No. 11-40204

In the United States Court of Appeals for the Fifth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

ELIZABETH ANN CHAMBERS
Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Texas, Beaumont Division
No. 1:10-cr-30(2), Hon. Marcia Crone, Judge Presiding

BRIEF OF APPELLANT ELIZABETH ANN CHAMBERS

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CERTIFICATE OF INTERESTED PARTIES

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UNITED STATES OF AMERICA,
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v.

ELIZABETH ANN CHAMBERS
Defendant-Appellant.

The undersigned counsel of record certifies the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate their possible recusal or disqualification.

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STATEMENT REGARDING ORAL ARGUMENT

Appellant Elizabeth Chambers requests oral argument. Chambers believes that oral argument would be of material assistance to the Court in evaluating whether the District Court erred in denying nondiscretionary safety-valve relief under U.S.S.G. §5C1.2(a)(5) when Chambers was rebuffed after repeatedly offering to debrief in advance of the sentencing hearing. In support of this request, Chambers notes that the District Court overruled her objection concerning §5C1.2(a)(5) in an oral order from the bench so vague that one must conjecture as to the grounds upon which this order rests.

Chambers also notes that she conveyed a written request directly to the prosecutor for a debrief session in December, 2010; she renewed this request via telephone before the February, 2011 sentencing hearing. Initially, the prosecutor willingly agreed to request a joint motion to continue so as to facilitate this debrief session the day before the sentencing hearing. The prosecutor thereafter reneged, explaining, "yesterday at 2:00 was not a convenient time." RE.6.297.

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. §3231. The district court entered its final judgment on February 16, 2011. RE.5.139-146.[1] Chambers timely filed her notice of appeal on February 18, 2011. RE.2.147. FED. R. APP. 4(b)(1)(A). This Court has jurisdiction over Chambers's appeal under 28 U.S.C. 1291 and 18 U.S.C. 3742(a).

[1] Docket entries 1-132 comprise the Record on Appeal and are referred to herein as R.[Bates number]. Cites to the record excerpts are in the form RE.[tab number].[Bates number].

STATEMENT OF ISSUES FOR REVIEW

1. Whether the District Court erred in failing to apply the non-discretionary safety-valve provision in U.S.S.G. §2D1.

2. Whether the District Court's findings about safety-valve relief were sufficiently detailed when the Statement of Reasons contained no mention of the subject and the oral ruling from the bench was vague.

3. Whether Chambers was "rebuffed" when she provided a written request for debrief directly to the prosecutor three months before sentencing and thereafter renewed the request by telephone the day before the sentencing hearing.

4. Whether the inference of Chambers being "rebuffed" is accentuated when the prosecutor warned Chambers at the Pretrial Conference, "we would be looking at 121 to 151 with a 10-year minimum prison sentence and no way to go underneath that 10 years **because you're not eligible for the safety-valve.**" However, the PSR extirpated both predictions in finding that Chambers was, in fact, safety-valve eligible and her Guidelines range was far lower than the prosecutor predicted.

5. Whether the District Court erred in concluding that a debrief the day before a sentencing hearing was "way too late" when this Court has recently reiterated its precedent that " the defendant need not debrief and provide truthful information at any particular time except prior to the commencement of the sentencing hearing...". *United States v. Powell*, 387 Fed. Appx. 491, 494 (5th Cir. 2010) (reversing when debrief occurred day before sentencing hearing).

6. Whether the District Court erred in denying Chambers's request for a continuance to effect a debrief session when the prosecutor stated "we could interview her 20 times."

7. Whether safety-valve relief is coextensive with Acceptance of Responsibility.

8. Whether a debrief session must be conducted in the presence of case agents.

9. Whether a written statement sent to a third-party totally removed from the debrief process can foreclose safety-valve relief when the prosecutor admits

she never read this written statement notwithstanding its inclusion in the PSR.

STATEMENT OF THE CASE

I. INTRODUCTION

On March 17, 2010, Elizabeth Chambers was named in a three-count indictment with narcotics offenses arising from the discovery of drugs in her car two days earlier. These drugs were hidden in the car by two co-defendants, Retika Johnson (Chambers's sister, roommate, and co-owner/shared user of the car) and Sammy Ware (a Beaumont drug dealer and the father of Johnson's child) during the daytime of March 15. Chambers was not present when the drugs were secreted; to the contrary, she was tending to matters at her home when Johnson took the car to meet Ware and throughout the day.

