

NO. 2012-1974

United States of America
First Circuit Court of Appeals

UNITED STATES OF AMERICA,
Appellee,

v.

DONNA GAEL CHILSON
Defendant/Appellant

APPEAL FROM NEW HAMPSHIRE DISTRICT COURT

BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

The First Circuit Court of Appeals has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

On November 16, 2011 Donna Gael Chilson was found guilty after pleading guilty in the United States District Court for the District of New Hampshire of conspiracy to distribute marijuana, contrary to 21 U.S.C. § 841(a)(1), and 21 U.S.C. § 846.

On August 6, 2012, the court (*Joseph A. DiClerico, Jr.*), sentenced her to 15 months, committed, plus two years of supervised release.

A notice of appeal was filed on August 8, 2012.

STATEMENT OF THE ISSUE

1. Did the court commit both procedural error and substantive error by failing to adequately consider the sentencing factors in 18 U.S.C. § 3553(a), and by sentencing Ms. Chilson to an unreasonable term of incarceration when the result will be to quash her operating small business which sustains her, impoverish her old age, increase the likelihood she will become reliant on public aid, eliminate a positive fixture of her community, and serve no positive social end?

STATEMENT OF THE CASE

Donna Gael Chilson – known to her friends as Gael – is 64 years old, and has lived most of her life in Sahuarita, Arizona, about 25 miles south of Tucson. Some time in the late 1990s, she was romantically involved with one Tony Labozetta, who persuaded her to aid him in his marijuana distribution business. SENT.TRN. at 6. Never before involved in any crime, Gael Chilson nonetheless over the next decade traveled to various parts of the country, including New Hampshire, sometimes delivering marijuana but mostly picking up money. Various members of the network were arrested, and Ms. Chilson’s activity tapered off around 2007 to sporadic collections after Tony Labozetta died. Gael was indicted shortly after her final trip in 2010.

Immediately upon arrest, Ms. Chilson confessed and provided complete cooperation. She did not request a lawyer or stand on her rights. She was twice debriefed, gave the government calendars and diaries specifying dates of her travel which were material in the prosecution of others, and offered testimony against them. Ms. Chilson has been free on conditions since her arrest and pending appeal.

In 2011 Ms. Chilson pleaded guilty to conspiracy to distribute between 1,000 and 3,000 kilograms of marijuana. With zero criminal history points and a criminal history category of I, PRE-SENT. INVESTIG.RPT. ¶¶ 41 & 62, *Sealed Appx.* at 1, the guidelines sentencing range was 24-30 months. The government recommended 24 months committed. SENT.TRN. at 3.

For the purposes of her sentencing, her lawyer traveled to Arizona, videotaped testimonial interviews by 14 of Ms. Chilson's references, and collected letters written by 12 additional references.¹ Taking some of the testimonial content into account, in 2012 the New Hampshire District Court sentenced her to 15 months incarceration, plus two years of supervised release.

¹This appeal is limited to issues concerning sentencing. The record pertaining to sentencing consists of 14 video interviews, 12 testimonial letters, and 2 other documents. These were all submitted to the court during the sentencing proceeding, and have been transferred to this Court.

The videos were created by the defendant's counsel below, by interviewing 14 separate people during July 2012. They are between 4 and 15 minutes each, and collectively run about 2 hours and 12 minutes. Viewing the video interview of the defendant herself is especially urged.

The letters were written by 12 additional people. They are all addressed "dear judge," and are dated during July 2012.

The videos, letters, and additional documents appear to have been informally numbered. Each video file comprises a separate exhibit, 1 through 14. It is hoped that the file names of the videos have been consistent and that the citations herein can be conveniently referenced to files in possession of the Court. In the event they cannot, the video exhibits are being submitted to the Court on disk along with this brief.

The video files are cited herein (for example) as: 01_GAEL_CHILSON.WMV (0:00), where the numbers in parentheses refer to the approximate time of the speaker's relevant statement.

The letters collectively comprise exhibit 16, and are lettered 16-a through 16-l. The letters and an additional document have likewise been transferred to this Court, and also appear in the addendum to this brief.

STATEMENT OF THE FACTS

I. Business, Healing, Community, Organizations

At the time of sentencing, Gael Chilson was 63 years old. SENT.TRN. at 4. She was raised in the house her father built in 1943 at the pithead of his now-inactive lead and zinc mine. 01_GAEL_CHILSON.WMV (0:40, 1:45). She received her bachelor of arts at Northern Arizona University in 1969, studying speech, drama, and music. RÉSUMÉ, exh. 15, *Addm.* at 35; PLEA TRN. at 3. Since then she has been certified in Bio-Touch and as a Bio-Touch instructor, a soft-touch healing technique. Gael has studied nutrition and food safety, has become self-educated in several healing arts. RÉSUMÉ. She is certified as a Shamanic Astrologer, and is an ordained minister. 01_GAEL_CHILSON.WMV (9:35); PRE-SENT. INVESTIG.RPT. ¶ 52; RÉSUMÉ.

