.

When Maurya's counsel asserted that the government had failed to meet its "burden by a preponderance of the evidence," DE340 at 20, the district court referred to the annual income figures listed in Mark Wittstadt's financial hardship statement and recited by the PSR, and asked:

> So the government has not done that **simply by showing the loss of income** to particular people who were harmed, who did suffer a hardship, like the Wittstadts, for instance . . . [?]
> . . . .
> What about going from the years that were shared with us, though,

> from 2013 and – what was the other year – 2017, the years that were reflected in the PSR?

Id. at 20–21 (bolding added). Maurya's counsel responded that the evidence did not show that the loss of income caused any victim to suffer a substantial hardship within the meaning of the Guidelines, but the court "overrule[d]" Maurya's objection and concluded "that there was a financial hardship that has been established by preponderance of the evidence with respect to Mark Wittstadt, in particular." *Id*. at 21.

2.5.2. The District Court Calculates a Guidelines Range of 33 to 41 Months of Imprisonment.

After the district court imposed the substantial financial hardship enhancement, the government moved, pursuant to the plea agreement, for (1) a one-level downward departure based on Maurya's substantial assistance to the government under U.S.S.G. §5K1.1; and (2) another one-level downward departure for Maurya's expeditious guilty plea. *Id.* at 22, 31. The court granted both of those departures. *See id.* Based on these departures and a three-level reduction for acceptance of responsibility, the court arrived at a total offense level of 20. *Id.* at 31. And this total offense level, in conjunction with a criminal history category of I, yielded a Guidelines range of 33 to 41 months in prison. *Id.*

2.5.3. The District Court Sentences Maurya to 84 Months in Prison.

Finally, the district court considered the parties' positions regarding a "reasonable sentence pursuant to 18 U.S.C. section 3553(a)." *Id.* at 32. The government called three victims—Gerard Wittstadt, Mark Wittstadt, and Art Morris (a retired MHS shareholder)—to testify, *see id.* at 33–43, and then recommended, pursuant to the plea agreement, that the court sentence Maurya to **the low end** of her Guidelines range—33 months. *Id.* at 44. Maurya's counsel requested **the same sentence**. *Id.* at 53.

Thereafter, Maurya addressed the court. She began by taking "full responsibility" for her actions. *Id.* at 54. She called her involvement in the fraud "a shame I will carry forever," and recognized that she "owe[d] so much more" than apologies because they "do[] little to fix those things I've done." *Id.* at 54–55. Maurya confessed that she had "betrayed everyone and everything [she] aspired to become" by "outright br[eaking] the law intentionally and . . . deceitfully." *Id.* at 55. And though she pledged to continue striving to be "a good and productive member of society," she acknowledged that she needed to atone for her actions, and apologized again to the victims of her crime. *Id.* at 54, 57.

The district court, however, was dismissive of Maurya's apology. Immediately after Maurya concluded her statement, the court remarked: "Yeah, I will tell you . . . sounds like that statement dealt a lot with what happened with

respect to MHS." *Id.* at 57–58. The court then honed in on Maurya's past transgressions towards other employers, and also openly expressed bewilderment at the fact that Maurya "just kept getting hired." *Id.* at 59. And though the court "t[ook] note of" the abuse that Maurya "ha[d] been so candid about," it did so only after twice expressing doubt regarding "how that relates" to Maurya's criminal conduct. *Id.*

The district court then told Maurya that, in light of her previous transgressions, her Guidelines range was inadequate. Specifically, the court stated:

> But I will tell you simply, I have ruled on the Guidelines as I see fit. I have just done the best that I can as a judge. But I don't find that where they end up warrants the most appropriate punishment for you. I just really don't.

Id.

Sensing that the district court was skeptical of her apology, Maurya tried to clarify that she was not "blaming anyone else" for her actions, and that "it was [her] decision to act upon every single one of these decisions." *Id.* at 61. The court responded succinctly: "That wasn't clear. So thank you for that." *Id.* at 62.

Thereafter, the district court sentenced Maurya to 84 months in prison. *Id.* The court acknowledged that this was "a variance upward," but stated that "under these circumstances," and based on Maurya's "repeated conduct," an 84-month sentence was "justified" and "should provide sufficient punishment and adequate deterrence, especially specific deterrence." *Id.* at 65.

3. Statement of the Standard of Review.

"[W]hether a particular guideline enhancement applies to a given set of facts is a question of law [that this Court] review[s] *de novo*." *United States v. Alberts*, 859 F.3d 979, 982 (11th Cir. 2017); *see also United States v. Anderson*, 326 F.3d 1319, 1326 (11th Cir. 2003) ("This Court reviews the district court's findings of fact for clear error and its application of the sentencing guidelines to those facts *de novo*."). This Court "review[s] *de novo* a defendant's claim that his sentence was imposed in violation of the Ex Post Facto Clause," but if the defendant "did not raise this claim below," this Court "review[s] it . . . under the plain error standard." *United States v. Abraham*, 386 F.3d 1033, 1037 (11th Cir. 2004). This Court "review[s] the substantive reasonableness of a sentence for an abuse of discretion." *United States v. Osorio-Moreno*, 814 F.3d 1282, 1287 (11th Cir. 2016).

SUMMARY OF THE ARGUMENT

Over Maurya's objection, the district court applied a two-level substantial financial hardship enhancement to Maurya's sentence pursuant to U.S.S.G. § 2B1.1(b)(2)(A)(iii). Based in part on that enhancement, the court determined that Maurya's adjusted Guidelines range was 33 to 41 months, but then sentenced Maurya to 84 months in prison.

In arriving at this 84-month prison sentence, the district court committed at least three reversible errors.

First, the district court erred as a matter of law by imposing the substantial financial hardship enhancement. That enhancement applies only if a defendant's fraud offense "resulted in substantial financial hardship to one or more victims." U.S.S.G. § 2B1.1(b)(2)(A)(iii). Thus, the size or dollar amount of loss sustained by a victim is not the relevant inquiry.

As this Court has recognized, the same amount of loss "'to one victim may result in a substantial financial hardship, while for another [wealthier victim] it may be only a minor hiccup.'" *United States v. Castaneda-Pozo*, 877 F.3d 1249, 1252 (11th Cir. 2017) (quoting *United States v. Minhas*, 850 F.3d 873, 877 (7th Cir. 2017)). Accordingly, the Guidelines provide many factors for determining whether a victim suffered "substantial financial hardship," and those factors focus on the **effects**—and not the dollar amount—of financial loss. They list actions that a victim might be forced to take, or consequences that a victim might be forced to weather, as a result of a crime that causes financial loss. *See* U.S.S.G. § 2B1.1, cmt. 4(F) (instructing sentencing courts to "consider," for example, "whether the offense resulted in the victim . . . making substantial changes to his or her employment" or "living arrangements").

Here, the district court applied the substantial financial hardship enhancement based on its conclusion that "there was a financial hardship . . . with respect to **Mark Wittstadt, in particular**." DE340 at 21 (bolding added).

But the government—which had the burden of proof—offered **no** evidence that Wittstadt was forced to take any of the actions or suffer any of the consequences listed in the substantial financial hardship factors, or anything of similar severity. Instead, the government argued that the drop in Wittstadt's income—at least $1.4 million per year from 2010 through 2013 to $172,758 in 2017—could support the enhancement, and the district court agreed. That decision was legally erroneous. The government did not introduce **any** evidence about the **effects** of the loss on Wittstadt's day-to-day life, and therefore failed to demonstrate that that "loss has resulted in a substantial hardship" to Wittstadt. *Minhas*, 850 F.3d at 877. The mere fact of a reduction of income, even a substantial one, does not legally demonstrate a substantial financial hardship.

