NO:

IN THE
SUPREME COURT OF THE UNITED STATES

KHALED ELBEBLAWY,

,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Petitioner, after acting in an undercover role for the government in a Medicare fraud investigation, signed an agreement to plead guilty to a criminal information. As part of that pre-charging agreement, petitioner waived the plea bargaining-privilege protections of Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410. When petitioner failed to enter a guilty plea after the government filed the information, the government indicted him on new charges and offered, in its case in chief at trial, the plea agreement's factual basis statement that admitted all elements of the charges. Affirming petitioner's convictions, the Eleventh Circuit held that under *United States v. Mezzanatto*, 513 U.S. 196 (1995) (allowing impeachment use of plea-negotiation admissions where defendant waived inadmissibility rules), the government could introduce the plea agreement document as substantive evidence at trial. The question presented is:

Does the impeachment-use waiver doctrine established by the Court in *United States v. Mezzanatto*, 513 U.S. 196, for plea-related discussions permit the government to introduce in its case in chief at trial a plea agreement signed by the defendant, thereby effectively presenting the jury with a written guilty plea entered without a Rule 11 plea colloquy, in the same way that the government may otherwise introduce a defendant's confession?

INTERESTED PARTIES

There are no parties interested in the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Khaled Elbeblawy respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered on August 7, 2018 in case number 16-16048, in a decision published at 899 F.3d 925, *United States v. Elbeblawy*, affirming the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit is contained in the Appendix (App. 1).

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on August 7, 2018. This petition is timely filed pursuant to SUP. CT. R. 13.1.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

U.S. Const., amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in

jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fed. R. Crim. P. 11(f)

(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

Fed. R. Evid. 410. Pleas, Plea Discussions, and Related Statements

(a) Prohibited Uses. In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

(1) a guilty plea that was later withdrawn;

(2) a nolo contendere plea;

(3) a statement made during a proceeding on either of those pleas under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or

(4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

(b) Exceptions. The court may admit a statement described in Rule 410(a)(3) or (4):

(1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or

> (2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

STATEMENT OF THE CASE

Petitioner was convicted and sentenced to 20 years imprisonment on charges of conspiracy to commit healthcare fraud and wire fraud, 18 U.S.C. § 1349, and conspiracy to defraud the United States and pay healthcare kickbacks, 18 U.S.C. § 371. Petitioner was accused of paying referral fees to doctors whose patients used the home health services agencies operated by petitioner. The government also alleged that some of the recipients of the home health services were not sufficiently disabled or incapacitated to be entitled under Medicare guidelines to receive treatment at home.

The government's primary, and most comprehensive, evidence at trial consisted of the factual basis statement that formed part of a plea agreement petitioner had signed for a prior criminal information the government filed, and then dismissed, pertaining to the same allegations as the later-indicted offense. This plea agreement document was against petitioner as substantive evidence in the government's case in chief as a party admission admissible under the plea-discussions waiver doctrine of *United States v. Mezzanatto,* 513 U.S. 196 (1995).

The circumstances of petitioner's execution of the waiver were as follows. In June 2015, petitioner and his attorney signed a plea agreement and, 14 days later, the written factual basis for the plea that was attached to and made part of the agreement. The plea agreement provided that, "[i]n the event of ... a breach[,] ... the [d]efendant waives any protection[ ] afforded by ... Rule 11 of the Federal Rules of Criminal Procedure and Rule 410 of the Federal Rules of Evidence," both of which bar the admission of statements made during plea discussions. App. 48–49. The agreement also stated that "the [g]overnment w[ould] be free to use against the [d]efendant, directly and indirectly, in any criminal or civil proceeding[,] any of the information, statements, and materials provided by him pursuant to th[e] [a]greement, including offering into evidence or otherwise using the attached Agreed Factual Basis for Guilty Plea." App. 49.

After he signed the agreement and the government filed the information, petitioner failed to enter the anticipated guilty plea, so the government dismissed that case. The government then indicted petitioner in the instant case, adding a conspiracy charge not included in the dismissed information: the § 371 kickback conspiracy. Petitioner was never colloquied on the plea agreement under Fed. R. Crim. P. 11 because the criminal information was dismissed and the agreement never submitted to the court. Before trial, petitioner moved to suppress the signed factual basis, arguing that the plea

agreement did not constitute a valid waiver of the protections of Fed. R. Evid. 410 and Fed. R. Crim. P. 11. App. 7. The district court denied the motion and found the factual basis portion of the plea agreement admissible at trial, because petitioner "made a free and deliberate choice to continue to cooperate" and "had full knowledge of [his] actions and [their] consequences." *Id.* Petitioner proceeded to a jury trial and was convicted as charged.

Prior to signing the plea agreement, petitioner had cooperated with law enforcement agents by providing information and performing undercover work to develop recorded evidence against doctors regarding their willingness to accept referral fees. Petitioner cooperated with authorities by meeting with doctors for approximately two years, making approximately 30 recordings.

To introduced the factual basis statement, the government introduced testimony that petitioner signed a plea agreement, App. 37, with the government as well as an "Agreed Factual Basis For Guilty Plea." App. 51–53. The government also introduced a copy of the factual basis statement, which was published and then given to the jury for deliberations. *Id.*; Govt. Ex. 1. The government's first witness, FBI Agent Alvarez-Karnes, read the entire factual basis statement to the jury. The factual basis consumes nearly three pages of the trial transcript. The government recalled FBI Agent Alvarez-Karnes as its last witness, and she reprised her reading of several paragraphs of the factual

basis. The government also featured the factual basis prominently in its closing arguments and told the jury the plea agreement's factual basis statement was the most important piece of evidence against petitioner.

The Eleventh Circuit affirmed, concluding that under *United States v. Mezzanatto*, 513 U.S. 196 (1995), a defendant may waive the plea protections of Fed. R. Evid. 410 and Fed. R. Crim. P. 11(f) as to a factual basis statement for a plea agreement and that a post hoc determination by the district court that the defendant acted knowingly and voluntarily in signing the plea agreement is sufficient to establish the waiver's validity. The court of appeals ruled that because the district court found that petitioner acted with the advice of counsel and with knowledge of the waiver, the factual basis statement was properly admitted in the government's case in chief.:

> The Supreme Court has held that a waiver of the plea-statement rules is "valid and enforceable" "absent some affirmative indication that the agreement was entered into unknowingly or involuntarily." *Mezzanatto*, 513 U.S. at 210 .... [T]he relinquishment of [a] right" is "voluntary" if it is "the product of a free and deliberate choice rather than intimidation, coercion, or deception." *United States v. Farley*, 607 F.3d 1294, 1326 (11th Cir. 2010) (quoting *Moran v. Burbine*, 475 U.S. 412, 421, ... (1986)). And a decision is made knowingly if it is "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.* (quoting *Moran*, 475 U.S. at 421 ...). ... .
>
> [T]he district court did not clearly err when it ruled that [petitioner] knowingly and voluntarily waived the rules. As

> discussed above, the waiver provision is unambiguous. And the testimonies of [petitioner], his attorney, and a government investigator over the course of a two-day evidentiary hearing amply support the findings by the district court.

App. 15–16.

REASONS FOR GRANTING THE WRIT

The Court should grant the petition to review the court of appeals' unwarranted extension of this Court's holding in *Mezzanatto*—that a defendant may waive rule-based bars to impeachment use of statements made during plea discussions—to the significantly more troubling case-in-chief use of the factual basis portion of a plea agreement as documentary proof of the defendant's agreement that he is guilty of the charged crime.

First, plea agreements, unlike mere factual statements made during discussions as in *Mezzanatto*, are quasi-judicial acts that should be evaluated under Fed. R. Evid. 410(a)(1), rather than 410(a)(4). Because a plea not entered at all is one for which the colloquy required by Fed. R. Crim. P. 11(e) was not conducted, the government's case-in-chief use of a plea agreement bypasses the totality of Rule 11 protections, not merely Rule 11(f)'s direct bar to the use of guilty pleas. Substituting a post hoc consideration of the rule waiver provision of the plea agreement is an inadequate substitute for the requirements of Rule 11 to review the voluntariness of the plea.

The Eleventh Circuit found that petitioner's plea agreement provision for a waiver of the Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410 bars was properly conditioned on petitioner's breach of the plea agreement, where the term "breach" was defined in the government-drafted plea agreement to include *attempts to withdraw the plea* prior to or after pleading guilty even though a guilty plea that has not yet been entered cannot be withdrawn. App. 14 ("The text of the agreement makes clear that to withdraw [the guilty plea], in this context, includes a decision not to plead guilty at all.").

Unlike mere plea discussions, plea agreements are like guilty pleas and carry special weight and potential for prejudice in their use against a defendant at trial. Federal Rule of Evidence 410 applies both to withdrawn pleas and to other plea discussions,[1] providing as follows:

> (a) In a civil or criminal case, evidence of the following is not admissible against the defendant who . . . participated in the plea discussions:
>
> (1) a guilty plea that was later withdrawn; ... or
>
> (4) a statement made during plea discussion with an attorney for the prosecuting authority if the discussions did not result in a guilty plea . . . .

[1] Rule 410 is incorporated by reference in Federal Rule of Evidence 11(f), which provides: "The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410."

However, there are inherent differences between the two categories. Withdrawn pleas follow plea colloquies in which the voluntariness of the plea is established by the district court. But plea discussions have a less formal and final aspect, as ordinarily understood in criminal law. Notably Rule 410 provides exceptions to preclusion of 410(a)(4) plea statements, but not 410(a)(1) withdrawn pleas.

Second, this Court did not hold in *Mezzanatto* that a waiver of the bar to case-in-chief use of even plea discussion statements was valid or consistent with plea bargaining policy concerns or the fairness of the plea bargaining process. Instead, the Court concluded in *Mezzanatto* that "[t]he admission of plea statements for *impeachment* purposes enhances the truth-seeking function of trials and will result in more accurate verdicts." *Id.* at 204 (emphasis added); *see id.* at 207–08 ("Because prosecutors have limited resources and must be able to answer "sensitive questions about the credibility of the testimony" they receive before entering into any sort of cooperation agreement, ... prosecutors may condition cooperation discussions on an agreement that the testimony provided may be used for *impeachment* purposes. ... If prosecutors were precluded from securing such agreements, they might well decline to enter into cooperation discussions in the first place and might never take this potential first step toward a plea bargain.") (emphasis added).

