

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

No. _____

ANGELA BANKSTON,
Petitioner,

-VS-

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Counsel for Respondent

Justin Herdman, United States Attorney
801 West Superior Avenue
Carl B. Stokes Building
Cleveland, Ohio 44113
Phone: (216) 622-3600

Counsel for Petitioner

David L. Doughten, Counsel of Record
Ohio Registration No. 0002847
4403 St. Clair Avenue
Cleveland, OH 44103
Phone: (216) 361-1112

QUESTIONS PRESENTED FOR REVIEW

- I. If, after a dismissal of a substantive conviction the was one of multiple convictions, the district court sentences a defendant for a greater term of incarceration than the original sentence, does the resultant greater sentence violate the Due Process Clause pursuant to North Carolina v. Pearce, 395 U.S. 711 (1969)?
- II. If an appellate court dismisses one of multiple convictions as the result of a defendant's first direct appeal, and remands the case to the district court for a sentencing hearing, is the district court limited in its sentencing considerations or may it engage in a de novo hearing?

**LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW
AND RULE 29.6 STATEMENT**

All parties appear in the caption of the case on the cover page. None of the parties included thereon have a corporate interest in the outcome of this case.

TABLE OF CONTENTS

QUESTION PRESENTED	i
TABLE OF CONTENTS	iii
INDEX TO APPENDICES	iii
TABLE OF AUTHORITIES CITED	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	4
I. If, after a dismissal of a substantive conviction that was one of multiple convictions, the district court sentences a defendant for a greater term of incarceration than the original sentence, does the resultant greater sentence violate the Due Process Clause pursuant to <u>North Carolina v. Pearce</u> , 395 U.S. 711 (1969)?	4
II. The district court may not sentence a defendant to a greater term of incarceration after a remand for a new sentencing hearing if the record does not support that the presumption of vindictiveness is overcome by new or additional information that might warrant a greater sentence.	7
CONCLUSION	9
INDEX TO APPENDICES	
APPENDIX A	
Opinion of the Sixth Circuit Court of Appeals, No. 16-4285, filed October 11, 2017	A-1

APPENDIX B

Order of the Sixth Circuit Court of Appeals, No. 16-4285, denying rehearing, filed November 30, 2017	A-11
---	------

APPENDIX C

Opinion of Sixth Circuit Court of Appeals, <u>United States v. Bankston</u> , 820 F.2d 215 (6 th Cir. 2016)	A-12
---	------

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
<u>Alabama v. Smith</u> , 490 U.S. 794 (1989)	6
<u>Chaffin v. Stynchcombe</u> , 412 U.S. 17 (1973).	7
<u>Colten v. Kentucky</u> , 407 U.S. 104 (1972)	5
<u>North Carolina v. Pearce</u> , 395 U.S. 711 (1969)	5
<u>United States v. Bankston</u> , 820 F.2d 215 (6 th Cir. 2016)	8
<u>United States v. Goodwin</u> , 457 U.S. 368 (1982)	6
<u>Wasman v. United States</u> , 468 U.S. 559 (1984)	6
 CONSTITUTIONAL PROVISIONS	
Sixth Amendment of the United States Constitution	5
 STATUTES	
18 U.S.C. §1028A (b)(4).	5

PETITION FOR WRIT OF CERTIORARI

Petitioner, Angelique Bankston, respectfully prays that a writ of certiorari issue to review the judgment below of the Federal Sixth Circuit Court of Appeals.

OPINIONS BELOW

The Order of the Sixth Circuit Court of Appeals, No. 16-4285, filed October 11, 2017, appears at Appendix A-1 to the Petition.

The Order of the Sixth Circuit Court of Appeals, No. 16-4285, denying rehearing, filed November 30, 2017 appears at Appendix A-11 to the petition.

JURISDICTION

Jurisdiction of this Court is conferred pursuant to 28 U.S.C. §§ 1257 and 1651 as a judgment of the federal court of appeals was entered on November 30, 2017.

RELEVANT CONSTITUTIONAL PROVISION

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The indictment charged Petitioner Angelique Bankston with multiple counts of conspiracy in relation to Bank Fraud, Aggravated Identity Theft, Money Laundering, Mail Fraud, Wire Fraud and Making a False Statement.

On her first direct appeal the district court sentenced Bankston to serve a term of 144 months for the conspiracy cases. Because a consecutive sentencing for Aggravated Identity Theft convictions are mandated, the district judge sentences Bankston to 24 months additional for those convictions. In other words, the convictions for Aggravated Identity Theft were sentenced concurrently to each other but consecutively to the 144 month sentence. The aggregate sentence was 168 months.

Bankston appealed her convictions and sentence to the Sixth Circuit Court of Appeals. On June 29, 2016, the Sixth Circuit reversed one count of Making a False Statement in violation of 18 U.S.C. §1001, but affirmed all other convictions. In addition, the Circuit reversed Bankton's sentence and with a remand to the district court for the purposes of determining the actual loss that occurred as the result of the convicted offenses, and for determining the criminal history category for her sentence. United States v. Bankston, 820 F.2d 215 (6th Cir. 2016).

On October 25, 2016, the district court, albeit a different judge, sentenced Bankston to an aggregate term of incarceration of 185 months. Thus, she is now serving a sentence of 17 months greater than her original sentence.

The remand hearing did not reveal any new negative information which would require Bankston to serve a greater term of incarceration than had been determined by the original judge. In fact, there was one less substantive conviction to be considered. It appears the district judge

vindictively lengthened her sentence as the result of Bankston winning an aspect of her first direct appeal.

Bankston appealed the sentence to the Sixth Circuit Court of Appeals. The Circuit found the greater sentence was appealable because the first remand was a general remand and not a limited remand. United States v. Bankston, No. 16-4285, decided October 11, 2017.

Because the judge failed to make a record as to why the greater sentence was warranted, and because the record does not support a greater sentence, the remand sentence is in violation of due process and double jeopardy as set forth in North Carolina v. Pearce, 395 U.S. 711 (1969) and its progeny.

REASONS FOR GRANTING THE WRIT

- I. The district court may not sentence a defendant to a greater term of incarceration after a remand for a new sentencing hearing if the record does not support that the presumption of vindictiveness is overcome by new or additional information that might warrant a greater sentence.**

The Double Jeopardy Clause limits the power of the court to alter sentences. A district court may not increase a legal sentence if it would disturb a defendant's expectations of finality in the sentence. Here, the original district court judge sentenced Bankston to serve concurrent time for her four convictions of Aggravated Identity Theft in violation of §1028A. She appealed her convictions. One Count, Fraudulent statement, was dismissed on sufficiency grounds.

The sentence was appealed on the basis of the failure of the district court to place its reasoning for how it found a specific amount of the fraud. She also had challenged the base level determination of the district court under the U.S.S.G. and whether the §3553(a) factors had been

considered. Bankston did not challenge the sufficiency of the Identity Theft charges.

On remand, after conducting the sentencing hearing, the district court sentenced Bankston to a greater sentence, 187 month, as opposed to the original sentence of 168 months, ostensibly because the court sentenced two of her identity theft convictions to be served consecutively to each other. Both judges sentenced at least one count of Aggravated Identity Theft to be served consecutively to the remaining charges, which is mandatory by law. The original sentencing court sentenced the four counts of Aggravated Identity Theft to be served concurrently with each other.

If a defendant is convicted with more than one count of Aggravated Identity Theft, the sentences may, in the discretion of the sentencing court, be sentenced concurrently or consecutively with each other. 18 U.S.C. §1028A (b)(4). However, if, as the result of determining that consecutive sentencing was warranted in the second sentencing hearing, the resultant sentence is greater than the original sentence, the sentence is constitutionally inviolate.

It is understood that the Double Jeopardy Clause of the Sixth Amendment did not prohibit *per se* the rendering of previously sentenced concurrent counts to be sentence consecutively on remand. What is prohibited is an aggregate sentence that exceeded the original sentence because of the dismissal of a conviction.

In North Carolina v. Pearce, 395 U.S. 711 (1969), the Supreme Court held that the Double Jeopardy Clause does not absolutely prohibit a harsher sentence upon reconviction following a successful appeal. *Accord* Colten v. Kentucky, 407 U.S. 104, 119, (1972). However, if vindictiveness plays any part in the decision to impose a more severe sentence following a successful appeal, there is a due process violation. Pearce, 395 U.S. at 725. There is

a presumption of vindictiveness if the same sentencing authority imposes a greater sentence, unless the reasons for doing so “affirmatively appear.” *Id.* at 726. In Pearce, this Court stated that the reasons for imposing a more severe sentence “must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.” *Id.*

To assure the absence of vindictive motivation, Pearce provides that “whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear.” *Id.* at 726. This has been recognized as giving rise to a presumption of vindictiveness in certain circumstances. See Alabama v. Smith, 490 U.S. 794, 798 (1989). There is no question that when, as here, a conviction is reversed on appeal and the same judge imposes a more severe sentence after a new trial, a presumption of vindictiveness arises.

This presumption of vindictiveness “may be overcome only by objective information in the record justifying the increased sentence.” United States v. Goodwin, 457 U.S. 368, 374 (1982). Such information includes any conduct or event coming to the judge's attention after the first sentencing that may throw “new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities.” Wasman v. United States, 468 U.S. 559, 570-71 (1984) (citation omitted). In Texas v. McCullough, 475 U.S. 134 (1986), the Court relaxed this requirement and upheld a more severe sentence where the resentencing judge relied on “objective information . . . justifying the increased sentence,” quoting United States v. Goodwin, 457 U.S. at 374. This is true even though the information did not relate to conduct of the defendant that occurred after the initial sentence. 475 U.S. at 143-44. Pearce requires no more than that “the second sentencer provide[s] an on-the-record, wholly logical, non-vindictive reason for the sentence.” *Id.* at 140.

It is recognized that this Court has upheld the “constitutional validity of higher sentences in the absence of vindictiveness despite whatever incidental deterrent effect they may have on the right to appeal.” Chaffin v. Stynchcombe, 412 U.S. 17, 29, (1973).

Bankston’s remand hearing did not require a new trial. The resentencing involved both the dismissal of one of the convictions, but also required the district court to provide the basis for its loss findings. There was no “objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original proceeding” (Id. at 726, 89 S. Ct. at 2081) that justifies the severe increase in the sentence. The judge failed to cite any evidence or information that shed a “new light upon the defendant’s life, health, habits, conduct, and mental and moral propensities.” Wasman v. United States, 468 at 570-71. This is not surprising, as there was nothing new in the record to substantiate the increase. In other words, the district court failed to provide “an on-the-record, wholly logical, non-vindictive reason for the sentence.” Pearce at 140.

In sum, the circuit court dismissed one out of numerous convictions of the Petitioner on direct appeal. The case was remanded in light of the fact that there was one less conviction than when she had been originally sentenced. The court had no new information. Regardless, the Petitioner was sentenced to 17 additional months, merely because she had one less offense to consider.

II. The district court lacks jurisdiction to re-sentencing a defendant if the circuit fails to specifically include non-effected convictions in the remand order.

In the opinion of the Sixth Circuit Court of Appeals, the circuit specifically withheld the four counts of Aggravated Identity Theft from the sentencing remand. The district judge in the

first instance had calculated an incorrect base offense level. The Circuit noted that “This error alone warrants remanding the case for resentencing on all but the aggravated identity theft counts.” United States v. Bankston, 820 F.2d 215, 236, (6th Cir. 2016).

The court of appeals also found that the criminal history category and the loss amount needed to be recalculated as the findings in the record were insufficient, but, as pointed out above, retract from the above language.

Bankston brought this to the attention of the trial court at her hearing. After being sentenced on the Identity Theft convictions, Bankston informed the court:

The Court of Appeals said that this error alone warrants a sentence in the case for resentencing on all but the aggravated identity theft counts, because they’re trying to give me, I guess, eight more years for more coverup for you, but its not going to work.

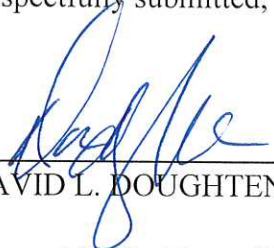
(R. 280, PageID# 5037)

If her interpretation is correct, the district court had no jurisdiction to alter the sentences for the identity theft cases. The original concurrent sentence for the four counts, 24 months concurrent to each other, but consecutive to the remaining offenses, applies. Thus, the court was limited to sentencing Bankston to 24 months consecutive to 137 months. The aggregate sentence must be 161 months instead of 185 months.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



DAVID L. DOUGHTEN

Counsel for Petitioner Bankston

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

File Name: 17a0578n.06

Case No. 16-4285

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

FILED
Oct 11, 2017
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	ON APPEAL FROM THE UNITED
	)	STATES DISTRICT COURT FOR
	)	THE NORTHERN DISTRICT OF
ANGELIQUE BANKSTON,	)	OHIO
	)	
Defendant-Appellant.	)	
	)	
	)	OPINION
	)	

BEFORE: STRANCH, DONALD, and LIPEZ, Circuit Judges.*

LIPEZ, Circuit Judge. In a prior appeal, we found that Defendant-Appellant Angelique Bankston was entitled to resentencing based on multiple flaws in her original proceeding, including the use of an incorrect base offense level (“BOL”) and the district court’s failure to explain its departure from the recommended criminal history category (“CHC”). *See United States v. Bankston*, 820 F.3d 215, 236 (6th Cir. 2016). On remand, before a different judge,¹ Bankston received a sentence that is seventeen months longer than her original term of imprisonment. In this appeal, she argues that the greater aggregate sentence violates principles of due process and double jeopardy because the district court failed to justify the lengthened term

*The Honorable Kermit V. Lipez, Circuit Judge for the United States Court of Appeals for the First Circuit, sitting by designation.

