

**United States Court of Appeals**

Eleventh Circuit  
56 Forsyth Street, N.W.  
Atlanta, Georgia 30303

FILED



**Thomas K. Kahn**  
Clerk

FILED  
MAY 11 2001  
In Reply, Give Number  
Of Case And Names of Parties  
CLERK OF COURT  
U.S. DISTRICT COURT  
ORLANDO, FLORIDA

May 09, 2001

Sheryl L. Loesch  
Clerk, U.S. District Court  
80 N. Hughey Ave, Floor 2-#218  
Orlando FL 32801

RE: 00-11249-JJ USA v. Terri Kicklighter  
DC DKT NO.: 99-00044 CR-ORL-18C

The enclosed certified copy of the judgment and a copy of this court's opinion are hereby issued as the mandate of this court.

Also enclosed are the following:

- Original Exhibits, consisting of: one psi
- Original record on appeal or review, consisting of: four volumes.

Please acknowledge receipt on the enclosed copy of this letter.

A copy of this letter and the judgment form, but not a copy of the court's opinion or Rule 36-1 decision, is also being mailed to counsel and pro se parties. A copy of the court's opinion or Rule 36-1 decision was previously mailed to counsel and pro se parties on the date it was issued.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Lisa Streeter (404) 335-6134

Encl.

A True Copy - Attested:  
Clerk, U.S. Court of Appeals  
Eleventh Circuit

By: \_\_\_\_\_  
Deputy Clerk  
Atlanta, Georgia

FILED

# United States Court of Appeals

## For the Eleventh Circuit

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No. 00-11249

FILED  
U.S. COURT OF APPEALS  
ELEVENTH CIRCUIT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO, FLORIDA

District Court Docket No.  
99-00044-CR-ORL-18C

Apr 10, 2001  
THOMAS K. KAHN  
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TERRI KICKLIGHTER,  
a.k.a. Diedra Lowe,  
a.k.a. Deidra K. Lowe,  
a.k.a. Alfreda English,

Defendant-Appellant.

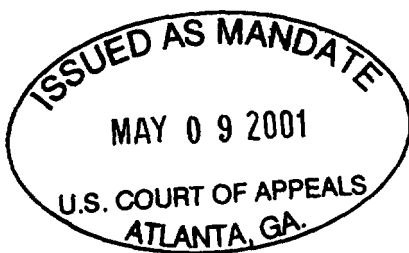
A True Copy -  
Clerk, U.S. Court of Appeals  
Eleventh Circuit  
By: *Lisa Freeter*  
Deputy Clerk  
Atlanta, Georgia

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Appeal from the United States District Court  
for the Middle District of Florida  
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### J U D G M E N T

It is hereby ordered, adjudged, and decreed that the attached opinion, included herein by reference, is entered as the judgment of this Court.

Entered: April 10, 2001  
For the Court: Thomas K. Kahn, Clerk  
By: McCombs, Elaine



[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

FILED  
U.S. COURT OF APPEALS  
ELEVENTH CIRCUIT

APR 10 2001

THOMAS K. KAHN  
CLERK

No. 00-11249  
Non-Argument Calendar

D.C. Docket No. 99-00044-CR-ORL-18C

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TERRI KICKLIGHTER,  
a.k.a. Diedra Lowe,  
a.k.a. Deidra K. Lowe, etc.,

Defendant-Appellant.

CLERK  
MIDDLE DISTRICT OF FLORIDA  
PALM BEACH, FLORIDA  
APR 11 11 3:29

FILED

Appeal from the United States District Court for the  
Middle District of Florida

(April 10, 2001)

Before CARNES, HULL and MARCUS, Circuit Judges.

PER CURIAM:

Terri Kicklighter appeals the district court's order denying the government's motion for reduction of sentence for substantial assistance, filed pursuant to Fed. R. Crim. P. 35(b). Kicklighter argues, for the first time on appeal, that the district court

erred in “its refusal to grant an evidentiary hearing and its perfunctory consideration of the Rule 35(b) sentence reduction motion.”<sup>1</sup>

We review for abuse of discretion a district court’s decision on whether to hold an evidentiary hearing on a Rule 35(b) motion, but a court’s discretion is severely curtailed once it accepts a plea bargain. See United States v. Yesil, 991 F.2d 1527, 1531 (11th Cir. 1992). However, because Kicklighter did not request an evidentiary hearing in this case, we review these issues for plain error, meaning that there must be error, the error must be plain, the error must affect substantial rights of the defendant, and the error must seriously affect the fairness, integrity or public reputation of a judicial proceeding. See United States v. Humphrey, 164 F.3d 585, 588 n.3 (11th Cir. 1999)(citing United States v. Olano, 507 U.S. 725, 732, 113. S. Ct.1770, 1776 (1993)). Upon thorough review of the record, as well as careful consideration of the parties’ briefs, we find no reversible error and affirm.

