No. 12-1809

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

United States of America, Plaintiff-Appellee, v. Maurice L. Maxwell, Defendant-Appellant.	Appeal from the United States District Court for the Western District of Wisconsin Case No. 11-CR-25-WMC The Honorable Chief Judge William M. Conley

REPLY BRIEF OF DEFENDANT-APPELLANT MAURICE L. MAXWELL

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The government's response concedes many of Maxwell's points—but requests an affirmance nonetheless. First, after conceding that it waived its forfeiture defense below, it claims it can resurrect the defense in this Court to obtain plain-error review. (U.S. Br. at 17–18.) Such an outcome would be directly at odds with the Supreme Court's holding in *Wood v. Milyard*, 132 S. Ct. 1826 (2012), a case the government does not even cite. The government next argues that Gee's testimony "satisfies both of the plurality's alternative tests for admission" in *Williams v. Illinois*, 132 S. Ct. 2221 (2012), (U.S. Br. at 25), and then sets forth what it believes to be the elements of those tests. Yet the government fails to recognize that the facts here do not meet any of its listed elements. (U.S. Br. at 23.) Finally, it concedes that the district court used an incorrect Guidelines range and never "firmly indicated" or "explicitly stated" (as required by this Court's precedent) that it would have given Maxwell the same sentence under the correct Guidelines range—but then argues against resentencing anyway. (U.S. Br. at 33.) This Court should reject the government's attempts to ignore the relevant facts and to rewrite the controlling law, and reverse or, at a minimum, remand for resentencing.

I. The government waived its forfeiture defense and cannot resurrect it now

The government concedes that it failed to raise its forfeiture defense before the district court. (U.S. Br. at 17.) It also does not dispute that its decision was intentional. That is a waiver, and under *Wood v. Milyard*, 132 S. Ct. 1826, 1835

(2012), a federal court lacks the authority to overlook it. The government neither cites nor attempts to distinguish *Wood*. Instead, the government argues that it did not waive its forfeiture defense because, after briefing was complete and after confirming its belief that "plain error [was] not at work," (App. at 51a), it then orally suggested to the district court that it would have argued for plain-error review in this Court had Maxwell never filed the Rule 29 motion and instead directly appealed his conviction. (U.S. Br. at 18–19; App. at 52a.)

But Maxwell did file that motion, the parties fully briefed it, and the district court heard argument on it. By failing to raise plain-error in its brief, the government waived it whether or not it later raised it orally (even if its decision to waive was mistaken). *See United States v. Rodriguez*, 888 F.2d 519, 524 (7th Cir. 1989) (holding that the government could not raise a waiver defense at oral argument because that defense had already been waived in its response brief); *see also Ryan v. United States*, 688 F.3d 845, 848 (7th Cir. 2012) ("[A] mistake in reaching a decision to withhold a known defense does not make that decision less a waiver."). Once again, the government simply ignores these controlling precedents in its response brief.

What is more, the government makes the astonishing claim that even if it waived its forfeiture defense in the district court, it can resurrect the defense in this Court. (U.S. Br. at 18.) Once an issue is waived, however, it is waived forever. *See Wood*, 132 S. Ct. at 1834–35 (holding that a defense waived before the district court could not provide the basis for the decision on appeal). The supposedly contrary

cases it cites, *Worth v. Tyer*, 276 F.3d 249, 262 n.4 (7th Cir. 2001), and *United States v. Brandao*, 539 F.3d 44, 57 (1st Cir. 2008), both predate the Supreme Court's decision in *Wood*, which alone should be dispositive. Furthermore, *Worth* is inapposite. There, the appellant sought de novo review of the district court's *factual* findings because, it argued, the appellee waived her right to clear-error review. *Worth*, 276 F.3d at 262 & n.4. This Court rejected that argument because it was an attempt to re-characterize a factual issue—one that was fully litigated and resolved in the district court—as a legal one, and that is not something that can be waived. *Id.* Here, Maxwell seeks de novo review of a *legal* issue (whether Gee's testimony violated the Confrontation Clause) because the government waived its forfeiture defense in district court. Put differently, the standard of review here is simply an incident to a possible defense; by waiving a forfeiture defense, the government waived the standard of review that comes with it as well. *United States v. Blagojevich*, 612 F.3d 558, 560 (7th Cir. 2010); *United States v. Cotnam*, 88 F.3d 487, 498 n.12 (7th Cir. 1996) ("[T]he government has not argued for the plain error standard of review. Thus the government has waived the right to invoke this standard[.]"). *Worth* says nothing to the contrary and the case is barely relevant to the situation here.

