No. 20-

IN THE

Supreme Court of the United States

MERCY O. AINABE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the Medicare beneficiaries whose health care treatments form the basis of fraudulent Medicare claims fit the definition of "victims" for purposes of base offense level sentence enhancements under Section 2B1.1(b)(2)(A)(i) of the Federal Sentencing Guidelines when the record shows no evidence of financial, pecuniary, or intangible harm to the beneficiaries and where the beneficiaries were paid in exchange for their consent to authorize Medicare documents.

(2) Whether, following a conviction for health care fraud, a sentencing court may consider discrete, readily identifiable and traceable, separate acts and omissions taking place in different time frames, through different corporate entities operating in different industries with different co-conspirators and different corporate principals, as part of the "same course of conduct or common scheme or plan as the offense of conviction" for purposes of "relevant conduct" under Section 1B1.3(a)(2) of the Federal Sentencing Guidelines.

(3) Whether a sentencing court may calculate the loss under Section 2B1.1(b)(1) of the Federal Sentencing Guidelines as the aggregate monetary amount of all Medicare claims submitted by a health care company in which the defendant was not a principal or "shadow owner" when the government admitted evidence into the record showing a "reasonably practicable" means of separating legitimate from fraudulent claims and where the record reflects no effort by the government or the sentencing court to articulate a basis for instead considering all of the submitted claims to be fraudulent.

PARTIES TO THE PROCEEDING

Petitioner is Mercy O. Ainabe, an individual citizen of the United States.

Respondent is the United States of America.

DIRECTLY RELATED PROCEEDINGS

1. This case arises out of a federal criminal case filed in the U.S. District Court for the Southern District of Texas, *United States v. Mercy O. Ainabe*, S.D. Tex. No. 4:17-CR-00412. The district court entered final judgment on October 5, 2018.

2. The case was noticed for direct appeal to the United States Court of Appeals for the Fifth Circuit on October 4, 2018. The Fifth Circuit entered judgment in the appeal on September 13, 2019. The docket number of the case was *United States of America v. Mercy O. Ainabe*, Fifth Cir. No. 18-20689.

3. The Petition for Rehearing En Banc was timely filed with the Fifth Circuit on October 4, 2019. The docket number of the case was *United States of America v. Mercy O. Ainabe*, Fifth Cir. No. 18-20689.

4. The Fifth Circuit entered a denial of the Petition for Rehearing En Banc on January 14, 2020. The docket number of the case was *United States of America v. Mercy O. Ainabe*, Fifth Cir. No. 18-20689.

5. There are no other directly related proceedings within the meaning of this Court's Rule 14.1(b)(iii).

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Mercy O. Ainabe respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

INTRODUCTION

This case presents three questions of significance to all federal defendant facing sentencing following a conviction for health care fraud: (1) What is the proper definition of "victims" in a health care fraud case? (2) Can the sentencing court include as "relevant conduct" those acts or omissions that are discrete, separate, readily identifiable, and traceable, with nothing in common except the defendant's long-standing and varied interactions with Medicare? (3) Must a sentencing court articulate its basis for considering all Medicare billings fraudulent when calculating total loss, particularly when the government has offered a reasonably practicable means for separating legitimate claims from fraudulent ones?

On the question of defining "victims" in a health care fraud case, the federal circuits have taken differing approaches. Some have relied on the plain meaning of "victims" and the articulated intent of the Federal

Sentencing Guidelines to address this question. Others, like the Fifth Circuit, have taken a more cursory approach, though not without well-reasoned criticism from judges within the circuit. The varied approaches result in disparate treatment of similarly situated defendants simply based on the geographic location of their trial and sentencing. This issue is ripe for review and readily resolved by this Court.

The second question calls on the Court to assess the proper use of "relevant conduct" at the sentencing phase. In the context of fraud, the Guidelines have identified and taken measures to address the challenge of readily separating specific acts and omissions from others. This effort is understandably designed to fairly account for the extent of ones offenses and fashion a commiserate sentence. When the ambiguity is removed, however, the Guidelines are not intended to give the government a pass on bringing timely indictments or proving its allegations beyond a reasonable doubt. Lowering the standards to include "relevant conduct" at sentencing must comport with the

plain text and intent of the Guidelines when applied to the specific facts of a case. Without these safeguards, defendants face substantial risk to their constitutional rights.