¹ The judge who previously sentenced Bankston had retired and the resentencing was thus assigned randomly to another judge.

No. 16-4285, *United States v. Bankston*

and the record does not support a greater sentence. Bankston further argues that the district court lacked jurisdiction to alter the sentence imposed on her four convictions for aggravated identity theft because those counts were outside the scope of the remand order. Having carefully considered Bankston's arguments, we find them unavailing. Accordingly, we **AFFIRM** her sentence.

I.

A. The First Sentencing and Appeal

Following her convictions on 23 counts arising from her participation in multiple schemes that involved the use of stolen identities to defraud banks and the government, Bankston was sentenced to a total of 168 months' imprisonment. Specifically, the court imposed a term of 144 months on nineteen convictions for crimes other than aggravated identity theft – i.e., for bank, mail and wire fraud; money laundering; making a false statement; and conspiracy – plus a mandatory consecutive 24-month term for the remaining four convictions for aggravated identity theft. *See* 18 U.S.C. § 1028A(b)(2). Although the court had discretion to impose separate, consecutive two-year terms for each aggravated identity theft count, *see id.* § 1028A(b)(4), it imposed concurrent sentences on the four counts. The sentencing on the other counts was based on a BOL of 27 and a CHC of VI.²

This court subsequently vacated the single conviction for making a false statement, and we also identified three errors in Bankston's first sentencing proceeding. First, consistent with the views of both parties, we held that the district court had erroneously used a BOL of 27 when it had earlier determined that the level should be 25. Second, we held that the court committed

² The original sentencing judgment specified the terms as follows: 144 months on each of Counts 2-5, 7, 9-14, 16, 18, and 20-21 (bank fraud, money laundering, mail fraud, wire fraud,); 60 months on each of Counts 1, 15, 17, and 23 (conspiracy and making a false statement), all to be served concurrently; and a term of 24 months on each of Counts 6, 8, 19, and 22 (aggravated identity theft), "to be served concurrently with each other but consecutive to Counts 1-5, 7, 9-18, 20, 21, and 23." R. 220.

No. 16-4285, *United States v. Bankston*

plain error when it applied a CHC of VI, rather than the recommended CHC of V, without an adequate explanation. Finally, we found that the court had not sufficiently addressed the parties' dispute concerning loss amounts. Hence, in addition to correcting the BOL discrepancy, we instructed the district court on remand "to provide an explanation for any upward departure in the CHC and resolve the remaining factual disputes regarding the loss amounts." *Bankston*, 820 F.3d at 237.

B. The Second Sentencing

At Bankston's resentencing hearing, the district court initially appeared to believe that the scope of the proceeding was limited to the four specific points addressed in our opinion: the prior judge's use of (1) a BOL of 27 and (2) a CHC of VI, (3) the dispute over loss amounts, and (4) removal of Count 23, the vacated conviction, from the sentencing calculus. R. 280: Sentencing Hr'g Tr., at 5022. The government, however, expressed the view that this court had ordered a general remand that empowered the district court to "start anew" and make its own determinations on every aspect of the sentence, including the applicability of the government's requested enhancements and the proper total offense level. *Id.* at 4997, 5022. Consistent with that view, the prosecutor urged the judge to reconsider the government's request at the time of Bankston's first sentencing that she be given separate two-year terms for each of her four aggravated identify theft counts. *Id.* at 4997-5000; 5027-28. That is, the government asked the court to add 96 months for aggravated identity theft, rather than the 24 months originally imposed, to the sentence on the other counts.

In a brief colloquy with the prosecutor, the court pointed out, and the government agreed, that Bankston would benefit in one respect from a general remand because a 2015 amendment to the Sentencing Guidelines that increased the threshold for an eight-level enhancement for loss

No. 16-4285, *United States v. Bankston*

amount would apply in a full resentencing. *Id.* at 5023-24. Under the revised version of the guideline, based on the government's claimed loss of approximately \$73,500, Bankston became subject to an increase of six levels rather than the eight levels that previously had been added to her BOL.³ After the government stated, "[s]o now it's plus six, as opposed to plus eight," *id.* at 5024, the court had the following exchange with defense counsel:

Court: Do you agree with that, since this is a general remand, we can --

Counsel: Yes. I would agree with that.

Court: We can agree it's a general remand.

Id. The parties' consensus thus resolved Bankston's challenge to the government's loss amount calculation, as her attorney had been urging a six-level, rather than eight-level, enhancement.⁴ *See id.* at 5021; *see also id.* at 5028.

After hearing both parties' positions on other proposed enhancements – for Bankston's leadership role in the schemes, the number of victims, and the involvement of "sophisticated [money] laundering," U.S.S.G. § 2S1.1(b)(3) – the court determined Bankston's total offense level to be 25 and her CHC to be VI, producing a guideline range of 110 to 137 months. R. 280: Sentencing Hr'g Tr., at 5031, 5033. The court imposed a concurrent sentence of 137 months on all but the aggravated theft counts. *Id.* at 5038. It grouped the four aggravated theft counts into two sets, imposing concurrent 24-month terms for each pair, and stacking the two sets to run consecutively to the 137-month sentence. *Id.* In other words, Bankston's total term of imprisonment was set at 185 months – 137 months for the counts other than aggravated identity

³ The threshold for the eight-level increase was raised from \$70,000 to \$95,000. *See* U.S.S.G. § 2B1.1(b)(1)(E). The six-level increase applies to losses between \$40,000 and \$95,000. *Id.* § 2B1.1(b)(1)(D).

⁴ Although the loss amount remained relevant to the amount of restitution, Bankston does not challenge on appeal the court's order that she pay restitution in the amount of \$73,554.17 (the same amount ordered in her first sentencing).

No. 16-4285, *United States v. Bankston*

theft, plus 48 months for the two sets of aggravated identity theft counts.⁵ The aggregate term of imprisonment thus exceeded her original 168-month sentence by seventeen months. The court articulated its rationale for each enhancement to the BOL, *id.* at 5030-31, and it detailed Bankston's extensive criminal history when explaining that it used a CHC of VI because, in its view, a CHC of V would underrepresent her criminal history, *id.* at 5032-33. The court did not explain its decision to impose two consecutive terms for the identity theft counts.

As described above, Bankston in this appeal asserts two challenges to her sentence, both of which focus on the district court's decision to lengthen her term of imprisonment by sentencing her to 48 months' imprisonment, rather than 24 months, on the four aggravated identity theft convictions. First, she claims that the longer sentence indicates a vindictive purpose to punish her for her prior successful appeal, violating principles of due process and double jeopardy. Second, she claims that the remand was "specifically limited" to the non-aggravated identity theft convictions and, hence, the district court had no jurisdiction to alter the original court's judgment to impose concurrent sentences on all four counts. Appellant's Br. at 13.

II.

A. The Constitutional Claims

Acknowledging that the Double Jeopardy Clause "does not absolutely prohibit a harsher sentence" following a successful appeal, Bankston argues that the stacking of sentences for her aggravated identity theft convictions was impermissible because the district court failed to justify

⁵ Thus, as compared to the original sentencing, Bankston received a term of 137 months (instead of 144 months) on each of Counts 2-5, 7, 9-14, 18, and 20-21 (bank fraud, mail fraud, money laundering); 137 months (instead of 60 months) on Counts 1, 15, and 17 (conspiracy to commit bank fraud and money laundering), all to be served concurrently; and terms of 24 months on Counts 6 & 8 and 18 & 22 (aggravated identity theft), to run consecutively to each other and to the 137 months on the other counts. Count 16, for aiding and abetting wire fraud, was omitted from the amended sentencing judgment, apparently inadvertently. *See* R. 273.

No. 16-4285, *United States v. Bankston*

the longer aggregate term of imprisonment that resulted from that change in approach. Appellant's Br. at 16. She relies on Supreme Court and Sixth Circuit cases in asserting that a presumption of vindictiveness applies, and a due process violation occurs, "if the same sentencing authority imposes a greater sentence, unless the reasons for doing so 'affirmatively appear.'" *Id.* at 17 (quoting *North Carolina v. Pearce*, 395 U.S. 711, 726 (1969)); *see also Texas v. McCullough*, 475 U.S. 134, 142 (1986) (explaining that the Court in *Pearce* had "applied a presumption of vindictiveness, which may be overcome only by objective information . . . justifying the increased sentence" (omission in original) (quoting *United States v. Goodwin*, 457 U.S. 368, 374 (1982))); *United States v. Jackson*, 181 F.3d 740, 746 (6th Cir. 1999) (finding that "the reasons given by the district court fail to ensure that a nonvindictive rationale led to the second, higher sentence").⁶ Bankston asserts that, because the district court offered no rationale for doubling the punishment for aggravated identity theft, the presumption remains in place and the longer sentence should be found unlawful.

The government maintains that Bankston's vindictiveness claim is not preserved and should be reviewed only for plain error. We bypass the standard-of-review question, however, because the claim cannot succeed even under de novo review. *See United States v. Layne*, 324 F.3d 464, 471 (6th Cir. 2003) (stating that constitutional challenges to sentences present questions of law that are reviewed de novo). Indeed, Bankston's constitutional argument is premised on a misstatement of the law as it applies to the facts of this case. It has long been the rule in this circuit that a presumption of vindictiveness ordinarily does not arise "where a *different* judge imposes a [longer] sentence after appeal." *United States v. McFalls*, 675 F.3d 599, 607 (6th Cir. 2012); *see also Goodell v. Williams*, 643 F.3d 490, 499 (6th Cir. 2011) ("The

⁶ *Pearce* and *McCullough* involved sentencings following retrials after the defendants had successfully challenged their convictions on appeal. We have held that "their reasoning applies equally to resentencing following a successful appeal of a sentence." *Gauntlett v. Kelley*, 849 F.2d 213, 217 (6th Cir. 1988).

No. 16-4285, *United States v. Bankston*

McCullough Court . . . expressly rejected the notion that *Pearce* stands for the proposition that the presumption applies where there are two different sentencers absent *other* circumstances that give rise to a need to protect against vindictiveness.”); *Gauntlett v. Kelley*, 849 F.2d 213, 217 (6th Cir. 1988) (stating that, “when the sentences are imposed by different sentencers, the presumption does not apply”). This exception exists “because a sentencing judge uninvolved in an earlier sentence lacks a personal stake in the outcome of later proceedings and thus would have little motive to act vindictively.” *McFalls*, 675 F.3d at 607. Absent the presumption, “the defendant must show actual vindictiveness.” *Id.*

Bankston has not come close to making such a showing. She notes that the district court “provided little or no reasoning” for departing from the original judge’s approach and instead stacking two 24-month terms for the aggravated identity theft convictions. Appellant’s Br. at 20. The absence of an explicit statement by the court in the circumstances of this case, however, is not evidence of vindictiveness. To the contrary, the most reasonable inference to be drawn from this record is that the court was persuaded by the government’s renewed argument that the identity theft crimes should be treated distinctly because they arose from four separate fraudulent schemes. The government emphasized during the resentencing hearing that each scheme was a “distinct and separate financial crime[,]” involving “completely different victims, banks, and identifiers that were used.” R. 280: Sentencing Tr., at 4998. Accordingly, the government argued, “it is completely within this Court’s discretion to stack those four separate counts of identity theft.” *Id.* at 5000. The court’s evident acceptance of the government’s logic – limited in Bankston’s favor to two consecutive terms rather than four – does not bespeak vindictiveness.⁷

⁷ We note that an express statement from the court would have been useful, as it would have eliminated our need to infer its rationale.

No. 16-4285, *United States v. Bankston*

Bankston also claims the disparity between her sentence and the 45-month term imposed on her co-defendant Jocelyn Hale is indicative of vindictiveness. This assertion is without merit, however, as Hale was not similarly situated to Bankston. Among other differences, Hale pled guilty “early on” and assisted the government, including by testifying against Bankston at trial. *Id.* at 5026. Indeed, upon motion by the government, Hale’s sentence was reduced to 38 months based on her cooperation and substantial assistance. R. 255: Mem. Op. and Order on Motion to Vacate, at 4868. Moreover, as our earlier decision described and the district court found, Bankston played a leadership role relative to Hale. R. 280: Sentencing Hr’g Tr., at 5031.

We therefore reject Bankston’s constitutional claims.