Further, none of the other victims identified below for purposes of the substantial financial hardship enhancement could have supported it.

The government offered **no** hardship (or even income) evidence relating to Gerard Wittstadt, and its evidence as to MHS and MHS's former employees was similarly deficient. Moreover, neither MHS nor its former employees could have served as the basis for the enhancement; the substantial financial hardship factors indicate that the enhancement cannot be premised solely on corporate victims like MHS, and MHS's former employees were not "victims" for purposes of the

enhancement because none of them "sustained any part of the actual loss determined under subsection (b)(1)" of U.S.S.G. § 2B1.1. U.S.S.G. § 2B1.1 cmt. 1.

Consequently, no substantial financial hardship enhancement was warranted, and this Court should therefore vacate Maurya's sentence and remand for resentencing under the correct total offense level of 18. The government cannot re-litigate substantial financial hardship on remand because "a party who bears the burden on a contested sentencing issue will generally not get to try again on remand if its evidence is found to be insufficient on appeal." *United States v. Washington*, 714 F.3d 1358, 1362 (11th Cir. 2013).

Second, if this Court were to find that a substantial financial hardship enhancement was warranted, then the district court's 84-month prison sentence violated Maurya's rights under the Ex Post Facto Clause of the United States Constitution. Because the enhancement was added to the Guidelines in 2015, the version of the Guidelines that the court used to sentence Maurya (the 2018 version) "provide[d] a higher sentencing range than the version in place at the time of [Maurya's] offense" (the 2013 version). *United States v. Elbeblawy*, 899 F.3d 925, 939 (11th Cir. 2018).

As a result, the district court's use of the 2018 version of the Guidelines was "proscribe[d]" by "the Ex Post Facto Clause" and established Supreme Court precedent. *Id.* In particular, the Supreme Court held in *Peugh v. United States* that

"there is an *ex post facto* violation when a defendant is sentenced under [advisory] Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense," 569 U.S. 530, 533 (2013), and thus the district court's use of the 2018 Guidelines was directly contrary to *Peugh.*

Moreover, this *ex post facto* violation affected Maurya's substantial rights because there is a reasonable probability that the district court would have imposed a lower sentence absent the error. "In **most cases** a defendant who has shown that the district court mistakenly deemed applicable an incorrect, higher Guidelines range has demonstrated a reasonable probability of a different outcome." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1346 (2016) (bolding added).

This case qualifies as one of those cases, especially in light of the fact that the district court used the "incorrect, higher Guidelines range" as the **starting point** of its sentencing analysis. *See id*. at 1345 ("'Even if the sentencing judge sees a reason to vary from the Guidelines, if the judge uses the sentencing range as the **beginning point** to explain the decision to deviate from it, **then the Guidelines are in a real sense the basis for the sentence**.'" (quoting *Peugh*, 569 U.S. at 542) (internal quotation marks omitted) (bolding added)).

Finally, the *ex post facto* violation here "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v.*

Cruickshank, 837 F.3d 1182, 1191 (11th Cir. 2016). In *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018), the Supreme Court held that "a miscalculation of the United States Sentencing Guidelines range" that "has been determined to be plain and to affect a defendant's substantial rights . . . will in the ordinary case . . . seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 1903.

Thus, although Maurya did not raise this issue below, the district court plainly erred by using the 2018 version of the Guidelines to sentence Maurya. Consequently, this Court should "exercise its discretion under Rule 52(b) to vacate [Maurya's] sentence" and remand with instructions to sentence her under the 2013 Guidelines. *Id.* at 1903.

Third, even leaving aside the sentencing errors described above, the district court's ultimate sentence was substantively unreasonable. Despite having calculated an adjusted Guidelines range of 33 to 41 months for Maurya, the court sentenced her to 84 months in prison—**more than double the upper end of that range.** To arrive at this upward variance, the court focused exclusively on Maurya's past transgressions towards previous employers. In doing so, the court failed to meaningfully consider **any** other relevant factors, including Maurya's acceptance of responsibility and cooperation with the government, the considerable physical and emotional abuse she suffered from her father and brother and her

resulting mental health problems, her significant physical injuries at the time of sentencing, her subservient role in the scheme, and her gainful employment with Shiftgig from 2016 until sentencing.

The district court's fixation on Maurya's past misconduct to the exclusion of all other relevant factors rendered its 84-month prison sentence substantively unreasonable. *United States v. McQueen*, 727 F.3d 1144, 1157 (11th Cir. 2013) ("[A] sentence may be unreasonable if it is grounded solely on one factor, relies on improper factors, or ignores relevant factors."). That severe upward variance was far greater than necessary to provide sufficient punishment and deterrence, especially in light of the fact that Maurya had already demonstrated a genuine commitment to renouncing her unlawful ways. Consequently, this Court should vacate Maurya's sentence and remand with instructions to impose a substantively reasonable sentence.

ARGUMENT AND CITATION OF AUTHORITY

1. The District Court Improperly Imposed a Substantial Financial Hardship Enhancement.

"The Government bears the burden of establishing by a preponderance of the evidence the facts necessary to support a sentencing enhancement." *United States v. Askew*, 193 F.3d 1181, 1183 (11th Cir. 1999).

In this case, over Maurya's objection, and despite the dearth of evidence offered by the government, the district court imposed a two-level substantial

financial hardship enhancement after concluding that "there was a financial hardship that has been established by a preponderance of the evidence with respect to Mark Wittstadt, in particular." DE340 at 21.

The district court erred as a matter of law. *Alberts*, 859 F.3d at 982 ("[W]hether a particular guideline enhancement applies to a given set of facts is a question of law we review *de novo*."). Under the set of facts provided by the government, the court improperly concluded that Mark Wittstadt suffered "substantial financial hardship" within the meaning of U.S.S.G. § 2B1.1(b)(2)(A)(iii). Moreover, none of the other individuals or entities identified below for purposes of this enhancement could have supported it.

1.1. The Government's Evidence Does Not Demonstrate that Mark Wittstadt Suffered Substantial Financial Hardship.

U.S.S.G. § 2B1.1(b)(2)(A)(iii) authorizes a two-level enhancement to a defendant's offense level if the defendant's offense "resulted in substantial financial hardship to one or more victims." This Court has followed other circuits in recognizing that "the inquiry" as to whether the enhancement applies "is specific to each victim," *Castaneda-Pozo*, 877 F.3d at 1252, and involves "a measure of relativity." *Minhas*, 850 F.3d at 877.

To elaborate, the relevant inquiry is **not** whether the dollar amount of loss suffered by a particular victim was "substantial." Indeed, the loss table in U.S.S.G.

§ 2B1.1(b)(1) already accounts for the "substantiality" of the dollar amount of loss caused by an offense.