II. INDICTMENT AND TRIAL

Count 1 charged Conspiracy to Possess with Intent to Distribute 5 kilograms or More of Cocaine HCI and 5 grams or more of Cocaine Base, in violation of 21 U.S.C. §846. Count 2 charged Possession with Intent to Distribute 500 Grams or More but Less than 5 Kilograms of Cocaine HCI, in violation of 21 U.S.C. §841(a)(1). Count 3 charged Possession with Intent to Distribute 5 Grams or More but Less than 50 grams of Cocaine Base, in violation of 21 U.S.C. §841(a)(1).

Ware and Johnson pled guilty. By contrast, Chambers proceeded to trial and presented a two-prong defense: 1) Chambers had not been present when the drugs were placed in the car and 2) Chambers joined her sister on a trip from Houston to

Beaumont only because their mother (an elderly and frail Beaumont resident) called Chambers and asked her to bring food. Nevertheless, the jury convicted Chambers on all counts.

III. FIRST PSR CONTAINS A (SUBSEQUENTLY ACKNOWLEDGED) COMPUTATIONAL MISTAKE

The first PSR issued on November 12, 2010. The Base Offense Level of 32 derived from U.S.S.G. §2D1.1(c)(4). [First PSR; ¶ 14]. A two-level minor role reduction was afforded because Chambers "had no financial interest in the drugs, and was not otherwise involved in the transaction." *Id.* at ¶ 17. Chambers's total Criminal History Category was assessed at 1. *Id.* at ¶ 29. The PSR urged a corresponding Guidelines range of 97-121 months. *Id.* at ¶ 46.

Problematically, the PSR failed to credit Chambers with additional two-level reduction under U.S.S.G. §2D1.1(a)(5) when she had received the mitigating role reduction. On December 10, 2010, Chambers filed an objection urging relief under U.S.S.G. §2D1.1(a)(5). (Doc. No. 103; ¶2). On February 1, 2011, a revised PSR issued acknowledging this mistake. The revised PSR assessed a Base Offense Level of 30 and a Total Offense Level of 28. (Doc. No. 117; ¶¶14; 23). The new Guidelines range therefore fell to 78-97 months.

IV. THE PSR FINDS CHAMBERS TO BE SAFETY-VALVE ELIGIBLE ONCE SHE DEBRIEFS

Additionally, the PSR determined that Chambers was safety-valve eligible under U.S.S.G. §5C1.2. (Doc. No. 117 at ¶15). However, while Chambers had satisfied each of the first four requirements of §5C1.2(a)(1)-(4), the fifth element (debriefing) had not yet been satisfied. *Id*.

V. CHAMBERS MAKES HER FIRST OFFER TO DEBRIEF IN WRITING

In her December, 2010 objections to the PSR, Chambers made clear her desire to debrief so as to satisfy all requirements for safety-valve relief: "in the event the court does not believe she has disclosed all the information available, she now be given the opportunity to do so.". (Doc. No. 103 at ¶6). This objection, and the specific request that Chambers now be allowed to debrief, was served upon the prosecutor as per the Certificate of Service. *Id*. at p. 3. Furthermore, this specific objection was listed in the Addendum to the revised PSR (Doc. No. 117, p. 13).

VI. PROBATION REQUESTS AN UNRELATED WRITTEN STATEMENT

Thereafter, the Probation Officer requested of Chambers a written statement about the events of March 15. Chambers provided this statement; the Probation Department reproduced it in the revised PSR under the heading "Adjustment for Acceptance of Responsibility." Doc. No. 117; ¶11. It is particularly salient that Chambers's objection to the PSR did not posit any objection on the grounds that

she was eligible for an adjustment under U.S.S.G. §3E1.1, Application Note 2. In other words, the decision to regard this statement as a metric of acceptance lied with the author of the PSR.

VII. CHAMBERS RENEWED HER REQUEST TO DEBRIEF ORALLY, THE PROSECUTOR AGREED TO REQUEST A CONTINUANCE TO ARRANGE FOR A DEBRIEF SESSION THE DAY BEFORE SENTENCING, BUT THEN REBUFFED CHAMBERS'S APPROACH

In a second earnest attempt to arrange a debrief session so as to satisfy the fifth safety-valve element, Chambers's counsel telephoned the prosecutor the day before the sentencing hearing. RE.6.294-295 (Chambers explaining sequence of events to the court). The prosecutor willingly agreed to request a continuance of the sentencing hearing to make the necessary arrangements for the debrief. *Id*. at 296 (prosecutor states to the court that she was initially amenable to debrief session). However, the prosecutor thereafter changed her mind and rebuffed Chambers's approach because "yesterday at 2:00 was not a convenient time." *Id*. at 297.