B. Jurisdiction

Bankston alternatively argues that the district court was without jurisdiction to alter the sentences imposed on the aggravated identity theft counts because this court remanded the case for resentencing only for the remaining 18 other counts of conviction. Although her prior appeal did not involve the sentencing for identity theft, *see infra*, Bankston is incorrect that our remand barred the district court from reconsidering the entirety of her sentence. Indeed, as described above, her attorney acknowledged the general nature of the remand at the sentencing hearing – which entitled her to a lesser enhancement for the amount of loss – and Bankston’s brief on appeal reiterates that “this Court remanded the case for a general re-sentencing.” Appellant’s Br. at 12.

Whether or not those acknowledgments amount to waiver – an argument not made by the government – Bankston’s jurisdictional claim is unavailing because the circumstances here fall squarely within our holding in *McFalls* rejecting a similar claim. The defendant in *McFalls* also contended that the district court had exceeded its authority on remand by reversing the original

No. 16-4285, *United States v. Bankston*

sentencing judge's decision to impose a concurrent, rather than consecutive, sentence. *See* 675 F.3d at 604. We explained that, “[u]nless otherwise specified, a remand order is presumed to be general,” and we detailed the requirements for specifying a limited remand:

A limited remand must . . . convey clearly the intent to limit the scope of the district court's review. This intent is achieved by outlining the procedure the district court is to follow, articulating the chain of intended events with particularity, and leaving no doubt as to the scope of the remand. The language used to limit the remand should be unmistakable.

Id. (citations omitted). Observing that an appellate court's focus on “a single sentencing issue does not automatically lead to the conclusion that the remand is limited,” *id.*, we emphasized the need for specific limiting language such as that used in *United States v. Moore*, 76 F.3d 111 (6th Cir. 1996), *id.* at 605. There, the court's “parting words,” which we quoted, directed a remand “in which both parties can have the opportunity to focus on the facts and law relevant to proving that Moore used or carried a firearm during and in relation to his drug trafficking offense.” *McFalls*, 675 F.3d at 605 (quoting *Moore*, 76 F.3d at 114).

The disclaimer that an appellate court's limited focus in its analysis does not necessarily signify a limited remand is directly applicable here. It is true, as Bankston points out, that our prior opinion repeatedly noted that her sentencing challenge was confined to the non-identity theft counts. We observed that (1) Bankston did not allege error in her sentence on the aggravated identity theft counts, (2) the government conceded that the case should be remanded for resentencing on all non-aggravated identity theft counts, and (3) the court's erroneous use of a BOL of 27 on its own “warrants remanding the case for resentencing on all but the aggravated identity theft counts.” 820 F.3d at 236. Yet, the fact that the flaws in Bankston's original sentencing did not affect the identity theft counts does not mean that those counts were excluded from reconsideration on remand. Our instructions imposed no such limitation. Unlike the

No. 16-4285, *United States v. Bankston*

specific directive used in *Moore* and endorsed in *McFalls*, the sentencing portion of our mandate stated only that we “**REMAND** the case for resentencing.” *Id.* at 237. That general phrasing did not confine the proceedings to the non-identity theft convictions. *Cf. McFalls*, 675 F.3d at 604 (“A remand is limited . . . when the Court’s *mandate* is so narrow in scope as to preclude the district court from considering a particular issue.” (emphasis added)).

Accordingly, as in *McFalls*, “[t]he presumption of general remand stands.” *Id.* at 606.⁸ Bankston does not contend that, if sentencing on the aggravated identity theft counts was properly before the district court on remand, it lacked the authority to stack the sentences. Nor do we see any basis for attacking the court’s judgment call.

III.

For the foregoing reasons, we **AFFIRM** Bankston’s sentence.

⁸ In her reply brief, Bankston unsuccessfully attempts to distinguish this case from *McFalls*, arguing that her situation is instead governed by *United States v. Foster*, 765 F.3d 610 (6th Cir. 2014), where we vacated two counts of conviction and refused the government’s request to allow the district court on remand to consider a longer sentence on the remaining counts. *Id.* at 613. *Foster* is simply inapt here. There, the question on appeal was how to frame the remand order, not whether a previously ordered remand was general or limited in scope. *See id.* at 614 (noting that the *McFalls* “presumption that remands are general rather than limited” does not speak to “whether a remand should be general or limited in the first place”). Moreover, in *Foster*, the defendant opposed resentencing on the non-vacated counts despite the possibility that a shorter sentence could result. *Id.* at 613. Bankston, by contrast, did not seek in her first appeal only to eliminate sentences imposed for counts the appellate court agreed to vacate; she specifically sought resentencing based on alleged *sentencing* flaws affecting 19 of the 23 original counts of conviction.

No. 16-4285

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 30, 2017
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

V.

ANGELIQUE BANKSTON,

Defendant-Appellant.

ORDER

BEFORE: STRANCH, DONALD, and LIPEZ,* Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Rich L. Hunt

Deborah S. Hunt, Clerk

*The Honorable Kermit V. Lipez, Circuit Judge for the United States Court of Appeals for the First Circuit, sitting by designation.



Positive
As of: February 17, 2017 8:34 AM EST

United States v. Bankston

United States Court of Appeals for the Sixth Circuit

December 9, 2015, Argued; April 14, 2016, Decided; April 14, 2016, Filed

File Name: 16a0091p.06

No. 14-3723

Reporter

820 F.3d 215 *; 2016 U.S. App. LEXIS 6763 **; 2016 FED App. 0091P (6th Cir.) ***

UNITED STATES OF AMERICA, Plaintiff-Appellee, v.
ANGELIQUE BANKSTON, Defendant-Appellant.

Subsequent History: Rehearing denied by, Rehearing, en banc, denied by *United States v. Bankston*, 2016 U.S. App. LEXIS 13039 (6th Cir., June 20, 2016)

Prior History: [**1] Appeal from the United States District Court for the Northern District of Ohio at Cleveland. No. 1:13-cr-00166-1—David D. Dowd, Jr., District Judge.

Hale v. United States, 2014 U.S. Dist. LEXIS 165565 (N.D. Ohio, Nov. 25, 2014)

Core Terms

indictment, questions, district court, district judge, sentencing, argues, counts, convictions, judicial function, false statement, fail to state, mails, waive counsel, self-representation, proceedings, waived, prosecutorial misconduct, identity theft, plain error, ineffective, vacate, amount of loss, mail fraud, resentencing, exemption, contends, charges, planted, judicial proceeding, fraudulent scheme

Case Summary

Overview

HOLDINGS: [1]-There was no error in the district court's Faretta inquiry as it addressed the relevant considerations by asking a series of questions that were drawn from, or substantially similar to, the model inquiry questions, and the district court also substantially made the required finding that defendant's waiver of counsel was knowing and voluntary; [2]-Because the older

version of *Fed. R. Crim. P. 12* was in effect during defendant's trial and when she filed the appeal, and it contained a failure to state an offense exception that preserved her defective indictment claim, to apply amended *Rule 12* to defendant's claims would be unjust; [3]-Because the count charging defendant with making false statements was based on conduct that, on the face of the judicial function exception in *18 U.S.C.S. § 1001(b)*, did not constitute a crime, the indictment failed to state an offense.

Outcome

Judgment affirmed in part and vacated in part. Case remanded for resentencing.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Burdens of Proof

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

HN1 [↓] In order to prevail on plain error review, the defendant must show that the district judge's decision constituted a plain error that affected her substantial rights and that implicated the fairness, integrity, or public reputation of judicial proceedings.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Waiver > Standards

Criminal Law & Procedure > Counsel > Waiver > Proceedings

HN2 [↓] The *Sixth Amendment* right to counsel has

David Doughten

A+ 12

implicit within it a right to self-representation. Recognizing the advantages of legal representation, the Faretta Court required, however, that, in order to represent himself, the accused must knowingly and intelligently forgo those relinquished benefits. Thus, while a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open.

Criminal Law & Procedure > Counsel > Waiver > Standards

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law &
Procedure > Counsel > Waiver > Proceedings

HN3 [📄] In determining whether a defendant's waiver of counsel was knowing and intelligent, the Sixth Circuit has required only that the questions be drawn from, or substantially similar to, the model inquiry set forth in the Bench Book for United States District Judges, rather than adhere literally to the recommended list of questions in the model inquiry. Substantial compliance and not literal adherence to the model inquiry is required. Consistently, the appellate court has reviewed a district judge's Faretta inquiry on appeal by focusing on whether the judge addressed the relevant considerations behind the model inquiry, such as the defendant's familiarity with the law, the gravity of the charges and the dangers of self-representation, and whether the defendant's decision to waive counsel is voluntary. Very generally, the model inquiry is thirteen questions about the defendant's familiarity with the law and legal system, and the charges against him. This inquiry must be followed by a strong admonishment that the court recommends against the defendant trying to represent himself or herself. Where the record shows that the defendant knew what he was doing and his choice was made with eyes open, the appellate court has found the Faretta inquiry adequate.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Waiver > Standards

Criminal Law &

Procedure > Counsel > Waiver > Proceedings

HN4 [📄] The Faretta inquiry is not rendered deficient due to the absence of any particular question. The substantial similarity standard, moreover, does not require a precise accounting of the questions asked. The critical question is whether, in context, the questions asked by the court meet the objectives of the model inquiry.

Criminal Law &

Procedure > Counsel > Waiver > Proceedings

Criminal Law & Procedure > Counsel > Waiver > Standards

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

HN5 [📄] The Sixth Circuit's disavowal of literal adherence to the model inquiry for determining whether a defendant's waiver of counsel was knowing and intelligent means not only that each individual question need not be identical to one of the Bench Book for United States District Judge's questions, but also that the overall shortfall as compared to the thirteen questions need not be an error. Rarely, if ever, has the court based the adequacy of the Faretta inquiry solely on the precise number of the model questions asked.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Waiver > Standards

Criminal Law &
Procedure > Counsel > Waiver > Proceedings

HN6 [📄] Where a district court does not specifically find that a defendant had knowingly and voluntarily waived his right to counsel, the district judge's statement that it finds that the defendant has the requisite knowledge, education and ability to represent yourself in this matter, establishes that the defendant's waiver is knowing and voluntary, and the district court substantially makes the required finding.

Criminal Law & Procedure > ... > Fraud Against the Government > False Statements > Elements

HN7 [📄] 18 U.S.C.S. § 1001(b) provides that § 1001(a),

which criminalizes making false statements in matters within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, does not apply to a party to a judicial proceeding for statements, representations, writings or documents submitted by such party to a judge or magistrate in that proceeding.

Criminal Law & Procedure > Preliminary
Proceedings > Pretrial Motions & Procedures > Dismissal

Criminal Law & Procedure > ... > Accusatory
Instruments > Dismissal > Procedure

HN8  The 2013 version of *Fed. R. Crim. P. 12* stated that a motion alleging a defect in the indictment must be filed prior to trial, and that a failure to do so would result in a waiver of that claim. *Rule 12(b)(3)(B), (e)*. This old version of *Rule 12*, however, also carved out an exception to the waiver rule stating that at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense. *Rule 12(b)(3)(B)*. By contrast, the 2014 version of *Rule 12(b)*, which took effect on December 1, 2014, eliminated the failure to state an offense exception, while modifying the consequences of failing to file a *Rule 12(b)(3)* motion. *Rule 12(b)(3)(B)(v)*. That is, the current rule states that a failure to file a 12(b)(3) motion prior to trial, including, a motion alleging a failure to state an offense, is untimely, but that a court may nonetheless consider the objection if the party shows good cause. *Rule 12(c)(3)*.

Criminal Law & Procedure > Preliminary
Proceedings > Pretrial Motions & Procedures > Dismissal

Governments > Legislation > Effect &
Operation > Amendments

Governments > Legislation > Effect &
Operation > Retrospective Operation

Governments > Courts > Rule Application & Interpretation

Criminal Law & Procedure > ... > Accusatory
Instruments > Dismissal > Procedure

HN9  The United States Supreme Court's order promulgating the 2014 amendments to the Federal Rules of Criminal Procedure stated that the new rules shall govern in all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings then pending. The language

in this order parallels the language in the Rules Enabling Act, which provides that the Supreme Court shall not require the application of such rule to further proceedings then pending to the extent that, in the opinion of the court in which such proceedings are pending, the application of such rule in such proceedings would not be feasible or would work injustice. *28 U.S.C.S. § 2074(a)*. Hence, the applicability of amended *Fed. R. Crim. P. 12* depends on whether its retroactive application to cases pending at the time of the amendment would be just and practicable, or, instead, would work injustice or be infeasible. In the latter circumstances, the old rule governs.

Governments > Courts > Rule Application & Interpretation

Governments > Legislation > Effect &
Operation > Amendments

HN10  Orders approving amendments to federal procedural rules reflect the commonsense notion that the applicability of such provisions ordinarily depends on the posture of the particular case.