The third question presents a fundamental issue of appellate review. Even at sentencing, the government maintains the burden of providing facts to support a sentence by a preponderance of the evidence. Calculating the intended loss from an offense impacts substantial liberty and property interests for a federal defendant because the Guidelines rely heavily on the loss calculation to determine sentence enhancements. Courts are required to articulate the basis for their sentencing order including how they separated, or attempted to separate, legitimate claims from fraudulent ones. Here, the sentencing court failed to do so. Such an error is plain. When the sentencing record is incomplete on an issue affecting a substantial right of the defendant, an appellate court has a responsibility to act to

preserve the fairness, integrity, and public perception of our judicial process.

The Petitioner respectfully requests this Court to grant this petition.

OPINIONS BELOW

The Fifth Circuit's opinion is reported as *United States v. Ainabe*, 938 F.3d 685 (5th Cir. 2019). The district court decision in *United States v. Mercy O. Ainabe* is docketed in the United States District Court for the Southern District of Texas on the criminal docket for Case No. 4:17-CR-00412, Docket Entry 110 (Sentencing Transcript).

JURISDICTION

The Fifth Circuit entered judgment on September 13, 2019. *See* Appendix A. A timely petition for rehearing *en banc* was denied on January 14, 2020. This petition is timely filed pursuant to Supreme Court Rule 13.1 and this Court's March 19, 2020 order. In light of the global pandemic caused by COVID-19, this Court's March 19 order extended the

deadline to file any petition for a writ of certiorari due on or after the date of the order to "150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing." Order Regarding Filing Deadlines, Supreme Court of the United States, March 19, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The appendix reproduces U.S.S.G. §§ 1B1.3 and 2B1.1.

STATEMENT

A. Statutory Background

The Federal Sentencing Guidelines ("Guidelines") are promulgated by the United States Sentencing Commission. In a federal criminal sentencing proceeding following conviction or guilty plea, the district court uses the Guidelines to determine the Base Offense Level, to apply enhancements and reductions to the Base Offense Level based on "specific offense characteristics" presented at trial

and during sentencing, and to calculate a recommended sentencing range and fine.

1. *Definition of "Victims."* Within this section of the Guidelines addressing crimes of fraud and deceit, the sentencing court applies a 2-level increase of the Base Offense Level if the offense "involved 10 or more victims." U.S.S.G. § 2B1.1(b)(2)(A)(i). In Application Note 4(E) of this section, the Guidelines provide a "special rule" for cases "involving means of identification." U.S.S.G. § 2B1.1, Comment n.4(E). In such a case, a "victim" is defined as either "(i) any victim as defined in Application Note 1 or (ii) any individual whose means of identification was used unlawfully or without authority." *Id.* Under Application Note 1 to this section, a "victim" means "(A) any person who sustained any part of the actual loss determined under subsection (b)(1); or (B) any individual who sustained bodily injury as a result of the offense." *Id.* at Comment n.1.

2. *Loss From the Offense.* In Section 2B1.1(b)(1), the Guidelines specify enhancements to the Base Offense Level for any offense where the loss exceeded $6,500. U.S.S.G. § 2B1.1(b)(1). The recommended enhancement level increases as the amount of loss increases. In this case, the sentencing court calculated a loss of "more than $3,500,000," resulting in a recommended 18-level enhancement pursuant to U.S.S.G. § 2B1.1(b)(1)(J).

3. *Loss to a Government Health Care Program.* Specifically for defendants convicted of a Federal health care offense involving a Government health care program, Section 2B1.1(b)(7) specifies enhancements to the Base Offense Level based on the amount of loss to the Government health care program. U.S.S.G. § 2B1.1(b)(7). For a loss of "more than $7,000,000" to the Government health care program, this section of the Guidelines recommends a 3-level enhancement to the Base Offense Level. U.S.S.G. § 2B1.1(b)(7)(B)(ii).