Gael has been employed her entire adult life. When she was young she worked as a waitress, but since then has been largely self-employed. In the 1980s she bought and managed a house-cleaning company, which she then sold. Gael has owned two health-food businesses, published a cookbook, and in the 1990s marketed a line of prickly pear health foods. RÉSUMÉ; PRE-SENT. INVESTIG.RPT. ¶ 53.

After she came into possession of her father's house in the mid-1990s, Gael established a retreat for those seeking alternative health therapies. PLEA TRN. at 3. There she hosts multi-day "intensives" administering and teaching her brand of alternative healing techniques. PRE-SENT. INVESTIG.RPT. ¶ 53; LETTER FROM DANIEL GIAMARIO, exh. 16-b, *Addm.* at 38. She also markets health supplements, essential oils, night-sky seminars, and books on these topics, both at her facility and at local farmers' markets.

RÉSUMÉ; 09_MARIE_MURPHY.WMV (2:20).

The business keeps Gael self-supporting, but requires frugality. From 2006 to 2011 it netted at most about \$10,000 annually. Her assets include only the homestead, a car, and less than \$1,000 in savings. PRE-SENT. INVESTIG.RPT. ¶¶ 54-55. She has a tenant, and maintains the aging property. 01_GAEL_CHILSON.WMV (2:30); 10_BARBARA_CHILSON.WMV (1:50). If Gael were forced a sustained absence, it is apparent the business would fall apart, SENT.TRN. at 4, her tenant would be landlord-less, and because of her age and the risk of losing the property, it would likely “end her legitimate business activities.” LETTER FROM NORMAN CARYL, exh. 16-a, *Addm.* at 37.

The nature of Ms. Chilson’s facility and business is best described by her in her own video interview, to which the attention of this Court is urged. 01_GAEL_CHILSON.WMV (*passim*).

II. Important Part of the Community

People in Ms. Chilson's community regard her as an important part of the local economy. A San Francisco business consultant who has known Gael for 45 years wrote she is a "prominent business owner in Green Valley" who is a "leading teacher of Yoga and meditation." LETTER FROM NORMAN CARYL, exh. 16-a, *Addm.* at 37. Others wrote and said she "has been a long-time regular merchant at the farmer's market," LETTER FROM LINEA VAN HORN, exh. 16-g, *Addm.* at 43, and is involved with its organization. 08_SUSAN_SHAW.WMV (4:05).

Ms. Chilson practices several healing arts. Two of her colleagues testified by video praising her work in their fields. One, a Kinesiologist, used to have an office-sharing arrangement with Gael, so got to know her professionally. She praised Gael as "a wonderful healing practitioner." 11_JOYCE_SIERRA.WMV (2:30). Another, a past massage therapist at the famed Canyon Ranch who has known Gael for 30 years, lauded Gael as "probably one of the most helpful people I know," 12_REBECCA_RIZZO.WMV (2:05 & 3:40), and commended her for adjust[ing] her fees when she is working with people." One of Gael's patients, who was a human resources manager and now works with housing services for ex-inmates, has known Gael for 21 years through his daughter, from the AA community, and also from his participation at the monthly AA meetings Gael sponsors at her facility. He offered that Gael's therapies have helped him with the symptoms of his Bell's Palsy. 07_CHRIS_LEDYARD.WMV (2:55, 3:30 & 4:25). One of Gael's patients wrote a letter lauding her for treating with kindness and compassion. LETTER FROM NANCY NUGENT, exh. 16-I, *Addm.* at 45.

Gael regularly volunteers at the Bio-Touch Center for the International Foundation of Bio-Magnetic, a non-profit which provides healing touch; those who have known her for decades from this work recommended Gael's skill, patience, and interest in helping those in pain. 06_PAUL_BUCKY.WMV (4:30-6:45); LETTER FROM MASCHA MIEDANER, exh. 16-h, *Addm.* at 44; RÉSUMÉ.