Criminal Law & Procedure > Preliminary
Proceedings > Pretrial Motions & Procedures > Dismissal

Criminal Law & Procedure > ... > Accusatory
Instruments > Dismissal > Procedure

HN11  Under the current *Fed. R. Crim. P. 12*, the failure to raise a defective indictment claim in a pre-trial motion may result in a waiver of that claim. *Rule 12(b)(3)(B)(v)*.

Criminal Law & Procedure > Preliminary
Proceedings > Pretrial Motions & Procedures > Dismissal

Criminal Law & Procedure > ... > Accusatory
Instruments > Dismissal > Procedure

HN12  Under the 2013 version of *Fed. R. Crim. P. 12*, the appellate court provides plenary review to a claim that the allegations of the indictment fail to state an offense. *Rule 12(b)(3)(B)*. De novo review applies if the claim that the defendant failed to raise under *Rule 12(b)* is a claim that contends that the indictment failed to establish jurisdiction or to charge an offense.

Criminal Law & Procedure > ... > Fraud Against the
Government > False Statements > Elements

HN13 [L] 18 U.S.C.S. § 1001(a) sets forth the criminal prohibition, while § 1001(b) provides for the statutory exemption. These provisions state, in part: (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title, imprisoned not more than five years; (b) § 1001(a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding. § 1001.

Criminal Law & Procedure > ... > Fraud Against the
Government > False Statements > Elements

HN14 [L] The exemption in 18 U.S.C.S. § 1001(b), frequently referred to as a judicial function exception, applies when the defendant shows: (1) he was a party to a judicial proceeding, (2) his statements were submitted to a judge or magistrate, and (3) his statements were made in that proceeding.

Criminal Law & Procedure > ... > Fraud Against the
Government > False Statements > Elements

Criminal Law & Procedure > ... > Dismissal > Grounds for
Dismissal > Defective Instrument

Criminal Law & Procedure > Preliminary
Proceedings > Pretrial Motions & Procedures > Dismissal

HN15 [L] The judicial function exception is different from a formalistic objection to a defect in the indictment because it goes to the heart of whether, as a matter of law, the defendant can be convicted of the crime with which he was charged. Thus, a claim that the judicial function exception applies to particular statements is a claim alleging a failure to state an offense and, therefore, is not waived under the old version of Fed. R. Crim. P. 12(b).

Criminal Law & Procedure > Preliminary
Proceedings > Pretrial Motions & Procedures > Dismissal

Criminal Law & Procedure > ... > Dismissal > Grounds for
Dismissal > Defective Instrument

HN16 [L] Under the old version of Fed. R. Crim. P. 12(b), a defendant who contends that the indictment fails to establish jurisdiction or to charge an offense may raise that challenge at any time.

Criminal Law & Procedure > Preliminary
Proceedings > Pretrial Motions & Procedures > Dismissal

Criminal Law & Procedure > ... > Dismissal > Grounds for
Dismissal > Defective Instrument

HN17 [L] Under the old version of Fed. R. Crim. P. 12(b), a claim that the indictment failed to state an offense can be raised for the first time on appeal.

Criminal Law & Procedure > ... > Fraud Against the
Government > False Statements > Elements

Criminal Law & Procedure > ... > Dismissal > Grounds for
Dismissal > Defective Instrument

Criminal Law & Procedure > Preliminary
Proceedings > Pretrial Motions & Procedures > Dismissal

HN18 [L] Where the underlying conduct is so patently not a crime that it satisfies 18 U.S.C.S. § 1001(b) on its face, the indictment fails to state an offense when it charges a false statement crime while omitting the judicial function exception.

Criminal Law & Procedure > ... > Dismissal > Grounds for
Dismissal > Defective Instrument

Criminal Law & Procedure > Preliminary
Proceedings > Pretrial Motions & Procedures > Dismissal

HN19 [L] A reversal of conviction is warranted, even without a showing of prejudice, where the indictment cannot within reason be construed to charge a crime.

Criminal Law & Procedure > ... > Standards of

Review > Plain Error > Definition of Plain Error

Criminal Law & Procedure > ... > Standards of
Review > Plain Error > Burdens of Proof

HN20 Where the defendant did not raise a claim in the district court, the appellate court reviews the claim only for plain error. The defendant must show that the alleged error was not only plain, but that it affected her substantial rights and implicated the fairness, integrity, or reputation of the trial.

direct appeal, the appellate court departs from that practice where the existing record is adequate to assess properly the merits of the claim.

Criminal Law & Procedure > ... > Standards of Review > De
Novo Review > Ineffective Assistance of Counsel

HN25 Ineffective assistance of counsel claims are mixed questions of law and fact, which the appellate court reviews de novo on appeal.

Criminal Law & Procedure > Appeals > Prosecutorial
Misconduct > Tests for Prosecutorial Misconduct

HN21 Improper but non-flagrant prosecutorial conduct requires a new trial if (1) proof of defendant's guilt is not overwhelming, and (2) defense counsel objected, and (3) the trial court failed to cure the error with an admonishment to the jury.

Criminal Law & Procedure > Counsel > Effective Assistance
of Counsel > Tests for Ineffective Assistance of Counsel

HN26 Under Strickland, a defendant must satisfy a two-pronged standard to demonstrate ineffective assistance of counsel. First, the defendant must show that counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness. Second, the defendant must show that the deficient performance by counsel was prejudicial to the defense. This showing of prejudice requires a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Criminal Law & Procedure > ... > Standards of
Review > Plain Error > Burdens of Proof

Civil Procedure > ... > Inability to Proceed > Disqualification
& Recusal > Grounds for Disqualification & Recusal

HN22 Where the defendant does not contemporaneously object to the trial court's conduct, the appellate court reviews that conduct under the plain-error standard.

Criminal Law & Procedure > Counsel > Effective Assistance
of Counsel > Tests for Ineffective Assistance of Counsel

HN27 Counsel's complete ignorance of the relevant law under which his client was charged fell below the objective standard of reasonableness.

Civil Procedure > ... > Disqualification & Recusal > Grounds
for Disqualification & Recusal > Personal Bias

Civil Procedure > ... > Disqualification & Recusal > Grounds
for Disqualification & Recusal > Appearance of Partiality

HN23 A judge's conduct may be characterized as bias or prejudice warranting recusal only if it is so extreme as to display clear inability to render fair judgment.

Criminal Law & Procedure > Counsel > Effective Assistance
of Counsel > Tests for Ineffective Assistance of Counsel

HN28 Counsel's failure to object to prosecutorial misconduct may constitute a deficient performance where the failure is due to lack of knowledge of controlling law, rather than reasonable trial strategy.

Criminal Law & Procedure > Counsel > Effective Assistance
of Counsel > Reviewability

HN24 While the appellate court does not typically consider ineffective assistance of counsel claims on

Criminal Law & Procedure > Counsel > Effective Assistance
of Counsel > Tests for Ineffective Assistance of Counsel

HN29 A reasonable probability is a probability

sufficient to undermine confidence in the outcome.

Criminal Law &
Procedure > ... > Reviewability > Preservation for
Review > Abandonment

HN30 [↓] Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.

Criminal Law &
Procedure > ... > Reviewability > Preservation for
Review > Abandonment

HN31 [↓] It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to put flesh on its bones.

Criminal Law & Procedure > Appeals > Reversible
Error > Cumulative Errors

HN32 [↓] The existence of only one error eliminates the foundation of the cumulative-effect theory. Indeed, the appellate court's recognition of the cumulative-effect theory has been limited to situations where errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.

Criminal Law & Procedure > Appeals > Reversible
Error > Cumulative Errors

HN33 [↓] To establish cumulative error, a defendant must show that the combined effect of individually harmless errors was so prejudicial as to render his trial fundamentally unfair.

Criminal Law & Procedure > ... > Standards of Review > De
Novo Review > Sufficiency of Evidence

Criminal Law & Procedure > ... > Standards of
Review > Substantial Evidence > Sufficiency of Evidence

HN34 [↓] The appellate court reviews sufficiency of the

evidence de novo, affirming the defendant's convictions if, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The appellate court must draw all available inferences and resolve all issues of credibility in favor of the jury's verdict.

Criminal Law & Procedure > ... > Fraud > Wire
Fraud > Elements

HN35 [↓] To prove wire fraud under 18 U.S.C.S. § 1343, the government must show, inter alia, that the defendant used or caused to be used an interstate wire communication in furtherance of the scheme.

Criminal Law & Procedure > Commencement of Criminal
Proceedings > Accusatory Instruments > Indictments

Criminal Law & Procedure > Trials > Burdens of
Proof > Prosecution

HN36 [↓] The government need not prove everything in an indictment but only so much thereof as establishes a violation of the statute.

Criminal Law & Procedure > ... > Fraud Against the
Government > Mail Fraud > Elements

HN37 [↓] Mail fraud, as specified in 18 U.S.C.S. § 1341, requires a showing, inter alia, that the defendant's conduct involved a use of the mails.

Criminal Law & Procedure > ... > Theft & Related
Offenses > Identity Theft > Penalties

HN38 [↓] Aggravated identity theft convictions are treated separately for sentencing purposes, with each conviction supporting a mandatory two-year sentence that has to be served consecutively with the sentence imposed for other crimes. 18 U.S.C.S. § 1028A(b)(2). Where the defendant is convicted of more than one aggravated identity theft charges, the sentences for all aggravated identity theft convictions may, in the discretion of the sentencing court, run concurrently with each other. § 1028A(b)(4).

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Findings

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

HN39 [↓] A court departing upward from a defendant's calculated criminal history category must articulate its reasons for departing from the guidelines in language relating to the guidelines.

Criminal Law & Procedure > ... > Appeals > Standards of Review > De Novo Review

HN40 [↓] Where a defendant's claim that the district court failed to resolve the dispute over the loss amounts is preserved, the appellate court reviews it de novo.

Criminal Law & Procedure > Sentencing > Presentence Reports

HN41 [↓] *Fed. R. Crim. P. 32(i)(3)(B)* states that a sentencing court must, for any disputed portion of the presentence report or other controverted matter, rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing. The appellate court has required literal compliance with this rule. Hence, while the district court need not establish the value of the loss with precision, the district court must publish the resolution of contested factual matters that formed the basis of the calculation. A mere expression of an agreement with the government's proposed loss amount, without explaining how the court calculated the amount of loss and responding to the defendant's specific factual objections to the methods of calculation, does not suffice.

Counsel: ARGUED: Nadia Wood, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Columbus, Ohio, for Appellant.

Mark S. Bennett, UNITED STATES ATTORNEY'S OFFICE, Cleveland, Ohio, for Appellee.

ON BRIEF: Nadia Wood, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Columbus, Ohio, for Appellant.

Mark S. Bennett, UNITED STATES ATTORNEY'S OFFICE, Cleveland, Ohio, for Appellee.

Judges: Before: STRANCH, DONALD, and LIPEZ,*

Opinion by: Kermit V. Lipez

Opinion

*****2** **[*220]** LIPEZ, Circuit Judge. Asserting that her trial on twenty-three fraud-related charges was flawed by numerous errors, Defendant-Appellant Angelique Bankston asks us to vacate all of her convictions and remand for a new trial. In particular, she argues that (1) her waiver of counsel was invalid, (2) she was improperly charged in count 23 with making false statements to a judge in violation of *18 U.S.C. § 1001*, (3) the trial proceedings were procedurally deficient due to judicial bias, prosecutorial misconduct, and ineffective *****2** assistance of counsel, and (4) the evidence was insufficient to support her convictions for wire and mail fraud. She further contends that, even if we reject her claims of trial error, she is entitled to resentencing.

Having carefully considered her claims, we conclude that only her claims of error as to the count 23 conviction and sentencing have merit. Therefore, we **VACATE** Bankston's conviction on count 23 of making false statements in violation of *18 U.S.C. § 1001*, **AFFIRM** her convictions on all other counts, and **REMAND** the case for resentencing.

I.

On August 28, 2013, Bankston was charged in a twenty-three-count Second Superseding Indictment with committing wire fraud, mail fraud, bank fraud, money laundering, identity theft, and a false statement offense in connection with three separate fraudulent schemes that occurred between March 2011 and June 2012. Unlike the previous indictments, this superseding indictment (and the final and operative Third Superseding Indictment) included count 23, which charged Bankston with making false statements in matters within the jurisdiction of the judiciary, based on a letter she wrote to the district judge accusing the government of planting evidence in her home. *****3**

Although Bankston asks that we vacate her convictions

* The Honorable Kermit V. Lipez, Circuit Judge for the United States Court of Appeals for the First Circuit, sitting by designation.

on every count, the fraudulent activity pertinent to her claims on appeal concerns primarily one of the three fraudulent schemes—the so-called "Citizens Bank and Lending Club Scheme." Hence, we limit our recitation of the facts to that particular scheme and provide additional details as necessary in our [***3] analysis. Similarly, we briefly sketch out the procedural background in this section, reserving a more complete account of the [*221] trial proceedings until our discussion of Bankston's claims.