In addition to being 'too busy' ("[m]y agents are tied up…" *id*.), the prosecutor took umbrage at the letter Chambers had submitted to the Probation Department and which the PSR had labeled "acceptance of responsibility" in the revised PSR. The prosecutor explained, "I had no idea that a letter had been submitted to the probation department", *id*. at 296, notwithstanding

the fact that the letter was reproduced in its entirety in the PSR and the prosecutor had filed no objection to this PSR. Apparently, this letter also predicated the prosecutor's conclusion that "[t]here is no indication at all that Ms. Chambers has accepted any responsibility…", even though the prosecutor reluctantly thereafter acknowledged that acceptance of responsibility is not the proper standard for safety-valve analysis. *Id*. at 296.

VIII. SENTENCING

At sentencing, Chambers cited a passel of cases in which defendants had been allowed to debrief in chambers immediately before sentencing, RE.6.295-296; 299, other cases explaining that a defendant need not proffer to any particular government agent, *id*. at 300, and cases where appeals courts had reversed when a defendant was rebuffed in their attempt to meet with the government. *Id*. at 295. Chambers also strenuously objected to the prosecutor's incorrect statement of the law confusing acceptance of responsibility with the controlling standards for the safety-valve. *Id*. at 299.

The district court accepted the PSR without change and determined an Offense Level of 28 with a Criminal History Category I (Statement of Reasons; Doc. No. 108, p. 1) but denied safety-valve relief. The district court imposed the mandatory minimum of 120 months imprisonment as to Count One and 78 months imprisonment as to Counts Two and Three all to be served concurrently, RE.5.141,

a five year term of Supervised Release, *Id*. at 142, and a Special Assessment of $300. *Id*. at 144.

STATEMENT OF FACTS

In early 2010, the Beaumont police began surveillance on a local drug dealer named Sammy Ware. R.330-332. On March 15, Ware travelled from Beaumont to a Channelview Whataburger where he met a woman named Retika Johnson in the parking lot at 11:00 a.m. R.333. Johnson is a Beaumont native living in Houston; she is also the mother of Ware's child. In need of money, Ware offered to pay Johnson $1,200 if she completed a narcotics transfer for him. R.405.

Johnson lent Ware her Dodge Intrepid, which was registered in the name of Johnson's sister and roommate, Elizabeth Chambers, R.334. However, Johnson and Chambers had purchased this car together one month earlier with Johnson putting down $1,000 of the purchase price, R.404, enjoyed equal use of the car, R.388, and shared responsibility for the car payments just as they did for their respective shares of the rent. R.384.

Ware took Johnson's Intrepid for two hours while Johnson waited at the shopping mall adjacent to the Whataburger. R. 391. At 2:00 p.m., Johnson told Chambers that Ware had secreted narcotics in the car and that she was travelling to Beaumont. R.405. Johnson and Chambers did not speak again until after 5:00. R.406.

In the meantime, the frail and elderly mother of both Johnson and Chambers, Patsy Johnson, called her daughters independently and asked them to bring her food at her Beaumont home that day because she was ill. R.626; 627 (Mother Johnson explaining phone calls made on March 15). Chambers and her mother had connected, but Johnson and her mother had not. When Johnson returned to her shared home with Chambers, Chambers informed Johnson of their mother's request for food. For that reason, the two sisters left for Beaumont together:

> Prosecutor: So what was the plan then? Where were y'all going?
> Johnson: To Walmart to get my mama some meat.
>
> Prosecutor: So, you were going to go to Walmart to buy your mom some groceries?
> Johnson: Yes.

R.398; *Accord* R.629; 630-631 (Mother Johnson testified on both direct and cross that she expected her daughters to arrive late at night with groceries); R.443 (arresting officer spoke to Mother Johnson night of arrest and told him the daughters were coming with food).

At 11:00 p.m., the Beaumont police affected a pretext stop of the shared car being driven by Chambers at the ingress to her mother's apartment complex. R.341. Chambers volunteered to the officer that she was going to her mother's house. R.441. Chambers willingly consented to a search of the vehicle. R.446. The police found a large amount of narcotics and money which Ware had secreted in the doorframe.