Instead, the guiding inquiry for the substantial financial hardship enhancement is whether the "loss has resulted in a substantial hardship" to the victim, which generally "turn[s]" not only on the dollar amount of loss, but also "on [the] victim's financial circumstances." *Minhas*, 850 F.3d at 877.[4] This is because the same amount of loss "'to one victim may result in a substantial financial hardship, while for another [wealthier victim] it may be only a minor hiccup.'" *Castaneda-Pozo*, 877 F.3d at 1252 (quoting *Minhas*, 850 F.3d at 877); *see also United States v. Poulson*, 871 F.3d 261, 268 & n.6 (3d Cir. 2017) ("echo[ing] the analysis" in *Minhas* and "agree[ing] with *Minhas* that the severity of a financial hardship generally depends on both the value of the loss and the victim's financial means (and is therefore 'relative' to the victim's wealth)").

Critically, the Guidelines provide instructions on how to determine whether a victim suffered "substantial financial hardship," and those instructions focus on the **effects** of financial losses—not their sizes or amounts. Specifically, Application Note 4(F) to U.S.S.G. § 2B1.1 states that

[4] Indeed, this Court recently remarked that it is "[c]ertainly . . . possible" for a victim to lose **nearly a million dollars**—"$893,397"—and still not suffer "substantial financial hardship" within the meaning of the Guidelines. *United States v. Newton*, 766 F. App'x 742, 758 (11th Cir. 2019) (unpublished).

> In determining whether the offense resulted in substantial financial hardship to a victim, the court shall consider, among other factors, whether the offense resulted in the victim
>
> (i) becoming insolvent;
> (ii) filing for bankruptcy under the Bankruptcy Code (title 11, United States Code);
> (iii) suffering substantial loss of a retirement, education, or other savings or investment fund;
> (iv) making substantial changes to his or her employment, such as postponing his or her retirement plans;
> (v) making substantial changes to his or her living arrangements, such as relocating to a less expensive home; and
> (vi) suffering substantial harm to his or her ability to obtain credit.

U.S.S.G. § 2B1.1, cmt. 4(F). Based on these factors, for the substantial financial hardship enhancement to apply, there must be some evidence that a victim was forced to take one of the actions, or to weather one of the consequences, listed in Application Note 4(F)—or something similar in magnitude.

During Maurya's sentencing proceedings, the government presented no such evidence as to Mark Wittstadt. Despite this Court's recognition that the substantial financial hardship inquiry "is specific to each victim," *Castaneda-Pozo*, 877 F.3d at 1252, the government expressly insisted in its sentencing memorandum that "**the financial status of the victim should not matter**." DE318 at 8 (bolding added).

And perhaps because of this misreading of the law, the **only** competent evidence the government pointed to was the fact that, after making at least $1.4

million per year from 2010 to 2013 (including $2,295,112 in 2013), Mark Wittstadt's income dropped to $172,758 in 2017.[5]

To be sure, these numbers establish that Mark Wittstadt incurred a considerable reduction in income. But as explained above, the relevant inquiry is **not** whether his loss was substantial, but instead whether that "loss has resulted in substantial hardship." *Minhas*, 850 F.3d at 877. And on that issue, the government fell well short of meeting its burden.

For example, there was never any assertion below—let alone any evidence—that Mark Wittstadt became insolvent, filed for bankruptcy, or suffered substantial harm to his ability to obtain credit. U.S.S.G. § 2B1.1 cmt. 4(F)(i)–(ii) & (vi). Similarly, Wittstadt made no mention of any savings or investment funds, or any changes in living arrangements, in either his financial impact statement or his testimony at Maurya's sentencing hearing. *Id.* § 2B1.1 cmt. 4(F)(iii) & (v); *see generally* DE318-3; DE340 at 36–40.

Further, although the government attempted to invoke factor (iv) of Application Note 4(F) based on Mark Wittstadt's loss of employment with MHS, *see* DE318 at 9, on its own, the fact that Wittstadt lost his job does not demonstrate that he suffered any substantial **hardship**. Job loss by itself is insufficient to show

[5] *See* DE318 at 9 ("He went from an income of almost $2.3 million in 2013 to $172,758 in 2017 . . . ."); DE340 at 18 ("Going from $2 million to 172,000, 172,000 is still a good income, but it's less than ten percent of what he made before the fraud.").

that a victim was forced to "mak[e] substantial changes to" their life, as factor (iv) requires. U.S.S.G. § 2B1.1 cmt. 4(F)(iv). Losing a job may or may not compel someone to "postpon[e] his or her retirement plans," *id.*, or make similarly drastic life changes—that "turn[s] on" the specific person's "financial circumstances." *Minhas*, 850 F.3d at 877.

For example, the loss of a job to a person who has **already** accumulated substantial wealth is unlikely to cause a substantial financial hardship. That person may very well not need to find a new job, and will not need to take actions of the magnitude contemplated by factor (iv) in order to make ends meet. By comparison, someone who is not wealthy is more likely to suffer a substantial financial hardship because of job loss; that person must go back onto the job market to find a new job, and may also have to work more hours or multiple jobs to get by. *See Poulson*, 871 F.3d at 268 n.6 (applicability of enhancement "generally depends on . . . the victim's financial means").

Instead of honing in on job loss by itself, the language of factor (iv) focuses on **actions** that a victim might be forced to take as a result of a loss—factor (iv) applies only when an offense "result[s] in the victim . . . **making** substantial [life] changes" "such as **postponing** his or her retirement plans." U.S.S.G. § 2B1.1 cmt. 4(F)(iv) (bolding added); *see also Poulson*, 871 F.3d at 268 n.6 (stating that the district court "appropriately . . . infer[red] the magnitude of financial hardship

based on the **actions** each victim **was forced to take** as a result" of the offense (bolding added)).

And in this case, there was never even an assertion that losing his job with MHS compelled Mark Wittstadt to postpone his retirement or take any other action of similar severity. Indeed, Wittstadt did not identify **any** action—substantial or otherwise—that he was forced to take as a result of the offense.[6] Unsurprisingly, then, neither the PSR nor the government made any mention of any such action.[7] Consequently, the government failed to make a sufficient showing under factor (iv).

At bottom, it appears that the district court based its decision to impose the substantial financial hardship enhancement on the drop in Mark Wittstadt's annual income from 2010 to 2017.[8] Indeed, that is in line with the PSR's recommendation.[9]

But while going from a seven-figure income to a six-figure income is undoubtedly a substantial reduction in income, those numbers alone do not

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[6] *See generally* DE318-3; DE340 at 36–40.

[7] *See generally* PSR; DE318.

[8] *See* DE340 at 20–21. Specifically, in response to Maurya's assertion that the government failed to meet its burden, the district court invoked the annual income figures listed in Mark Wittstadt's financial hardship statement and recited by the PSR, and asked: "So the government has not [met its burden] **simply by showing the loss of income** to particular people who were harmed, who did suffer a hardship, like the Wittstadts, for instance . . . [?]" *Id.* (bolding added).

[9] *See* PSR ¶ 91 ("Since the defendant's activity . . . **significantly affected Mr. Wittstadt's income**, this enhancement should apply." (bolding added)).

establish that that "loss has resulted in a substantial hardship" to Wittstadt. *Minhas*, 850 F.3d at 877. There was, for instance, no evidence that Mark Wittstadt lost his "life savings"[10] or "a large portion of [his] retirement funds."[11] There was no evidence that he had to "postpone [his] retirement plans[] and relocate,"[12] or that he was "forc[ed] . . . to work additional side jobs."[13] And there was no evidence that the offense put him "at substantial risk of loan foreclosure proceedings."[14]

Based on the evidence before it, the district court erroneously found that Mark Wittstadt suffered a "substantial financial hardship" within the meaning of U.S.S.G. § 2B1.1(b)(2)(A)(iii).