The Court explained that the circumstances in *Mezzanatto* did not require the Court to "decide whether and under what circumstances substantial 'public policy' interests may permit the inference that Congress intended to override the presumption of waivability, for in this case there is no basis for concluding that waiver will interfere with the Rules' goal of encouraging plea bargaining." *Id.* at 207. And as the concurring opinion of Justice Ginsburg explained, "a waiver allowing the Government to impeach with statements made during plea negotiations is compatible with Congress' intent to promote plea bargaining," but "[i]t may be, however, that a waiver to use such statements in the case in chief would more severely undermine a defendant's incentive to negotiate, and thereby inhibit plea bargaining." *Mezzanatto*, 513 U.S. at 211 (Ginsburg, J., concurring, with O'Connor and Breyer, JJ.).[2]

Decisions by the courts of appeals have generally placed no limits (or even speed bumps) on the most waiver-extensive interpretations of *Mezzanatto*. *See*

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[2] In *Mezzanatto*, not only was the permissibility of using plea-protected statements in the government's *case-in-chief* left unresolved, the Court also did not address issues regarding what waivers may reasonably be imposed for entry into a one-sided plea agreement (in that the government unilaterally had the ability to withdraw from the agreement without consequence and without cause), the use of a waiver provision to force a defendant to go forward with a plea (and whether such pressure is acceptable under Fed. R. Crim. P. 11), and the decided prejudice and potential jury confusion from the use of evidence regarding a defendant's attempted entry of a plea of guilty plea, including the implicit judicial finding of the defendant's breach of the plea agreement. The rule and judicial bypass effected by the type of plea agreement used by the government in petitioner's case presents important issues meriting review.

United States v. Nelson, 732 F.3d 504, 513, 516–17 (5th Cir. 2013) (agreement "contained a waiver clause providing that if Nelson failed to plead guilty, 'any information provided by the defendant,' including 'but not limited to[ ] the factual stipulation contained in this Plea Agreement,' 'may be used against [Nelson] in this or any other prosecution.'"); *United States v. Washburn*, 728 F.3d 775, 780 (8th Cir. 2013) (same); *United States v. Stevens*, 455 Fed. Appx. 343, 344 (4th Cir. 2011) (defendant "agreed that if he withdrew from the plea agreement or proceeded to trial on the conspiracy charge, the Government was permitted to use the stipulation of facts as evidence in its case-in-chief."); *United States v. Mitchell*, 633 F.3d 997, 1004 (10th Cir. 2011) (finding "no analytical distinction between Rule 410's application to impeachment waivers and case-in-chief waivers"); *United States v. Burch*, 156 F.3d 1315, 1322–23 (D.C.Cir. 1998) (considering statements made in the defendant's written plea agreement and during subsequent debriefing sessions as covered by the protections of Rules 410 and 11(f))).

Other circuits, including the Second, Third, and Ninth, countenance rebuttal waivers, allowing use of a defendant's plea statements if the defendant presents any evidence at trial that contradicts his plea statements, although what constitutes contradictory evidence varies by circuit and the language of a particular plea agreement. *United States v. Hardwick*, 544 F.3d 565, 570 (3d

Cir. 2008) (permitting waiver for rebuttal purposes); *United States v. Velez*, 354 F.3d 190 (2d Cir. 2004) (same); *United States v. Rebbe*, 314 F.3d 402 (9th Cir. 2002) (same).

"[T]he disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice." *Santobello v. New York*, 404 U.S. 257, 260 (1971). Rule 11 reflects the due process concerns that resulted in this Court's plea voluntariness decisions in *Boykin v. Alabama*, 395 U.S. 238 (1969), and *McCarthy v. United States*, 394 U.S. 459 (1969). In order to encourage plea agreements, Rule 11(f) prohibits the introduction at trial of any statement made by a defendant in a withdrawn or failed plea. Petitioner's Rule 410 waiver, which is part of the plea agreement, does not indicate that he waived his Rule 410 rights and agreed that his plea statements could be admitted against him *regardless* of whether the court approved the agreement, as in *Washburn*, 728 F.3d at 780. And the question presented is whether the policy and scope questions not reached in *Mezzanatto* should be addressed, now that the government has adopted the extreme and unnecessary approach of effectively extracting guilty pleas from defendants entirely outside the protections of Fed. R. Crim. P. 11, including Rule 11(f)'s incorporation of Fed. R. Evid. 410.

The protections provided by Rule 410 safeguard the defendant's fundamental right to trial. The advisory notes to Rule 410 explain that telling a jury the defendant has entered and withdrawn a guilty plea "would effectively set at naught the allowance of withdrawal and place the accused in a dilemma utterly inconsistent with the decision to award him a trial." Fed. R. Evid. 410, Advisory Committee's Notes, 1972 Proposed Rules (citing *Kercheval v. United States*, 274 U.S. 220 (1927)). Additionally, the admission of a guilty plea would force the defendant to testify in order to explain the entry and withdrawal of the plea. *Id.* (citing *People v. Spitaleri*, 173 N.E.2d 35 (1961)). The concerns identified in the advisory notes apply with equal or greater force here, where petitioner never entered a guilty plea. Indeed, petitioner felt compelled at trial to explain why he signed the plea agreement and factual basis and then chose not to enter a guilty plea.

The overwhelming prejudice to the defendant of the introduction of a plea agreement, including particularly that portion of the agreement that identifies the factual basis for the conviction by plea, can hardly be overstated. It turns the trial into a slow plea—and simply renders Rule 11 dispensable at the discretion of the government. That is far too much power in a system where the government can easily extract whatever it needs from most targeted suspects,

and thus voids the Rule and the due process protections of *Boykin* and *McCarthy*.[3]

In petitioner's case, he offered affirmative evidence to try to prove that the agreement to waive the protections against the use of his plea-related statements was made unknowingly, and therefore involuntarily, particularly where no authority of this Court permitted the government to extract such a waiver, much less in the context of a plea agreement for which judicial review was still required under Fed. R. Crim. P. 11. *Cf. Crosby v. United States*, 506 U.S. 255, 261 (1993) ("Since the notion that trial may be commenced in absentia still seems to shock most lawyers, it would hardly seem appropriate to impute knowledge that this will occur to their clients.") (internal quotation marks omitted). Nor, from a practical standpoint, can a jury be expected to undertake a valid post hoc Rule 11-type review of voluntariness evidence as to the "confession" in this context, including attorney-client communications. *See* 18 U.S.C. § 3501 ("trial judge shall permit the jury to hear relevant evidence on the

[3] *See Halliday v. United States*, 394 U.S. 831, 832–33 (1969) ("The rule we adopted in *McCarthy* has two purposes: (1) to insure that every defendant who pleads guilty is afforded Rule 11's procedural safeguards, which are designed to facilitate the determination of the voluntariness of his plea; (2) to provide a complete record at the time the plea is entered of the factors relevant to this determination, thereby facilitating a more expeditious disposition of a post-conviction attack on the plea. Unquestionably, strict compliance with Rule 11 enhances the reliability of the voluntariness determination, and we have retroactively applied constitutionally grounded rules of criminal procedure designed to correct serious flaws in the fact-finding process at trial.") (internal citation and quotation marks omitted).

issue of voluntariness"). And even though the record shows petitioner was never advised of what rights are actually afforded by Fed. R. Evid. 410 and Fed. R. Crim. P. 11(f), and that the plea withdrawal language and other provisions in the plea agreement were profoundly confusing and never *explained* by counsel, the trial and appellate court's post hoc reviews are no substitute for Rule 11 either.

Thus, even if petitioner's waiver could be viewed as knowing and voluntary in the ordinary sense of a confession, its use contravenes public policy and traditional voluntary confession analysis. *See Hutto v. Ross*, 429 U.S. 28, 30 (1976) (per curiam) (holding that confessions "'obtained by any direct or implied promises, however slight'" may be involuntary) (quoting *Bram v. United States*, 168 U.S. 532, 542–43 (1897)). Similarly, in *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963), the Court found that it was "abundantly clear that the petitioner's oral confession was made only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not 'cooperate.'" The Court held "that a confession made under such circumstances must be deemed not voluntary, but coerced." *Id.*

Compelling constitutional principles stemming from the Fifth Amendment's core guarantees accordingly counsel in favor or granting a writ of certiorari.

CONCLUSION

The Eleventh Circuit's decision warrants review by the Court.

Respectfully submitted,

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November 2018

APPENDIX

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-16048

D.C. Docket No. 1:15-cr-20820-BB-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KHALED ELBEBLAWY,

Defendant-Appellant.

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

(August 7, 2018)

Before WILLIAM PRYOR and MARTIN, Circuit Judges and WOOD,[*] District Judge.

WILLIAM PRYOR, Circuit Judge:

[*] Honorable Lisa Wood, United States District Judge for the Southern District of Georgia, sitting by designation.

This appeal from the convictions and sentence of Khalid Elbeblawy for conspiracy to commit healthcare fraud and wire fraud, 18 U.S.C. § 1349, and conspiracy to defraud the United States and pay healthcare kickbacks, 18 U.S.C. § 371, calls to mind the familiar warning that anything you say to the government can and will be used against you. While he owned or managed three home health entities, Elbeblawy hired patient recruiters and bribed doctors and staffing groups to refer patients with Medicare coverage to his agencies; he falsified medical records; and he billed Medicare for tens of millions of dollars in unnecessary medical services. After he had cooperated with the investigation of these crimes for two years, Elbeblawy and his attorney signed a plea agreement and a statement about its factual basis. The agreement waived two evidentiary rules that would ordinarily bar the admission of statements made during plea discussions. But before Elbeblawy pleaded guilty in open court, he changed his mind and demanded a jury trial. At trial, the district court admitted the factual basis for the plea agreement as well as other evidence that the government obtained as a result of Elbeblawy's cooperation. The jury convicted Elbeblawy, and the district court sentenced him to 240 months of imprisonment and ordered him to forfeit approximately $36 million. We conclude that the district court did not err when it admitted the factual basis for the plea agreement because Elbeblawy knowingly and voluntarily signed a valid waiver. And we reject Elbeblawy's arguments that

the district court committed other errors at his trial when it calculated his Sentencing Guidelines range. But we vacate the forfeiture order and remand for entry of a new order because the district court impermissibly held Elbeblawy jointly and severally liable for the proceeds of the conspiracy. We affirm in part, vacate in part, and remand.