To determine the loss amount in a case where the defendant has been convicted of a Federal health care offense involving a Government health care program, Application Note 3(F) says "the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss, i.e., is evidence sufficient to establish the amount of the intended loss, if not rebutted." U.S.S.G. § 2B1.1, Comment n.3(F).

4. *Relevant Conduct.* To calculate the loss under Section 2B1.1(b), the Guidelines direct sentencing courts to consider other "relevant conduct," namely "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant." U.S.S.G. § 1B1.3(a)(1)(A). For offenses like fraud which "would require grouping of multiple counts," the Guidelines instruct sentencing courts to consider all acts and omissions "that were part of the same course of conduct o

common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2).

Application Note 5(B) to this section of the Guidelines provides guidance on determining whether an act or omission is part of the "same course of conduct or common scheme or plan." U.S.S.G. § 1B1.3, Comment n.5(B). Within this section, "[f]or two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi." U.S.S.G. § 1B1.3, Comment n.5(B)(i).

If certain acts or omissions do not qualify as part of a "common scheme or plan," they "may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses. Factors that are appropriate to the determination of whether offenses are sufficiently connected

or related to each other to be considered as part of the same course of conduct include the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses." U.S.S.G. § 1B1.3, Comment n.5(B)(ii).

Commentary included in the "Background" section of the Application Notes explains that Section 1B1.3(a)(2) allows the sentencing court to consider a "broader range of conduct" with respect to a class of offenses that includes fraud because the Guidelines recommendations "depend substantially on quantity" when calculating a sentencing range for these offenses. U.S.S.G. § 1B1.3 (Background Comments). The Commentary to Section 1B1.3 further indicates that these different rules have been adopted for this class of offenses because they "often involve a pattern of misconduct that cannot readily be broken into discrete, identifiable units that are meaningful for purposes of sentencing." *Id.*

B. Factual And Procedural Background

Mercy O. Ainabe was charged by Superseding Indictment returned on November 30, 2017 and found guilty after a 3-day jury trial on one count of conspiracy to commit health care fraud, 18 U.S.C. §§ 1349 and 1347; five counts of health care fraud, 18 U.S.C. §§ 1347 and 2; and one count of conspiracy to pay health care kickbacks, 18 U.S.C. §371.

The jury found that Ainabe had worked with a named co-conspirator, Magadalene Ahkaramen, to recruit Medicare beneficiaries and pay kickbacks to medical providers for paperwork authorizing those Medicare beneficiaries to receive home health services delivered through a company called Texas Tender Care. Texas Tender Care submitted claims to Medicare seeking reimbursement for the home health services purportedly delivered to patients, with $3.5 million in total claims billed and $3.2 million in claims paid between approximately August 2011 and August 2015.

At sentencing, the district court applied a 2-level enhancement for an offense involving 10 or more victims

under U.S.S.G. § 2B1.1(b)(2)(A)(i) by counting an unspecified number of Medicare beneficiaries as victims of the fraud. The district court made no findings regarding any kind of harm, financial or otherwise, to any individual or entity other than the Medicare program.

The district court also applied an 18-level enhancement for a loss greater than $3.5 million under U.S.S.G. § 2B1.1(b)(1)(J) and a 3-level enhancement for a loss to a federal health care program greater than $7 million under U.S.S.G. § 2B1.1(b)(7)(B)(ii). To arrive at the loss calculation applicable to both Guideline provisions, the district court considered "relevant conduct" pursuant to U.S.S.G. § 1B1.3(a)(2), and included total Medicare claims submitted under two prior health care companies in which Ainabe was a principal: Gulf EMS, an ambulance and medical transport company dating back to at least 2003, and Gifter, a medical diagnostic company registered as a Medicare provider in 2010. The district court concluded that these two prior companies were "part of the same course of

conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2).

Ainabe objected to all three enhancements (and others not challenged here), arguing that Medicare was the only victim and challenging the loss calculation related to both the appropriate amount to be counted for Texas Tender Care and the inclusion of Medicare claims submitted by Gulf EMS and Gifter as "relevant conduct." The district court rejected all three arguments, calculated a total offense level of 31 for a Guidelines range of 108 to 135 months in prison, and imposed a sentence of 108 months imprisonment followed by three years of supervised release.