1.2. No Other Individual or Entity Could Have Supported the Substantial Financial Hardship Enhancement.

The **only** explicit finding that the district court made with respect to the substantial financial hardship enhancement was that "there was a financial hardship . . . to **Mark Wittstadt, in particular**." DE340 at 21 (bolding added). Thus, the court conspicuously abstained from making similarly explicit findings as to any of the other individuals or entities identified below for purposes of the

[10] *Minhas*, 850 F.3d at 878.
[11] *United States v. Stewart*, 728 F. App'x 651, 654 (9th Cir. 2018).
[12] *United States v. Brandriet*, 840 F.3d 558, 561 (8th Cir. 2016).
[13] *Poulson*, 871 F.3d at 272.
[14] *United States v. Howder*, 748 F. App'x 637, 643 (6th Cir. 2018) (internal quotation marks omitted).

enhancement. There is a reason the court never mentioned any other individuals or entities; none of them could have supported the enhancement.

First, the PSR and the government also identified Mark Wittstadt's brother, Gerard, as a victim who potentially suffered substantial financial hardship.[15] But the evidence as to Gerard Wittstadt is **even thinner** than that which was supplied to portray his brother's hardship. Unlike Mark, Gerard did **not** submit—and the government did not point to—**any** information, numeric or otherwise, about the effect the offense had on his income.

Further, even assuming Gerard Wittstadt's income mirrored that of his brother, there was still no evidence as to whether the losses he incurred "resulted in substantial financial hardship." U.S.S.G. § 2B1.1(b)(2)(A)(iii). In that regard, the proof was just as insufficient; there was no evidence to demonstrate **any** of the financial hardship factors in Application Note 4(F), or any other similarly severe life consequences. Thus, lack of income data aside, the substantial financial hardship enhancement could not have been premised on Gerard Wittstadt for all the reasons applicable to his brother.

Second, although the PSR's discussion of the enhancement made no reference to the former employees of MHS, the government mentioned those

[15] *See* DE318 at 9.

employees in a passing reference in its sentencing memorandum.[16] Because the government did not expressly put the former employees of MHS before the court as a basis for the enhancement, this Court should not consider them either.

But even if the Court were to do so, those employees could not have supported the enhancement.

As an initial matter, the enhancement could not have been premised on MHS's former employees because they were not "victims" within the meaning of U.S.S.G. § 2B1.1. Under the definitions section of § 2B1.1, "victim" means, as relevant here, "any person **who sustained any part of the actual loss determined under subsection (b)(1)**" of § 2B1.1. U.S.S.G. § 2B1.1 cmt. 1 (bolding added).

In this case, the PSR's proposed amount of actual loss under subsection (b)(1) was $22,207,431, but the PSR expressly specifies that this loss was "**suffered by Fidelity National Financial**." PSR ¶¶ 78, 90 (bolding added). And in arguing that the loss amount was at least $9.5 million, the government based its calculation on the amount of money Maurya helped Hardwick take **from MHS**. *See* DE318 at 4–5. For her part, Maurya objected to the PSR's loss amount calculation and argued for a loss amount of $900,000—which was the amount of money that the indictment alleged Maurya took **from MHS** for her own personal

[16] *See* DE318 at 9 ("The Wittstadts suffered significant financial harm, to say nothing of the firm's 800-plus employees who also lost their jobs as a result of Maurya's conduct.").

gain. *See* DE319 at 3–8. Ultimately, the district court sustained Maurya's objection and imposed a fourteen-level increase under subsection (b)(1) based on a loss amount of $900,000. DE340 at 5–13.

None of the former employees of MHS "sustained any part of" that $900,000 loss. U.S.S.G. § 2B1.1 cmt. 1. Instead, as detailed above, the only person who might have "sustained any part of" that loss was MHS. Consequently, MHS's former employees were not "victims" for purposes of § 2B1.1. And in turn, they could not have served as a basis for imposing the substantial financial hardship enhancement. *See United States v. Buckman*, 2019 WL 142385, at *6 (E.D. Pa. Jan. 8, 2019) (finding that a group of homeowners were not "victims" for purposes of the substantial financial hardship enhancement because "the actual loss [under subsection (b)(1)] was calculated with respect to the lenders," and not the homeowners).

Moreover, even further assuming MHS's former employees were "victims" under § 2B1.1, the government provided **no** details about **any** of them beyond the fact that they lost their jobs when MHS collapsed. And as explained above, job loss alone is insufficient to show substantial financial **hardship** within the meaning of § 2B1.1(b)(2). The government failed to present so much as a single statement or letter, from any former employee, discussing his or her financial hardship.

Plainly, then, the enhancement could not have been premised on any former employees of MHS.

Third, and finally, both the PSR and the government appeared to identify MHS as an independent basis for the enhancement.[17] However, the factors for determining whether a victim suffered "substantial financial hardship" demonstrate that the enhancement **must** be premised on **individuals**, as opposed to corporate entities like MHS.

To review, the factors in Application Note 4(F) instruct sentencing courts to consider "whether the offense resulted in the victim" (i) "becoming insolvent"; (ii) "filing for bankruptcy under the Bankruptcy Code"; (iii) "suffering substantial loss of a retirement, education, or other savings or investment fund"; (iv) "making substantial changes to **his or her** employment, such as postponing his or her retirement plans"; (v) "making substantial changes to **his or her** living arrangements, such as relocating to a less expensive home"; and (vi) "suffering substantial harm to **his or her** ability to obtain credit." U.S.S.G. § 2B1.1 cmt. 4(F)(i)–(vi) (bolding added).

By their plain terms, factors (iii) through (vi) can apply **only** to **natural persons**. Corporate entities do not have genders. *See Dedrick v. Youngblood*, 200 F.3d 744, 746 (11th Cir. 2000) (construing the definition of "contract employee" in

[17] *See* PSR ¶ 91; DE318 at 8.

42 U.S.C. § 233(g) to include only individuals because the statute uses the **personal pronoun** "who": "We interpret the personal pronoun 'who' as identifying **only individual physicians** who contract with eligible entities, **not organizations or foundations** who contract with eligible entities." (bolding added)); *see also Thomas v. Taco Bell Corp.*, 879 F. Supp. 2d 1079, 1082 n.1 (C.D. Cal. 2012) (concluding "that a director of an Illinois corporation must be a natural person" based on the fact that "the sections of the [Illinois corporate] code discussing directors uses only gendered pronouns . . . when referring to directors"); *Technograph Printed Circuits, Ltd. v. Packard Bell Elecs. Corp.*, 290 F. Supp. 308, 324 (C.D. Cal. 1968) ("Section 1 of Title 1 of the United States Code prescribes rules of construction of 'any' Act of Congress and states that 'words importing the masculine gender may be applied to females,' but nothing is said to the effect that such words shall include corporations or legal entities other than an individual.").

Further, only individual people "suffer[]" losses of retirement and education funds. *See Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 201–03 (1993) (holding that "person" in the *in forma pauperis* statute, 28 U.S.C. § 1915, "refers only to individuals" in part because the statute describes "the affidavit required by § 1915(a) as an 'allegation of poverty,'" and "[p]overty, in its primary sense, is a human condition . . . [a]rtificial entities may be insolvent, but they are not well spoken of as 'poor'").