I. BACKGROUND

Khaled Elbeblawy owned or managed three home health agencies that provided in-home medical nursing and other services to homebound patients, and he used each to defraud Medicare of millions of dollars. Elbeblawy began defrauding Medicare when he was working as a billing agent at Willsand Home Health. He and Eulises Escalona, the owner of Willsand and a cooperating witness for the government, were "falsifying . . . medical records, []exaggerating the symptoms [of] . . . patients in order to get paid [by] Medicare," and billing for services that were never provided. Elbeblawy quickly saw the potential to bilk Medicare for still more money. He asked Escalona for a promotion to marketing director and offered to "go out there [in] the community and recruit doctors . . . [who would accept] kickbacks." He told Escalona that if they "pa[id] kickback[s]," and took "doctors to lunch or g[ave] them nice gift[s]," the doctors would refer patients to them. Escalona agreed, and they began to pay doctors between $400 and

$800 per referral. They insisted on paying the doctors only in "[c]ash because cash is the only way that nobody can trace if you pay somebody or not."

Elbeblawy also hired "[b]etween eight [and] ten" "patient recruiters" and purchased referrals from nurses and other home health entities or staffing groups that lacked the authority to bill Medicare. Because the groups required a "large amount of money," it was impractical to pay them in cash. Elbeblawy and Escalona consulted a lawyer who informed them that it was illegal to pay for patient referrals. Undeterred, Elbeblawy and Escalona disguised check payments to the groups by inflating the rate they paid for staffing services. And they described checks to the patient recruiters as payments for consulting and other services. Escalona testified that 90 percent of the patients of Willsand were referred because of a kickback of some kind.

Elbeblawy and Escalona also paid the doctors to approve unnecessary medical services. Elbeblawy would pick the most profitable services, falsify the medical records, and pay the doctors in cash-filled envelopes to sign the appropriate documents. Escalona testified that the majority of the patients of Willsand did not need the services billed to Medicare.

Although Elbeblawy began to hold himself out as the chief executive officer of Willsand, Escalona refused to make him a full partner and instead agreed to become equal partners with him in a new firm, JEM Home Health. Elbeblawy

managed the day-to-day operations of the new agency, which had "the same modus operand[i]" as Willsand and used many of the same sources for patient referrals. Around March 2009, Elbeblawy became the sole owner of JEM.

In November 2009, Medicare suspended payments to JEM in response to "reliable information that [JEM] billed Medicare and received payment for home health services provided to beneficiaries who are not, in fact, homebound and were not homebound during the time the services were rendered." Safeguard Services, a Medicare contractor responsible for investigating healthcare fraud, audited JEM. The audit revealed that almost 74 percent of claims submitted between July 2008 and July 2009, and almost 99 percent of claims submitted between August 2009 and February 2010, should never have been paid.

Elbeblawy then started yet another home health agency, this time in his ex-wife's name, and failed to disclose that he was affiliated with a suspended agency. From the beginning, Elbeblawy ran Healthy Choice Home Health. And in 2013, he bought the company from his ex-wife for ten dollars in accordance with a "stock purchase option agreement" they entered in 2010. All told, Medicare paid $29.1 million for claims from Willsand, $8.7 million for claims from JEM, and $2.5 million for claims from Healthy Choice.

Elbeblawy later decided to "cooperate with the [g]overnment and accept responsibility." For approximately two years, Elbeblawy helped investigators

obtain evidence against his former conspirators. For example, he provided the government with a handwritten list of the doctors, home health groups, and recruiters with whom he used to work. And he recorded more than 30 incriminating conversations about kickbacks with his former conspirators. He offered one physician "the same number [they] used to do." And he told another physician that he "remember[ed] what [he] used to do with [the physician] before," and he told the physician to "[l]et [him] know what [he] ha[d] in mind" for payment.

In June 2015, Elbeblawy and his attorney signed a plea agreement and, 14 days later, a written factual basis for the agreement. The agreement provided that, "[i]n the event of . . . a breach[,] . . . the [d]efendant waives any protection[] afforded by . . . Rule 11 of the Federal Rules of Criminal Procedure and Rule 410 of the Federal Rules of Evidence," both of which bar the admission of statements made during plea discussions. The agreement also stated that "the [g]overnment w[ould] be free to use against the [d]efendant, directly and indirectly, in any criminal or civil proceeding[,] any of the information, statements, and materials provided by him pursuant to th[e] [a]greement, including offering into evidence or otherwise using the attached Agreed Factual Basis for Guilty Plea." Elbeblawy's attorney testified that he met with Elbeblawy at least twice to discuss the

agreement, that he "literally read" the agreement to him, and that he "walk[ed] [Elbeblawy] through each paragraph separately."

After he signed the agreement, Elbeblawy "changed [his] mind" and refused to plead guilty, so the government prosecuted him for conspiracy to commit healthcare fraud and wire fraud, 18 U.S.C. § 1349, and conspiracy to defraud the United States and pay healthcare kickbacks, 18 U.S.C. § 371. Before the trial, the district court denied Elbeblawy's motion to suppress the signed factual basis for the plea agreement on the ground that Elbeblawy did not knowingly and voluntarily waive the protections of Rule 410 and Rule 11. It held a two-day evidentiary hearing at which Elbeblawy, his attorney, and a government investigator testified. And it explained that Elbeblawy "has a college degree," that "[t]here were several meetings between [Elbeblawy] and [his] attorney," that Elbeblawy was "engaged" and "asked many questions" before he signed the agreement, and that "[h]is questions were answered." Based on this evidence, the district court found that Elbeblawy "made a free and deliberate choice to continue to cooperate" and that he "had full knowledge of [his] actions and [their] consequences."

At trial, the government introduced the factual basis for the plea agreement as well as the evidence Elbeblawy helped the government obtain. And it called Escalona and Kansky Delisma, one of the doctors who accepted kickbacks, to

testify. Elbeblawy testified in his own defense and declared that he was completely "framed" by the government.

At the end of the trial, the district court instructed the jury on both conspiracy counts. It instructed the jury that "[t]o . . . defraud the United States" under section 371 "means to cheat the [g]overnment out of . . . property or money or to interfere with any of its lawful [g]overnment functions by deceit, craft, or trickery." The wording of this instruction varied slightly from the wording in the indictment, which alleged that Elbeblawy conspired "to defraud the United States by impairing, impeding, obstructing, and defeating through deceitful and dishonest means, the lawful government functions of the United States Department of Health and Human Services." The jury found Elbeblawy guilty of each object on both conspiracy counts: conspiracy to commit healthcare fraud and wire fraud, and conspiracy to defraud the United States and pay healthcare kickbacks.

The district court denied Elbeblawy's motion for a new trial based on an alleged violation of his right to due process under *Brady v. Maryland*, 373 U.S. 83 (1963). Elbeblawy argued that the government unconstitutionally failed to disclose an exculpatory interview report that revealed that Delisma originally denied working with Elbeblawy. The district court reviewed the evidence at trial, which included testimony by Delisma admitting that he knew Elbeblawy as well as a video of Elbeblawy giving him a kickback. And it concluded that the interview

report did not create a "reasonable probability that the outcome of th[e] trial would have been different" had the report been disclosed.

The district court imposed a forfeiture order of $36,400,957. *See* 18 U.S.C. § 982(a)(7). Because Escalona testified that about 90 percent of the patients of Willsand and JEM were referred because of kickbacks, the district court reduced the total amount Medicare paid to the three clinics—$40,445,507—by 10 percent. This number represented "the total amount of the gross proceeds traceable to the commission of the conspiracy, not the amount that was received directly by . . . Elbeblawy." The district court also ruled that "Elbeblawy's convicted co-conspirators [were] jointly and severally liable for th[e] forfeiture money judgment up to the amount of their respective forfeiture money judgments."

At the sentencing hearing, the district court ruled that the 2015 Sentencing Guidelines applied, that Elbeblawy used "sophisticated means" to commit his crimes, and that the loss amount from the conspiracy exceeded $25 million. Elbeblawy argued that an earlier, less-stringent version of the Guidelines applied because his criminal conduct occurred before November 2011. But the district court ruled that the 2015 Guidelines applied because the "continuing criminal conduct . . . began in 2006 and ended in 2013." It also applied a sophisticated-means role enhancement because the conspiracy "was a sophisticated and very extensive and elaborate operation." The district court explained that Elbeblawy

"recruited . . . patient recruiters" and "directly paid the doctors . . . [and] made arrangements for those meetings and those payments." And it stated that Elbeblawy "was involved in the fraudulent contracts that were executed." For the loss amount, the district court used the same $36 million figure it had used for the forfeiture order. It then sentenced Elbeblawy to 240 months of imprisonment.

II. STANDARDS OF REVIEW

Several standards govern this appeal. "In reviewing the district court's suppression rulings, 'we review factual findings for clear error and the court's application of law to those facts *de novo*.'" *United States v. Mathurin*, 868 F.3d 921, 927 (11th Cir. 2017) (quoting *United States v. Goddard*, 312 F.3d 1360, 1362 (11th Cir. 2002)). "We review *de novo* alleged *Brady* . . . violations," and we review "the district court's denial of a motion for [a] new trial for an abuse of discretion." *United States v. Stein*, 846 F.3d 1135, 1145 (11th Cir. 2017). We review a forfeited constructive-amendment argument for plain error. *United States v. Madden*, 733 F.3d 1314, 1322 (11th Cir. 2013). "We review *de novo* the interpretation of the Guidelines by the district court and the application of the Guidelines to the facts." *United States v. Shabazz*, 887 F.3d 1204, 1222 (11th Cir. 2018). But "[w]e review for clear error the factual findings of the district court, including its . . . loss-amount determinations." *Id.* And "[w]e review *de novo* the district court's legal conclusions regarding forfeiture and the court's findings of

fact for clear error." *United States v. Hoffman-Vaile*, 568 F.3d 1335, 1340 (11th Cir. 2009) (quoting *United States v. Puche*, 350 F.3d 1137, 1153 (11th Cir. 2003)).