Several of Gael's contacts in the astrology community, many of whom have known her upwards of 20 and 25 years, commented on her talent and skill in the field, her professionalism and competence in leading the Tucson Astrologers' Guild, 03_FRANK_COLE.WMV (1:30); 04_CATHERINE_BASKET.WMV (4:00); 05_CAYELIN_CASTELL.WMV (3:20); 09_MARIE_MURPHY.WMV (3:20); 13_STEPHANIE_ST_CLAIRE.WMV (3:00); LETTER FROM DANIEL GIAMARIO, exh. 16-b, *Addm.* at 38; RÉSUMÉ, and on her hardworking success in hosting annual professional events. 14_JASMINE_DEGUIRE.WMV (2:30).

Gael has had success in handling her alcoholism for many years, PRE-SENT. INVESTIG.RPT. ¶ 51; PLEA TRN. at 3 ("I have been sober and in the program of Alcoholics Anonymous for 21 years now."), and many people came forward who know her years' of sobriety. 03_FRANK_COLE.WMV (4:00); 06_PAUL_BUCKY.WMV (9:50). Some were those who Gael has directly sponsored or helped, 07_CHRIS_LEDYARD.WMV (3:25); 08_SUSAN_SHAW.WMV (2:10), and some praised her work with others including Native Americans and prisoners. LETTER FROM DANIEL GIAMARIO, exh. 16-b, *Addm.* at 38; LETTER FROM GAIL GUERETTE, exh. 16-d, *Addm.* at 40; LETTER FROM SABRINA CASWELL, exh. 16-j, *Addm.* at 46. The court recognized that Gael has "no current mental

health or substance abuse problems.” SENT.TRN. at 20.

Gael has taken an active role in the leadership of the local AA organization, 03_FRANK_COLE.WMV (4:00); 11_JOYCE_SIERRA.WMV (6:10); LETTER FROM SABRINA CASWELL, exh. 16-j, *Addm.* at 46, and by hosting monthly meetings at her facility which attract upwards of 40 people. 07_CHRIS_LEDYARD.WMV (2:55); LETTER FROM SABRINA CASWELL, exh. 16-j, *Addm.* at 46.

Congregants from Gael’s church expressed her devotion, 03_FRANK_COLE.WMV (7:35); 07_CHRIS_LEDYARD.WMV (10:25); 09_MARIE_MURPHY.WMV (3:50); LETTER FROM HEATHER PELAEZ, exh. 16-f, *Addm.* at 42; LETTER FROM SABRINA CASWELL, exh. 16-j, *Addm.* at 46, her role as volunteer, and her place in the church choir where she both sings and plays flute. 02_REV_MAUURICE_GUERETTE.WMV (0:45 & 2:50); LETTER FROM HEATHER PELAEZ, exh. 16-f, *Addm.* at 42. Her minister who has known her for 10 years said he welcomed Gael as a spiritual person who finds meaning in the worship, and also as a reasoned, orderly, and prudent voice on the church’s board of trustees. 02_REV_MAUURICE_GUERETTE.WMV (1:45 & 2:25); RÉSUMÉ.

People from many areas of Gael’s life commented on her leadership and contribution to their community through civic involvement, non-profit organizations, donations of time and skill, and as a helping neighbor. PRE-SENT. INVESTIG.RPT. ¶ 47; SENT.TRN. at 4; 03_FRANK_COLE.WMV (3:10 & 4:50); 04_CATHERINE_BASKET.WMV (4:00); 05_CAYELIN_CASTELL.WMV (9:05); 07_CHRIS_LEDYARD.WMV (6:40); 08_SUSAN_SHAW.WMV (4:10); 10_BARBARA_CHILSON.WMV (6:15); 14_JASMINE_DEGUIRE.WMV (3:40); LETTER FROM HAROLD BAHR, exh. 16-e, *Addm.*

at 41; LETTER FROM LINEA VAN HORN, exh. 16-g, *Addm.* at 43; LETTER FROM MASCHA MIEDANER, exh. 16-h, *Addm.* at 44; LETTER FROM NANCY NUGENT, exh. 16-I, *Addm.* at 45; LETTER FROM SABRINA CASWELL, exh. 16-j, *Addm.* at 46.

III. Moral Character

Those who know Gael describe her as “honest and moral,” a “single woman with high values and character.” LETTER FROM HEATHER PELAEZ, exh. 16-f, *Addm.* at 42. One professional wrote: “I have been consistently impressed by Ms. Chilson’s high moral and ethical conduct.” LETTER FROM NORMAN CARYL, exh. 16-a, *Addm.* at 37. See 04_CATHERINE_BASKET.WMV (2:50); 12_REBECCA_RIZZO.WMV (3:45 & 5:30); LETTER FROM DANIEL GIAMARIO, exh. 16-b, *Addm.* at 38; LETTER FROM LINEA VAN HORN, exh. 16-g, *Addm.* at 43.