All of Bankston's fraudulent schemes followed one fundamental pattern. She unlawfully obtained the personal identification information of individuals and used it to defraud commercial banks and the state and federal government. In the Citizens Bank and Lending Club Scheme, she instructed her co-conspirator, Jocelyn Hale, to open an account at Citizens Bank in the name of Rachelle Butler—whose personal identifiers Bankston had illegally obtained—at the bank's branch office in Erie, Pennsylvania. When opening the account, Hale also opened a Citizens Bank credit card in Butler's name. Bankston then deposited funds in Butler's Citizens Bank account, [**4] which she acquired in part from a fraudulent Lending Club loan application that she had filled out online using Butler's identifiers. Bankston then instructed Hale to withdraw a portion of these funds in the form of two cashier checks. Bankston and Hale failed to cash those checks, however, and a dispute arose shortly thereafter over Bankston's refusal to pay Hale as promised.

On September 5, 2012, Postal Inspector L.E. Macek searched Bankston's home pursuant to a warrant. While the search uncovered certain evidence of Bankston's fraudulent schemes, such as a list of individuals whose identifiers she had obtained unlawfully, most of the search involved the postal inspector asking Bankston a series of questions about her acquaintance with a co-conspirator and her reasons for placing mail holds.¹ Bankston answered these questions, having signed a waiver of her *Miranda* rights.

Before trial, Bankston wrote a letter to the district judge complaining of a disagreement with her attorney about trial strategy. Bankston wanted [**5] to present as a defense her theory that the evidence of the fraudulent schemes that was recovered from her home had been

planted by a federal agent. Specifically, she claimed that Postal Inspector Macek, who performed the search of her home, was in fact the same person as one of the two local police officers who had visited her home several months earlier on a separate investigation. Bankston explained in her letter that her attorney's refusal to present the planted evidence theory as a defense resulted in a breakdown of the attorney-client relationship.

[**4] The district court treated Bankston's letter as a pro se motion to suppress the evidence and held a suppression hearing. The court also appointed new counsel to represent Bankston. At the suppression hearing, the two local police officers testified that they were not aware of the federal investigation of Bankston when they visited Bankston's home earlier that year on a separate investigation, and that they did not enter her residence or plant evidence. Instead, they left a card in the door for Bankston to call. Macek testified that he was not aware of the local police investigation of Bankston, and he was not at Bankston's home when [**6] the local police officers paid a visit earlier that year. The district court denied Bankston's motion to suppress.

Meanwhile, before the suppression hearing, the government filed the Second Superseding Indictment that included the count 23 false statement charge. That charge relied solely on Bankston's letter as the factual basis for the offense, excerpting, for instance, portions of the letter in [*222] which Bankston explained her planted evidence theory. The indictment also stated that, in addition to deceiving the district court by presenting the planted evidence theory, the letter "caused the FBI and IRS agents assigned to the case to perform additional investigation."

Trial commenced on November 5, 2013. During voir dire, Bankston's attorney informed the district court that Bankston wished to proceed pro se. While the district judge was initially reluctant to allow Bankston to represent herself, the judge ultimately conducted an inquiry to determine if Bankston's decision to waive her right to counsel was knowing and intelligent. The court found that it was, and Bankston remained pro se throughout the trial. The jury found Bankston guilty on all twenty-three counts.

At the sentencing hearing, [**7] Bankston was again represented by an attorney. After hearing argument on various proposed enhancements to the base offense level, the court determined Bankston's base offense

¹ Bankston placed mail holds on certain individuals whose identities she had obtained in order to intercept various documents and checks that she had arranged to be sent to them.

level to be 27, with a criminal history category of VI, which resulted in the guideline range of 130 to 162 months. The court sentenced Bankston to 144 months on counts other than the aggravated identity theft counts, added a mandatory two-year consecutive sentence for Bankston's aggravated identity theft convictions, and imposed a total sentence of 168 months. This appeal followed.

[**5] II.

Bankston raises five arguments on appeal. First, she argues that her waiver of counsel was invalid because the district court failed to conduct a full *Faretta* inquiry, as required by *United States v. McDowell*, 814 F.2d 245 (6th Cir. 1987). Second, Bankston contends that count 23 in the indictment was defective because the underlying conduct for the charge—here, writing a letter to the district judge as part of a criminal defense—is explicitly exempted from criminal liability under the statute. Third, and relatedly, Bankston argues that there were numerous errors throughout the trial relating to count 23, which, individually and collectively, warrant a new trial on all counts. These alleged [**8] errors include: ineffective assistance of counsel in failing to object to or move to dismiss count 23; prosecutorial misconduct in overzealously pursuing that charge; and judicial bias resulting from the district judge's failure to recuse himself, despite the fact that he was the recipient of Bankston's letter and hence a victim of the false statement crime. Fourth, Bankston argues that her convictions on counts 16 (wire fraud) and 18 (mail fraud) should be vacated because the government failed to prove essential elements of the crimes in those respective counts—namely, the use of an interstate wire communication for wire fraud and the use of the mails for mail fraud. Finally, Bankston argues that the district court committed a series of errors in sentencing, such as incorrectly calculating the base offense level and failing to provide an explanation for departure in the criminal history category, which require resentencing. We address each claim in turn.

A. Waiver of Counsel

The parties agree that plain error review applies to the claim that Bankston's waiver of counsel was invalid. Hence, *HN1* [T] in order to prevail, Bankston must show that the district judge's *Faretta* inquiry constituted [**9] a plain error that "affect[ed] [her] substantial rights" and that implicated the "fairness, integrity, or public reputation of judicial proceedings." *Johnson v. United States*, 520 U.S. 461, 466-69, 117 S. Ct. 1544, 137 L.

Ed. 2d 718 (1997) (internal quotation marks omitted); see also *United [**223] States v. Oliver*, 397 F.3d 369, 375-76 (6th Cir. 2005).

[**6] 1. Legal Principles

The legal standards governing the validity of waiver of counsel are well-developed, though they are not without complexities in application. In *Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), the Supreme Court held that *HN2* [T] the *Sixth Amendment* right to counsel has implicit within it a right to self-representation. Recognizing the advantages of legal representation, the *Faretta* Court required, however, that, "in order to represent himself, the accused must knowingly and intelligently forgo those relinquished benefits." *Id. at 835* (internal quotation marks omitted). Thus, while "a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Id.* (internal quotation marks omitted). Following the Court's decision in *Faretta*, numerous circuits addressed the question of what type of "record" is necessary [**10] to establish that a defendant's waiver of counsel was "knowing and intelligent." See, e.g., *United States v. Hafen*, 726 F.2d 21, 25-26 (1st Cir. 1984); *Richardson v. Lucas*, 741 F.2d 753, 756-57 (5th Cir. 1984); *United States v. Kimmel*, 672 F.2d 720, 721-22 (9th Cir. 1982); *United States v. Bailey*, 675 F.2d 1292, 1297-1302, 219 U.S. App. D.C. 67 (D.C. Cir. 1982).

This Circuit did so in *McDowell*, 814 F.2d at 248-50. There, we acknowledged the "difficult position" of a district judge in determining whether a waiver is knowing and intelligent. *Id. at 248*. "An overprotective judge who refuses to allow a defendant to jeopardize his own defense may be reversed, and a judge who does not make a copious inquiry into the thought process of the accused (which may themselves be characterized as trial strategy) is subject to an appeal . . ." *Id. at 248-49*. To mitigate such concerns, we identified "the nature of the inquiry to be made and the procedure to be followed" when a criminal defendant expresses a wish to represent himself. *Id. at 250*. A model inquiry, we noted, is one provided in the *Benchbook for U.S. District Court Judges* ("Bench Book"). *Id.* We then instructed the district courts in our circuit that:

In the future, whenever a federal district judge in

this circuit is faced with an accused who wishes to represent himself in criminal proceedings, the model inquiry or one covering the same substantive points along with an express finding [***7] that the accused has made a knowing and voluntary waiver of counsel, shall [**11] be made on the record prior to allowing the accused to represent himself.

Id.; see also *id.* at 251 (Appendix to the Opinion (hereinafter "App.") reprinting a list of the Bench Book questions).

The law of our Circuit has evolved since *McDowell*. If the language of *McDowell* recommended a "formal inquiry" that consists of thirteen questions and one admonishment as specified in the Bench Book (or at least questions that cover "[those] same substantive points," *id.* at 250), our subsequent cases have hewed closer to the underlying concern for setting forth the model inquiry, *i.e.*, the "difficult position" of the district judge, *id.* at 248. Thus, in the post-*McDowell* era, *HN3* [↑] we have required only that the questions be "drawn from, or substantially similar to, the model inquiry set forth in the [Bench Book]," rather than adhere literally to the recommended list of questions in the model inquiry. *United States v. McBride*, 362 F.3d 360, 366 (6th Cir. 2004); see also *United States v. Utrera*, 259 F. App'x 724, 728 (6th Cir. 2008) ("Substantial compliance and not literal adherence to [the model inquiry] is required."). Consistently, we have reviewed a district judge's *Faretta* inquiry on appeal by focusing on whether the judge addressed the "relevant considerations" behind the model inquiry, such as "the defendant's familiarity with the law, . . . the [**12] gravity of the charges and the dangers of self-representation," and whether "the defendant's decision to waive counsel is voluntary." *United States v. Miller*, 910 F.2d 1321, 1324 (6th Cir. 1990); see also *United States v. Williams*, 641 F.3d 758, 767 (6th Cir. 2011) ("Very generally, the model inquiry is thirteen questions about the defendant's familiarity with the law and legal system, and the charges against him. This inquiry must be followed by a strong admonishment that the court recommends against the defendant trying to represent himself or herself."). Where the record shows that the defendant "kn[ew] what he [wa]s doing and his choice [wa]s made with eyes open," *Faretta*, 422 U.S. at 835 (internal quotation marks omitted), we have found the *Faretta* inquiry adequate.

[***8] 2. Whether the *Faretta* Inquiry Was Adequate

In the case before us, the district judge began the

inquiry by asking the following questions:

- "How far did you go in school?"
- "What college did you go to?"
- "Do you have any degrees?"
- "Have you ever studied law?"
- "When you were in college, did you take any courses involving the law either as to the procedure or the substance of the law?"
- "Have you ever represented yourself in a criminal action?"

• "[D]o you understand the crimes you're charged with in this case?" Based on an affirmative answer from Bankston, the judge then asked, [**13] "[c]an you list them for me now?"

• "Can you explain to me why you delayed until today while we're impaneling the jury to decide that you wanted to represent yourself?" When Bankston answered, "I've been saying it over and over, [and] I discussed it with my attorneys," the judge asked, "[d]o you have any idea what your defenses are?"

• The judge further stated, "I am just curious as to if you thought through what your defenses are." Based on an affirmative answer from Bankston, the judge then asked, "[h]ow are you going to establish that?"

The judge then warned Bankston of the difficulties of self-representation, stating, "[y]ou've got to decide whether you are really serious about representing yourself. It's a very difficult thing to do." In a similar vein, the judge also asked:

• "Do you understand if you represent yourself, it will be your decision whether you testify or not?"

• "And do you understand that if you represent yourself and testify, I'll make you sit up here in the witness stand[?]"

• "Do you understand that you won't be allowed to consult with your lawyers about how you should answer a question when you're being cross-examined?"

• "Have you ever heard the statement that he who represents himself [**14] has a fool for a client?"

When Bankston repeatedly expressed her understanding of the difficulties of self-representation and her wish to do so regardless, the judge inquired one final [***9] time, "[o]kay. In [***9] spite of that, you want to represent yourself; is that true?" Bankston responded, "[y]es, I do." The judge then stated: "Let me say for the record that I am satisfied that the defendant has sufficient understanding of the case and sufficient

intelligence to undertake the task of representing herself. She has a constitutional right to represent herself."

Under these circumstances, we cannot say that the district judge's inquiry was inadequate under the "substantially similar" standard. First, while Bankston argues that the judge asked only three out of the thirteen model questions,² that accounting seems to be incorrect. For instance, the judge informed Bankston of the possibility of taking the stand and the consequences of doing so, as required by the model inquiry. *Compare* R. 242: Voir Dire Tr., at 2754 ("Do you understand if you represent yourself, it will be your decision whether you testify or not? . . . And do you understand that if you represent yourself and testify, I'll make you sit up here **[**15]** in the witness stand?") with *McDowell*, 814 F.2d at 251 (App.) ("(k) You realize, do you not, that if you decide to take the witness stand, you must present your testimony by asking questions yourself? You cannot just take the stand and tell your story. You must proceed question by question through your testimony."). While Bankston also argues that the judge did not mention the statutory maximum penalties at voir dire, the record shows that the district court discussed, at the suggestion of the government, the statutory maximums for each count the following day.³ Indeed, while we recognize the time lapse between the initial *Faretta* inquiry and when the colloquy on statutory maximums occurred, we do not find it to be a plain error here because the colloquy took place at the beginning of the trial before any evidence was introduced, and, as

² Our "3 out of 13 questions" formulation is substantively the same as Bankston's "4 out of 14 questions" characterization. Bankston's characterization construes the "strong admonishment" requirement as a question, rather than a statement, which is how we characterized it **[**16]** in *McDowell*, 814 F.2d at 251 (App.), and how we understand it here.