III. DISCUSSION

We divide our discussion in five parts. First, we explain that the district court did not err when it admitted the signed factual basis for Elbeblawy's plea agreement. Second, we explain that the government did not violate Elbeblawy's right to due process under *Brady*. Third, we explain that the district court did not constructively amend the indictment when it instructed the jury. Fourth, we explain that the district court did not clearly err when it calculated Elbeblawy's Sentencing Guidelines range. Fifth, we explain that the district court erred when it imposed a forfeiture order that held Elbeblawy jointly and severally liable for the proceeds of the conspiracy.

A. The District Court Did Not Err when It Admitted the Factual Basis for Elbeblawy's Plea Agreement.

Federal Rule of Evidence 410(a), which is incorporated into Federal Rule of Criminal Procedure 11(f), provides that "a statement made during plea discussions" may not be admitted "[i]n a civil or criminal case . . . against the defendant who made the plea or participated in the plea discussions" if "the discussions did not result in a guilty plea." Fed. R. Evid. 410(a); *see also* Fed. R. Crim. P. 11(f) ("The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410."). But "an

agreement to waive" the protections in these rules is "valid and enforceable," the Supreme Court has held, "absent some affirmative indication that the agreement was entered into unknowingly or involuntarily." *United States v. Mezzanatto*, 513 U.S. 196, 210 (1995).

Elbeblawy argues that, although he and his attorney signed a plea agreement that waived the plea-statement rules, the waiver is unenforceable. The relevant provision of that agreement waived the protections of Rule 410 and Rule 11 in broad terms:

> Defendant agrees that if he fails to comply with any of the provisions of this [a]greement, including the failure to tender such [a]greement to the [district] [c]ourt, . . . or attempts to withdraw the plea (prior to or after pleading guilty to the charges identified [in the agreement]), the [g]overnment will have the right to characterize such conduct as a breach of th[e] [a]greement. In the event of such a breach[,] . . . the [d]efendant waives any protections afforded by Section 1B1.8(a) of the Sentencing Guidelines, Rule 11 of the Federal Rules of Criminal Procedure[,] and Rule 410 of the Federal Rules of Evidence, and the [g]overnment will be free to use against the [d]efendant, directly and indirectly, in any criminal or civil proceeding any of the information, statements, and materials provided by him pursuant to this [a]greement, including offering into evidence or otherwise using the attached Agreed Factual Basis for Guilty Plea.

Elbeblawy argues that the waiver is ambiguous and should be construed against the government and, in the alternative, that he did not knowingly and voluntarily sign the plea agreement and that his attorney could not waive the plea-statement rules on his behalf. We disagree.

1. The Waiver Is Unambiguous.

We construe plea agreements "in a manner that is sometimes likened to contractual interpretation." *United States v. Harris*, 376 F.3d 1282, 1287 (11th Cir. 2004) (quoting *United States v. Jefferies*, 908 F.2d 1520, 1523 (11th Cir. 1990)); *see also United States v. Hunter*, 835 F.3d 1320, 1326 (11th Cir. 2016). "This analogy, however, should not be taken too far." *Jefferies*, 908 F.2d at 1523. We have explained that "a plea agreement must be construed in light of the fact that it constitutes a waiver of 'substantial constitutional rights' requiring that the defendant be adequately warned of the consequences of the plea." *United States v. Copeland*, 381 F.3d 1101, 1106 (11th Cir. 2004) (quoting *Jefferies*, 908 F.2d at 1523). So "[w]hen a plea agreement is ambiguous, it 'must be read against the government.'" *Id.* at 1105–06 (quoting *Raulerson v. United States*, 901 F.2d 1009, 1012 (11th Cir. 1990)).

Elbeblawy argues that the waiver provision in his plea agreement was ambiguous and must be construed against the government, but the agreement clearly stated that Elbeblawy "waive[d] any protections afforded by . . . Rule 11 . . . and Rule 410." And to avoid any confusion, it elaborated that "the [g]overnment will be free to use against the [d]efendant, directly and indirectly, in any criminal or civil proceeding any of the information, statements, and materials provided by him pursuant to th[e] [a]greement, including offering into evidence or

otherwise using the attached Agreed Factual Basis." We discern no ambiguity in this text.

Elbeblawy objects that the waiver provision is ambiguous because it defined "breach" to include "attempts to withdraw the plea (prior to or after pleading guilty . . .)" even though "[a] guilty plea that has not yet been entered cannot be withdrawn." Put differently, he contends that the use of the word "withdraw" renders the agreement "ambiguous" about whether a defendant who "attempts to withdraw" "prior to" pleading guilty has breached the agreement. We disagree.

That the term withdraw might have a different meaning in other contexts does not render its meaning in this context any less clear. The text of the agreement makes clear that to withdraw, in this context, includes a decision not to plead guilty at all. Elbeblawy's waiver is unambiguous.

We also reject Elbeblawy's argument that the waiver is ambiguous because it refers to the "attached Agreed Factual Basis" even though the factual basis was not attached when the agreement was signed. The factual basis was identified in the plea agreement and was later signed by both Elbeblawy and his attorney. And the agreement did not condition its enforcement on whether the signed statement was yet attached. Elbeblawy's attorney also testified that when he and Elbeblawy signed the agreement, they "had a . . . [f]actual [b]asis," although he could not

recall "if it was specifically stapled to [the agreement]." Nothing suggests that Elbeblawy was confused about the contents of the factual basis.

2. The District Court Did Not Clearly Err when It Found that Elbeblawy Knowingly and Voluntarily Waived the Plea-Statement Rules.

The Supreme Court has held that a waiver of the plea-statement rules is "valid and enforceable" "absent some affirmative indication that the agreement was entered into unknowingly or involuntarily." *Mezzanatto*, 513 U.S. at 210. And this Court has described the conditions necessary for a knowing and voluntary waiver in decisions about the waiver of a defendant's rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). "[T]he relinquishment of [a] right" is "voluntary" if it is "the product of a free and deliberate choice rather than intimidation, coercion, or deception." *United States v. Farley*, 607 F.3d 1294, 1326 (11th Cir. 2010) (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)). And a decision is made knowingly if it is "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.* (quoting *Moran*, 475 U.S. at 421). We have explained that "the totality of the circumstances . . . must reveal both an uncoerced choice and the requisite level of comprehension." *Everett v. Sec'y, Fla. Dep't of Corr.*, 779 F.3d 1212, 1241 (11th Cir. 2015).

Elbeblawy acknowledges that both he and his attorney signed the plea agreement, but he argues that his attorney could not waive the plea-statement rules

on his behalf and that he did not knowingly sign the agreement because he did not understand the waiver provision or the protections he was waiving. He stresses that, although his attorney met with him twice to discuss the agreement and "read the entire plea agreement to him," his attorney did not *explain* the plea-statement rules or the waiver provision. Elbeblawy also argues that his attorney testified that he generally advises his clients that "there would be no agreement" if the client "pulls out of the agreement *after the plea*." According to Elbeblawy, his attorney "did not tell [him] the agreement would be void if he never entered a guilty plea." This argument fails.

We need not decide whether an attorney may waive the plea-statement rules on behalf of his client, because the district court did not clearly err when it ruled that Elbeblawy knowingly and voluntarily waived the rules. As discussed above, the waiver provision is unambiguous. And the testimonies of Elbeblawy, his attorney, and a government investigator over the course of a two-day evidentiary hearing amply support the findings by the district court. Not only could Elbeblawy read the waiver provision for himself, his attorney "literally read" it to him. Indeed, his attorney "walk[ed] through each paragraph separately" with Elbeblawy, and his attorney testified that he was present when Elbeblawy signed the agreement. The district court also explained that Elbeblawy "has a college degree" and "asked many questions" of his attorney, which suggests that he took steps to ensure that he

knew his rights and understood the consequences of signing the agreement. His attorney agreed that, "[o]ther than those questions or concerns that he raised" about unrelated issues, Elbeblawy never "indicate[d] to [him] that there was any portion of the [p]lea [a]greement or [f]actual [b]asis that he didn't understand." We reject Elbeblawy's argument that the district court clearly erred.

B. *The Government Did Not Violate Elbeblawy's Right to Due Process Under* Brady.

To establish a violation of the duty to disclose exculpatory evidence, a defendant must prove "that the government possessed favorable evidence," that the defendant "did not possess the evidence and could not have obtained the evidence with any reasonable diligence, that the government suppressed the favorable evidence, and that the evidence" is material, or "creates a reasonable probability of a different outcome." *United States v. Man*, 891 F.3d 1253, 1276 (11th Cir. 2018) (alterations adopted) (citation and internal quotation marks omitted). "A reasonable probability of a different result is one in which the suppressed evidence undermines confidence in the outcome of the trial." *Rimmer v. Sec'y, Fla. Dep't of Corr.*, 876 F.3d 1039, 1054 (11th Cir. 2017) (citation and internal quotation marks omitted). "[W]e must consider the totality of the circumstances" and "evaluate the withheld evidence in the context of the entire record" to determine whether the result would have been different. *Id.* (alteration adopted) (citations and internal quotation marks omitted).

Elbeblawy argues that the government violated *Brady* when it failed to disclose an allegedly exculpatory report about an early police interview of Delisma. According to the interview report, Delisma initially denied knowing Elbeblawy and acknowledged only that he "may have seen Elbeblawy . . . approximately 4–5 years [before the date of the interview]" when Elbeblawy was approaching other doctors about working with him. But Delisma almost immediately reversed course. He testified that about two weeks after that initial interview he "f[ound] out that the [g]overnment knew that [he] had referred patients to . . . Elbeblawy in exchange for money" when an investigator "showed [him] a video where [he] was receiving cash money from . . . Elbeblawy in exchange for a referral." At that point, he "admitt[ed] to receiving money for patient referrals." The government played the video for the jury, and Delisma testified that he "told the [g]overnment" about other referrals he made in exchange for kickbacks.