Meanwhile, factors (i) and (ii) must be read in light of their neighboring factors as the most helpful barometers of their scope. *See United States v. Williams*, 553 U.S. 285, 294 (2008) (holding that the "meanings" of two facially broad verbs "are narrowed by the commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated").

Indeed, another court has already held that "based upon the[] factors" in Application Note 4(F), "[i]t is clear" that the substantial financial hardship enhancement "was intended for individual victims as opposed to institutional or corporate victims." *Buckman*, 2019 WL 142385 at *6 n.6.

This reading of the enhancement also comports with ordinary understandings of "financial hardship." When there is concern about a struggling corporation, that concern is **not** motivated by any potential hardship to the artificial legal entity that is technically the "corporation." Instead, it is motivated by the hardship that might eventually befall the **individuals** who may be dependent on the corporation—for example, its owners and its employees.

Stated differently, the intuitive and ordinary meaning of "financial hardship" is something that **individual people** suffer. *Cf. Rowland*, 506 U.S. at 201–03 (holding that only natural persons can proceed *in forma pauperis* under 28 U.S.C. § 1915 in part because "[p]overty, in its primary sense, is a **human condition**,"

and thus "[w]hatever the state of its treasury, **an association or corporation cannot be said to lack the comforts of life** . . . [a]rtificial entities may be insolvent, but they are not well spoken of as 'poor'" (internal quotation marks omitted and bolding added)). Therefore, interpreting the "substantial financial hardship" enhancement to focus on individual suffering is consistent with ordinary understandings of "financial hardship."

In any event, even taking MHS's demise into account, no substantial financial hardship enhancement is warranted based on this specific record. Although MHS collapsed, the government failed to present **any** evidence that **any** one of MHS's employees or owners suffered a "substantial financial hardship" as a result. Thus, the government made no showing of substantial hardship to the actual people who were dependent on MHS—which, as discussed above, is the type of "financial hardship" that is most salient even in the corporate context.

In other words, if the government demonstrated any "hardship," it did so only with respect to an artificial legal entity. The government never took the next, legally required step of demonstrating how the collapse of that artificial entity imposed a substantial financial hardship on any human person (other than its attempt to do so with respect to Mark Wittstadt, which failed for the reasons set forth above).

1.3. Because the District Court's Error Rendered Maurya's Sentence Procedurally Unreasonable, This Court Should Vacate Maurya's Sentence and Remand for Resentencing Under the Correct Offense Level of 18.

The district court's decision to impose the substantial financial hardship enhancement rendered Maurya's sentence procedurally unreasonable.[18] And because this error was materially harmful, this Court should vacate Maurya's sentence and remand for resentencing. *See United States v. Mathews*, 874 F.3d 698, 710 (11th Cir. 2017) (holding that the district court's sentencing error, which resulted in an incorrect Guidelines range of 33 to 41 months instead of a correct range of 24 to 30 months, was materially harmful, **even though** the court varied upward and imposed a 60-month sentence, because the court "did not state that he would have imposed the same 60-month sentence absent any error in the guidelines calculations").

In particular, this Court should "remand for resentencing under the correct [total] offense level" of 18 and corresponding Guidelines range of 27 to 33 months.[19] *United States v. Joyner*, 899 F.3d 1199, 1208 (11th Cir. 2018).

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[18] *See United States v. Docampo*, 573 F.3d 1091, 1100 (11th Cir. 2009) ("Procedural unreasonableness includes . . . improperly calculating[] the Guidelines range . . . .") (internal quotation marks omitted).

[19] The substantial financial hardship enhancement yielded a total offense level of 20. *See* DE340 at 31. Thus, without the two-level substantial financial hardship enhancement, Maurya's correct total offense level is 18.

The government should not be permitted to re-litigate substantial financial hardship on remand. "Nothing prevented the government—which was aware of [Maurya's] objection—from putting on evidence concerning the [enhancement] at the sentencing hearing, and a party who bears the burden on a contested sentencing issue will generally not get to try again on remand if its evidence is found to be insufficient on appeal." *Washington*, 714 F.3d at 1362. "[A] 'remand for further findings is inappropriate when the issue was before the district court and the parties had an opportunity to introduce relevant evidence,' . . . and here the government failed to present any evidence concerning" the enhancement. *Id.* (quoting *United States v. Canty*, 570 F.3d 1251, 1257 (11th Cir. 2009)).[20]

Moreover, neither party should be allowed to litigate issues that could have been, but were not, appealed. "The law of the case doctrine . . . applies to findings made under the Sentencing Guidelines." *United States v. Amedeo*, 487 F.3d 823, 830 (11th Cir. 2007). Thus, any such findings that have not been appealed are now law of the case, and cannot be disturbed on remand. *See United States v. Mims*, 330 F. App'x 897, 899 (11th Cir. 2009) ("Moreover, the district court's finding regarding the value of the stolen jewelry [for purposes of a sentencing

[20] *See also United States v. Alred*, 144 F.3d 1405, 1422 (11th Cir. 1998) ("We conclude that the evidence presented by the government . . . of Roy Alred's buyer/seller and fronting relationships is insufficient to support his four-level enhancement under [§] 3B1.1(a) for having a leadership role . . . . On remand, the district judge will resentence him without the [§] 3B1.1(a) enhancement.").

enhancement] became part of the law of the case after Mims failed to raise any issue regarding his sentence on direct appeal."); *United States v. Patterson*, 194 F. App'x 687, 690 (11th Cir. 2006) ("Consequently, the district court's drug quantity findings became the law of the case, and Patterson was precluded from relitigating those drug quantities on remand.").[21]

Further, the government has waived reliance on any enhancement that the government **both** (1) failed to advocate during Maurya's sentencing proceedings; **and** (2) failed to cross-appeal to this Court. *United States v. Sutton*, 582 F.3d 781, 786 (7th Cir. 2009) ("But the government neither advocated imposing that adjustment [under U.S.S.G. § 2B1.1(b)(10)] in the district court nor cross-appealed on that issue. Thus, it has waived the argument that § 2B1.1(b)(10) applies."); *United States v. Askanazi*, 14 F. App'x 538, 541 (6th Cir. 2001) ("The district court did not analyze whether the [U.S.S.G. § 3B1.3] enhancement was proper under the 'special skill' prong, and the United States did not argue in district court that it objected to the Presentence Investigation Report with regard to special skill. In examining the record, we determine that the government waived its right to a 'special skill' enhancement before the district court."); *see also Canty*, 570 F.3d at

[21] *See also Williamsburg Wax Museum v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987) ("Under law of the case doctrine, a legal decision made at one stage of litigation, **unchallenged in a subsequent appeal when the opportunity to do so existed**, becomes the law of the case for future stages of the same litigation, and the parties are **deemed to have waived** the right to challenge that decision at a later time." (bolding added)).

1256–57 ("We require litigants to make all their objections to a sentencing court's findings of fact, conclusions, of law, and the manner in which the sentence was imposed at the initial sentencing hearing . . . **The rule applies to the defense and the prosecution alike**." (bolding added)).

Consequently, this Court should vacate Maurya's sentence and remand for resentencing under the correct total offense level of 18.

2. Alternatively, the District Court Violated Maurya's Rights Under the Ex Post Facto Clause of the United States Constitution.

If this Court finds that the evidence in the record warranted a substantial financial hardship enhancement, then the district court's decision to impose the enhancement poses a different problem, this one constitutional in nature.