The government's theory at trial was that Chambers knew that the drugs were in the car; Chambers's defense was that she was uninvolved with these drugs and thought her sister had completed the transportation during the long interregnum between their calls at 1:00 and 5:00. R.325 (Chambers establishes that 4 hours is far more time than is needed to make a round trip from Houston to Beaumont). On cross-examination, Johnson acknowledged that Chambers was unaware that Johnson had not affected the transport without her and in her absence:

> Q: You never discussed drugs on the road trip to Beaumont, did you?
> A: No, sir.
>
> Q: You never told your sister drugs were still in the car, did you?
> A: No, sir.

R.407.

SUMMARY OF THE ARGUMENT

Chambers's sentence on Count One must be reversed and remanded for resentencing with safety-valve applicability because Chambers satisfied all five elements under §5C1.2; the fifth (and only disputed) element was satisfied by Chambers's written request to the prosecutor in December 2010 that she be allowed to debrief because the prosecutor rebuffed this approach.

In the alternative, Chambers's sentence must be reversed and remanded with the instruction that Chambers is entitled to be resentenced on Count One after she

has been afforded an official opportunity to debrief. Chambers easily satisfied U.S.S.G. §5C1.2(A)(1)-(4); only §5C1.2(A)(5) precluded her safety-valve relief. Chambers repeatedly offered to debrief in advance of the sentencing hearing. The prosecutor was initially amenable to such a meeting, but thereafter changed her mind because the proposed time "was not a convenient time." RE.6.297.

The District Court summarily overruled Chambers's objection about the "tell-all" fifth safety-valve element. No mention of the safety-valve is made in the Statement of Reasons. The District Court's ruling from the bench is not sufficiently detailed to permit this Court to determine why non-discretionary safety-valve relief was denied.

Furthermore, the District Court misconstrued the import of the letter given to the Probation Officer at his request. Because Chambers recognized that information must be conveyed to the government (rather than the Probation Department) for safety-valve relief, this letter was never intended to be a substitute for a debrief session. This parameter is made plain by the fact that the Probation Officer reproduced the letter in its entirety under a hearing "Acceptance of Responsibility" in the revised PSR notwithstanding the fact that Chambers had not posited any objection under U.S.S.G. §3E1.1, Application Note 2. For this reason, it is unsurprising that the District Court erroneously concluded, "I think she is not

in a position that she is going to be able to do this", RE.6.303, when Chambers's earnest efforts to debrief had been rebuffed for 3 months.

Moreover, Chambers's letter read, "I never asked Retika if she had finished with Sammy, I just assumed she had." (PSR, Doc. No. 117, ¶11). Rather than demonstrating falsehood, this statement perfectly correlates with Johnson's testimony that she never told Chambers drugs were still in the car.

The impact of this sentencing error is obvious and of great magnitude. Chambers was sentenced to concurrent 78 month sentences on Counts 2 and 3. RE.5.141. This was the lowest point on Chambers's Guidelines range after she successfully attacked a computational error in the original PSR. Chambers's safety-valve situation was not even mentioned in the Statement of Reasons. Therefore, there is no reason to think that a sentence of 54% greater magnitude (120 months versus 78 months) would have been imposed absent the prosecutor's decision to rebuff Chambers's approach. *Cf. United States v. Sanchez*, 347 Fed. Appx. 38, 40 (5th Cir. 2009) ("Sanchez cannot show plain error because there is no indication that his sentence would have been different if the district court had provided reasons for the denial of a safety valve reduction.").

STANDARDS OF REVIEW

Safety Valve

"The language of §2D1.1(b)(4) is clear and unambiguous. Its directive is not discretionary." *United States v. Leonard*, 157 F.3d 343, 346 (5th Cir. 1998).

When seeking a safety valve reduction, the defendant bears the burden of proving his eligibility. *United States v. Flanagan*, 80 F.3d 143, 145-46 (5th Cir. 1996).

If the Government opposes the safety valve on the grounds that a defendant has not satisfied the fifth criterion — i.e., has not truthfully provided all the information he has concerning the offense or course of conduct that gave rise to the crime of conviction — it must offer more proof than "mere[Ballot box] speculat[ion]." *United States v. Miller*, 179 F.3d 961, 969 (5th Cir. 1999). "[A] mere challenge to factual findings at sentencing does not automatically exclude application of [the safety valve]." *United States v. Edwards*, 65 F.3d 430, 433 (5th Cir. 1995).