Elbeblawy contends that the report was material because "Delisma [was] the only witness who testified that he received kickbacks from Elbeblawy" and the report "directly exculpate[d] Elbeblawy of any wrongdoing relating to his alleged payment to Delisma of kickbacks." He also maintains that the report was "powerful impeachment evidence" because it showed "Delisma's dishonesty and his willingness to lie to [government investigators]." And he asserts that

impeaching Delisma's credibility would have "undermined . . . Escalona's testimony" because "the government relied on Delisma's testimony to corroborate testimony elicited from [Escalona,] its star witness." We again disagree.

The interview report does not "create[] a reasonable probability of a different outcome." *Man*, 891 F.3d at 1276 (citation and internal quotation marks omitted). The video and Delisma's testimony established that his initial, exculpatory denials were false. And although the interview report may have had some minimal impeachment value, there is no reasonable probability that it would have changed the outcome of the trial. Counsel for Elbeblawy had already called Delisma's credibility into question when he effectively cross-examined him about a separate Medicare fraud scheme. In response to questioning, Delisma admitted that he knew he was violating the law when he referred patients to his brother's home health agency and that he "lie[d]" to federal agents when he said that he stopped referring patients after he learned that it is illegal to pay kickbacks. "[A]ny additional impeachment value that [counsel] might have derived from the [interview report] would have been minimal." *United States v. Jones*, 601 F.3d 1247, 1267 (11th Cir. 2010).

Moreover, the evidence at trial was overwhelming even without Delisma's testimony. *See United States v. Hernandez*, 864 F.3d 1292, 1306 (11th Cir. 2017) (holding that evidence was immaterial, "not just because the alleged unavailable

evidence [was] insufficiently probative or sufficiently substituted, but also because the evidence of guilt [was] overwhelming"). Escalona was the main cooperator, and the government introduced evidence derived from two years of cooperation, including multiple videos of Elbeblawy discussing his kickback arrangements with various doctors, the inculpatory statements Elbeblawy made to federal agents, and Elbeblawy's signed factual basis. Delisma's testimony was not especially important in the light of this record.

C. The District Court Did Not Constructively Amend the Indictment.

The Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." U.S. Const. amend. V. So the government may not try a defendant "on charges that are not made in the indictment against him." *Madden*, 733 F.3d at 1318 (quoting *Stirone v. United States*, 361 U.S. 212, 217 (1960)). And it follows that a "district court may not constructively amend the indictment" by altering the "essential elements of [an] offense contained in the indictment . . . to broaden the possible bases for conviction beyond what is contained in the indictment." *Id.* (quoting *United States v. Keller*, 916 F.2d 628, 634 (11th Cir. 1990)).

Elbeblawy argues that the district court "constructively amended Count [Two] of the superseding indictment" when it instructed the jury. Count Two

charged Elbeblawy with violating section 371, which prohibits "conspir[ing] . . . to defraud the United States, or any agency thereof in any manner or for any purpose." 18 U.S.C. § 371. The indictment alleged that Elbeblawy conspired to "defraud the United States by impairing, impeding, obstructing, and defeating through deceitful and dishonest means, the lawful government functions of the . . . Department of Health and Human Services." And the district court instructed the jury that "[t]o . . . defraud the United States means to cheat the [g]overnment out of . . . property or money or to interfere with any of its lawful [g]overnment functions by deceit, craft, or trickery." Elbeblawy argues that the statute "identifies at least two distinct ways in which it can be violated": by depriving the government of property or money and by obstructing or impairing the lawful functions of the government. And he argues that the indictment alleged a violation of the statute by obstructing or impairing the lawful functions of the government, not by depriving the government of property or money. So Elbeblawy contends that the district court constructively amended the indictment when it instructed the jury that it could convict Elbeblawy for conspiring to "cheat the [g]overnment out of . . . property or money." This argument fails.

Our review is governed by the plain-error standard, which applies to challenges that were not raised before the district court. *See Madden*, 733 F.3d at 1319. Elbeblawy argues that he preserved his constructive-amendment argument

because he mentioned it, in passing, in a post-trial reply motion. But Federal Rule of Criminal Procedure 51(b) "tells parties how to preserve claims of error: 'by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection.'" *Puckett v. United States*, 556 U.S. 129, 135 (2009) (quoting Fed. R. Crim. P. 51(b)). The rule "serves to induce the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them." *Id.* at 134. Ebleblawy's post-trial remark was neither timely nor sufficiently developed.

We conclude that there was no error, let alone plain error, because the slightly different wording of the jury instruction did not amount to a constructive amendment of the indictment. The district court correctly stated the law and its instructions tracked, almost verbatim, our pattern instructions for conspiracy to defraud the United States, 18 U.S.C. § 371. The defraud clause prohibits "conspir[ing] . . . to defraud the United States, or any agency thereof in any manner or for any purpose." *Id.* And the Supreme Court has explained that the statute does not encompass only "conpirac[ies] [that] contemplate a financial loss or that one shall result." *Haas v. Henkel*, 216 U.S. 462, 479 (1910). "The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing[,] or defeating the lawful function of any department of [g]overnment."

Id.; *see also Dennis v. United States*, 384 U.S. 855, 861 (1966). Cheating the government out of money or property is a *kind* of deceptive interference with the lawful functions of the government. After all, the lawful functions of the government do not include making unlawful payments to fraudsters.

D. The District Court Did Not Clearly Err when It Calculated Elbeblawy's Sentencing Guidelines Range.

Elbeblawy raises three challenges to the calculation of his Sentencing Guidelines range. First, he argues that the district court violated the Ex Post Facto Clause, U.S. Const. art. 1, § 9, cl. 3, when it sentenced him under the 2015 Guidelines instead of the less severe Guidelines in effect before November 1, 2011. Second, he argues that the district court clearly erred when it found that Elbeblawy used sophisticated means within the meaning of section 2B1.1(b)(10)(C) of the Guidelines. Third, he argues that the district court clearly erred when it calculated the loss amount. None of these arguments is persuasive.

Although a defendant is ordinarily sentenced under the Guidelines in effect at the time of sentencing, *United States v. Aviles*, 518 F.3d 1228, 1230 (11th Cir. 2008), the Ex Post Facto Clause proscribes sentencing an offender under a version of the Guidelines that would provide a higher sentencing range than the version in place at the time of the offense, *Peugh v. United States*, 569 U.S. 530, 533 (2013). Because the Guidelines were amended to provide a four-level increase for certain federal healthcare offenses in November 2011, *see* U.S.S.G. App. C., vol. III, at

388–89 (amend. 749), Elbeblawy could be sentenced under the 2015 Guidelines only if his offense conduct continued after the amendment. *Aviles*, 518 F.3d at 1231.

The district court did not clearly err when it found that Elbeblawy's conduct continued after 2011. Elbeblawy's signed factual basis expressly provided that his "primary role in the scheme . . . was to establish and take control of JEM . . . (from approximately 2006–2011) and Healthy Choice . . . (*from approximately 2009–2013*)." This evidence alone establishes that Elbeblawy's criminal conduct continued after 2011.

Nor did the district court err when it found that Elbeblawy used "sophisticated means" within the meaning of section 2B1.1(b)(10)(C) to defraud the government. The role enhancement for sophisticated means applies to "especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense," such as "hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts." U.S.S.G. § 2B1.1 n.9(B). Elbeblawy and Escalona first agreed to use cash to pay the doctors because "cash is the only way that nobody can trace if you pay somebody or not." They later decided to create sham contracts that allowed them to inflate the rates they paid for staffing services to disguise the kickbacks they paid to the home health entities. Elbeblawy also sent checks to patient

recruiters that used the term "patient care coordinator[]" because, according to Escalona, "if you use the word 'recruiter' . . ., you will be caught very eas[il]y." And he used his ex-wife to open a new home health agency when Medicare suspended payments to JEM. In the light of these efforts at concealment, we are not "left with a definite and firm conviction that a mistake has been committed." *United States v. Robertson*, 493 F.3d 1322, 1332 (11th Cir. 2007); *see also United States v. Feaster*, 798 F.3d 1374, 1381 (11th Cir. 2015) ("[O]ur caselaw demonstrates that we have sustained application of the sophisticated-means enhancement where defendants have engaged in concealment of their crimes in a variety of ways not expressly stated in the Application Note.").

Finally, the district court did not clearly err when it estimated that the loss amount under section 2B1.1(b)(1) was in excess of $25 million. "Although it may not speculate about the existence of facts and must base its estimate on reliable and specific evidence, the district court is required only to make a reasonable estimate of the loss" based on facts that the government must prove by a preponderance of the evidence. *United States v. Ford*, 784 F.3d 1386, 1396 (11th Cir. 2015). "[B]ecause 'district courts are in a unique position to evaluate the evidence relevant to a loss determination,' we must give their determinations 'appropriate deference.'" *United States v. Whitman*, 887 F.3d 1240, 1248 (11th Cir. 2018) (alteration adopted) (quoting *United States v. Moran*, 778 F.3d 942, 973 (11th Cir.

2015)). In his signed factual basis, Elbeblawy admitted that Medicare paid tens of millions of dollars to Willsand, JEM, and Healthy Choice. And evidence at trial established that the three entities collectively reaped $40,445,507 from Medicare, and audit findings revealed that over 73 percent of claims submitted by JEM between 2008 and 2009, and almost 99 percent of claims submitted between 2009 and 2010, should not have been paid. Applying even the lower overpayment rate of 73 percent to $40,445,507 yields $29,525,220.11, which is sufficient for 22-level increase that the district court applied. *See* U.S.S.G. § 2B1.1(b)(1)(L). We "must affirm the finding by the district court if it is 'plausible in light of the record viewed in its entirety.'" *Whitman*, 887 F.3d at 1248 (quoting *United States v. Siegelman*, 786 F.3d 1322, 1333 (11th Cir. 2015)). The record here amply supports the finding by the district court.