The relevant facts are straightforward. Pursuant to a plea agreement, on March 23, 1999, Kicklighter pled guilty to bank fraud, money laundering, and conspiracy

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<sup>1</sup> Kicklighter also raises several arguments for the first time in her supplemental reply brief: (1) that it was not clear that she was represented by counsel at the time the government filed the Rule 35(b) motion and, thus, her failure to request an evidentiary hearing should not be held against her; (2) that her appeal should be treated as a 28 U.S.C. § 2255 motion and remanded to “examine/correct” her failure to request a hearing; (3) that the district court failed to consider the full extent of her cooperation; and (4) that she should have been given the opportunity to address the district court regarding her sentence, which was higher than she expected. We deem these issues to be waived. See United States v. Dicter, 198 F.3d 1284, 1289 n. 6 (11th Cir. 1999), cert. denied, 121 S.Ct. 77 (2000).

charges, agreeing to “cooperate fully with the United States in the investigation and prosecution of other persons . . . .” In return, the government agreed to consider filing a U.S.S.G. § 5K1.1 motion for a downward departure, and/or a Fed.R.Crim.P. 35(b) motion for a sentence reduction. At sentencing, the government did not seek a downward departure pursuant to § 5K1.1, and the district court sentenced Kicklighter to 78 months imprisonment. Kicklighter appealed her sentence to this Court, but then moved to voluntarily dismiss the appeal a few days after filing it. We construed the voluntary dismissal as a motion to dismiss the direct appeal with prejudice and granted the motion.

Kicklighter continued to cooperate with the authorities, and in December 1999, the government filed a Rule 35(b) motion to reduce her sentence based on substantial assistance. The record does not indicate that either party requested an evidentiary hearing on the motion. The district court did not hold an evidentiary hearing, and denied the motion in an endorsed order, stating: “[t]he assistance provided to the government since sentencing does not appear to be substantial in this Court’s opinion.”<sup>2</sup> A district

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<sup>2</sup> On February 7, 2000, Kicklighter filed a pro se “Motion to File Late Notice of Appeal” stating an intent to appeal her sentence, which the district court endorsed as granted on March 8, 2000. In response to a jurisdictional question issued sua sponte by this Court, Kicklighter argued that the district court’s March 8, 2000, order denying the government’s motion for a sentence reduction allowed her to appeal the original judgment and commitment order and/or the denial of the Rule 35(b) motion. We dismissed the appeal from the judgment and commitment order as untimely and allowed the appeal to proceed from the January 7, 2000, order denying the government’s Rule 35(b) motion for reduction of sentence because, although the notice of appeal was untimely from that order, the district court had granted Kicklighter an extension of time to appeal. Accordingly, the district court’s January 7, 2000,

court's ruling on a Rule 35(b) motion is an "otherwise final sentence," and appeals from such rulings are governed by 18 U.S.C. § 3742. See United States v. Manella, 86 F.3d 201, 202-03 (11th Cir. 1996). In order to appeal her sentence under § 3742, a defendant must show that the sentence (1) was imposed in violation of the law; (2) was imposed as a result of an incorrect application of the sentencing guidelines; (3) is harsher than the maximum established by the guideline range; or (4) was imposed for an offense for which there is no guideline and the sentence is plainly unreasonable. See 18 U.S.C. § 3742(a). Kicklighter argues that the district court failed "to entertain the full facts of [her] cooperation," and thereby denied her the full benefits of her plea agreement and imposed an illegal sentence. We disagree.

Quite simply, Kicklighter has provided no information showing that she failed to receive the benefit of her plea agreement. The agreement obligated the government to (1) consider whether any assistance provided by Kicklighter qualified as "substantial assistance . . . warranting the filing of a motion for a reduction of sentence" pursuant to Rule 35(b), and (2) "make known to the Court . . . the nature and extent of defendant's cooperation and any other mitigating circumstances indicative of the defendant's rehabilitative intent by assuming the fundamental civic duty of reporting crime." The agreement made clear that the government could "make no representation that the district

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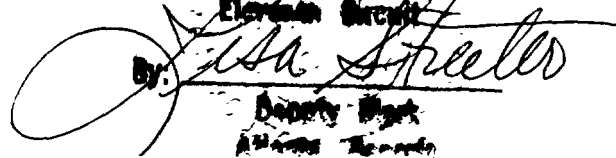
order denying the government's Rule 35(b) motion is the sole subject of this appeal.

court will impose a lesser sentence on account of, or in consideration of, such cooperation.” The government not only considered whether Kicklighter’s assistance was substantial, but, in fact, it actually requested a sentence reduction by filing a Rule 35(b) motion detailing Kicklighter’s assistance.

Moreover, to the extent that Kicklighter urges that the district court denied the government the opportunity to present information regarding Kicklighter’s cooperation at an evidentiary hearing, neither party requested a hearing, and the government argues that the motion contained all of the information the government possessed regarding Kicklighter’s cooperation. Compare United States v. Yesil, 991 F.2d 1527, 1532 (11th Cir. 1992)(finding abuse of discretion where district court accepted plea bargains that specifically obligated government to make known to court the nature and extent of defendants’ cooperation, but then subsequently denied parties’ requests for evidentiary hearings and thereby deprived government of the opportunity to proffer information concerning cooperation). Because the government had the opportunity to inform the court of Kicklighter’s cooperation and filed a Rule 35(b) motion as the plea agreement required, there was no breach of the plea agreement.

We conclude that the district court did not err by denying the government’s Rule 35(b) motion.

**AFFIRMED.**

A True Copy - Attached:  
Clerk, U.S. Court of Appeals  
Eleventh Circuit  
By:   
Deputy Clerk  
U.S. Court of Appeals  
Eleventh Circuit

Sheryl L. Loesch  
Clerk, U.S. District Court  
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Orlando FL 32801

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May 09, 2001

RE: 00-11249-JJ USA v. Terri Kicklighter  
DC DKT NO.: 99-00044 CR-ORL-18C

TO: Sheryl L. Loesch

CC: Ellis Rexwood Curry

CC: Tamra Phipps

CC: Adelaide G. Few

CC: Administrative File