Ainabe appealed to the Fifth Circuit, reasserting these three points of error. The Fifth Circuit affirmed, with a special concurring opinion by Judge Dennis who disagreed with including Medicare beneficiaries as "victims" of health care fraud for purposes of U.S.S.G. § 2B1.1(b)(2)(A)(i) when they suffered no financial loss or other harm and were paid for authorizing paperwork related to their medical

treatment as part of the fraudulent scheme. Ainabe's timely petition for rehearing *en banc* was denied on January 14, 2020. This petition for a writ of certiorari follows.

This petition is timely because no more than 150 days have passed since the Fifth Circuit order denying a timely petition for rehearing. In light of the global pandemic caused by COVID-19, this Court issued an order on March 19, 2020 extending the deadline to file any petition for a writ of certiorari due on or after the date of the order to "150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing." Order Regarding Filing Deadlines, Supreme Court of the United States, March 19, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

REASONS FOR GRANTING THE PETITION

I. FEDERAL DEFENDANTS SHOULD BE SUBJECT TO ONE CONSISTENT DEFINITION OF "VICTIMS" REGARDLESS OF THEIR LOCATION WITHIN THE UNITED STATES.

The varied definitions of "victims" applied in federal district and circuit courts have resulted in disparate treatment for similarly situated federal defendants in different jurisdictions. This should not be tolerated as a matter of constitutional integrity. When facing a potential enhancement to the level and corresponding duration of confinement and associated fine, a federal defendant's fate should depend on a consistent application of the law to the facts in his or her specific case, not on the geographic location of the sentencing court.

a. The Circuits Are Inconsistent In Their Approach To The Definition Of "Victims" In Sentencing For Health Care Fraud Convictions.

The federal circuit courts are inconsistent in their approach to the definition of "victims" in determining the sentence for a defendant convicted of health care fraud.

Certain federal circuits applying the Guidelines definition of "victims" on similar facts have either factored into their analysis evidence in the record showing that the government proved financial loss or pecuniary harm to the "victims" or else remanded the case for further sentencing. Others, like the Fifth Circuit, have provided conclusory reasoning to consistently affirm Base Offense Level enhancements based on the number of "victims," namely Medicare beneficiaries whose treatments formed the basis of Medicare claims, in health care fraud cases.

This Court has pointed appellate courts to an analysis of both the text and the Commentary or Application Notes of the specific Guideline in question to determine whether a certain application of the Guideline is constitutional. *See Stinson v. United States*, 508 U.S. 36, 38, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993) ("[C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal

statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.")

Both the Eleventh and Eighth Circuits have properly engaged in the analysis counseled by *Stinson* when considering the proper application of a sentence enhancement based on the number of "victims."

The Eighth Circuit addressed the definition of "victim" under U.S.S.G. §2B1.1(b)(2)(B) in *United States v. Laws*, 819 F.3d 388 (8th Cir. 2016). A tax fraud case involving taxpayers who had false tax returns filed in their names, the *Laws* court heard an appeal where the sentencing court applied a 4-level enhancement for more than 50 victims who "sustained any part of the actual loss," meaning "the reasonably foreseeable pecuniary harm that resulted from the offense." *Id.* at 395. Though the court did not rely on the Application Note 4(E) definition involving means of identification, it considered the taxpayers victims, instead of co-conspirators, "because they will be held responsible for the fraud until they can prove their innocence

and because the 'adverse effect of battling the bureaucracy is a reasonable foreseeable pecuniary harm.'" *Id.* (*quoting United States v. Quevedo*, 654 F.3d 819, 825 (8th Cir. 2011)).

The *Laws* panel further noted that the sentencing court credited the government with showing that the taxpayers "were audited," "were required to spend time in interviews or filling out questionnaires to prove that they were not responsible for the fraud," and would be deprived of future refund payments from the IRS if they "received money to which they were not entitled" as part of the scheme. *Id.* But the *Laws* court also took care to include a footnote saying those "taxpayers who benefited from the fraudulent scheme may of course be unindicted co-conspirators, rather than victims." *Id.* at n. 2.