It is well-established that "[a]lthough a defendant is ordinarily sentenced under the Guidelines in effect at the time of sentencing . . . the Ex Post Facto Clause proscribes sentencing an offender under a version of the Guidelines that would provide a higher sentencing range than the version in place at the time of the offense." *Elbeblawy*, 899 F.3d at 939. Here, because the substantial financial hardship enhancement was added to the Guidelines in 2015, "the Guidelines in effect at the time of sentencing . . . provide[d] a higher sentencing range than the version [of the Guidelines] in place at the time of [Maurya's] offense." *Id.* Thus, the sentence rendered by the district court violated Maurya's rights under the Ex Post Facto Clause of the United States Constitution.

Because Maurya "did not raise an objection" to her sentence "based on" the Ex Post Facto Clause in the district court, this Court reviews Maurya's *ex post facto* challenge for plain error. *Cruickshank*, 837 F.3d at 1191.

"To show plain error, [Maurya] must establish (1) an error, (2) that is plain or obvious, [] (3) that affected [her] substantial rights," and (4) that "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* Maurya satisfies all four of these prongs.

First, there was error because the version of the Guidelines "in effect at the time of sentencing" (the 2018 version) "provide[d] a higher sentencing range than the version in place at the time of [Maurya's] offense" (the 2013 version[22]). *Elbeblawy*, 899 F.3d at 939. The only difference between these two versions that affects Maurya's sentencing range is the addition of the substantial financial hardship enhancement. Specifically, while § 2B1.1(b)(2)(A) of the 2013 Guidelines provides a two-level enhancement if the offense "(i) involved 10 or more victims; or (ii) was committed through mass-marketing," that same subsection of the 2018 Guidelines provides a two-level enhancement if the offense "(i) involved 10 or more victims; (ii) was committed through mass-marketing; **or**

[22] Maurya pled guilty to Count One in the original indictment. *See* DE112 ¶ 1. That Count alleged that Maurya conspired to commit wire fraud, in violation of 18 U.S.C. § 1349, "continuing through in or about August 2014." DE1 ¶ 1. Thus, the 2013 version of the Guidelines was in place during the last date of Maurya's offense of conviction. *See* U.S.S.G. § 1B1.11 cmt. 2 ("[T]he last date of the offense of conviction is the controlling date for ex post facto purposes.").

(iii) resulted in substantial financial hardship to one or more victims." U.S.S.G. § 2B1.1(b)(2)(A) (bolding added).

Thus, Maurya's total offense level would have been 18 under the 2013 Guidelines, but the substantial financial hardship enhancement boosted it to 20 under the 2018 Guidelines. *See* DE340 at 31. And as a result, the 2018 Guidelines provided a higher sentencing range for Maurya (33 to 41 months) than the 2013 Guidelines (27 to 33 months).

Second, this error was plain. "An error is plain when it contradicts precedent from the Supreme Court or our Court directly resolving the issue." *Cruickshank*, 837 F.3d at 1191. Although there was a time when this Court had not yet "resolved the question of whether in the post-*Booker* era, where the Sentencing Guidelines are only advisory, a district court's application of a sentencing guidelines manual promulgated after the offense has occurred would violate the Ex Post Facto Clause," *United States v. Fowler*, 342 F. App'x 520, 523 (11th Cir. 2009), the Supreme Court definitively resolved that issue in the affirmative in 2013. *Peugh*, 569 U.S. at 533 ("We consider here whether there is an *ex post facto* violation when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense. We hold that there is.").

Consequently, sentencing Maurya under the 2018 Guidelines directly "contradicts precedent from the Supreme Court," *Cruickshank*, 837 F.3d at 1191, because the 2018 version "provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense." *Peugh*, 569 U.S. at 533.[23]

Third, the *ex post facto* violation affected Maurya's substantial rights. In the sentencing context, an error affects a defendant's substantial rights when there is a **reasonable probability** that the sentencing court would have imposed a lower sentence absent the error. *See United States v. Corbett*, 921 F.3d 1032, 1040 (11th Cir. 2019). Here, the district court applied a higher Guidelines sentencing range as a result of its error. Under the Supreme Court's recent decision in *Molina-Martinez*, this is sufficient to satisfy the "substantial rights" prong of plain error.

Specifically, the Supreme Court held in *Molina-Martinez* that "[i]n **most cases** a defendant who has shown that the district court mistakenly deemed

[23] *See also United States v. Head*, 817 F.3d 354, 361 (D.C. Cir. 2016) (holding that *ex post facto* violation was plain where, at the time of sentencing, "precedent from this circuit established that sentencing a defendant under Guidelines other than those in effect at the time of the offense that created a substantial risk that the sentence would be more severe was a violation of the *Ex Post Facto* Clause" (internal quotation marks omitted)); *United States v. Davis*, 397 F.3d 340, 348 (6th Cir. 2005) (holding that *ex post facto* violation was plain because "[t]he *ex post facto* clause **announces a fundamental constitutional absolute**" and "[t]he Guidelines, as well as the Supreme Court and Sixth Circuit precedent, clearly instruct the district court to apply the Guidelines in effect at the time the offense was committed if the application of the current Guidelines would work an *ex post facto* violation" (bolding added)).

applicable an incorrect, higher Guidelines range has demonstrated a reasonable probability of a different outcome." 136 S. Ct. at 1346 (bolding added). In other words, "the Supreme Court explained [in *Molina-Martinez*] that an incorrect calculation of a Guidelines range **will almost always affect a defendant's substantial rights**." *United States v. Tirado-Yerena*, 688 F. App'x 782, 786 (11th Cir. 2017) (bolding added).

According to the Supreme Court, this "holding follows from the essential framework the Guidelines establish for sentencing proceedings," as "[t]he Court has made clear that the Guidelines are to be the sentencing court's 'starting point and . . . initial benchmark.'" *Molina-Martinez*, 136 S. Ct. at 1345 (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007)). Thus, "'[e]ven if the sentencing judge sees a reason to vary from the Guidelines, if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense the basis for the sentence.'" *Id.* (quoting *Peugh*, 569 U.S. at 542) (internal quotation marks omitted).

The Supreme Court also invoked its previous observation "that there is 'considerable empirical evidence indicating that the Sentencing Guidelines have the intended effect of influencing the sentences imposed by judges,'" such that "'when a Guidelines range moves up or down, offenders' sentences tend to move with it.'" *Id.* at 1346 (quoting *Peugh*, 569 U.S. at 543–44). In short, because

Guidelines ranges are so "central[]" to the "sentencing process," and the empirical data demonstrate that they have significant anchoring effects on actual sentences, a "court's reliance on an incorrect range **in most instances** will suffice to show an effect on the defendant's substantial rights." *Id.* at 1346–47 (bolding added).

To be sure, *Molina-Martinez* recognized that "[t]here may be instances" where the substantial rights prong is not met "despite application of an erroneous Guidelines range." *Id.* at 1346. "The record in a case may show, for example, that the district court thought the sentence it chose was appropriate irrespective of the Guidelines range." *Id.* For example, Guidelines miscalculations may not affect a defendant's substantial rights where the sentencing court explicitly states that it would have imposed the same sentence even if its Guidelines calculations were erroneous, *see Tirado-Yerena*, 688 F. App'x at 786–87, or where the sentencing court explains on the record that its original intention was to impose "the statutory maximum," and that it arrived at its ultimate sentence by "go[ing] down one year" from that statutory maximum. *United States v. Oliver*, 653 F. App'x 735, 743 (11th Cir. 2016) (internal quotation marks omitted).