Thus, "where a defendant in her submissions credibly demonstrates that she has provided the government with all the information she **reasonably was expected to possess**, in order to defeat her [claim to the safety valve], the government must at least come forward with some sound reason to suggest

otherwise." *United States v. Miranda-Santiago*, 96 F.3d 517 (1st Cir. 1996) (emphasis added); *see also Miller*, 179 F.3d at 969 (quoting *Miranda-Santiago* approvingly and at length).

Interpretation and Application of Sentencing Guidelines

"We review a district court's interpretation or application of the Guidelines de novo and its factual findings for clear error." *United States v. Conner*, 537 F.3d 480, 489 (5th Cir. 2008).

Relevant Conduct

Factual findings regarding relevant conduct are reviewed for clear error. *United States v. Rhine*, 583 F.3d 878, 885 (5th Cir. 2009). These findings are not clearly erroneous as long as they are "plausible in light of the record as a whole." *Id*.

ARGUMENT

I. THE DISTRICT COURT DID NOT MAKE SUFFICIENTLY DETAILED FINDINGS

A. Safety-Valve Protection is Not Discretionary

"The language of § 2D1.1(b)(4) is clear and unambiguous. Its directive is not discretionary." *United States v. Leonard*, 157 F.3d 343, 346 (5th Cir. 1998).

B. Findings on A Disputed Safety-Valve Issue Must Impart A Requisite Minimum of Detail

A district court must make sufficient findings in denying safety-valve credit to permit appellate review. *See, e.g.*, *United States v. Reid*, 139 F.3d 1367, 1368 (11th Cir. 1998) (reversing when the district court only explained that it did "not feel the safety-valve applies in this case."); *United States v. Hamilton*, 154 Fed. Appx. 775, 777 (11th Cir. 2005) (reversing when the district court only explained "I find that the limit and application of statutory minimum sentencing under 5C1 point 2 of the guidelines, I find that the Defendant does not qualify because of the findings that I observed and that Counsel has made referenced to Section 5 applies. And I deny the eligibility of this section.").

C. The Statement of Reasons Says Nothing About Safety-Valve

The Statement of Reasons does not mention the safety-valve issue in any way; the narrative section does not even aver to the 53% discrepancy between the Guidelines' sentences imposed on Counts Two and Three and the mandatory minimum imposed on Count One. (Doc. No. 108, p. 4). *Accord United States v. Quinn*, 212 Fed. App'x 297, 300-301 (5th Cir. 2007) (writing in the context of Section 3553(c)(2)'s specificity requirement, the Court reversed, explaining, "Where the court fails to provide any fact-specific reasons to support a departure of 42 months from the top of the guideline range, it is an abuse of discretion.").

D. The District Court's Explanation Was Impermissibly Vague

Denying Chambers's objection as to safety-valve, the district court only stated:

> I agree with that. I think it's way too late. I think she continues to deny involvement. I don't think that's truthful. I think the jury verdict speaks volumes and the court heard the evidence and I agree with it. I think she is not in a position that she is going to be able to do this.

RE.6.302-303.

This ruling from the bench is far more vague than those found to require reversal in *Reid* and *Hamilton.* See Part I.B., *supra*.

In *United States v. Hardman*, this Court affirmed denial of safety-valve relief when "the district court made an 'independent determination' that Hardman was not eligible for a reduction under § 5C1.2 because she had not provided truthful information." 328 Fed. Appx. 304, 305-306 (5th Cir. 2009). By contrast, there is no indication that the District Court made an "independent determination." To the contrary, the District Court simply stated "I agree with that."

The reader of this oral order can only speculate as what facts the nebulous term, "that", includes or excludes. In this context, "that" could have been used either as a demonstrative pronoun or as an adverb. Chambers recognizes "that" might have referred to the prosecutor's arguments about the case agents' busy schedules and a laches bar to a defendant's ability to avail herself of safety-valve

relief after a uttering a statement deemed to be counterfactual. However, as will be explained in Part VI-VII, *infra*, the prosecutor's arguments concerning §5C1.2(a)(5) fail both as a matter of logic and as a matter of law.