The government's other case, *Brandao*, actually supports Maxwell's position. There, the district court applied plain-error review to a Rule 29 motion and the appellate court followed suit. *Brandao*, 539 F.3d at 57. Importantly, the government specifically invoked the forfeiture defense in the district court. *United States v.*

Brandao, 448 F. Supp. 2d 311, 317 (D. Mass. 2006). In fact, not only did the government not waive its forfeiture defense, both parties fully briefed the issue of forfeiture and the applicability of plain-error review. *See* Gov't's Second Opp'n to Def.'s Mot. for Judgment of Acquittal at 7–10, *Brandao*, 448 F. Supp. 2d 311 (Crim. No. 03-10329-PBS), 2006 WL 6605584; Def. Angelo Brandao's Resp. to Gov't's Second Opp'n at 8–9, *Brandao*, 448 F. Supp. 2d 311 (Crim. No. 03-10329-PBS), 2003 WL 25589926. By contrast, the government here deliberately chose not to raise forfeiture in the district court. Accordingly, it cannot resurrect forfeiture in this Court. *Wood*, 132 S. Ct. at 1835.

II. Gee's reliance on Nied's test results violated the Confrontation Clause

Because the government concedes that it waived its forfeiture defense (and because under *Wood* federal courts may not overlook that waiver), Maxwell's objection to Gee's testimony was effectively preserved and so this Court reviews the issue de novo.

A. Neither *Williams* nor *Turner* supports the government's position

The government claims that "under *Williams*, Gee['s] testimony was appropriate, as it satisfies both of the plurality's alternative tests for admission as well as the concurring opinion." (U.S. Br. at 25.) But Gee's testimony does not pass muster under either of the plurality's alternative tests or that of Justice Thomas. First, although the plurality stated that the DNA profile in question was not offered for the truth of the matter asserted, it also conceded that the stakes would change if

the case had involved a jury trial rather than a bench trial. With a jury trial, "there would have been a danger of the jury's taking [the expert's] testimony as proof that the [profile came] from the victim's vaginal swabs." *Williams*, 132 S. Ct. at 2236 (opinion of Alito, J.). Maxwell, of course, elected to have a jury trial, and so there was a danger that the jury took Gee's testimony as proof that the forensic analysis was indeed true. The *Williams* plurality continued: "Absent an evaluation of the risk of juror confusion and careful jury instructions, *the testimony could not have gone to the jury*." *Id.* (emphasis added). In its response brief, the government cannot point to any evaluation of the risk of juror confusion. And as for "careful jury instructions"—while the court instructed the jury that Sergeant Grywalsky was an expert, it offered absolutely no instruction regarding Michelle Gee. (Appellant Br. at 6; R. 101 at 1–2.)

The plurality's second alternative test requires statements to have "the primary purpose of accusing a targeted individual." *Williams*, 132 S. Ct. at 2243 (opinion of Alito, J.); *accord id.* at 2251 (Breyer, J., concurring). Perhaps that was not true in *Williams*, but it is certainly true here. In fact, accusing a targeted individual (Maxwell) was not just the primary purpose of John Nied's forensic analysis, it was the only one.