E. The District Court Erred when It Entered a Forfeiture Order That Held Elbeblawy Jointly and Severally Liable for the Proceeds of the Conspiracy.

Elbeblawy raises three challenges to the forfeiture order. He argues that the district court erred because "[t]he forfeiture statutes do not authorize personal money judgments as a form of forfeiture," because the Sixth Amendment "require[s] a jury verdict or proof beyond a reasonable doubt to sustain [a] forfeiture order," and because "a forfeiture judgment premised on proceeds received by Escalona" contravenes the holding of the Supreme Court in *Honeycutt*

v. United States, 137 S. Ct. 1626 (2017). Our precedent forecloses the first two arguments, but Elbeblawy is correct that joint and several liability is impermissible under *Honeycutt*.

We have squarely held that "criminal forfeiture acts *in personam* as a punishment against the party who committed the criminal act[]." *United States v. Fleet*, 498 F.3d 1225, 1231 (11th Cir. 2007). The "proceeds of crime constitute a defendant's interest in property" and "can be forfeited in an *in personam* proceeding in a criminal case." *In re Rothstein, Rosenfeldt, Adler, P.A.*, 717 F.3d 1205, 1211 (11th Cir. 2013) (citation and internal quotation marks omitted). In an attempt to circumvent this precedent, Elbeblawy argues that "*Honeycutt*'s focus on individual receipt of forfeitable assets . . . shows that money judgments derived from conspiratorial criminal responsibility are not authorized." But *Honeycutt* held only that a district court may not hold members of a conspiracy jointly and severally liable for property that a conspirator derived from the crime. 137 S. Ct. at 1630. And far from *sub silentio* abolishing *in personam* judgments against conspirators, the Court presumed the continued existence of *in personam* proceedings when it stated that the statute at issue there "adopt[ed] an *in personam* aspect to criminal forfeiture." *Id.* at 1635.

Elbeblawy's Sixth Amendment argument fares no better. The Supreme Court held in *Libretti v. United States* that "the right to a jury verdict on

forfeitability does not fall within the Sixth Amendment's constitutional protection." 516 U.S. 29, 49 (1995). Elbeblawy argues that the Supreme Court abrogated this precedent by implication when it held in *Alleyne v. United States* that "any fact that increases the mandatory minimum [imposed by statute] is an 'element' [of the offense] that must be submitted to the jury." 570 U.S. 99, 103 (2013). He also maintains that "[t]he crucial underpinnings of th[e] holding in *Libretti* . . . have been so thoroughly undermined by subsequent holdings . . . that applying *Libretti* . . . defies recognition of supervening precedent." But *Libretti* controls this appeal, and as a circuit court, we must "follow the case which directly controls, leaving to th[e] [Supreme] Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (citation and quotation marks omitted).

Finally, we agree with both parties that we must remand for a new forfeiture determination because the district court erred when it ruled that Elbeblawy was jointly and severally liable for the proceeds from the conspiracy. The Supreme Court held in *Honeycutt* that a defendant may not "be held jointly and severally liable for property that his co-conspirator derived from [certain drug] crime[s] but that the defendant himself did not acquire." 137 S. Ct. at 1630. The Court interpreted a different forfeiture statute in *Honeycutt*, *see* 21 U.S.C. § 853(a), but the same reasoning applies to the forfeiture statute for healthcare fraud, *see* 18

U.S.C. § 982(a)(7). As the Fifth Circuit has explained, neither statute provides for joint and several liability, and both statutes reach only property traceable to the commission of an offense. *See United States v. Sanjar*, 876 F.3d 725, 749 (5th Cir. 2017). The drug statute at issue in *Honeycutt* requires, among other things, the forfeiture of "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of [a] violation [of a relevant statute]." 21 U.S.C. § 853(a)(1). And the healthcare-fraud statute requires district courts to "order the person [convicted of a healthcare-fraud offense] to forfeit property, real or personal, that constitutes or is derived, directly or indirectly, from gross proceeds traceable to the commission of the offense." 18 U.S.C. § 982(a)(7). Finally, "the forfeiture statute for [healthcare-fraud] offenses incorporates many of the drug-law provisions on which *Honeycutt* relied in rejecting joint and several liability." *Sanjar*, 876 F.3d at 749 (citing 21 U.S.C. §§ 853(c), 853(e), and 853(p)). For example, the Supreme Court stated in *Honeycutt* that "[s]ection 853(p)—the sole provision of [section] 853 that permits the [g]overnment to confiscate property untainted by the crime—lays to rest any doubt that the [drug-forfeiture] statute permits joint and several liability." 137 S. Ct. at 1633. And section 982, which includes the healthcare-fraud provision, provides that "[t]he forfeiture of property under this section . . . shall be governed by the provisions of [section 853]." 18

U.S.C. § 982(b)(1); *see also id.* at § 982(b)(2). The healthcare-fraud statute does not permit joint and several liability.

IV. CONCLUSION

We **AFFIRM** Elbeblawy's convictions and sentence, **VACATE** the forfeiture order, and **REMAND** for proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT

Southern District of Florida
Miami Division

UNITED STATES OF AMERICA
v.
KHALED ELBELAWY

JUDGMENT IN A CRIMINAL CASE

Case Number: **15-CR-20820-BB**
USM Number: **08071-104**

Counsel For Defendant: **Richard Klugh, Jr.**
Counsel For The United States: **Nicholas Surmacz**
Court Reporter: **Yvette Hernandez**

The defendant is adjudicated guilty of these offenses:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18: USC 1349	Conspiracy to commit healthcare and wire fraud	05/01/2013	1s
18 USC 371	Conspiracy to defraud the United States and Pay Healthcare Kickbacks	05/01/2013	2s

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence:
August 30, 2016

Beth Bloom
United States District Judge

Date: August 31, 2016

DEFENDANT: **KHALED ELBELAWY**
CASE NUMBER: **15-CR-20820-BB**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **240 MONTHS. This term consists of 240 months as to count 1 and 60 months as to count 2, to be served concurrently to count 1**.

The court makes the following recommendations to the Bureau of Prisons: The defendant be housed in a facility in South Florida.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **KHALED ELBELAWY**
CASE NUMBER: **15-CR-20820-BB**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 YEARS. This term consists of 3 years as to counts 1 and 2, all such terms to run concurrently**.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **KHALED ELBELAWY**
CASE NUMBER: **15-CR-20820-BB**

SPECIAL CONDITIONS OF SUPERVISION

Anger Control / Domestic Violence - The defendant shall participate in an approved treatment program for anger control/domestic violence. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Financial Disclosure Requirement - The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

Health Care Business Restriction - The defendant shall not own, directly or indirectly, or be employed, directly or indirectly, in any health care business or service, which submits claims to any private or government insurance company, without the Court's approval.

No New Debt Restriction - The defendant shall not apply for, solicit or incur any further debt, included but not limited to loans, lines of credit or credit card charges, either as a principal or cosigner, as an individual or through any corporate entity, without first obtaining permission from the United States Probation Officer.

Self-Employment Restriction - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

DEFENDANT: **KHALED ELBELAWY**
CASE NUMBER: **15-CR-20820-BB**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$200.00	$0.00	$36,400,957.00

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

NAME OF PAYEE	TOTAL LOSS*	RESTITUTION ORDERED	PRIORITY OR PERCENTAGE
Center for Medicare and Medicaid Services	$40,445,508.65	$36,400,957.00	

Restitution with Imprisonment - It is further ordered that the defendant shall pay restitution in the amount of $36,400,957.00. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay a minimum of $25.00 per quarter toward the financial obligations imposed in this order. Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: **KHALED ELBELAWY**
CASE NUMBER: **15-CR-20820-BB**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. Lump sum payment of $200.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

CASE NUMBER DEFENDANT AND CO-DEFENDANT NAMES (INCLUDING DEFENDANT NUMBER)	**TOTAL AMOUNT**	**JOINT AND SEVERAL AMOUNT**
12-CR-20293 Eulises Escalona	$36,400,957.00	$36,400,957.00

The defendant shall forfeit the defendant's interest in the following property to the United States:

$36,400,957.00 in U. S. Currency. The Order entered by this Court granting forfeiture is incorporated and is part of this Judgment.

Restitution is owed jointly and severally by the defendant and co-defendants in the above case.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

vs.

KHALED ELBEBLAWY,

Defendant.
_____/

PLEA AGREEMENT

The United States of America, by and through the Fraud Section of the Criminal Division of the Department of Justice and the United States Attorney's Office for the Southern District of Florida (collectively, the "United States"), and Khaled Elbeblawy (the "Defendant"), enter into the following agreement (the "Plea Agreement" or "Agreement"):

1. The Defendant agrees to plead guilty to Count 1 of the Information. Count 1 charges that the Defendant knowingly and willfully combined, conspired, confederated and agreed with others to violate Title 18, United States Code, Section 1347, that is, to execute a scheme and artifice to defraud a health care benefit program affecting commerce, as defined in Title 18, United States Code, Section 24(b), that is, Medicare, and to obtain, by means of materially false and fraudulent pretenses, representations, and promises, money and property owned by, and under the custody and control of, said health care benefit program, in connection with the delivery of and payment for health care benefits, items, and services, in violation of Title 18, United States Code, Section 1349. The Defendant acknowledges that he has read the charge against him contained in the Information and that charge has been fully explained to him

by his attorney.