This analysis unequivocally echoes the reasoning of Fifth Circuit Judge Dennis in his special concurrence to the decision prompting this petition for a writ of certiorari. First, the *Laws* court identified the principled reason for recognizing an identity theft victim as a "victim" for purposes

of the §2B1.1(b)(2) enhancement: the intangible costs such as "hassle" and "lost time" recognized by the Sentencing Commission as non-quantifiable (but provable) harm under the loss calculation. Second, the *Laws* court held the government to proving, and the sentencing court to finding, that the individuals counted as "victims" for purposes of the §2B1.1(b)(2) enhancement did in fact suffer this non-quantifiable harm. Finally, the *Laws* court sanctioned the conclusion that individuals who "benefited from the fraudulent scheme" could not be counted as "victims."

The Eleventh Circuit also addressed the definition of "victims" in the context of a potential sentence enhancement in *United States v. Tejas*, 868 F.3d 1242 (11th Cir. 2017), declining the reflexive application of plain language found within the Guidelines when doing so would be contrary both to the intent of the Sentencing Commission and to the facts developed at trial. In *Tejas*, the defendant was convicted of theft of mail when he took a package from the front seat of a postal carrier's delivery vehicle. *Id.* at 1244. The sentencing

court applied a 2-level enhancement for 10 or more victims under U.S.S.G. §2B1.1 because of a "special rule" in the commentary to the Guideline specifically for offenses involving the theft of undelivered United States mail.

The special rule contains two relevant provisions: 1) when the offense involves a "United States Postal Service relay box, collection box, delivery vehicle, satchel, or cart," the offense "*shall* be considered to have involved at least 10 victims"; and 2) when the offense involves a "housing unit cluster box or any similar receptacle that contains multiple mailboxes," the offense "*shall*, unless proven otherwise, be presumed to have involved the number of victims corresponding to the number of victims corresponding to the number of mailboxes in each cluster box or similar receptacle." *Id.* at 1245 (*quoting* U.S.S.G. §2B1.1, Application Note 4(C)(ii)) (emphasis added).

On review, the Eleventh Circuit looked to the Sentencing Commission's reasons for adopting the special rule: "(1) the unique proof problems often attendant to

offenses involving undelivered mail; (2) the frequently significant, but difficult to quantify, non-monetary losses in such offenses; and (3) the importance of maintaining the integrity of the United States mail." *Id.* (*citing* U.S.S.G. App. C, Amendment 617 (Reasons for Amendment)). Significantly, the *Tejas* panel credited the sentencing court with having "properly followed the commentary" in applying the 2-level enhancement because the defendant "took undelivered mail from a postal delivery vehicle," triggering the seemingly obligatory language that the offense "shall" be counted as one involving at least 10 victims. *Id.*

Yet, the Eleventh Circuit concluded that "application of the commentary's special rule in this case is inconsistent with the plain text of the number-of-victims enhancement, and is thus not authoritative." *Id.* Pointing to "clear" evidence in the record that the defendant took one piece of undelivered mail from the postal delivery vehicle, the *Tejas* panel found that the offense "involved at most two victims – the mail carrier and the addressee on the package." *Id.*

Where the panel observed that the sentencing court's "own findings are clear that the offense involved fewer than ten victims," application of what the Eleventh Circuit referred to as "the special's rules *mandate*" was deemed "inconsistent with the plain text of the guideline." *Id.* (emphasis added). Acknowledging that the special rule might be reasonably applied in cases "where there is any doubt as to the number of victims involved," the Eleventh Circuit cautioned that the rule could "produce erroneous and contrary results when the number of victims is readily determined." *Id.* at 1245-46.