The government's misplaced reliance on *Williams* is most clearly exposed by its own description of that case:

> [T]he plurality pointed out that this profile was generated before a suspect had been identified; DNA evidence is not inherently inculpatory; creation of DNA profiles involves numerous technicians and should not be discouraged by imposing burdensome requirements

> at trial; and defendants are free to subpoena those non-testifying individuals who took part in the testing.

(U.S. Br. at 23.) Here, the analysis was conducted after the suspect (Maxwell) had been identified; forensic analysis purporting to identify a Schedule II controlled substance is inherently inculpatory; forensic drug analysis involves only a single lab analyst; and the government cannot shift the burden of producing essential witnesses to Maxwell, *see Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324–25 (2009) (noting that the subpoena power "is no substitute for the right of confrontation [because it] shifts the consequences of adverse-witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court."). In fact, until the moment that Gee testified in the courtroom, Maxwell had every reason to believe that she performed the analysis herself. (R. 48) ("Ms. Gee will offer her opinion that the substance seized in this case contained cocaine base. This opinion is based on the results of a visual examination, along with a gas chromatography test and a mass spectrometry test performed on a liquid extraction of the substance, and an infrared spectroscopy performed on the solid material.").

Finally, Justice Thomas's concurring opinion in *Williams* flatly stated that the DNA report was offered for the truth of the matter asserted, 132 S. Ct. at 2256 (Thomas, J., concurring in the judgment), a conclusion that applies *a fortiori* to Nied's forensic analysis. In other words, at least five Justices (perhaps all nine, given the plurality's emphasis on *Williams* being a bench trial) would dispute the

government's claim that Gee's testimony was not offered for the truth of the underlying facts, (U.S. Br. at 26). As for Justice Thomas's indicia-of-solemnity test, the government never produced any of Nied's analysis or data that Gee relied on, (U.S. Br. at 25–26), making it impossible to determine, given the record in this case, whether this test was satisfied. *Cf. Williams*, 132 S. Ct. at 2260 n.5 (Thomas, J., concurring in the judgment) ("I have stated that [the Confrontation Clause] 'also reaches the use of technically informal statements when used to evade the formalized process.'" (quoting *Davis v. Washington*, 547 U.S. 813, 838 (2006) (Thomas, J., concurring in the judgment in part and dissenting in part))). Nied's final report, (App. at 55a–57a), however, almost certainly satisfies Justice Thomas's test, as this Court suggested (without deciding) in a recent case involving the Wisconsin State Crime Laboratory. *See United States v. Turner*, No. 08-3109, 2013 WL 776802, at *6 (7th Cir. Mar. 4, 2013) ("Hanson's report was both official and signed, it constituted a formal record of the result of the laboratory tests that Hanson had performed, and it was clearly designed to memorialize that result for purposes of the pending legal proceeding against Turner, who was named in the report. In those respects, the report arguably is the functional equivalent of the report at issue in *Bullcoming*.").

Taking a question-begging approach, the government summarily asserts that Gee's reliance on Nied's "machine generated reports" does not violate the Confrontation Clause. (U.S. Br. at 26.) Maxwell does not dispute that if Nied had testified, then Gee could have offered an expert opinion based on his test results.

But Nied and Gee are not interchangeable for all of the reasons animating the Supreme Court's decisions in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), and *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011). Indeed, a key concern of the Court regarding forensic drug analysis is that it "requires the exercise of judgment and presents a risk of error that might be explored on cross-examination," *Melendez-Diaz*, 557 U.S. at 320; confrontation "is designed to weed out not only the fraudulent analyst, but the incompetent one as well," *id.* at 319. Put differently, the "machine generated reports" that Gee relied on were not merely the passively generated outputs of an impartial machine; Nied played an active role in generating those reports and, even if he "possesse[s] the scientific acumen of Mme. Curie and the veracity of Mother Theresa," Maxwell had a right to probe his competence and honesty. *Id.*