The community regards Gael as “selfless” and “giving,” even after her very-public arrest at the farmers’ market, “always willing to give helping hand to those in need.” LETTER FROM SABRINA CASWELL, exh. 16-j, *Addm.* at 46; 04_CATHERINE_BASKET.WMV (4:00); 05_CAYELIN_CASTELL.WMV (12:55); 06_PAUL_BUCKY.WMV (5:35 & 8:15); 12_REBECCA_RIZZO.WMV (4:20 & 5:00); 13_STEPHANIE_ST_CLAIRE.WMV (4:30); LETTER FROM NANCY NUGENT, exh. 16-I, *Addm.* at 45. She has been described as “dependable,” “reliable,” “loyal,” and numerous times as a “good friend.” 05_CAYELIN_CASTELL.WMV (4:05); 07_CHRIS_LEDYARD.WMV (9:45 & 15:30); 08_SUSAN_SHAW.WMV (3:15); LETTER FROM DANIEL GIAMARIO, exh. 16-b, *Addm.* at 38; LETTER FROM ERIK ROTH, exh. 16-c, *Addm.* at 39; LETTER FROM GAIL GUERETTE, exh. 16-d, *Addm.* at 40; LETTER FROM SUZAN STEINBERG, exh. 16-l, *Addm.* at 48. People talked about her spirituality, 02_REV_MAUURICE_GUERETTE.WMV (2:25); 03_FRANK_COLE.WMV (12:50); 08_SUSAN_SHAW.WMV (2:50); 09_MARIE_MURPHY.WMV (3:10), and her “healing” and “helper” nature.

08_SUSAN_SHAW.WMV (3:15); 10_BARBARA_CHILSON.WMV (3:25); 11_JOYCE_SIERRA.WMV (2:50 & 6:35); LETTER FROM HEATHER PELAEZ, exh. 16-f, *Addm.* at 42.

Gael is known as “hardworking,” “diligent,” “responsible,” “reliable,” “conscientious,” “dedicated” and “enthusiastic” about her work and endeavors. 03_FRANK_COLE.WMV (4:50); 04_CATHERINE_BASKET.WMV (2:50 & 4:00); 05_CAYELIN_CASTELL.WMV (3:55); 09_MARIE_MURPHY.WMV (4:15); LETTER FROM HAROLD BAHR, exh. 16-e, *Addm.* at 41. She is regarded as sober, 06_PAUL_BUCKY.WMV (9:15); 07_CHRIS_LEDYARD.WMV (11:10); “independent” and “self-reliant.” 10_BARBARA_CHILSON.WMV (2:40). People who work with her understand she is “humble,” “modest,” “self-effacing,” and “frugal.” 04_CATHERINE_BASKET.WMV (2:50); 09_MARIE_MURPHY.WMV (3:10); 11_JOYCE_SIERRA.WMV (3:35); 12_REBECCA_RIZZO.WMV (8:10); LETTER FROM SAO RON LONG, exh. 16-k, *Addm.* at 47. She is intelligent and shows leadership. 02_REV_MAUURICE_GUERETTE.WMV (1:45 & 2:25); 03_FRANK_COLE.WMV (4:50); 04_CATHERINE_BASKET.WMV (2:50 & 4:00); 09_MARIE_MURPHY.WMV (3:30 & 4:15).

Even the Government conceded Gael is a “lovely human being” who “has given much to her community,” SENT.TRN. at 8-9, and the court was compelled to find she is “obviously ... an extraordinary person, [who] has helped many in the community, many individuals.” SENT.TRN. at 10.

IV. Crime Out of Character; Shame and Contrition

Everybody who knows Gael was surprised when they learned of her arrest and crime. 03_FRANK_COLE.WMV (8:10) (“surprised”); 04_CATHERINE_BASKET.WMV (3:10 & 7:35) (“I was absolutely floored, I can’t believe it.” & “I’m still kind of stunned by the situation.”); 06_PAUL_BUCKY.WMV (8:35) (“I was surprised.”); 07_CHRIS_LEDYARD.WMV (6:05) (“I was utterly shocked.”); 11_JOYCE_SIERRA.WMV (3:05) (“I couldn’t believe it.”). They regarded criminal activity as completely out of character. 05_CAYELIN_CASTELL.WMV (6:45) (“[I]t is so totally out of character for what I know her for 22 years.”); 07_CHRIS_LEDYARD.WMV (9:20) (“[S]o out of character for what and how I know Gael.”); 11_JOYCE_SIERRA.WMV (3:50) (“Not in harmony with her character.”); 13_STEPHANIE_ST_CLAIRE.WMV (5:50) (“[S]he is not capable of doing this. She would not ever seek this out.”); LETTER FROM NORMAN CARYL, exh. 16-a, *Addm.* at 37 (“[T]he offense with which she has been charged [is] completely contrary to her normal deportment.”).