³ We reject Bankston's argument that the government's proposal on the first day of trial to go over the statutory maximums suggests that the government knew that the initial *Faretta* inquiry was deficient. Although the government acknowledged that one of the thirteen model questions had not been asked, it did not indicate that the inquiry conducted was inadequate overall. Nor do we find it problematic that it was the government, rather than the district judge, that explicitly discussed the statutory penalties. After thanking the government for placing the statutory penalties on the record, the judge asked Bankston if she "ha[d] any questions about the maximum sentences." Bankston answered, "No."

demonstrated below, *HN4*^(T) the *Faretta* inquiry is not rendered deficient due to the absence of any particular question.

[10]** The "substantial similarity" standard, moreover, does not require a precise accounting of the questions asked. The critical question under *McDowell* and our subsequent case law is whether, in context, the questions asked by the court meet the objectives of the model inquiry. Hence, while Bankston argues that the judge failed to ask the remaining eight out of the thirteen model inquiry questions, we find that many of those eight questions were in fact addressed during **[**17]** the colloquy, even if the judge did not ask them verbatim. Upon learning that Bankston did not go to law school, the judge asked whether, in college, Bankston "t[ook] any courses involving the law either as to the procedure or the substance of the law," R. 242: Voir Dire Tr., at 2750-51—an inquiry that "substantially" covers the two model questions regarding the defendant's familiarity with **[*226]** the Federal Rules of Evidence and the Federal Rules of Criminal Procedure. See *McDowell*, 814 F.2d at 251 (App.) ("(g)" & "(i)"). Similarly, while the judge did not explicitly ask whether Bankston's decision to represent herself was "entirely voluntary on [her] part," *id.* (App.) ("(n)"), the judge asked why she made the decision late when the trial had already commenced, and Bankston answered that she had expressed her desire to represent herself "over and over" to her attorneys after having "discussed it with [them]," R. 242: Voir Dire Tr., at 2751, a response which suggested voluntariness. The judge also asked Bankston whether, in spite of the difficulties of self-representation, she wanted to represent herself, *id.* at 2755—a question that, again, bears substantial similarity to one of the model questions in the Bench Book. See *McDowell*, 814 F.2d at 251 (App.) ("(m) Now, in **[**18]** light of the penalty that you might suffer if you are found guilty and in light of all the difficulties of representing yourself, is it still your desire to represent yourself and to give up your right to be represented by a lawyer?").

We recognize that the remaining four questions were not asked. We reiterate, however, that *HN5*^(T) our disavowal of "literal adherence" to the model inquiry, *Utrera*, 259 F. App'x at 728, means not only that each individual question need not be identical to one of the Bench Book questions, but also that the overall shortfall as compared to the thirteen questions need not be an error.⁴ Rarely, if ever, have we based the adequacy of

⁴ Where we have found error in the district court's *Faretta*

the *Faretta* inquiry solely on the precise [***11] number of the model questions asked. See *id.* (holding that the district judge "substantially complied with the *McDowell* inquiry" because the Court "rigorously explained the pitfalls of self-representation" and "repeatedly attempted to dissuade [the defendant] from proceeding pro se, point[ing] out that [he] lacked appropriate legal training" and he "would likely increase his risk of conviction" by choosing to represent himself); *Williams*, 641 F.3d at 767 ("The district court's questioning substantially covered the thirteen model questions drawn from the [**19] Bench Book . . ."); see also *Miller*, 910 F.2d at 1324-25.

Finally, Bankston argues that the district judge did not make an express finding that her waiver of counsel was knowing and voluntary, as required by the model inquiry. See *McDowell*, 814 F.2d at 251 (App.) ("(o)"). The district judge noted, however, that he was "satisfied that the defendant has sufficient understanding of the case and sufficient intelligence to undertake the task of representing herself." R. 242: Voir Dire Tr., at 2759. While Bankston contends that this statement does not suffice as an express finding because the judge did not say "knowing and voluntary," the requirement [**20] of an express finding is not a magic word test. We held in *Williams*, HNG[↑] "[a]lthough the district court did not specifically find that [the defendant] had knowingly and voluntarily waived his right to counsel," the district judge's statement at issue—"I find that you have the requisite knowledge, education [**227] and ability to represent yourself in this matter"—"establishes that [the defendant's] waiver was knowing and voluntary, and the district court *substantially made the required finding.*" 641 F.3d at 767 (emphasis added). The district judge's colloquy and the statement here is virtually indistinguishable from the statement in *Williams*.

In sum, the district court addressed the "relevant considerations"—including "the defendant's familiarity with the law," "the gravity of the charges," and "the

inquiry, it was based on the judge's failure to address the relevant considerations or make the express finding at all—instances clearly distinguishable from the case at issue. See, e.g., *United States v. Herrera-Martinez*, 985 F.2d 298, 301-02 (6th Cir. 1993) (finding error in the district court's inquiry because the judge allowed the defendant to proceed pro se without making any express finding); *United States v. Clemons*, No. 97-6267, 1999 U.S. App. LEXIS 5977, 1999 WL 196568, at *4 (6th Cir. 1999) (holding that the defendant's waiver of counsel was ineffective because, inter alia, "[t]he record reveals that the district court did not make this inquiry or warn [the defendant] of the dangers of self-representation").

dangers of self-representation," *Miller*, 910 F.2d at 1324—by asking a series of questions that were "drawn from, or substantially similar to," the model inquiry questions, *McBride*, 362 F.3d at 366. The judge also "substantially made the required finding" that Bankston's waiver of counsel was [***12] knowing and voluntary. *Williams*, 641 F.3d at 767. We, therefore, find no error, let alone plain error, in the judge's *Faretta* inquiry.

B. Defective Indictment as to Count 23

Count 23 of the operative indictment [**21] charged Bankston with violating 18 U.S.C. § 1001 for making false statements in her letter to the district judge when she asserted that the postal inspector who searched her home while investigating Bankston's fraudulent schemes had previously posed as a local police officer and planted the evidence that he later seized from her residence. On appeal, Bankston claims that count 23 was defective because the underlying conduct was not a crime under § 1001(b), i.e., the charge failed to state an offense. HNZ[↑] Section 1001(b) provides that § 1001(a)—which criminalizes making false statements in "matter[s] within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States"—"does not apply to a party to a judicial proceeding . . . for statements, representations, writings or documents submitted by such party . . . to a judge or magistrate in that proceeding." 18 U.S.C. § 1001(b). Bankston asserts that her conviction on count 23 must, therefore, be vacated.

The government claims that Bankston's challenge to her conviction on count 23 is waived because it was not raised in a pretrial motion pursuant to *Rule 12(b)*. Alternatively, the government contends that Bankston's conduct is not facially exempt because the indictment alleged that Bankston's [**22] false statements related to matters "within the jurisdiction of the judicial and executive branches of the United States" and "caused the FBI and IRS agents assigned to the case to perform additional investigation in connection with the Defendant's allegations." We begin with the issue of waiver.

1. Waiver and Standard of Review

The government's contention that Bankston's claim is waived presents a threshold question as to which version of *Rule 12* applies in this case. HNZ[↑] The 2013 version of *Rule 12*—which was in place when Bankston was tried and filed this appeal—stated that "a motion alleging a defect in the indictment" must be filed

prior to trial, and that a failure to do so would result in a waiver of that claim. *Fed. R. Crim. P. 12(b)(3)(B), 12(e)* (2013). This old version of [***13] *Rule 12*, however, also carved out an exception to the waiver rule stating that "at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense." *Fed. R. Crim. P. 12(b)(3)(B)* (2013).⁵ By contrast, the 2014 version of [**228] *Rule 12(b)*—which took effect on December 1, 2014, when this appeal was pending and is still in force—eliminated the "failure to state an offense" exception, while modifying the consequences [**23] of failing to file a 12(b)(3) motion. See *Fed. R. Crim. P. 12(b)(3)(B)(v)* (2014). That is, the current rule states that a failure to file a 12(b)(3) motion prior to trial—including, a motion alleging a failure to state an offense—is "untimely," but that a court may nonetheless "consider [the objection] if the party shows good cause." *Fed. R. Crim. P. 12(c)(3)* (2014). The government argues that the current version of the rule applies and Bankston's claim is waived, or, alternatively, even if the claim is not waived, it is subject to plain error review because Bankston did not raise it in the district court. Bankston argues that, under the applicable older version of *Rule 12*, her claim is not only preserved but it is subject to de novo review. We conclude that Bankston has the better argument.

HN9 [↑] The Supreme Court's order promulgating the 2014 amendments to the Federal Rules of Criminal Procedure stated that the new rules "shall govern in all proceedings in criminal cases thereafter commenced and, *insofar as just and practicable*, all proceedings then pending." S. Ct. Order Amending Fed. R. Crim. P. at ¶ 2 (Apr. 25, 2014) (emphasis added). The language in this order parallels the language in the Rules Enabling Act, which provides that "the Supreme Court shall not require the application of such rule to further

⁵ We acknowledge that we have inconsistently applied the now-defunct *12(e)* "waiver" provision. As we observed in *United States v. Soto*, 794 F.3d 635, 649 (6th Cir. 2015), we sometimes construed the party's failure to file a timely pretrial motion as a "true waiver," other times construed it as forfeiture and conducted plain error review, and yet other times avoided "resolving the proper characterization" or examined "whether the appellant had shown good cause for the failure." *Id.* at 649-50. Because we decide here that the earlier [**24] version of *Rule 12* applies, and under that version an indictment fails to state an offense when it omits a facially applicable statutory exemption, see *infra*, we do not comment on whether Bankston's defective indictment claim would have been subject to waiver under the current rule.

proceedings then pending to the extent that, in the opinion of the court in which such proceedings are pending, the application of such rule in such proceedings would *not be feasible or would work injustice*." 28 U.S.C. § 2074(a) (emphasis added). Hence, the applicability of amended *Rule 12* depends on whether its retroactive application to cases pending at the time of the amendment would be "just and [***14] practicable," or, instead, [**25] would "work injustice" or be "[in]feasible." In the latter circumstances, the old rule governs. See *Landgraf v. USI Film Prods*, 511 U.S. 244, 275 n.29, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994) (**HN10** [↑]) "Our orders approving amendments to federal procedural rules reflect the commonsense notion that the applicability of such provisions ordinarily depends on the posture of the particular case."; see also, e.g., *Diaz v. Shallbetter*, 984 F.2d 850, 853 (7th Cir. 1993) (holding that the "just and practicable" exception means only that the amendments "may or may not govern" in pending cases, and that it is not a blanket "authorization for retroactive application").

Here, we conclude that application of amended *Rule 12* would "work injustice," since, **HN11** [↑] under the current rule, the failure to raise a defective indictment claim in a pre-trial motion may result in a waiver of that claim. See *Fed. R. Crim. P. 12(b)(3)(B)(v)* (2014). Indeed, the situation here is much different from the few cases in which we have applied amendments to the Federal Rules retroactively. In *United States v. Soto*, we applied the 2014 version of *Rule 12* to pending proceedings because both the amended rule and its predecessor treated the conduct at issue—a defendant's [**229] failure to bring a pre-trial motion to sever the claims—the same way, i.e., as a waiver. 794 F.3d 635, 648-50 & n.2 (6th Cir. 2015). If anything, the amended rule favored the defendant in *Soto* because, as explained [**26] above, it eliminated *Rule 12(e)*'s reference to "waiver" and instead carved out a "good cause" exception. Likewise, in *Ridder v. City of Springfield*, we applied an amendment to the Federal Rules of Civil Procedure retroactively in part because the conduct that was subject to sanctions under the amended rule continued even after the amendments took effect. 109 F.3d 288, 296 (6th Cir. 1997). In the case before us, the older version of *Rule 12* was in effect during Bankston's trial and when she filed this appeal, and it contained a "failure to state an offense" exception that could have—and we hold below did—preserve Bankston's claim. To apply amended *Rule 12* to Bankston's claims would hence be unjust.

HN12 [↑] Under the 2013 version of *Rule 12*, we

provide plenary review to a claim that the allegations of the indictment fail to state an offense. See *Fed. R. Crim. P. 12(b)(3)(B)*; *United States v. Gatewood*, 173 F.3d 983, 986 (1999) (holding that de novo review applies if the claim that the defendant failed to raise under *Rule 12(b)* is a claim that "contends that the indictment fail[ed] to establish jurisdiction or to charge an offense"). Hence, we review de novo Bankston's [***15] challenge to count 23, mindful that where, as here, an indictment is not challenged until appeal, "the indictment must be construed liberally in favor of its sufficiency." *Id.*

2. Whether [**27] the Indictment Failed to State an Offense as to Count 23

Bankston argues that the conduct alleged in count 23—writing a letter to the district judge as part of a criminal defense—was not a crime under *18 U.S.C. § 1001* because the statute expressly exempts from criminal liability statements made to a judge in the course of judicial proceedings. See *18 U.S.C. § 1001(b)*.⁶

HN14 [↑] The exemption, frequently referred to as a "judicial function exception," applies when the defendant shows: "(1) he was a party to a judicial proceeding, (2) his statements were submitted to a judge or magistrate,

⁶ **HN13** [↑] *Section 1001(a)* sets forth the criminal prohibition, while *§ 1001(b)* provides for the statutory exemption. These provisions state, in relevant parts:

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--

- (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
- (2) makes any materially false, fictitious, or fraudulent statement or representation; or
- (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted [**28] by such party or counsel to a judge or magistrate in that proceeding.