These are not idle or speculative concerns, as recent events have all too vividly demonstrated. *See* Sally Jacobs, *Chasing Renown on a Path Paved with Lies*, Boston Globe, Feb. 3, 2013, at A1, *available at* http://www.bostonglobe.com/metro/2013/02/03/chasing-renown-path-paved-with-lies/Axw3AxwmD33lRwXatSvMCL/story.html (describing a Massachusetts crime lab analyst who, *inter alia*, failed to check the accuracy of scales, "dry labbed" samples—that is, "identified cocaine and heroin samples according to what they were suspected to be" without actually testing them, and deliberately contaminated samples to cover her tracks, thus throwing into question the reliability of some 34,000 drug convictions). Surrogate testimony is incapable of serving the purposes of confrontation, *Bullcoming*, 131 S. Ct. at

2715, and five Justices in *Williams* recognized that this is so even if the surrogate happens to be an expert (and if the testimonial statement is accordingly never formally admitted into evidence). In *Williams*, to be sure, there was the additional complicating factor that the DNA profile was not generated as part of a targeted prosecution. 132 S. Ct. at 2241. That complication is absent from this case—Nied's forensic analysis is identical to that in *Melendez-Diaz* and so falls under the condemnation of expert surrogate testimony by five Justices in *Williams*.

Perhaps realizing the absence of support in *Williams*, the government turns to this Court's decision in *Turner*, 2013 WL 776802, at *6. But *Turner* does not control the outcome of this case. In *Turner*, this Court addressed only two pieces of testimony that, as the government correctly points out, are not present in this case: the surrogate's testimony that the analyst agreed with him and his testimony that the analyst followed proper procedures. *Id.* at *2. The defendant in *Turner* did not raise the issue presented here: whether a surrogate may testify about her own conclusions based on the analyst's raw data. *See* Appellant's Br. at 14–21, *Turner*, 2013 WL 776802 (No. 08-3109), 2009 WL 900111 (challenging various portions of the surrogate's testimony but explicitly disclaiming any argument that the reliance on the raw data by itself was a Confrontation Clause violation). Mr. Turner no doubt made that decision because at the time, this Court had held in *United States v. Moon*, 512 F.3d 359, 362 (7th Cir. 2008), that the Confrontation Clause does not extend to forensic analysis data "because data are not 'statements' in any useful sense. Nor is a machine a 'witness against' anyone." The Supreme Court's

subsequent decisions in *Melendez-Diaz* and *Bullcoming* cast considerable doubt on the continued viability of that assertion.

In any event, because the parties in *Turner* did not join the precise issue of whether a surrogate expert can offer an opinion based on someone else's forensic data, *Turner* does not control here. Indeed, though the government cites dicta from *Turner* that supports its position, (U.S. Br. at 25–26), other dicta in *Turner* supports Maxwell's position, *e.g.*, 2013 WL 776802, at *4–5 (noting that the government deprived the defendant of the opportunity to challenge the reliability of the forensic analysis and acknowledging that two aspects of the case—that the forensic analysis was part of a targeted prosecution and that the case was tried before a jury—"add force to the argument that a Confrontation Clause violation occurred").

B. The error was not harmless

The government has not shown harmlessness beyond a reasonable doubt. (U.S. Br. at 27–31.) First, the government asserts that "[t]he testimony at trial established [that] the drugs in the defendant's possession were crack cocaine even without Gee's testimony." (U.S. Br. at 28.) But this is precisely the kind of sufficiency-of-the-remaining-evidence argument that this Court has explicitly rejected in harmless-error analysis. *Jones v. Basinger*, 635 F.3d 1030, 1053 (7th Cir. 2011). Instead, courts must ask whether there is any "reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman v. California*, 386 U.S. 18, 23 (1967) (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86–87 (1963)) (internal quotation mark omitted). As this Court said in *Turner*, "[w]hether

an error is harmless beyond a reasonable doubt depends upon factors such as the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of corroborating or contradictory evidence and the overall strength of the prosecution's case." 2013 WL 776802, at *7 (quoting *United States v. Walker*, 673 F.3d 649, 658 (7th Cir. 2012)).