II. CHAMBERS WAS REPEATEDLY "REBUFFED"

A. Chambers Made A Written Request to Debrief

Chambers recognizes cases in which safety-valve relief was denied when a defendant was deemed to have been unwilling to debrief or untruthful when he did. *See, e.g.*, *United States v. Gonzalez-Candelario*, 312 Fed. Appx. 613, 614 (5th Cir. 2009) (affirming when "[t]he Government informed the district court that Gonzalez-Candelario disputed the amount of cocaine that was attributed to him, that Gonzalez-Candelario refused to debrief, and that Gonzalez-Candelario's written statement was insufficient to qualify him for the safety valve departure."). Chambers also recognizes that in *United States v. Flanagan*, the Fifth Circuit interpreted the language of the safety-valve disclosure provision as placing "the burden . . . on the defendant to provide the Government with all the information and evidence regarding the offense.". 80 F.3d 143, 146 (5th Cir. 1995). This Court found "no indication that the Government must solicit the information." *Id.*

These circumstances are wholly absent from Chambers's situation. Unlike *Gonzalez-Candelario*, Chambers did not refuse to debrief. Unlike *Flanagan*, Chambers did not lie supine waiting for the government to solicit information. To

the contrary, Chambers conveyed directly to the prosecutor a written request (in her objections) to debrief three months before sentencing; Chambers reiterated this request by telephone the day before sentencing. Furthermore, Chambers propounded her written request to the prosecutor antecedent to, and independent of, the unrelated statement requested by the Probation Department regarding "Acceptance of Responsibility."

B. Chambers Directed the District Court's Attention to the Seventh Circuit's Opinion in *United States v. Brack*

Other Circuits have labeled this situation a "rebuff." The Second Circuit has described the concept in the obverse; after citing and aligning with this Court's opinion in *Flanagan*, the Court explained, "This is not a case in which there is any possibility of a misunderstanding **or of a rebuff by the government** when Ortiz sought to provide the requisite information." *United States v. Ortiz*, 136 F.3d 882, 884 (2d Cir. 1997) (emphasis added).

At sentencing, Chambers directed the District Court's attention to the Seventh Circuit's opinion in *United States v. Brack*, 188 F.3d 748 (7th Cir. 1999) (RE.6.295) (Chambers offers a pinpoint citation to *Brack*, explains its reasoning, and quotes in detail). In *Brack*, "the government… contends that because it believed that Tyler's statement was not truthful, it was under no obligation to

follow up with an interview." *Id*. at 763. The Seventh Circuit rejected that contention:

> This argument confuses the issues. Although the government was not required to give Tyler a second chance to tell the truth, it could not complain of incompleteness when it refused to allow him to finish telling his story.

The Court further explained:

> In this case, however, Tyler acted affirmatively by inviting the government (in writing) to interview him. The government rebuffed him. Under these circumstances, Tyler's written statement (if truthful) combined with his offer to meet with the government satisfied the safety valve disclosure requirement.

Id.

1. Chambers's Situation is Largely Coextensive to *Brack*

Like Tyler, Chambers "acted affirmatively by inviting the government (in writing) to interview" her. Also like Tyler, "the government rebuffed" her. But unlike Tyler, Chambers made a telephone call to the prosecutor by way of further follow-up.

2. The Holding in *Brack* Militates Even More Strongly in Chambers's Favor Than it Did on the Facts Presented

Unlike Tyler, Chambers made an unrelated statement to the Probation Department. The prosecutor acknowledged that but-for this letter, she would have urged Chambers's satisfaction of the fifth safety-valve element. RE.6.297 (prosecutor acknowledging that when she originally agreed to a debrief the day

before sentencing hearing "I did not even know what the letter was or what it had said at that point…".).

Even if Chambers's letter sent to Probation was intended as an effort to convey information impinging on the debrief (which it was not), the prosecutor should not be allowed "to complain of incompleteness when it refused to allow [her] to finish telling his story." This logic undergirding this conclusion is even stronger when the government refuses to give a defendant an initial audience. *Accord United States v. Schreiber*, 191 F.3d 103, 108 (2d Cir. 1999) ("If, for example, the government refuses from the outset to meet with a defendant, such fact may weigh in favor of a finding that a defendant's written proffer is complete.").