Gael repeatedly expressed her shame and contrition to those in her community. A retired engineer who knows Gael from her astrology work said Gael was “extremely embarrassed and contrite [when] she confided in me some time ago.” 03_FRANK_COLE.WMV (10:25). He said that when she told him she was “sheepish” and it “took her several minutes to get it out”; she told him her actions had been “really foolish.” 03_FRANK_COLE.WMV (11:30). A professional acquaintance said that when Gael told her, Gael was “embarrassed and frightened.” 04_CATHERINE_BASKET.WMV (5:05). A friend who has known Gael for decades said in an interview that “this whole

situation has been deeply challenging for Gael and I know she regrets her involvement in this; this has affected her life deeply in many ways.” 05_CAYELIN_CASTELL.WMV (10:20). Others said “she was embarrassed,” 07_CHRIS_LEDYARD.WMV (8:35), “I think she is pretty regretful,” 11_JOYCE_SIERRA.WMV (3:55), and that she is embarrassed, contrite, and ashamed. 13_STEPHANIE_ST_CLAIRE.WMV (8:30). A letter-writer said that Gael “has expressed genuine remorse to me.” LETTER FROM NORMAN CARYL, exh. 16-a, *Addm.* at 37.

The judgment of her community is that Gael is highly unlikely to re-offend. One close friend said it was apparent to him that the incident had lead Gael to deeply question herself spiritually and ask: “where did I go wrong in terms of my intention to do good and help other people.” 03_FRANK_COLE.WMV (12:45). Another said “I feel she has learned her lesson. I know she will never be involved in anything like this again. She has really paid her dues so to speak.” 05_CAYELIN_CASTELL.WMV (10:50). One member of the community who works with inmates said that “from what I can tell ... I think Gael has already learned her lesson.” 07_CHRIS_LEDYARD.WMV (12:30). A kindergarten teacher who has been Gael’s neighbor for 15 years, when asked if she worried Gael would re-offend said “absolutely not.” 08_SUSAN_SHAW.WMV (6:10). Even the court found that “the likelihood of Ms. Chilson being a recidivist is very low.... That really isn’t a major factor in this sentencing.” SENT.TRN. at 11.

V. Incarceration Would not Help Gael Chilson nor Her Community

All of Gael's references expressed concern for the well-being of their greater community were she to be plucked out for a year or more to serve time in jail. Her Reverend said it would be a detriment to their church "because she is a vital part." 02_REV_MAUURICE_GUERETTE.WMV (3:30). One person suggested the farmers' market would suffer. 09_MARIE_MURPHY.WMV (5:30).

Members of the Astrology Guild said "it would cause a gap in the leadership" 03_FRANK_COLE.WMV (8:30), with one person worrying that "the whole thing might implode ... because she is that important to it," 04_CATHERINE_BASKET.WMV (6:55), and another saying it would be "devastating," 11_JOYCE_SIERRA.WMV (6:30), because "she's been running our astrology guild for several years." 13_STEPHANIE_ST_CLAIRE.WMV (7:55).

Those who work with Gael at the volunteer Bio-Touch Center said losing Gael "would be a loss for us she covers a lot of time and teaching for people in our center." 06_PAUL_BUCKY.WMV (11:40). It would also harm particular individuals: One related that Gael has been "working on a lady that is maybe 86 years old and she gives her massages almost daily the lady enjoys it and benefits from it. It is beautiful that Gael can devote so much time. She is so busy all the time helping people." 10_BARBARA_CHILSON.WMV (7:00). If Gael were to go to jail, there would be "problems it would create to the whole community." 03_FRANK_COLE.WMV (9:10); 05_CAYELIN_CASTELL.WMV (11:35).

Several people suggested Gael does more for society out of jail than paying

penance in. 07_CHRIS_LEDYARD.WMV (12:50). “I think [it] is really admirable and important that she stay connected to that community instead of being pulled away from it because of the service she does for everyone.” 08_SUSAN_SHAW.WMV (6:50). Gael “seems to be all community service based ... and most of what she does trying to educate people in how to take care of their own health.” 06_PAUL_BUCKY.WMV (12:50). One said “I don’t see how going to prison would serve anything more,” 05_CAYELIN_CASTELL.WMV (10:40), and another suggested that for Gael jail “would be a travesty of justice,” and that to “put someone like her in prison ... is just the height of absurdity.” 13_STEPHANIE_ST_CLAIRE.WMV (7:00 & 7:40).