Nowhere in its response brief does the government assert that Gee's testimony was unimportant or cumulative. And while it is true that Wilson's subjective testimony might have been legally sufficient to sustain a conviction, that does not make the error harmless, for it "ignores the significant prejudicial effect the error can have on a jury's ability to evaluate fairly the remaining evidence." *Jones*, 635 F.3d at 1053. The government's only response to this is to say that any impact Gee's testimony had on the jury is "pure conjecture." (U.S. Br. at 30.) But it is hardly conjecture to conclude that forensic analysis has a uniquely compelling effect on a jury. *See* Andrew P. Thomas, *The CSI Effect: Fact or Fiction*, 115 Yale L.J. Pocket Part 70, 70 (2006) (discussing a survey in which "38% [of prosecutors] believed they had at least one trial that resulted in either an acquittal or hung jury because forensic evidence was not available"). And in any event, the government, not Maxwell, bears the burden of proving that Gee's testimony did *not* have such an effect; in the absence of conclusive proof either way, the presumption of harmfulness favors Maxwell. What's more, Wilson testified that the substance weighed 13 grams, when in fact it weighed just over 10 grams, an error of more than twenty percent (and one that the jury never heard). (U.S. Br. at 6 n.2.) By putting Gee on

the stand instead of Nied, the government neatly avoided having to answer questions about this discrepancy, which could have affected Wilson's credibility in the eyes of the jury.

Furthermore, Gee provided the only objective evidence showing that the substance was crack and not merely cocaine; in fact, Wilson himself provided potentially contradictory evidence when he said that he also found two straws along with the baggies seized from Maxwell, (App. at 35a). Straws are more consistent with powder cocaine (which is snorted) than with crack cocaine (which is smoked). (R. 111 at 122) (government expert Grywalsky testifying that the presence of straws "usually indicates use of powder cocaine," not crack). The only other corroborating evidence that Maxwell had crack was Wilson's and Grywalsky's respective visual observations of the substance, which are hardly conclusive because "powder" cocaine can in fact look rocky. *See Cocaine*, U.S. DRUG ENFORCEMENT AGENCY, http://www.justice.gov/dea/pr/multimedia-library/image-gallery/images_cocaine.shtml (last visited Apr. 2, 2013) (depicting various images of cocaine and crack, two of which are reproduced below); *see also United States v. Fuller*, 532 F.3d 656, 660–61 (7th Cir. 2008) (recognizing that powder cocaine can be "rerocked").

Image of Powder Cocaine, *available at* http://www.justice.gov/dea/pr/multimedia-library/image-gallery/cocaine/cocaine_hcl3.jpg

Image of Crack Cocaine, *available at* http://www.justice.gov/dea/pr/multimedia-library/image-gallery/cocaine/crack_cocaine2.jpg

Absent any forensic analysis and given the contradictory presence of the straws, a *reasonable* jury could have concluded that these subjective visual observations did not prove beyond a reasonable doubt that the substance was indeed crack and not merely, say, cocaine. *See United States v. Ford*, 683 F.3d 761, 767 (7th Cir. 2012) ("The criterion of harmlessness is whether a *reasonable* jury might have acquitted[.]"), *petition for cert. filed*, No. 12-7958 (U.S. Dec. 20, 2012).

Turner is not to the contrary. Applying what appears to be a novel harmless-error standard, this Court found harmlessness in that case because there was "considerable" evidence proving the disputed element of the government's case—possession of crack cocaine. *Turner*, 2013 WL 776802, at *8. Even under this approach, admission of Gee's testimony is not harmless. The government introduced considerably less admissible evidence proving possession of crack cocaine against Maxwell than it did against Turner. Unlike this case, the prosecution in *Turner* introduced evidence of three controlled buys carried out by an undercover officer whose explicit purpose was to buy crack cocaine and who did so at prices "consistent

with the prices charged for crack cocaine." *Id.* Both evidence-of-purpose and price, explicitly relied on to find harmlessness by this Court in *Turner*, are entirely lacking from the evidence introduced against Maxwell. In addition, the evidence introduced in Maxwell's case contains something lacking from Turner's: affirmative evidence—the two straws—that casts doubt on whether the substance Maxwell was carrying was crack as opposed to powder cocaine. (R. 111 at 122.)