Even in the face of the government's meritorious claim that applying the special rule vindicates "the Sentencing Commission's goal of protecting the integrity of the United States mail," the Eleventh Circuit concluded that the importance of this law enforcement goal "cannot trump the plain text of the guideline, which is based solely on the number of victims." *Id.* at 1246. Based on this reasoning, the *Tejas* court vacated the defendant's 366-day sentence

and remanded for resentencing without the 2-level enhancement. *Id.*

Similarly, in *United States v. Rodriguez*, 732 F.3d 1299 (11th Cir. 2013), the Eleventh Circuit required the government to establish in the record, and the sentencing court to specifically find, the individuals who would be counted as "victims" for purposes of a sentence enhancement. Following a conviction for wire fraud and conspiracy to commit wire fraud, the defendant in *Rodriguez* challenged the 4-level enhancement of his sentence for 50 or more victims under U.S.S.G. §2B1.1(b)(2)(B), where the government introduced 42 victim affidavits and a summary chart listing 238 customers who purchased machines based on the defendant's fraudulent advertising. *Id.* at 1303. Over the defendant's objection, the sentencing court "reasoned that out of 238 customers who bought machines from Mr. Rodriguez, there must have been at least 50 victims." *Id.*

On appeal, the Eleventh Circuit found the government's evidence and the sentencing court's

assumption wholly insufficient. In support of its decision to remand on the 4-level enhancement, the *Rodriguez* panel reasoned:

> The District Court clearly erred when it found that Mr. Rodriguez's offense involved more than 50 victims. The only evidence presented to the Court suggesting that there were more than 50 victims was the summary chart proffered by the government. The prosecution presented no witnesses to authenticate what the chart represented, how it was prepared, or by whom. While the district court could consider trial evidence, there was no testimony or evidence tying the summary chart to any of the trial evidence either. Neither did the prosecution present any witnesses or evidence to verify that the information in the chart was correct. In essence, the summary chart amounted to little more than an allegation by the government on a piece of paper that Mr. Rodriguez's offense involved more than 50 victims.

Id. at 1305.

In a special concurring opinion in *Rodriguez*, Senior District Judge Bowen expressed a concern that rings true in the case now before the Court in this petition: "I fear that the latitude allowed in sentencing proceedings often lulls the Government's lawyers into a species of spectator. However, the lower standard of proof, the district court's wide

discretion, and the degree of informality in no way lessen the importance or the due process implications of the event." *Id.* at 1307.

On the other hand, the Seventh Circuit and the Second Circuit engaged in more conclusory analysis of the definition of "victims" for purposes of sentence enhancements, and required little to no factual showing by the government or the sentencing court when affirming the challenged sentence.

The Seventh Circuit used the same conclusory reasoning as the Fifth Circuit in *United States v. Roy*, 819 F.3d 998 (7th Cir. 2016), affirming the application of a 4-level enhancement in a health care fraud case where the government alleged more than 50 victims based on the number of Medicare claims found to be fraudulent. *Id.* at 1002. In one sentence, the *Roy* court reasoned simply that 1) the definition of "victims" under U.S.S.G. §2B1.1 Application Note 4(E) includes "any individual whose means of identification was used unlawfully or without authority,"

2) "names and Medicare numbers are 'means of identification'" under 18 U.S.C. § 1028(d)(7), and 3) the combination of these two statutory definitions "mak[es] the individuals whose numbers were used victims." *Id.* No further factual showing was required of the government (though the *Roy* court noted at the outset of its opinion that the defendant was the CEO of the company that filed fraudulent claims).

The Second Circuit in *United States v. Jesurum*, 819 F.3d 667 (2nd Cir. 2016) engaged a discussion of the definition of "victim" under U.S.S.G. §2B1.1(b)(2), citing both Application Note 4(E) and the Commission's commentary in support of Amendment 726. Yet, the *Jesurum* court still concluded that Sprint cellular phone users whose unique cellular device numbers were used by the defendant to bill for unauthorized calls were victims "regardless of whether the customers suffered any financial loss." *Id.* at 671-72. The Second Circuit never discussed the implications of the Commission's commentary about victims of identity theft

who suffer intangible harms. *Id.* at 671. Nor did the *Jesurum* court require the government to prove any intangible costs, like lost time, to the more than 250 customers it counted as "victims."

The approach in different federal circuits is needlessly inconsistent.

b. The Fifth Circuit's Precedent Under *Barson* Is Wrong Regarding The Definition of "Victims."