18 U.S.C. § 1001.

and (3) his statements were made in that proceeding." *United States v. Vreeland*, 684 F.3d 653, 662 (6th Cir. 2012) (quoting *United States v. McNeil*, 362 F.3d 570, 572 (9th Cir. 2004) (internal quotation marks omitted)); see also *United States v. Holmes*, 840 F.2d 246, 248-49 (4th Cir. 1988). Bankston's letter to the district judge clearly satisfies all three elements of the exception. The fact that the indictment referenced Bankston's false statements in matters "within the jurisdiction of the judicial and executive branches [**230] of the United States" does not change the analysis. Even construing the indictment liberally, see *Gibson*, 513 F.2d at 979, count 23 is explicitly and exclusively premised on the letter that Bankston wrote to the judge, particularly her allegations regarding the planting of evidence. It is of no legal significance that the false statements in the letter concerned the actions of the executive branch and thus required investigation by the executive agencies. Neither the statute nor our case law discussing the [***16] judicial function exception takes into account the effect of false statements. [**29] See *Vreeland*, 684 F.3d at 662. A contrary interpretation, moreover, would render *§ 1001(b)* inapplicable to all adversarial statements made by a criminal defendant that lead to an investigation by law enforcement.⁷

To find that Bankston's conduct is not a crime under *§ 1001* does not end our analysis, however, because there is language in *Vreeland* suggesting that the judicial function exception may be an affirmative defense that must be raised by a defendant. See

⁷ Legislative history supports our conclusion that the effect of false statements on an executive agency does not affect the applicability of the judicial function exception. In codifying *§ 1001(b)*, Congress agreed with federal courts that had long recognized that a judicial function exception is "necessary to safeguard from the threat of prosecution statements made in the course of adversarial litigation." H.R. Rep. No. 104-680, at 4 (1996). The fear was that, without the judicial function exception, *§ 1001* would "chill vigorous advocacy, thereby undermining the adversarial process." *Id.* Thus, in codifying the judicial function exception, Congress drew a bright-line rule distinguishing "the adjudicative and administrative functions of the court." *Id.* at 9 (noting that "only those representations made to a court when it is acting in its administrative or 'housekeeping' capacity," such as "submissions related to bar membership," are within the scope of criminal prohibition). To consider the effect of false statements as a disqualifying [**30] factor—when those statements would otherwise satisfy the judicial function exception—would, therefore, restrict the scope of *§ 1001(b)* contrary to Congress's intent.

Vreeland, 684 F.3d at 662 (stating that the defendant "must show" the three elements of the judicial function exception under § 1001(b)). But the case before us is appreciably different from *Vreeland*. In *Vreeland* and cases like it, the defendant's conduct did not, on its face, fall within the judicial function exception, and thus the applicability of § 1001(b) was in dispute. Indeed, in *Vreeland*, we dealt with whether § 1001(b) applied to false statements made to a probation officer who was assigned to the defendant during his term of supervised release and who prepared the presentence investigation report. We held that it did not because a probation officer is more than a conduit between the defendant and the judge when playing the role of an investigator, and the statements directed at the officer were hence not made in a "judicial proceeding." [**31] 684 F.3d at 664-65; see also *United States v. Westberry*, 491 F. App'x 364, 365-66 (4th Cir. 2012) (per curiam); *United States v. Grace*, 396 Fed. Appx. 65, 65-66 (5th Cir. 2010) (per curiam); *Manning*, 526 F.3d at 618-20. But see *United States v. Horvath*, 492 F.3d 1075, 1080-81 (9th Cir. 2007) (holding that statements made to a probation officer in the course of preparing a presentence investigation report are protected under the § 1001(b) exception). Similarly, in *McNeil*, 362 F.3d at 572—the Ninth Circuit case quoted in *Vreeland*—the court addressed "whether the range of judicial activities implied by [the judicial function exception] includes the inquiry into a defendant's [**17] financial status for purposes of appointing counsel" and ultimately concluded that it did. In all these cases, there was a dispute—between the parties and [**231] across circuits—as to whether § 1001(b) applied to the novel factual circumstances at issue. By contrast, there is no gray area or nuance in applying § 1001(b) to Bankston's conduct: writing a letter to a judge in the course of a criminal defense is the quintessential conduct protected from criminal liability.

Rather than *Vreeland*, this case is more akin to *United States v. Hubbard*, 16 F.3d 694, 697 (6th Cir. 1994), *rev'd on other grounds*, 514 U.S. 695, 115 S. Ct. 1754, 131 L. Ed. 2d 779 (1995), where we dealt with false statements that a defendant had made in response to pleadings and motions in a judicial proceeding. We observed in *Hubbard* that *HN15* [↑] the judicial function exception is different from "a formalistic objection to a defect in the indictment" because [**32] it "goes to the heart of whether, as a matter of law, [the defendant] can be convicted of the crime with which he was charged." *Id.* at 698. We thus concluded—creating an apparent conflict with *Vreeland*—that a claim that the judicial function exception applies to particular statements is a

claim alleging a failure to state an offense and, therefore, is not waived under the old version of *Rule 12(b)*. *Id.*; see also *Gatewood*, 173 F.3d at 986 (noting that, *HN16* [↑] under *Rule 12(b)*, "a defendant who contends that the indictment fails to establish jurisdiction or to charge an offense may raise that challenge at any time"); *United States v. Harrod*, 168 F.3d 887, 890 (6th Cir. 1999) (holding that *HN17* [↑] a claim that the indictment failed to state an offense "can be raised for [the] first time on appeal") (citing *United States v. Forbes*, 16 F.3d 1294, 1297 (1st Cir. 1994)). Drawing upon our discussion in *Hubbard*, we hold in this case that *HN18* [↑] where, as here, the underlying conduct is so patently not a crime that it satisfies § 1001(b) on its face, the indictment fails to state an offense when it charges a false statement crime while omitting the judicial function exception.

Because count 23 is based on conduct that, on the face of the relevant statutory exemption, does not constitute a crime, we find that the indictment failed to state an offense in count 23. We thus vacate Bankston's conviction [**33] on count 23. See *Gatewood*, 173 F.3d at 986 (holding that *HN19* [↑] a reversal of conviction is warranted, even without a showing of prejudice, where "the indictment cannot within reason be construed to charge a crime") (quoting *United States v. Hart*, 640 F.2d 856, 857-58 (6th Cir. 1981)).

[**18] C. Due Process Errors Relating to Count 23

Bankston claims that the government's refusal to dismiss count 23, the district judge's failure to recuse himself despite being the recipient of her letter, and her counsel's failure to object to or move to dismiss count 23—either individually or collectively—created an "unfair trial setting" that violated her *Fifth Amendment* due process rights.⁸ Specifically, she asserts [**232] that she

⁸The government does not respond to any of these arguments. Instead, the government argues only that Bankston cannot raise an ineffective assistance [**34] of counsel claim because her decision to represent herself "rendered [her counsel's] actions beyond the scope of an ineffective assistance challenge." The government is wrong. Bankston has a viable ineffective assistance claim because the conduct to which she objects—her counsel's failure to move to dismiss count 23—occurred during the time when she was represented by counsel, i.e., after the district judge appointed trial counsel and before Bankston began representing herself at voir dire. See *Wilson v. Parker*, 515 F.3d 682, 698 (6th Cir. 2008) (stating that, where the conduct that gives rise to an ineffective assistance of counsel claim

would not have testified at trial if she had not needed to defend herself against the count 23 charge, and her testimony opened the door to cross-examination in which her prior convictions were revealed. She further claims that the disclosure of her criminal background "infected" the fairness of the entire trial, which warrants vacating her convictions on all counts. We discuss each claim of impropriety before considering the issue of cumulative effect.

1. Prosecutorial Misconduct

HN20^(↑) Because Bankston did not raise a prosecutorial misconduct claim in the district court, we review the prosecutor's conduct only for plain error. See *United States v. Henry*, 545 F.3d 367, 376 (6th Cir. 2008). As described above, Bankston must show that the alleged error was not only plain, but that it affected her substantial rights and implicated the fairness, integrity, or reputation of the trial. See *Johnson*, 520 U.S. at 466-69.

We have already held that count 23 was improperly charged, **[**35]** and that her conviction on that count must thus be vacated. While Bankston also seeks to invalidate her convictions on the other counts based on alleged prosecutorial misconduct in pursuing the § 1001 charge, she cites no precedent supporting her contention that the prosecutor's decision to pursue a charge—however ill-conceived—can by itself constitute a due process error, absent evidence of an improper motive, inflammatory rhetoric, or other conduct "tend[ing] to mislead the jury or **[***19]** prejudice the defendant." *Cristini v. McKee*, 526 F.3d 888, 899 (6th Cir. 2008) (quoting *United States v. Carter*, 236 F.3d 777, 783 (6th Cir. 2001)). Indeed, while the prosecutor's pursuit of count 23 in light of a facially applicable statutory exemption was "improper," we cannot conclude here that such behavior was "flagrant," as typically required by our case law. *Cristini*, 526 F.3d at 899; see *United States v. Carroll*, 26 F.3d 1380, 1385-86 (6th Cir. 1994) (holding that HN21^(↑) improper but non-flagrant prosecutorial conduct requires a new trial if "(1) proof of defendant's guilt is not overwhelming, and (2) defense counsel objected, and (3) the trial court failed to cure the error with an admonishment to the jury.") (quoting *United States v. Bess*, 593 F.2d 749, 757 (6th Cir. 1979)).

occurs prior to waiver, "the logic . . . that exercising the *Faretta* right to represent oneself necessarily eliminates claims of ineffective assistance does not apply").

Moreover, Bankston has not shown the requisite prejudice to warrant a new trial on the remaining twenty-two counts. See *Carroll*, 26 F.3d at 1385-86. Bankston does not claim that the evidence on most of the other counts was **[**36]** insufficient to support the jury's verdicts, and our review of the record persuades us that the jury heard ample evidence of her guilt. See, e.g., *infra* Section II.D (rejecting sufficiency-of-the-evidence claim concerning counts 16 and 18). Additionally, the district court gave a limiting instruction about her prior convictions, remarking to the jury:

Let me interrupt and say that the fact that the defendant has these prior convictions is not any proof whatsoever that she's committed the crimes that are alleged in the third superseding indictment. That testimony is admissible, so you may consider it with respect to her credibility. That's the purpose for the court admitting the testimony to come in. You may consider the fact of a prior conviction as it relates to your determination as to her credibility, but it is—the fact of the prior convictions, the fact of being in prison is no proof that she's committed any of the crimes that are alleged in the superseding indictment—third superseding indictment.

In short, Bankston's claim of prosecutorial misconduct fails because she has not **[*233]** shown any of the requisite elements for establishing a due process error—that the proof of her guilt was **[**37]** not overwhelming, that she objected to the improper conduct, and that the court failed to cure the error with an admonishment to the jury. See *Carroll*, 26 F.3d at 1390. Accordingly, we reject Bankston's claim that she is entitled to a new trial based on prosecutorial misconduct.

[*20]** 2. Judicial Bias

Bankston's judicial bias claim is also unpreserved and hence is subject to plain error review. See *United States v. Hynes*, 467 F.3d 951, 957-58 (6th Cir. 2006) (HN22^(↑) "[W]here the defendant does not contemporaneously object to the trial court's conduct, we review that conduct under the plain-error standard."). The claim would be unavailing under any standard, however. While Bankston argues that the trial judge should have recused himself because he was the "victim" of the false statement crime, she fails to explain how the one remark by the judge on which she relies—"where is the evidence that she submitted the handwritten letter to me?"—reflects bias. Indeed, contrary to Bankston's contention, the district judge suggested dismissing count 23. The government declined, stating, "you can't

lie to a court. I'm not going to allow that to occur." In the end, there is no indication in the record that the judge exhibited a "high degree of favoritism or antagonism" necessary to support judicial **[**38]** bias. *Liteky v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994); see also *id.* at 551 (stating that **HN23** a judge's conduct may be "characterized as 'bias' or 'prejudice'" warranting recusal only if "it is so extreme as to display clear inability to render fair judgment"); *Lyell v. Renico*, 470 F.3d 1177, 1187 (6th Cir. 2006) (holding that a recusal was warranted where the trial judge "took over the cross-examination of the central witness in the case . . . and elicited information not revealed on direct examination" and "chose to limit questioning [of the witness] on her own" absent objection from the prosecutor). Thus, we reject Bankston's claim of judicial bias.