Turner's harmlessness finding also relied on what it deemed permissible portions of the surrogate's testimony. *Turner*, 2013 WL 776802, at *9. As discussed *supra*, this included the surrogate's testimony that Turner had crack based on data generated by the primary analyst—and Turner did not argue that an expert's reliance solely on the data produced by a non-testifying analyst violated the Confrontation Clause. Accordingly, this Court weighed the harmfulness of the additional testimony (that the analyst agreed with the surrogate's conclusions and followed proper testing procedures) against, *inter alia*, the surrogate's independent expert opinion that the substance was crack, which the defendant effectively conceded was admissible. As a result, the admissible evidence proving that the substance was crack considerably outweighed the unconstitutional evidence. *Id.* By contrast, Maxwell is challenging Gee's opinion based on Nied's raw data itself, which, if excluded, leaves only Wilson's and Grywalsky's subjective visual observations on the government's side of the scales.

The government's final gambit is to echo the district court's opinion that the error was harmless because Maxwell's "trial strategy centered on claiming the

drugs were for personal use and denying the intent to distribute," as opposed to contesting that the substance was crack cocaine. (U.S. Br. at 29.) The government continues:

> Maxwell did not cross-examine any witness regarding the identification of the drug and elicited no independent evidence that the substance was something other than crack cocaine. Further, neither of the parties mentioned Gee's testimony or how the substance was proven to be crack cocaine during closing arguments. The argument for both sides focused primarily on what the defendant intended to do with the drugs.

(U.S. Br. at 30.) Even if all of this is true, none of it is relevant. The only thing that Maxwell needed to do to dispute the identity of the substance was to plead not guilty. Maxwell could have remained utterly silent throughout trial. He could have waived opening and closing argument; failed to call a single witness or offer any evidence in his defense; and declined to cross-examine any of the prosecution's witnesses. It still would not have relieved the government of its obligation to give Maxwell the opportunity to confront the witnesses against him. Whether or not Maxwell would have chosen to question John Nied about the identity of the substance is irrelevant; it was Maxwell's choice to make. By putting Michelle Gee and not John Nied on the stand, the government unilaterally denied Maxwell that opportunity.

III. Maxwell is entitled to a full remand for resentencing

The government concedes that the district court used an incorrect Guidelines range and that this error is now plain in light of the Supreme Court's decision in *Dorsey v. United States*, 132 S. Ct. 2321 (2012). (U.S. Br. at 33.) Furthermore, the

government also concedes that the district court did not "firmly indicate[]" or "explicitly state[]," as required by this Court, that it would have imposed the same sentence had it known that the Fair Sentencing Act of 2010 applied retroactively. (U.S. Br. at 33); *see United States v. Foster*, 701 F.3d 1142, 1157–58 (7th Cir. 2012) (describing the case law establishing the "common thread" of affirming a sentence imposed under an incorrect Guidelines range only where the sentencing court "firmly indicated" or "explicitly stated" that it would have imposed the same sentence under the correct Guidelines range).

Nevertheless, it argues against resentencing because the district court "did not tie the defendant's sentence to the guideline range" and "specifically stated that the sentence was appropriate based on all of the circumstances of the offense and Maxwell's prior criminal history." (U.S. Br. at 34–35.) But this is completely unremarkable; *every* sentencing court is required to undertake that kind of analysis. *See Gall v. United States*, 552 U.S. 38, 49–50 (2007) (holding that a sentencing court, after correctly calculating the Guidelines range, must then consider all of the factors listed in 18 U.S.C. § 3553(a) without presuming that the Guidelines range is reasonable). Accordingly, this Court routinely finds plain error and remands for resentencing whenever a sentencing court uses an incorrect Guidelines range. *See* (Appellant Br. at 30) (listing cases). Absent the firm indication or clear statement, there is "no reason to believe that the district court would not have selected an even lower sentence if given the opportunity to do so." *United States v. Farmer*, 543 F.3d 363, 375 (7th Cir. 2008).