People felt that jailing Gail would be “sad” and a “terrible waste” of a community resource. “I think it would be tragic. I’m sure that there are other ways she can compensate. That would be a waste.” 11_JOYCE_SIERRA.WMV (4:25); 12_REBECCA_RIZZO.WMV (8:40). Several suggested community service. 04_CATHERINE_BASKET.WMV (6:30). If the judge “gave her 500 hours of community service she could just keep doing her life exactly as she’s been doing.” 03_FRANK_COLE.WMV (10:10). “I don’t see how as a taxpayer, how we would benefit from her being in jail.” 07_CHRIS_LEDYARD.WMV (14:25).

One expressed that jail would be “going backward.” 08_SUSAN_SHAW.WMV (6:50). Another who works professionally with inmates worried jail would harm Gael: “I am concerned because she is a nice person inside she’s going to be vulnerable and I think that only harm could come to her.” 07_CHRIS_LEDYARD.WMV (12:55).

A friend sobbingly pointed out the irony that Gael would probably “make the best

of a bad situation” and begin to help other inmates in jail. 12_REBECCA_RIZZO.WMV (8:55).

To get a sense of these matters, it is worth reviewing Gael’s allocution at length:

THE DEFENDANT: I’m grateful that you’ll give me this opportunity to speak. I really had no comprehension of how serious a crime I was involved in. I’ve never, up until August of 2010, I’ve never had handcuffs or been in chains or been in prison or anything. I can’t believe that I was that person that did that, this, what’s involved in this conspiracy. Before Tony came along I had nine years in AA. I ran if I smelled pot. And then Tony came along and he was Mr. AA and I found out he smoked pot and somehow that man made it all okay. He gave me permission that marijuana was okay. But I never advocated it to anyone. I never told my sponsor, oh, it’s okay. I never told anybody, oh, sure, smoke some pot , I never was, I never used it. I couldn’t use it. I can’t believe that today that this person that I am could be – could lead such a double life as you said, such a double life. I mean, I was ashamed of Tony using pot. I thought maybe being part of being in AA, I was ashamed of that. And I was ashamed that I was part of this organization. I was ashamed that because I loved this guy, got involved in it, I am ashamed that I was doing something that I couldn’t be proud of, that I couldn’t tell, oh, yeah, here, let me show you how to make money, this is a great. No, I was so ashamed, and this has given me a way to become, you know, to, it’s given me a way to come clean with my friends. It’s given me a way to become honest, to become clean with all the people in my life, these people that I love dearly with my community.

When I was arrested on August of 2010, that night I came home and I took to be in my bed, I wanted to be in my bed, be in my home, and take care of my home, take care of my animals, I came home and I prayed to God, and I just, please, let me stay sober, just let me stay sober. I know you’re going to walk me through this. Just let me stay sober. It took courage and commitment too. And this has given me a way to come clean. I was addicted to love, to being needed, and to the money that was paying the bills. I was deeply in debt, and I’m a responsible person and I wanted to pay my debts, and this was a way to pay my debts, and I kept rationalizing, you know, and I’m a healer, at least I’m not hurting anybody. I vowed not to hurt anybody and I thought at least I’m not hurting anybody. But yet, I was, I felt like, oh, they need me and I can pay my bills.

There's a couple of my dear friends that have cancer. I feel like in August 2010 I was given a diagnosis. I was diagnosed with this horrible disease. That blackness in me has been exposed. This disease in me has been exposed. And I see what happens to my friends when they go on chemo therapy. Their lives are destroyed. They can't live their lives, they can't do what they were doing, and I feel like I'm coming before you to get my prescription for my treatment, for this disease that I have, and to bring me back into balance with my life and with society and with the government, and I'm standing here before you to get this treatment, this regimen that's going to bring me back into balance with my life, and I just pray, and my community is praying, that this treatment won't destroy my life and won't destroy what I have built here in the community, because my community would be – the school couldn't have their classes there anymore that I host, and the campfire meetings wouldn't be there anymore because I have to keep making – keep working to pay the bills that pay the electricity, that pay the water that keeps that house going, that this would all go away. And my clients who come to me regularly, the dear man that has been coming to me every Friday for a year now and has given me the care of his body and I said, he would go find somebody else, all my clients would go find somebody else. The people who call me for consultations who found me no longer there, they would go some place else. And this whole business and everything that I've worked so hard to build would be gone. And the community that I serve, it – I don't know how I would ever rebuild it. So I'm praying, I'm praying that you please give me a second chance at life. Thank you.

SENT.TRN. at 13-16.