The Fifth Circuit improperly affirmed an erroneous definition of "victims" under the Guidelines in Ainabe's case. Its interpretation stretches the clear intent of a Guidelines provision to accomplish more punitive sentences for defendants by "double counting" certain conduct. This approach is repugnant to our Constitution.

In affirming Ainabe's sentence, the Fifth Circuit relied exclusively on its precedent in *United States v. Barson*, 845 F.3d 159 (5th Cir. 2016). In *Barson*, the defendant argued that the district court erred in treating the 429 Medicare beneficiaries for whom claims were filed as "victims" under

the Guidelines. *Id.* at 167. In a sentence, the Fifth Circuit "agree[d] with the government that Application Note 4(E) of U.S.S.G. § 2B1.1 defines 'victim' in a way that encompasses the Medicare beneficiaries because it includes 'any individual whose means of identification was used unlawfully or without authority.'" *Id.* The sentence enhancement was affirmed with no further analysis.

c. Fifth Circuit Judge Jones' Partial Dissent In *Barson* Provides The Proper Analysis Of The Definition Of "Victims" And Its Application In A Health Care Fraud Case.

However, in a partial dissent to *Barson*, Fifth Circuit Judge Jones parted with the majority on the definition of "victims" in a fulsome analysis. First, Judge Jones argued that the majority holding in *Barson* offends the plain meaning of the word "victim." *Id.* at 169. Merriam-Webster Dictionary defines "victim" as "one that is acted on" and "adversely affected by a force or agent," such as "one that is injured" or "destroyed" or "one that is subjected to oppression, hardship, or mistreatment." *Merriam-Webster.com Dictionary*, Merriam-Webster,

https://www.merriam-webster.com/dictionary/victim. Accessed 8 Jun. 2020. Medicare beneficiaries who form the basis of Medicare claims, without more, are not "victims" under the plain meaning of the word. They have not been "adversely affected" or "injured" in any way. Judge Jones argued that Medicare beneficiaries cannot be considered victims under Note 4(E) of the Guidelines because

> "Even real Medicare beneficiaries are not normally victims of Medicare fraud because Medicare, not the patient, pays the billing provider directly. The real victim is the U.S. taxpayer, through Medicare, and that has been accounted for by the guidelines in this case. There is no proof at all that the purported beneficiaries in this case suffered any harm, pecuniary or otherwise; they cannot be considered victims under Note 4(E)."

Barson, 845 F.3d at 170.

Second, Judge Jones opposed the majority because the intent of the Sentencing Commission does not support the definition of "victim" as applied to the facts in *Barson*. Judge Jones pointed out that, with Amendment 726 to the 2009 Guidelines, the Sentencing Commission intended to resolve a circuit split regarding victims of identity theft. *See* Office

of General Counsel, *Victim Primer* § 2B1.1(b)(2), U.S. SENTENCING COMM'N (2013), at 8. In support of the amendment, the Commission explained that a victim of identity theft might be reimbursed for financial losses, but the harm caused by spending "additional time resolving credit problems and related issues...may not be adequately accounted for in the loss calculations under the guidelines." U.S.S.G. § 2B1.1, Comment n.4; U.S.S.G. App. C, Amend. 726 (eff. Nov. 1, 2009).

In dissent Judge Jones acknowledged that "this hassle and lost time justified considering as a victim for sentencing purposes anyone whose identity was stolen." *Barson*, 845 F.3d. 159, 170. He further posited that "the purpose for the definition of victims under Note 4(E) is to capture by an enhancement harms otherwise difficult to measure. This purpose is entirely consistent with the plain meaning of 'victim' in the English language." *Id.*

d. Fifth Circuit Judge Dennis Likewise Appropriately Analyzed And Applied The Definition Of "Victims" In His Special Concurrence To *United States v. Ainabe.*

Importantly, Fifth Circuit Judge Dennis again recognized this problem in his special concurrence in this case. *United States v. Ainabe*, 938 F.3d 685, 693-95 (5th Cir. 2019). Judge Dennis pointed out that "the record does not show that Medicare beneficiaries spent 'significant time' – or any time at all – resolving credit problems or related issues due to Ainabe's use of their identities." *Id.* at 694. Given these missing facts, Judge Dennis argued that "the government ought shoulder the burden of proving this hardship to Medicare beneficiaries before they can properly be deemed 'victims' under the Guidelines." *Id.* (*citing United States v. Watts*, 519 U.S. 148, 156 (1997)(requiring the government to prove conduct by a preponderance of the evidence at sentencing).