The record in this case, however, is devoid of any similarly clear indicators that the district court chose its sentence "irrespective of the Guidelines range." *Molina-Martinez*, 136 S. Ct. at 1346. *Molina-Martinez* recognized that "sentencing

judges often say little about the degree to which the Guidelines influenced their determination." *Id.* at 1347. This is one of those cases.

But helpfully, there is one thing that the district court did say, and it confirms that the district court used the Guidelines range as the **starting point** for its sentencing analysis. Specifically, the court first calculated a Guidelines range of 33 to 41 months,[24] and subsequently stated the following:

> But I will tell you simply, I have ruled on the Guidelines as I see fit. I have just done the best that I can as a judge. But I don't find that where they end up warrants the most appropriate punishment for you. I just really don't.

DE340 at 59.

From there, the court (1) imposed a sentence of 84 months; (2) recognized that this was a "variance upward" from the Guidelines range; (3) noted that such a variance was "uncommon"; and (4) explained its rationale that the variance was "justified" "under these circumstances" in order to "provide sufficient punishment and adequate deterrence, especially specific deterrence." *Id.* at 65.

Thus, the court's apparent usage of the erroneous sentencing range as the **starting point** for its analysis indicates that, at the very least, there is a **reasonable probability** that the court would have imposed a lower sentence if it had first calculated the correct sentencing range. *Molina-Martinez*, 136 S. Ct. at 1347. Again, as the Supreme Court emphasized in *Molina-Martinez*, "'[e]ven if the

[24] DE340 at 31.

sentencing judge sees a reason to vary from the Guidelines, if the judge uses the sentencing range as the **beginning point** to explain the decision to deviate from it, **then the Guidelines are in a real sense the basis for the sentence**.'" *Id.* at 1345 (quoting *Peugh*, 569 U.S. at 542) (internal quotation marks omitted) (bolding added). That describes what happened here. *See also United States v. Wikkerink*, 841 F.3d 327, 338 (5th Cir. 2016) (holding that the substantial rights prong was satisfied because "it appears that the district court used the Guidelines range as the **beginning point** to explain the decision to deviate from it" (bolding added)).

Indeed, the 84-month sentence that the district court ultimately imposed seems less arbitrary in light of the upper end of Maurya's incorrectly calculated Guidelines range (41 months). Consequently, this case qualifies as one of the substantial majority of cases where a defendant "demonstrate[s] a **reasonable probability** of a different outcome" by "show[ing] that the district court mistakenly deemed applicable an incorrect, higher Guidelines range." *Molina-Martinez*, 136 S. Ct. at 1346 (bolding added).

Fourth, and finally, the error in this case "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Cruickshank*, 837 F.3d at 1191. This conclusion is compelled by yet another recent Supreme Court decision. Specifically, in *Rosales-Mireles*, the Supreme Court held that "a miscalculation of the United States Sentencing Guidelines range" that "has been determined to be

plain and to affect a defendant's substantial rights" will, in most cases, "call[] for a court of appeals to exercise its discretion under [plain error review] to vacate the defendant's sentence" because "such an error will in the ordinary case . . . seriously affect the fairness, integrity, or public reputation of judicial proceedings." 138 S. Ct. at 1903.

This is true for at least a few reasons. As an initial matter, "any amount of actual jail time is significant, and has exceptionally severe consequences for the incarcerated individual and for society which bears the direct and indirect costs of incarceration." *Id.* at 1907 (internal quotation marks and citations omitted, and alterations adopted). Thus, "it is crucial in maintaining public perception of fairness and integrity in the justice system that courts exhibit regard for fundamental rights and respect for prisoners as people." *Id.* (internal quotation marks omitted).

Beyond that, "a plain Guidelines error" has particular propensity to "undermine[] the fairness, integrity, or public reputation of judicial proceedings" because (1) "Guidelines miscalculations ultimately result from judicial error," not "trial strategies"; and (2) "a remand for resentencing, while not costless, does not invoke the same difficulties as a remand for retrial does." *Id.* at 1908 (internal quotation marks omitted). "In considering" plain Guidelines errors, then, "'what reasonable citizen wouldn't bear a rightly diminished view of the judicial process

and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands?'" *Id.* (quoting *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333–34 (10th Cir. 2014) (Gorsuch, J.)).

Further, "because the United States Sentencing Commission relies on data developed during sentencing proceedings . . . to determine whether revisions to the Guidelines are necessary," "[w]hen sentences based on incorrect Guidelines ranges go uncorrected, the Commission's ability to make appropriate amendments is undermined." *Id.*

Here, the plain constitutional error that affected Maurya's substantial rights "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 1902. Although "[t]here may be instances where countervailing factors satisfy the court of appeals that the fairness, integrity, and public reputation of the proceedings will be preserved absent correct," this case involves no such countervailing factors. *Id.* at 1909. Consequently, the district court's *ex post facto* error "calls for [this Court] to exercise its discretion under Rule 52(b) to vacate [Maurya's] sentence" and remand with instructions to sentence her under the 2013 version of the Guidelines. *Id.* at 1903. Under that version, Maurya's correct total offense level is 18, and her corresponding Guidelines range is 27 to 33 months.

3. Maurya's 84-Month Prison Sentence Is Substantively Unreasonable.

District courts "**shall** impose" sentences that are "sufficient, but **not greater than necessary**, to comply with the purposes" of 18 U.S.C. § 3553(a) (bolding added). Consequently, whether a sentence is substantively reasonable turns on whether "the statutory factors in § 3553(a) support the sentence in question." *United States v. Gonzalez*, 550 F.3d 1319, 1324 (11th Cir. 2008). Those factors include, *inter alia*: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence to reflect the seriousness of the offense, afford adequate deterrence to criminal conduct, and protect the public from further crimes; (3) the kinds of sentences available; and (4) the defendant's sentencing range under the Guidelines. 18 U.S.C. § 3553(a).

Although this Court "must give due deference to" a district court's sentencing decision, *Gall*, 552 U.S. at 51, "the district court does **not** have unfettered discretion in sentencing." *United States v. Williams*, 526 F.3d 1312, 1322 (11th Cir. 2008) (bolding added). Thus, for example, a sentence may be unreasonable if the district court "fail[ed] to afford consideration to relevant factors that were due significant weight," *United States v. Irey*, 612 F.3d 1160, 1189 (11th Cir. 2010) (internal quotation marks omitted), or if the sentence "is grounded solely on one factor." *McQueen*, 727 F.3d at 1157. Further, when a district court imposes a sentence outside of the Guidelines range, its justification for the variance

"**must be sufficiently compelling to support the degree of the variance**." *Irey*, 612 F.3d at 1186–87 (bolding added).

In this case, even if the district court's decision to impose the substantial financial hardship enhancement was somehow not erroneous, its ultimate sentencing decision was still substantively unreasonable. Despite calculating an adjusted Guidelines range of 33 to 41 months, DE340 at 31, the court sentenced Maurya to 84 months in prison. *Id.* at 62. But in reaching that sentence, the court failed to consider certain "relevant factors" relating to Maurya's history and characteristics and the nature and circumstances of her offense "that were due significant weight." *Irey*, 612 F.3d at 1189 (internal quotation marks omitted).