2. The Defendant is aware that the sentence will be imposed by the Court. The Defendant understands and agrees that federal sentencing law requires the Court to impose a sentence that is reasonable and that the Court must consider the United States Sentencing Guidelines and Policy Statements (the "Sentencing Guidelines") in effect at the time the offense was committed in determining that reasonable sentence. The Defendant acknowledges and understands that the Court will compute an advisory sentence under the Sentencing Guidelines and that the applicable sentencing range will be determined by the Court relying in part on the results of a presentence investigation by the United States Probation Office ("Probation"), which investigation will commence after the Defendant's guilty plea has been entered. The Defendant is also aware that, under certain circumstances, the Court may depart from the advisory Sentencing Guidelines range that it has computed, and may raise or lower that advisory sentence under the Sentencing Guidelines. The Defendant is further aware and understands that while the Court is required to consider the advisory sentencing range determined under the Sentencing Guidelines, it is not bound to impose that sentence. Defendant understands that the facts that determine the offense level will be found by the Court at the time of sentencing and that in making those determinations the Court may consider any reliable evidence, including hearsay, as well as the provisions or stipulations in this Plea Agreement. The United States and the Defendant agree to recommend that the Sentencing Guidelines should apply pursuant to *United States v. Booker*, that the Sentencing Guidelines provide a fair and just resolution based on the facts of this case, and that no upward or downward departures are appropriate other than the reductions for acceptance of responsibility. The Court is permitted to tailor the ultimate sentence

in light of other statutory concerns, and such sentence may be either more severe or less severe than the Sentencing Guidelines' advisory sentence. Knowing these facts, the Defendant understands and acknowledges that the Court has the authority to impose any sentence within and up to the statutory maximum authorized by law for the offense identified in paragraph 1 and that the Defendant may not withdraw the plea solely as a result of the sentence imposed.

3. The Defendant also understands and acknowledges that as to Count 1, the Court may impose a statutory maximum term of imprisonment of up to ten (10) years. In addition to any period of imprisonment the Court may also impose a period of supervised release of up to three (3) years to commence at the conclusion of the period of imprisonment. In addition to a term of imprisonment and supervised release, the Court may impose a fine of up to the greater of $250,000, or twice the pecuniary gain or loss pursuant to 18 U.S.C. § 3571(d).

4. The Defendant further understands and acknowledges that, in addition to any sentence imposed under paragraph 3 of this Agreement, a special assessment in the total amount of $100.00 will be imposed on the Defendant. The Defendant agrees that any special assessment imposed shall be paid at the time of sentencing.

5. The Defendant understands and acknowledges that as a result of this plea, the Defendant will be excluded as a provider from Medicare, Medicaid, and all federal health care programs. Defendant agrees to complete and execute all necessary documents provided by any department or agency of the federal government, including but not limited to the United States Department of Health and Human Services, to effectuate this exclusion within 60 days of receiving the documents. This exclusion will not affect Defendant's right to apply for and

receive benefits as a beneficiary under any federal health care program, including Medicare and Medicaid.

6. The Defendant recognizes that pleading guilty may have consequences with respect to the Defendant's immigration status if the Defendant is not a natural-born citizen of the United States. Under federal law, a broad range of crimes are removable offenses, including the offense to which the Defendant is pleading guilty. In addition, under certain circumstances, denaturalization may also be a consequence of pleading guilty to a crime. Removal, denaturalization, and other immigration consequences are the subject of a separate proceeding, however, and Defendant understands that no one, including the Defendant's attorney or the Court, can predict to a certainty the effect of the Defendant's conviction on the Defendant's immigration status. The Defendant nevertheless affirms that the Defendant chooses to plead guilty regardless of any immigration consequences that the Defendant's plea may entail, even if the consequence is the Defendant's denaturalization and automatic removal from the United States.

7. The Defendant shall cooperate with law enforcement officials, attorneys with the United States Department of Justice and United States Attorney's Office for the Southern District of Florida, and with federal regulatory officials charged with regulating or overseeing the Medicare program by providing full, complete and truthful information regarding his knowledge, conduct and actions while involved in health care and by providing active cooperation in ongoing investigations if requested to do so. If called upon to do so, the Defendant shall provide complete and truthful testimony before any grand jury or trial jury in any criminal case, in any civil proceeding or trial, and in any administrative proceeding or hearing. In carrying out his

obligations under this paragraph Defendant shall neither minimize his own involvement nor fabricate, minimize or exaggerate the involvement of others. If the Defendant intentionally provides any incomplete or untruthful statements or testimony, his actions shall be deemed a material breach of this Agreement and the United States shall be free to pursue all appropriate charges against him notwithstanding any agreements to forbear from bringing additional charges as may be otherwise set forth in this Agreement.

8. The Defendant shall provide Probation and counsel for the United States with a full, complete and accurate personal financial statement. If the Defendant provides incomplete or untruthful statements in his personal financial statement, his action shall be deemed a material breach of this Agreement and the United States shall be free to pursue all appropriate charges against him notwithstanding any agreements to forbear from bringing additional charges otherwise set forth in this Agreement.

9. Provided that the Defendant commits no new criminal offenses and provided that he continues to demonstrate an affirmative recognition and affirmative acceptance of personal responsibility for his criminal conduct, the United States agrees that it will recommend at sentencing that the Defendant receive a three-level reduction for acceptance of responsibility pursuant to Section 3E1.1 of the Sentencing Guidelines, based upon the Defendant's recognition and affirmative and timely acceptance of personal responsibility. The United States, however, will not be required to make this sentencing recommendation if the Defendant: (1) fails or refuses to make a full, accurate and complete disclosure to the United States and Probation of the circumstances surrounding the relevant offense conduct and his present financial condition; (2) is found to have misrepresented facts to the United States prior to entering this Plea Agreement; or

(3) commits any misconduct after entering into this Plea Agreement, including but not limited to committing a state or federal offense, violating any term of release, or making false statements or misrepresentations to any governmental entity or official.

10. The United States reserves the right to inform the Court and Probation of all facts pertinent to the sentencing process, including all relevant information concerning the offenses committed, whether charged or not, as well as concerning the Defendant and the Defendant's background. Subject only to the express terms of any agreed-upon sentencing recommendations contained in this Plea Agreement, the United States further reserves the right to make any recommendation as to the quality and quantity of punishment.

11. The United States reserves the right to evaluate the nature and extent of the Defendant's cooperation and to make the Defendant's cooperation, or lack thereof, known to the Court at the time of sentencing. If in the sole and unreviewable judgment of the United States the Defendant's cooperation is of such quality and significance to the investigation or prosecution of other criminal matters as to warrant the Court's downward departure from the sentence advised by the Sentencing Guidelines, the United States may at or before sentencing make a motion pursuant to Title 18, United States Code, Section 3553(e), Section 5K1.1 of the Sentencing Guidelines, or subsequent to sentencing by motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure, reflecting that the Defendant has provided substantial assistance and recommending a sentence reduction. The Defendant acknowledges and agrees, however, that nothing in this Agreement may be construed to require the United States to file such a motion and that the United States' assessment of the nature, value, truthfulness, completeness, and accuracy of the Defendant's cooperation shall be binding on the Defendant.

12. The Defendant understands and acknowledges that the Court is under no obligation to grant a motion by the United States pursuant to Title 18, United States Code, Section 3553(e), 5K1.1 of the Sentencing Guidelines or Rule 35 of the Federal Rules of Criminal Procedure, as referred to in paragraph 11 of this Agreement, should the United States exercise its discretion to file such a motion.

13. The Defendant admits and acknowledges that the following facts are true and that the United States could prove them at trial beyond a reasonable doubt:

a. That the Defendant's participation in the conspiracy and scheme and artifice resulted in an actual or intended loss of more than $7,000,000 and less than $20,000,000;

b. That the Defendant's fraudulent scheme involved sophisticated means;

c. That the Defendant was an organizer or leader of a criminal activity that involved five or more participants and was otherwise extensive; and

d. That the Defendant committed a federal health care offense involving a government health care program and a loss of more than $1,000,000.

14. Based on the foregoing, the United States and the Defendant agree that, although not binding on Probation or the Court, they will jointly recommend that the Court impose a sentence within the advisory sentencing guideline range produced by application of the Sentencing Guidelines. Although not binding on Probation or the Court, the United States and the Defendant further agree that, except as otherwise expressly contemplated in this Plea Agreement, they will jointly recommend that the Court neither depart upward nor depart downward under the Sentencing Guidelines when determining the advisory Sentencing

Guideline range in this case. Further, the United States and the Defendant agree, although not binding on Probation or the Court, that there are no factors or circumstances which would support or otherwise suggest the propriety of the Court's finding of any variance under Title 18, United States Code, Section 3553(a). The parties agree that, at the time of sentencing, the United States will recommend a sentence at the low end of the Sentencing Guidelines.

15. The United States and the Defendant agree that, although not binding on Probation or the Court, they will jointly recommend that the Court make the following findings and conclusions as to the sentence to be imposed:

(a) Base Offense Level: That the base offense level is six (6), pursuant to Section 2B1.1(a)(2) of the Sentencing Guidelines.

(b) Loss: That the Defendant's offense level shall be increased by twenty (20) levels pursuant to Section 2B1.1(b)(1)(K) because the actual or intended loss related to the health care fraud scheme was greater than $7,000,000, but less than $20,000,000. This figure reflects the fraudulent billings for health care items and services, known as of the date of this Agreement, that were submitted to the Medicare program by Willsand Home Health Agency, Inc., JEM Home Health Care, LLC and Healthy Choice Home Health Services, Inc. as a result of the Defendant's participation in the conspiracy.

(c) Sophisticated Means: That the Defendant's offense level shall be increased by two (2) levels pursuant to Section 2B1.1(b)(10)(C) because the offense otherwise involved sophisticated means.

(d) Aggravating Role: That the Defendant's offense level shall be increased by

four (4) levels pursuant to Section 3B1.1(a) because the Defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive.

(e) Federal Health Care Offense: That the Defendant's offense level shall be increased by two (2) levels pursuant to Section 2B1.1(b)(7)(B)(i) because the Defendant was convicted of a federal health care offense involving a government health care program and a loss under subsection (b)(1) of more than $1,000,000.

TOTAL OFFENSE LEVEL – UNADJUSTED 34

(f) Acceptance of Responsibility: That the Defendant's offense level shall be decreased by three (3) levels pursuant to Sections 3E1.1(a) and 3E1.1(b) because the Defendant has demonstrated acceptance of responsibility for his offense and assisted authorities in the investigation of and prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty.

TOTAL OFFENSE LEVEL – ADJUSTED 31

16. The Defendant acknowledges and understands that additional or different enhancements or provisions of the Sentencing Guidelines might be applicable, and that neither the Court nor Probation are bound by the parties' joint recommendations.

17. The Defendant agrees to forfeit to the United States voluntarily and immediately all of his right, title and interest to any and all assets and their substitutes which are subject to forfeiture pursuant to 18 U.S.C. § 982(a)(7) which are in the possession and control of the Defendant or nominees.