The government seemingly misunderstands this governing precedent when it claims that the district court did have the opportunity to impose a lower sentence because Maxwell, not surprisingly, asked for one. (U.S. Br. at 34.) This Court in *Farmer* was clearly referring to the opportunity to sentence the defendant *under the correct Guidelines range*. The government also labels Maxwell's sentencing challenge a "weak assertion" supported by "no facts" showing that the district court might have given Maxwell a lower sentence had it known that the Fair Sentencing Act applied retroactively. (U.S. Br. at 34.) In fact, the district court did indicate that it was starting from the Guidelines range and then calculating a departure from that range (as it was required to do by *Gall*), which suggests that it might well impose a different sentence under the correct Guidelines range if given the opportunity to do so. *See* (R. 136 at 18) ("The question is, and I don't disagree with you, Counsel, is at what point—at what point do I depart from the 240[-month minimum Guidelines value]. And if I do, how far."). But even had the district court not made that statement, it would not change the fact that this Court requires a firm indication or clear statement to overcome the rule that an incorrect Guidelines range warrants resentencing. And as the government has conceded, there was no such firm indication or clear statement here. (U.S. Br. at 33.)

Perhaps sensing that this Court's precedents require resentencing, the government argues in the alternative for a limited remand. (U.S. Br. 35.) But neither of the cases it cites, *United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005), and *United States v. White*, 582 F.3d 787 (7th Cir. 2009), supports a limited remand

here. *Paladino* involved a sentence imposed before (but appealed after) the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), which rendered the Guidelines advisory. 401 F.3d at 481. *White* involved a sentence imposed before (but appealed after) the Supreme Court's decision in *Kimbrough v. United States*, 552 U.S. 85 (2007), which allowed sentencing courts to consider the crack–powder-cocaine disparity when sentencing defendants. 582 F.3d at 798–99. Critically, in both cases, the district court sentenced the defendant using the *correct* Guidelines range. The only issue in each of those cases, therefore, was whether the court would still impose the same sentence had it known that the Guidelines were not mandatory (*Paladino*) or had it known that it could consider an additional factor in its analysis (*White*). Because the district court had used the correct Guidelines range, under *Gall* a limited remand was appropriate.

By contrast, here the district court indisputably used an incorrect Guidelines range. And this Court has "repeatedly held that a sentencing based on an incorrect Guidelines range constitutes plain error and warrants a remand for resentencing[.]" *United States v. Martin*, 692 F.3d 760, 766 (7th Cir. 2012) (internal quotation mark omitted) (citing *United States v. Pineda-Buenaventura*, 622 F.3d 761, 767 (7th Cir. 2010), *United States v. Farmer*, 543 F.3d 363, 375 (7th Cir. 2008), and *United States v. Garrett*, 528 F.3d 525, 527 (7th Cir. 2008)). Indeed, this Court recently encountered a case involving the Fair Sentencing Act and summarily remanded for resentencing under plain-error review. *United States v. Jackson*, 491 F. App'x 738, 739 (7th Cir. 2012) (per curiam). Maxwell is entitled to the same.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the district court and either grant Maxwell's motion for acquittal or a new trial or remand for further proceedings, including, at a minimum, resentencing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because this brief contains 4,893 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 12-point Century Schoolbook font with footnotes in 11-point Century Schoolbook font.

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Dated: April 8, 2013

CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Defendant-Appellant, Maurice L. Maxwell, hereby certify that I electronically filed this brief and appendix with the clerk of the Seventh Circuit Court of Appeals on April 8, 2013, which will send notice of the filing to counsel of record.

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