For example, the district court disregarded the fact that Maurya took responsibility and expressed genuine remorse for her role in the offense, and assisted both Fidelity and the government. When MHS discovered money missing from its escrow accounts, Maurya admitted and described her role in the scheme to both MHS and Fidelity. *See* PSR ¶¶ 61, 69. Thereafter, Maurya pled guilty and—as even the government acknowledged at sentencing—made a good-faith effort to assist both Fidelity and the government. *See id.* ¶ 23; DE340 at 47 ("I believe that [Maurya] did try to be helpful to us and to Fidelity."). Additionally, in addressing the court at her sentencing hearing, Maurya called her participation in the fraud "a shame I will carry forever," and candidly admitted that she had "betrayed everyone

and everything I aspired to become." DE340 at 54–55. And the common theme among the letters submitted on Maurya's behalf was that Maurya expressed remorse very early on, and took full responsibility for her actions.[25]

Despite all of this, the district court was unduly skeptical of Maurya's contrition and acceptance of responsibility. Sensing the court's skepticism, Maurya tried to clarify that "[i]n no way, shape, or form am I blaming anybody else." DE340 at 61. However, the court curtly brushed Maurya's clarification aside, stating that "[t]hat wasn't clear." *Id.* at 62.

As another example, the district court discounted the considerable physical and emotional abuse that Maurya suffered at the hands of her father and brother during her formative years, and her resulting anxiety and depression. In their letters to the court, both Carrie Maurya (Maurya's sister-in-law) and Jeffrey Engberg (Maurya's therapist since 2008) discussed these issues in detail. To summarize, Maurya's father was verbally, emotionally, and physically abusive towards both Maurya and her mother. DE319-2 at 1. And after Maurya's father abandoned the family, Maurya's brother—Carrie Maurya's husband—"stepped into" that abusive role. DE319-1 at 1.

[25] *See, e.g.*, DE319-1 at 2 ("In 2014, Asha reached out to my husband and me to take complete ownership for her actions."); DE319-4 at 2 (stating that Maurya "has never minimized her responsibility," and has "expressed a staggering remorse for her participation").

"[M]uch like [her] mother," Maurya "fell into the role of a quiet acceptor of the hurt and pain." *Id.* at 2. And aside from causing Maurya to feel anxious and depressed, this abuse also diminished her ability to set relationship boundaries. DE319-2 at 2. Relatedly, according to Engberg, as a result of all the abuse inflicted on Maurya by those closest to her, Maurya "sought out narcissistic superiors not . . . for the sake of gaining wealth, but to find her impossible 'Golden Ticket,' **acceptance and approval**." *Id.* (bolding added). And in turn, these relational distortions made Maurya "particularly susceptible" to participating in Hardwick's scheme. DE319 at 18.

Nonetheless, the district court was dismissive of these serious abuse and mental health issues. Specifically, although the court stated that it would "take note of that abuse that you have been so candid about," it did so only after twice emphasizing that the abuse seemed unrelated to Maurya's criminal conduct. DE340 at 59 ("And I'm not sure how that relates to the abuse that you unfortunately suffered as a younger person. I'm not sure how that connection is made.").

The district court also overlooked a host of other relevant factors. For instance, from April 2016 until the sentencing proceedings in early 2019, Maurya was employed without incident by a company called Shiftgig. PSR ¶ 123. Maurya's arrest in 2015 for using her former employer's credit cards was a wakeup

call, and after that arrest, Maurya resolved to confront and change her unlawful behavior. Then, when Maurya started working for Shiftgig, she quickly earned the trust of her co-workers and praise for her relentless work ethic. In particular, Mindy Gulledge, one of Maurya's direct supervisors at Shiftgig, described Maurya as "the epitome of organization, efficiency, and communication excellence" who had been "very up front with" Gulledge about her past transgressions and had "never given [Gulledge] any reason not to trust her completely." DE319-5 at 1–2. And Mary Kathryn Mitchell—the "Senior Account Manager for Shiftgig Bullpen in 2016"—identified Maurya as the member of her team "with the most integrity," and recounted how Maurya took the initiative to work "the early-bird hours" in order to better "serve . . . clients which do not have traditional business hours." DE319-6 at 1.

Additionally, Maurya had only a subservient role in the scheme to steal from MHS's escrow accounts, and did not personally gain any money from that scheme.[26] On the other hand, Hardwick—who was not only Maurya's employer and supervisor, but also managing partner of the entire firm—received tens of millions of dollars from the scheme. PSR ¶ 43. Further, as noted in several of the letters submitted in support of Maurya, Maurya was the primary emotional and

[26] Maurya received $900,000 from a separate scheme against MHS. *See* PSR ¶¶ 16–21.

financial caregiver for her ailing mother.[27] And beyond that, Maurya sustained serious injuries, including a torn rotator cuff and four cracked vertebrae, when she was inadvertently crushed by a pallet jack while on the job for Shiftgig in June 2017. PSR ¶ 117. At the time of sentencing, Maurya was still in need of surgery to repair the torn rotator cuff. *Id.*; *see also* DE319-9 & DE319-10 (Maurya's medical records).

The district court did not meaningfully consider **any** of these factors. Instead, the court focused **exclusively** on Maurya's past thefts from previous employers. *See* DE340 at 57–59, 65. In the course of that discussion, the court wondered aloud how Maurya was even able to keep obtaining employment. *Id.* at 59. And after imposing the 84-month prison sentence, the court stated that "it should provide sufficient punishment and adequate deterrence, especially specific deterrence." *Id.* at 65.

The district court's fixation on Maurya's past misconduct to the exclusion of all other relevant factors rendered its sentencing decision substantively unreasonable. *See McQueen*, 727 F.3d at 1157 ("[A] sentence may be unreasonable if it is grounded solely on one factor, relies on improper factors, or ignores relevant factors."). This is especially true in light of the remarkable personal growth that

[27] *See, e.g.*, DE319-1 at 2 ("Protecting her mother from additional distress and acting as primary care giver has also become a large part of Asha's life."); DE319-4 at 1 (stating that Maurya "has taken on the responsibility to protect and care for her mother").

Maurya has shown, as illustrated by her employment with Shiftgig. Because Maurya has already demonstrated a sincere commitment to becoming a law-abiding and productive member of society, the court's 84-month prison sentence was far "greater than necessary" to provide sufficient punishment and deterrence. 18 U.S.C. § 3553(a). Consequently, the court's justification for imposing a sentence **more than double the upper end of the applicable Guidelines range** was not "sufficiently compelling to support the degree of the variance." *Irey*, 612 F.3d at 1186–87.

CONCLUSION

For those reasons, this Court should vacate Maurya's sentence and remand for resentencing with instructions to use the correct total offense level of 18 and corresponding Guidelines range of 27 to 33 months, or in the alternative, with instructions to impose a substantively reasonable sentence.

Appellant Asha R. Maurya submits this brief on November 12, 2019.

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains a total of 12,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4.

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This certification is made on November 12, 2019.

/s/ Jeffrey Chen
Jeffrey Chen

CERTIFICATE OF SERVICE

I certify that, on November 12, 2019 I electronically filed **Defendant-Appellant Asha R. Maurya's Brief** with the Clerk of Court using the CM/ECF system which will automatically send email notifications of such filing to all counsel of record in this matter:

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