The Defendant also consents to the Court's entry of any necessary order of forfeiture

relating to any personal money judgment and property.

The Defendant also agrees that he shall assist the United States in all proceedings, whether administrative or judicial, involving the forfeiture, disgorgement, transfer or surrender of all rights, title, and interest, regardless of their nature or form, in the assets which the Defendant has agreed to forfeit, disgorge, transfer or surrender, and any other assets, including real and personal property, cash and other monetary instruments, wherever located, which the Defendant or others to his knowledge have accumulated as a result of illegal activities. Such assistance will involve an Agreement on Defendant's part to the entry of an order enjoining the transfer or encumbrance of assets which may be identified as being subject to forfeiture, disgorgement, transfer or surrender, including but not limited to those specific real and personal properties set forth in the forfeiture counts of the Information. Additionally, Defendant agrees to identify as being subject to forfeiture all such assets, and to assist in the transfer of such property by delivery to the United States upon the United States' request, all necessary and appropriate documentation with respect to said assets, including consents to forfeiture, quit claim deeds and any and all other documents necessary to deliver good and marketable title to said property. To the extent the assets are no longer within the possession and control or name of the Defendant, the Defendant agrees that the United States may seek substitute assets within the meaning of 21 U.S.C. § 853.

18. The Defendant knowingly and voluntarily agrees to waive any claim or defenses he may have under the Eighth Amendment to the United States Constitution, including any claim of excessive fine or penalty with respect to the forfeited assets. Defendant further knowingly and voluntarily waives his right to a jury trial on the forfeiture of said assets, waives any statute of

limitations with respect to the forfeiture of said assets, and waives any notice of forfeiture proceedings, whether administrative or judicial, against the forfeited assets. Defendant waives any right to appeal any order of forfeiture entered by the Court pursuant to this Plea Agreement.

19. The Defendant acknowledges that because the offenses of conviction occurred after April 24, 1996, restitution is mandatory without regard to the Defendant's ability to pay and that the Court must order the Defendant to pay restitution for the full loss caused by his criminal conduct pursuant to 18 U.S.C. § 3663A.

20. The Defendant is aware that the sentence has not yet been determined by the Court. The Defendant is also aware that any estimate of the probable sentencing range or sentence that the Defendant may receive, whether that estimate comes from the Defendant's attorney, the United States, or Probation, is a prediction, not a promise, and is not binding on the United States, Probation or the Court. The Defendant understands further that any recommendation that the United States makes to the Court as to sentencing, whether pursuant to this Agreement or otherwise, is not binding on the Court and the Court may disregard the recommendation in its entirety. The Defendant understands and acknowledges, as previously acknowledged in paragraph 2 above, that the Defendant may not withdraw his plea based upon the Court's decision not to accept a sentencing recommendation made by the Defendant, the United States, or a recommendation made jointly by both the Defendant and the United States.

21. The Defendant is aware that Title 18, United States Code, Section 3742 affords him the right to appeal the sentence imposed in this case. Acknowledging this, in exchange for the undertakings made by the United States in this Plea Agreement, the Defendant hereby waives all rights conferred by Section 3742 to appeal any sentence imposed, including any forfeiture or

restitution ordered, or to appeal the manner in which the sentence was imposed, unless the sentence exceeds the maximum permitted by statute or is the result of an upward departure and/or a variance from the Sentencing Guidelines range that the Court establishes at sentencing. The Defendant further understands that nothing in this Agreement shall affect the right of the United States and/or its duty to appeal as set forth in Title 18, United States Code, Section 3742(b). However, if the United States appeals the Defendant's sentence pursuant to Section 3742(b), the Defendant shall be released from the above waiver of appellate rights. By signing this Agreement, the Defendant acknowledges that he has discussed the appeal waiver set forth in this Agreement with his attorney. The Defendant further agrees, together with the United States, to request that the Court enter a specific finding that the Defendant's waiver of his right to appeal the sentence to be imposed in this case was knowing and voluntary.

22. For purposes of criminal prosecution, this Plea Agreement shall be binding and enforceable upon the Fraud Section of the Criminal Division of the United States Department of Justice and the United States Attorney's Office for the Southern District of Florida. The United States does not release Defendant from any claims under Title 26, United States Code. Further, this Agreement in no way limits, binds, or otherwise affects the rights, powers or duties of any state or local law enforcement agency or any administrative or regulatory authority.

23. Defendant agrees that if he fails to comply with any of the provisions of this Agreement, including the failure to tender such Agreement to the Court, makes false or misleading statements before the Court or to any agents of the United States, commits any further crimes, or attempts to withdraw the plea (prior to or after pleading guilty to the charges identified in paragraph one (1) above), the Government will have the right to characterize such

conduct as a breach of this Agreement. In the event of such a breach: (a) the Government will be free from its obligations under the Agreement and further may take whatever position it believes appropriate as to the sentence and the conditions of the Defendant's release (for example, should the Defendant commit any conduct after the date of this Agreement that would form the basis for an increase in the Defendant's offense level or justify an upward departure – examples of which include but are not limited to, obstruction of justice, failure to appear for a court proceeding, criminal conduct while pending sentencing, and false statements to law enforcement agents, the Probation Officer, or Court – the Government is free under this Agreement to seek an increase in the offense level based on that post-Agreement conduct); (b) the Defendant will not have the right to withdraw the guilty plea; (c) the Defendant shall be fully subject to criminal prosecution for any other crimes which he has committed or might commit, if any, including perjury and obstruction of justice; and (d) the Defendant waives any protections afforded by Section 1B1.8(a) of the Sentencing Guidelines, Rule 11 of the Federal Rules of Criminal Procedure and Rule 410 of the Federal Rules of Evidence, and the Government will be free to use against the Defendant, directly and indirectly, in any criminal or civil proceeding any of the information, statements, and materials provided by him pursuant to this Agreement, including offering into evidence or otherwise using the attached Agreed Factual Basis for Guilty Plea.

24. This is the entire Agreement and understanding between the United States and the Defendant. There are no other agreements, promises, representations or understandings.

WIFREDO FERRER

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF FLORIDA

Date: June 2, 2015

By: _____
JOSEPH S. BEEMSTERBOER
ASSISTANT CHIEF
U.S. DEPARTMENT OF JUSTICE
CRIMINAL DIVISION, FRAUD SECTION

Date: June 1, 2015

By: _____
KHALED ELBEBLAWY
DEFENDANT

Date: June 1, 2015

By: _____
Francisco A. Mas, ESQ.
COUNSEL FOR KHALED ELBEBLAWY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. _____

UNITED STATES OF AMERICA,

vs.

KHALED ELBEBLAWY,

Defendant.
_____/

AGREED FACTUAL BASIS FOR GUILTY PLEA

Beginning in or around approximately 2006, and continuing until in or around approximately 2013, the defendant, Khaled Elbeblawy ("Elbeblawy" or the "Defendant"), knowingly and willfully conspired and agreed with others to commit health care fraud, in violation of 18 U.S.C. § 1349. Medicare is a "health care benefit program" of the United States, as defined in 18 U.S.C. § 24. Furthermore, Medicare is a health care benefit program affecting commerce.

Elbeblawy was affiliated with three fraudulent home health agencies ("HHAs") in the Miami, Florida area. Specifically, from approximately 2006 through 2009, he was a managing employee at Willsand Home Health Agency, Inc. ("Willsand HH"); from approximately 2006 through 2011, he was an owner and operator of JEM Home Health Care, LLC ("JEM HH"); and from approximately 2009 through 2013, he was a manager/owner of Healthy Choice Home Health Services, Inc. ("Healthy Choice HH"). Willsand HH, JEM HH and Healthy Choice HH each purported to provide home health care and therapy services to Medicare beneficiaries. Elbeblawy and his co-conspirators agreed to and actually did manage and operate Willsand HH, JEM HH and Healthy Choice HH for the purpose of billing the Medicare Program for, among

other things, expensive physical therapy and home health care services that were medically unnecessary, not provided, and/or procured through the payment of kickbacks.

Elbeblawy's primary role in the scheme, among others, was to establish and take control of JEM HH (from approximately 2006 – 2011) and Healthy Choice HH (from approximately 2009 – 2013), and to generally oversee the operation of the schemes there; to coordinate with his co-conspirators the submission of fraudulent claims submitted to the Medicare program by Willsand HH, JEM HH and Healthy Choice HH; and to pay bribes and kickbacks in return for referral of Medicare beneficiaries to Willsand HH, JEM HH and Healthy Choice HH, as well as in return for provision of prescriptions, Plans of Care ("POCs") and certifications for therapy and home health services. Elbeblawy and his co-conspirators would use these prescriptions, POCs and medical certifications to fraudulently bill the Medicare program for home health care services, which Elbeblawy knew was in violation of federal criminal laws. Elbeblawy would conspire with patient recruiters, physicians and others for the purpose of fraudulently billing Medicare for home health care and therapy services.

Elbeblawy and his co-conspirators caused Willsand HH, JEM HH and Healthy Choice HH to submit fraudulent claims to the Medicare program for expensive therapy, skilled nursing and other home health services. Specifically, from in or around January 2006 through in or around November 2009, Willsand HH submitted approximately $42 million in false and fraudulent claims to Medicare. Medicare paid approximately $27 million of these fraudulent claims.

From in or around January 2006 through in or around January 2011, JEM submitted approximately $12 million in false and fraudulent claims to Medicare, of which Medicare actually paid approximately $10 million. Finally, from in or around October 2009 through in or

around March 2013, Healthy Choice submitted approximately $2.28 million in false and fraudulent claims to Medicare, of which Medicare actually paid approximately $2.57 million.

The preceding statement is a summary, made for the purpose of providing the Court with a factual basis for my guilty plea to the charges against me. It does not include all of the facts known to me concerning criminal activity in which I and others engaged. I make this statement knowingly and voluntarily and because I am in fact guilty of the crimes charged.

DATE: 6/17/15

KHALED ELBEBLAWY
Defendant

FRANCISCO MARTY, ESQ.
Attorney for Defendant