3. The Prosecutor Was Invariably Disposed Against Safety-Valve Relief and Made Affirmative Efforts to Impede Chambers's Eligibility

a. At Pretrial Conference, The Prosecutor Made an On-The-Record Assurance That Chambers Would Be Ineligible for Safety-Valve Relief

On the final pretrial hearing, the prosecutor admonished the defendant:

> [I]f we proceed to trial, without acceptance and if she's found guilty on that charge, we would be looking at 121 to 151 with a 10-year minimum prison sentence and no way to go underneath that 10 years **because you're not eligible for the safety-valve.**

R.170 (emphasis added).

The prosecutor then predicted:

> However, if the jury finds and accepts the evidence as to this conspiracy, it could easily go to a Level 34 which would be a calculation of 188 to 235 months, which is 15 and a half years to 19 and a half years' imprisonment, should you be found guilty.

Id.

It is striking that, despite this prediction, the prosecutor made no objection to the PSR that this vastly higher range (235 months predicted by prosecutor at Pretrial Conference versus 78 months imposed at low end of Guidelines range) should be meted out to Chambers. To the contrary, the prosecutor predicted that Chambers would not be eligible for the safety-valve and, rather than objecting to the PSR on these grounds, the prosecutor rebuffed Chambers's entreaties to compel that result.

b. At Sentencing, the Prosecutor Revealed That Debriefing Chambers Was A Viable Option

At sentencing, the prosecutor made clear that she would not believe Chambers in any circumstance. "This defendant lacks credibility no matter—**we could interview her 20 times** and every time get a different story." RE.6.302 (emphasis added). In other words, the prosecutor was adamant that her agents lacked the ability to sit for even one debrief because they were "working 20 hours a day", RE.6.297, but also stated that it would have been possible to "interview

Chambers 20 times" were they so inclined. The fact that the prosecutor volunteered this information without prompt from the court or in response to any of Chambers's objections suggests that this point was not in any sense rhetorical.

The ineluctable conclusion is that the prosecutor was invariably disposed against safety-valve relief even before the start of trial and this predisposition may have animated the refusal to allow Chambers to debrief.

III. CHAMBERS'S REQUEST WAS NOT "WAY TOO LATE"

After conclusorily denying Chambers's objection, the District Court stated, "I think it's way too late." RE.6.302. This Court has recently reversed and remanded in a case where the district court denied safety-valve relief when the defendant moved for a continuance "two days before the original sentencing" and actually debriefed "the day before the rescheduled sentencing." *United States v. Powell*, 387 Fed. Appx. 491, 494 (5th Cir. 2010). This Court also reiterated its precedent that "[o]ur case law makes clear that the defendant need not debrief and provide truthful information **at any particular time except prior to the commencement of the sentencing hearing**...". *Id.* at 496 (emphasis added) (citing *United States v. Brenes*, 250 F.3d 290, 293 (5th Cir. 2001).

While Chambers's first entreaty to the prosecutor made three months earlier was certainly not "way too late", the phone call to the prosecutor the day before the sentencing hearing fell within the same temporal framework found to be acceptable

in *Powell*. Also like *Powell*, Chambers made a specific oral motion for a continuance to convene the debrief session originally requested three months earlier. *Id*. at 299 ("we would ask that perhaps this hearing could be continued so as to allow Ms. Chambers a chance to visit with the agents.").

Chambers also notes that other courts have taken an even more capacious view of the relevant range "prior to the commencement of the sentencing hearing." *See, e.g.*, *United States v. Mejia-Pimental*, 477 F.3d 1100 (9th Cir. 2007) (reversing the district court's refusal to give credit for the safety-valve even though defendant waited until this third sentencing, after his co-defendants had pleaded guilty and were sentenced).

IV. THE DISTRICT COURT'S RULING CONFUSED SAFETY-VALVE WITH ACCEPTANCE OF RESPONSIBILITY

Next, the District Court stated, "I think she continues to deny involvement." RE.6.302. Contrariwise, as Chambers gainsaid the prosecutor at sentencing, numerous courts have held that a defendant who fails to qualify for acceptance of responsibility is not necessarily ineligible for safety-valve. RE.6.299 ("she didn't correctly state the law on the issue of relation to acceptance of responsibility."). *See, e.g.*, *United States v. Shrestha*, 86 F.3d 935 (9th Cir. 1996) (affirming safety valve credit even though defendant denied guilty knowledge at trial and at sentencing); *United States v. Webb*, 110 F.3d 444 (7th Cir. 1997) (defendant may

be denied acceptance of responsibility reduction under §3E1.1 even though the court finds the defendant eligible for the safety-valve.).