SUMMARY OF ARGUMENT

After noting that sentencing must be individualized and listing the factors that must be considered, Gael Chilson argues that because of her age, unique situation in the community, and ownership of a marginal but operating business that would probably not survive her absence, incarceration would impoverish her and thus is not a rational sentence. She argues that probation and some combination of restrictions would better serve the purposes of the sentencing statute.

ARGUMENT

I. Individualized Sentencing

Sentences must be individualized. “It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.” *Koon v. United States*, 518 U.S. 81, 113 (1996). “[T]he punishment should fit the offender and not merely the crime.” *Pepper v. United States*, 131 S.Ct. 1229, 1240 (2011) (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)). Because it is a “basic ‘precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense,’” *Miller v. Alabama*, 132 S.Ct. 2455, 2463 (2012) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)), sentencing “necessitates a case-by-case approach, the hallmark of which is flexibility.” *United States v. Martin*, 520 F.3d 87, 91 (1st Cir. 2008). Idiosyncracies of circumstance are to be firmly taken into account. *United States v. Prospero*, 686 F.3d 32 (1st Cir. 2012) (affirming no-jail sentence for defendants convicted of supplying substandard concrete to big dig project).

After *United States v. Booker*, 543 U.S. 220 (2005), and applying an abuse of discretion standard to the judgment of the district court, *Gall v. United States*, 552 U.S. 38, 49-50 (2007), this Court must “weigh[] the applicability of the sundry factors delineated in 18 U.S.C. § 3553(a), [in] reaching an ultimate sentencing determination.” *Martin*, 520 F.3d at 91. “Procedural error” is broadly defined: including “failing to consider the § 3553(a) factors.” *Gall*, 552 U.S. at 51.

The § 3553(a) factors are: the defendant’s criminal history; the seriousness of the offence; promoting respect for the law; providing just punishment; deterrence; recidivism; minimizing disparities in sentencing; the defendant’s need for educational, vocational, medical, or correctional treatment; the types of sentences available; the guidelines sentencing range; restitution; and relevant United States Sentencing Commission policy statements.²

In weighing these factors, the court “shall impose a sentence *sufficient, but not greater than necessary*, to comply with [these] purposes.” 18 U.S.C. § 3553(a) (emphasis added).

²18 U.S.C. § 3553(a) provides:

- (a) Factors To Be Considered in Imposing a Sentence.— The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
 - (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
 - (3) the kinds of sentences available;
 - (4) the kinds of sentence and the sentencing range established for—
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the [sentencing] guidelines...
 - ...
 - (5) any pertinent [Sentencing Commission] policy statement...
 - ...
 - (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
 - (7) the need to provide restitution to any victims of the offense.

II. Incarceration for this Defendant Serves no Positive Social Function

Gael Chilson is not a dangerous disorderly defendant in desperate need of rehabilitative social services. *See, United States v. Wallace*, 605 F.3d 477, 479 (8th Cir. 2010) (“[I]ncarceration would permit [defendant] to address substance abuse and mental health issues.”).

Rather, she is gainfully (albeit marginally) self-employed. If she were incarcerated, however, the business facility she operates atop an old mine will cease to exist. There will be no one to provide its revenue-generating services. Without what little income it produces, it will be difficult to provide for its upkeep, insurance, and taxes. There is risk that Gael will come out of jail with no place to live and no money. At her age, and especially if she loses the property, there is little likelihood of her being able to reestablish what it has taken her a lifetime to build. She will be forced to public assistance.

The criminal justice system will thus have accepted a productive member of society and created a destitution. *Cf. United States v. Gaind*, 829 F. Supp. 669, 670 (S.D.N.Y. 1993) *aff'd*, 31 F.3d 73 (2d Cir. 1994) (noting dismantlement of defendant’s materials-testing business a positive outcome of incarceration because business enabled defendant’s environmental crimes). Whether it will have also broken a positive spirit cannot be predicted.

Gall involved a man who had once been involved in the drug trade, but who renounced and “self-rehabilitated.” *Gall*, 552 U.S. at 41. The supreme court upheld his no-time sentence. The case recognized that for some defendants and some situations, jail

is not the answer. The *Gall* court quoted:

“Any term of imprisonment in this case would be counter effective by depriving society of the contributions of the defendant who ... understands the consequences of his criminal conduct and is doing everything in his power to forge a new life. The defendant’s post-offense conduct indicates neither that he will return to criminal behavior nor that the defendant is a danger to society.

Gall, 552 U.S. at 44-45. It continued:

“[A] sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing.”

Gall, 552 U.S. at 54.