3. Ineffective Assistance of Counsel

Bankston asserts that her court-appointed attorney provided ineffective assistance in failing to object to and move to dismiss count 23 during the period in which the attorney represented Bankston. **HN24** While we do not typically consider ineffective assistance of counsel claims on direct appeal, we depart from that practice where "the existing record is adequate to assess properly the merits of the claim." *Hynes*, 467 F.3d at 969 (quoting *United States v. Franklin*, 415 F.3d 537, 555-56 (6th Cir. 2005)). Here, we find that the record is adequate and hence review Bankston's claim *de novo*. See *Mallett v. United States*, 334 F.3d 491, 497 (6th Cir. 2003) (**HN25**) "Ineffective assistance of counsel claims are mixed questions of law and fact, which we review *de novo* on appeal." **[**39]**

[21]** **HN26** Under *Strickland v. Washington*, 466 U.S. 668, 687-94, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), a defendant must satisfy a two-pronged standard to demonstrate ineffective assistance of counsel. First, the defendant must show that counsel's performance was "deficient," *i.e.*, that it "fell below an objective standard of reasonableness." *Id.* at 687-88. Second, the defendant must show that the deficient performance by counsel was prejudicial to the defense. *Id.* This showing of prejudice requires "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.; accord *Rayner v. Mills*, 685 F.3d 631, 636 (6th Cir. 2012).

[*234] Trial counsel's failure to object to or move to dismiss count 23 satisfies the performance prong of *Strickland*. See *Magana v. Hofbauer*, 263 F.3d 542, 550

(6th Cir. 2001) (holding that **HN27** counsel's "complete ignorance of the relevant law under which his client was charged" fell below the objective standard of reasonableness); *Washington v. Hofbauer*, 228 F.3d 689, 702 (6th Cir. 2000) (finding that **HN28** counsel's failure to object to prosecutorial misconduct may constitute a deficient performance where the "failure is due to . . . lack of knowledge of controlling law, rather than reasonable trial strategy"). We also find prejudice as to count 23 because there is a reasonable probability that, had Bankston's counsel objected to count 23, the charge would have been dismissed. **[**40]** See *Strickland*, 466 U.S. at 694 (stating that **HN29** a reasonable probability is "a probability sufficient to undermine confidence in the outcome"). This prejudice, however, has been addressed by our conclusion that her conviction on count 23 must be stricken based on the indictment's failure to state an offense. In other words, any remedy for ineffective assistance of counsel regarding count 23 is mooted by the remedy we have already afforded on an alternative basis.

While Bankston makes passing references to broader prejudice to her convictions on other counts resulting from the revelation at trial of her prior convictions, she does not develop this argument fully. Hence, the claim is waived. See *United States v. Sandridge*, 385 F.3d 1032, 1035-36 (6th Cir. 2004) (**HN30**) "Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (quoting *Popovich v. Cuyahoga Cnty. Ct. of Common Pleas*, 276 F.3d 808, 823 (6th Cir. 2002)); *McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997) (**HN31**) "It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones." (quoting *Citizens Awareness [**22] Network, Inc. v. U.S. Nuclear Reg. Comm'n*, 59 F.3d 284, 293-94 (1st Cir. 1995)). We add, moreover, that even if we were to address the claim of broader prejudice, we would find no such prejudice for the reasons stated *supra*, Section II.C.1—namely, that the jury otherwise heard ample evidence of **[**41]** her guilt and the court gave a limiting instruction.

4. Cumulative Effect

Bankston argues that, even if each asserted impropriety relating to her count 23 conviction does not on its own result in denial of her constitutional right to a fair trial, the cumulative effect of the errors created an unfair trial setting that violated her due process rights. **HN32** The existence of only one error, however, eliminates the

foundation of her cumulative-effect theory. Indeed, our recognition of the cumulative-effect theory has been limited to situations where "[e]rrors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair." *United States v. Hernandez*, 227 F.3d 686, 697 (6th Cir. 2000) (quoting *Walker v. Engle*, 703 F.2d 959, 963 (6th Cir. 1983)). Here, we conclude that there is no prosecutorial misconduct or judicial bias, not that any error committed by the prosecutor or the judge was harmless. See *United States v. Trujillo*, 376 F.3d 593, 614 (6th Cir. 2004) (holding that, *HN33* [↑] to establish cumulative error, defendant must show that "the combined effect of individually harmless errors was so prejudicial as to render his trial fundamentally unfair"). In short, Bankston's cumulative effect argument fails because there is no cumulation of errors. See, e.g., *Baze v. Parker*, 371 F.3d 310, 330 (6th Cir. 2004) (denying a due *[**42]* process claim based on the *[*235]* cumulative effect argument because the defendant "cannot establish any errors to cumulate").

D. Insufficiency of Evidence as to Count 16 Wire Fraud and Count 18 Mail Fraud

Bankston argues that the record is insufficient to support the jury's findings of guilt on count 16, alleging wire fraud, and count 18, alleging mail fraud, because the government failed to prove the use of an interstate wire communication or the mails. *HN34* [↑] We review sufficiency of the evidence de novo, affirming the defendant's convictions if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Cunningham*, 679 F.3d 355, 369 (6th Cir. 2012) *[***23]* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). We must draw "all available inferences and resolve all issues of credibility in favor of the jury's verdict." *United States v. Smith*, 749 F.3d 465, 477 (6th Cir. 2014) (quoting *United States v. Salgado*, 250 F.3d 438, 446 (6th Cir. 2001)).

1. Count 16 Wire Fraud

HN35 [↑] To prove wire fraud under 18 U.S.C. § 1343, the government must show, inter alia, that the defendant "used or caused to be used an interstate wire communication in furtherance of the scheme." *Cunningham*, 679 F.3d at 370. The indictment stated that Bankston filled out the Lending Club loan application online from her home in Ohio and, in

doing *[**43]* so, connected to the Lending Club server physically located in Las Vegas, Nevada. Bankston contends that the government failed to prove that the server was in fact located in Las Vegas or, alternatively, that it was located in any specific place outside Ohio.

The record belies Bankston's contention. Eric Kinney, from Lending Club's Fraud Operations, testified that, while he could not be certain as to which, the server could have been located in "Nevada, California, Santa Clara" at the time that Bankston filled out the loan application. By contrast, there was no evidence suggesting that the server could have been in Ohio. The government was not obliged to prove the actual location of the Lending Club server, only that Bankston's transaction involved the use of an interstate wire. See *Gambill v. United States*, 276 F.2d 180, 181 (6th Cir. 1960) (holding that *HN36* [↑] the government "need not prove everything in an indictment but only so much thereof as establishes a violation of the statute"). Viewing the testimony in the light most favorable to the prosecution, we conclude that sufficient evidence supported the jury's finding that the government proved the interstate wire element of count 16.

2. Count 18 Mail Fraud

Bankston's argument regarding count 18 *[**44]* fails for similar reasons. *HN37* [↑] Mail fraud, as specified in 18 U.S.C. § 1341, requires a showing, inter alia, that the defendant's conduct involved "a use of the mails." *United States v. Crossley*, 224 F.3d 847, 857 (6th Cir. 2000). While Bankston argues that the government failed to show the use of the mails element *[***24]* (particularly that the Citizens Bank credit card was mailed in the first place), witness testimony at trial suggests otherwise. Bankston's co-conspirator Hale testified that she "knew" that the Citizens Bank credit card "ended up" with Bankston, and that she was familiar with Bankston's practice of receiving "documents in the mail such as debit cards," which were directed to individuals whose identities she had obtained, including that of Rachelle Butler. Butler—the victim of Bankston's identity *[*236]* theft—also testified as to the bank statements from Citizens Bank documenting the use of the credit card, which appeared to have been mailed to Butler, but which she did not receive seemingly due to the mail hold that Bankston had placed on her address. Based on these testimonies, we cannot conclude that no rational juror could have found the use of the mails beyond a reasonable doubt.

E. Sentencing

Bankston argues that the district court committed multiple errors **[**45]** in sentencing that require resentencing on all but the aggravated identity theft counts (counts 6, 8, 19, and 22).⁹ Specifically, Bankston contends that the district court (i) incorrectly used a base offense level ("BOL") of 27 when it had previously determined the correct level to be 25, (ii) departed from the recommended criminal history category ("CHC") without an adequate explanation, and (iii) failed to rule on the disputed loss amounts from Bankston's fraudulent schemes. The government concedes that the district judge erred in using a BOL of 27 and agrees that the case should be remanded for resentencing on all non-aggravated identity theft counts. The government does not address the other alleged sentencing errors.

It is clear, based on the record and the parties' agreement on the issue, that the district judge erroneously used a BOL of 27 when it had earlier ruled that the level should be 25. *Compare* R. 254: Sentencing Hr'g Tr. at 4842-43 (the district judge remarking, "so I get an adjusted offense level of 25") with *id.* at 4844-45 (the judge remarking, without an explanation, **[**25]** that "[t]he offense level has been fixed at 27"). This error, alone, warrants remanding the case for resentencing on all but the aggravated identity theft counts.

We also address, however, the two additional errors raised by Bankston because they are relevant to the proceedings on remand. Her argument that the district court failed to explain its departure from the recommended CHC appears not to have been raised in the district court and is thus subject to plain error review. See *United States v. Mabee*, 765 F.3d 666, 671 (6th Cir. 2014). We have held that **HN39**  "[a] court departing upward from a defendant's calculated [CHC]" must "articulate its reasons for departing from the guidelines in language relating to the guidelines." *United States v. Schultz*, 14 F.3d 1093, 1101 (6th Cir. 1994) (quoting *United States v. Kennedy*, 893 F.2d 825, 829 (6th Cir. 1990)). Here, the district judge departed from the

calculated CHC of V to VI without providing any explanation. Simply stating that the court "grants the motion **[**47]** and affixes the criminal history category as VI"—without specifying the reasons "in language relating to the guidelines," *Schultz*, 14 F.3d at 1101—is not sufficient.

HN40  Bankston's claim that the district court failed to resolve the dispute over the loss amounts is preserved, and we review it de novo. See *United States v. Triana*, 468 F.3d 308, 321 (6th Cir. 2006). Bankston points to three separate loss amounts—one concerning the Ohio Department of Jobs and Family Services ("ODJFS"), another concerning Wells Fargo, and another one concerning the Dollar **[*237]** Bank. **HN41**  *Federal Rule of Criminal Procedure 32(i)(3)(B)* states that a sentencing court "must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing." We have required "literal compliance" with this rule. *United States v. Nelson*, 356 F.3d 719, 722-23 (6th Cir. 2004) (citing *United States v. Monus*, 128 F.3d 376, 396 (6th Cir. 1997)). Hence, while the district court "need not establish the value of the loss with precision," the court must "publish the resolution of contested factual matters that formed the basis of the calculation." *Id.* at 723. A mere expression of an agreement with the government's proposed loss amount—without "explain[ing] how [the court] calculated the amount of loss and . . . respond[ing] to the defendant's **[**48]** 'specific factual objections to the methods of calculation'"—does not suffice. *Id.* (quoting *Monus*, 128 F.3d at 396-97).

[*26]** Here, the district court determined that a dispute on the Dollar Bank loss amount does not affect sentencing. It is not apparent from the record whether the court ruled on the disputed loss amounts of ODJFS and Wells Fargo. When the government explained the fraudulent scheme that resulted in ODJFS's loss, the district court merely asked that the loss be "demonstrated by some particular exhibit," but did not specifically find that the government's loss amount was correct or explain how the court arrived at that amount. Similarly, we are unable to discern from the record—especially in light of the government's failure to rebut Bankston's claim in its brief—any explanation from the district court about why Wells Fargo's loss was not inflated, contrary to Bankston's claim. Accordingly, in remanding the case for resentencing, we instruct the district court to provide an explanation for any upward

⁹ **HN38**  Aggravated identity theft convictions are treated separately for sentencing purposes, with each conviction supporting a mandatory two-year sentence that has to be served consecutively with the sentence imposed for other crimes. See 18 U.S.C. § 1028A(b)(2). Where, as here, the defendant is convicted of more than one aggravated identity theft charges, the sentences for all aggravated identity theft convictions may, in the discretion of the sentencing court, run concurrently with each other. **[**46]** See *id.* § 1028A(b)(4).

departure in the CHC and resolve the remaining factual disputes regarding the loss amounts.¹⁰

III.

For the foregoing reasons, we **VACATE** Bankston's conviction on count 23, **AFFIRM** her other convictions, and **REMAND** the case for resentencing.

End of Document

¹⁰ We decline to address whether the district court incorrectly calculated the loss amounts. Bankston will have **[**49]** an opportunity to make this argument to the district court on remand. We also decline to address whether the district judge's remark—that he has "32 months of discretion" within the 130-to-162-months guideline range—reflects his mistaken understanding that the guidelines sentencing range is binding. To the extent that the judge's remark suggests anything more than inartful phrasing, the district court on remand should treat the guidelines as advisory in accordance with United States v. Booker, 543 U.S. 220, 266-67, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005).