Moreover, Chambers's statement did not "deny involvement." The statement read, "I never asked Retika if she had finished with Sammy, I just assumed she had." (PSR, Doc. No. 117, ¶11). This statement perfectly accords with Johnson's trial testimony when she was presented as the prosecution's star witness:

> Q: You never discussed drugs on the road trip to Beaumont, did you?
> A: No, sir.
>
> Q: You never told your sister drugs were still in the car, did you?
> A: No, sir.

R.407.

V. THE DISTRICT COURT'S RULING CONFUSED SAFETY-VALVE WITH RULE 29

Lastly, the District Court stated, "I think the jury verdict speaks volumes and the court heard the evidence and I agree with it." RE.6.302-303. If this were a correct statement of the law, safety-valve relief would effectively be foreclosed for any defendant who goes to trial (obviating acceptance of responsibility points; U.S.S.G. §3E1.1, Application Note 2) and who fails to prevail on sufficiency challenge

under FED. R. CRIM. P. 29 ('the jury verdict speaks volumes and I agree with it'); R.623 (court denies Chambers's motion for directed verdict).

VI. THE PROSECUTOR WAS MISTAKEN THAT A DEBRIEF HAD TO BE CONDUCTED IN THE PRESENCE OF THE CASE AGENTS

Despite having originally agreed to a joint motion to continue the sentencing hearing, the prosecutor was not willing to meet with Chambers alone. By the time of sentencing, the prosecutor asserted that a debrief was impossible because "[m]y agents were actually tied up and are working about 20 hours a day right now on other matters." RE.6.297. This argument contravenes the legal principle that for safety-valve purposes, a defendant need not give information to a particular government agent. *United States v. Real-Hernandez*, 90 F.3d 356 (9th Cir. 1996) (the fact that the current AUSA was not present when another AUSA debriefed defendant was not relevant to the question of whether defendant provided information to the "government.").

The prosecutor was clearly able to meet with Chambers alone before the sentencing hearing had she been so willing. Insofar as the prosecutor rebuffed Chambers's approach because she thought such an interview could only be conducted in the presence of "my agents", this belief is contrary to decisional law.

VII. THE PROSECUTOR WAS MISTAKEN THAT CHAMBERS'S WRITTEN STATEMENT DISQUALIFIED HER FROM SAFETY-VALVE RELIEF *VEL NON*

At sentencing, the prosecutor expounded:

> But if she says different now than what she's put in the PSR, something's going to be untruthful. So, there is no way that she can be found to be a truthful debriefer at any point. If she sticks to the story, it's untruthful. If she changes her story, then she was untruthful when she told the presentence report officer this.

RE.6.302.

The sophistry in this statement is obvious; numerous cases have held that past lies and omissions do not disqualify a defendant who ultimately tells the truth before sentencing. *United States v. Tournier*, 171 F.3d 645 (8th Cir. 1999) (defendant submitted to four interviews at which she lied, and did not provide full information until just before sentencing, but the Eighth Circuit nevertheless upheld the district court's decision to apply the safety valve); *United States v. De La* Torre, 599 F.3d 1198 (10th Cir.2010) (defendant's trial estimony primarily sought to convince the jury that while he knew he possessed marijuana, he did not know that he possessed methamphetamine, and it was possible that a fact-finder could believe defendant's testimony without contradicting his conviction); *United States v. Brownlee*, 204 F.3d 1302 (11th Cir. 2000) (a defendant's past lies and omissions do not automatically disqualify him if he makes a complete and truthful proffer before sentencing).

CONCLUSION

Chambers's sentence on Count One must be vacated and remanded for resentencing with safety-valve relief. In the alternative, Chambers's sentence must be reversed and remanded for resentencing after Chambers has been afforded the condign opportunity to properly debrief without being rebuffed by the government.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6,941 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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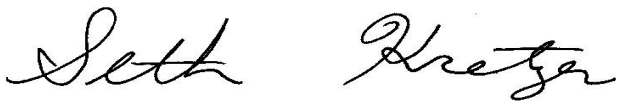

Date: June 15, 2011

Seth H. Kretzer

CERTIFICATE OF SERVICE

I certify that seven (7) copies of the Brief of Appellant were filed with the Court by U.S. Mail, and in electronic format via the ECF system, on the 15t^{h} day of June, 2011. I also certify that one copy of the Brief of Appellant was served on Elizabeth Ann Chambers, Register Number 17004-078, at the following address on the same date.

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