Like *Gall*, jail here is “counter effective.” From the “small flood” of witness statements in support of Gael, *Gall*, 552 U.S. at 43, it is apparent that not only would her absence cause a noticeable gap in the well-being of the community, but that society is served more fully by Gael being *out* of jail doing what she does. The statements also make apparent that the “respect for the law” the statute demands is already devolving into the “derision” of which *Gall* warns.

The “just punishment” purpose of § 3553(a) has already been served – and in her nature likely to last a lifetime – by Ms. Chilson’s shame and public humiliation. Given her age, gender, education, employment, and lack of criminal history, the court appropriately found that “she’s a low risk for recidivism.” SENT.TRN. at 11; U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004). Restitution is not an issue. PRE-SENT. INVESTIG.RPT. ¶ 25 (“no identifiable victims”).

To the extent there is any concern for sentencing disparities here, it is that she was sentenced too severely, compared to *Gall* and *Prosperi*, 686 F.3d at 32. While on the one hand Gael committed a serious offense, it should be pointed out that marijuana is now fully legal in two states, decriminalized in thirteen, and regarded as a medical treatment in fifteen. <http://en.wikipedia.org/wiki/Places_that_have_decriminalized_non-medical_cannabis_in_the_United_States> (visited Mar. 1, 2013).

The only § 3553(a) factor that sending Gael to jail will arguably accomplish is “deterrence to criminal conduct” of others. But the evidence shows otherwise: “Research to date generally indicates that increases in the *certainty* of punishment, as opposed to the *severity* of punishment, are more likely to produce deterrent benefits.” Valerie Wright, Ph.D., Sentencing Project, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment* (Nov. 2010), <<http://www.sentencingproject.org/doc/deterrence%20briefing%20.pdf>> (visited Mar. 1, 2013) (emphasis in original). This Court has made clear, moreover, that deterrence alone cannot justify incarceration. *United States v. Prosperi*, 686 F.3d 32, 41 (1st Cir. 2012) (affirming no-jail sentence where district court found: “There is one benefit, and only one, that I see in this case to incarceration, and that is the sanction of deterrence that a sentence of incarceration would pose for others.”). Most important, deterrence does not require the criminal justice system contrive to impoverish a woman’s old-age.

III. Sentence Far More Punitive than Necessary to Fulfill Purposes of Sentencing Statute

There is an alternative. “[P]robation, rather than an act of leniency, is a substantial restriction of freedom.” A probationer “will not be able to change or make decisions about significant circumstances in his life, such as where to live or work, which are prized liberty interests, without first seeking authorization from his probation officer or, perhaps, even the court. Of course, the defendant always faces the harsh consequences that await if he violates the conditions of his probationary term.” *Gall*, 552 U.S. at 44 (2007) (quotation of district court omitted). In addition, “home confinement [and] community service ... are punitive measures that serve as deterrents, promote respect for the law, and are just punishment given all of the circumstances present in this case.” *Prosperi*, 686 F.3d at 41 (quotation of district court omitted).

While the reduction Gael Chilson requests here – from a guidelines range of 24-30 months to a probationary sentence – is significant, it is *less* than what the supreme court approved in *Gall*, 552 U.S. at 38 (36 months probation where guidelines range was 30-37 months committed), and *much less* than what this Court approved in *Prosperi*, 686 F.3d at 39, 41 (six months home monitoring, three years probation, 1,000 hours of community service, and modest fine, where guidelines range was 87 to 108 months). *See also, United States v. Martin*, 520 F.3d 87 (1st Cir. 2008) (upholding 91-month downward deviation from guidelines range); *United States v. Germosen*, 473 F. Supp. 2d 221, 224 (D. Mass. 2007) (six months home detention, two years probation, where guidelines range was 37 to 46 months) (“This case involves a man who struggled all his life, supported his community at great personal risk, and then made a mistake.”).

Accordingly, despite this Courts' deferential standard of review, the sentencing court made procedural error in Gael's case. Although there is a §3553(a) soliloquy on the record, it is not apparent the court had the factors which it "shall consider" firmly in mind when it decide to incarcerate for 15 months. The court also imposed a substantively unreasonable sentence, *Gall*, 552 U.S. at 38, in that it is far more punitive than necessary to fulfill the purposes of the sentencing statute.

CONCLUSION

Based on the foregoing, Gael Chilson respectfully requests this Court review the lower court's sentencing order in tandem with the record, and remand for re-sentencing in accord with the statute. She further requests this Court order the sentence of incarceration be replaced with a sentence better suited to Gael's individualized situation, such as a period of community confinement, probation, and (continued) community service.

Ms. Chilson requests her attorney be allowed to present oral argument because the issues presented herein and their outcome affect the extent of the loss of her liberty.

Respectfully submitted,

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By her Attorney,

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/s/

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