Judge Dennis further acknowledged that "the loss to the real victim – the American taxpayer – has already been accounted for in Ainabe's [two other sentence enhancements

related to the amount of loss to a government program and a federal health care program]." He joined Judge Jones in concluding that *Barson* provided an "incorrect interpretation of 'victim'." *Id.* at 695.

e. Fifth Circuit Precedent in *Barson* Has Sanctioned Several Wrongly Applied Sentence Enhancements – But Not Without Criticism.

Despite these two sound critiques by Fifth Circuit judges, the *Barson* precedent has sanctioned several wrongly applied sentence enhancements in health care fraud cases based on the number of "victims." The panel in *United States v. Kalu*, 936 F.3d 678 (5th Cir. 2019) provided a perfunctory treatment of *Barson*. In one sentence, the panel pointed to the defendant's concession that *Barson* is binding precedent and provided no further discussion of its reasoning or specific application to the facts developed in the *Kalu* case. *Id.* at 683. The opinion in *United States v. Ainabe* followed a month after *Kalu* with no further analysis by the majority.

More recently, in reviewing the 2-level enhancement applied in the health care fraud case of *United States v.*

Emordi, 2020 WL 2488181, at *5 (5th Cir. May 14, 2020), the Fifth Circuit made a point to acknowledge that "the court has not been unanimous in its conclusion" regarding the definition of "victim" sanctioned by *Barson* and to note "the disagreement in our precedents." Yet again, without further analysis, the *Emordi* panel resigned itself to being "bound by *Barson*." *Id.*

Yet, the Fifth Circuit has signaled concerns about *Barson*'s reasoning when applied to health care fraud cases. While citing to *Barson*, the Fifth Circuit in *United States v. Ezukanma*, 756 F. App'x 360 (5th Cir. 2018) stated that Medicare is the victim in a case of health care fraud. *Id.* at 374. ("[T]he defendant has the burden of proving that he rendered legitimate services that Medicare, *as victim of the fraud*, would have paid for...") (emphasis added).

In *United States v. Mazkouri*, 945 F.3d 293, 305 (5th Cir. 2019), the Fifth Circuit highlighted disagreement within the circuit about *Barson* and went beyond mere reliance on precedent to ground its analysis. The *Mazkouri* defendant

challenged his two-level enhancement for Medicare fraud involving ten or more victims, arguing that the record revealed fewer victims. Reviewing his contention for plain error because it had not been raised at trial, the panel cited *Barson*, *Ainabe*, and *Kalu* as precedent, but further grounded its reasoning in the fact that 1) the "reliable evidence summarized in the PSR provides ample basis to find by a preponderance of the evidence that, of the nearly 1,000 patients for whom [the defendant] filed claims, at least ten of them were victims of his fraudulent scheme," and 1) "[d]efense counsel practically conceded as much at the sentencing hearing about the loss calculation," quoting three occasions in the record where defense counsel stated that the defendant treated "36 patients." *Id.* at 305.

More strikingly, the panel included a lengthy discussion of Judge Jones' partial dissent in *Barson* and Judge Dennis' concurrence in *Ainabe* – and agreed with one of the central points of the argument: that "the 'victim' for §2B1.1(b)(2) is the Government rather than the individuals

whose identities were used to fraudulently bill the Government." *Id.* at n.3. The panel posited that treating the government, rather than beneficiaries, as the sole victim of health care fraud "makes sense, given that §2B1.1(b)(2) follows §2.B1.1(b)(1), and the loss calculation for §2B1.1(b)(1) is based on the amount of money fraudulently billed to Medicare." *Id.* The *Mazkouri* panel further noted Judge Jones' second point in dissent that "depending on the facts of the case, it may be implausible to describe the individuals whose identities were used to bill Medicare as 'victims' of identity theft"; where some of the beneficiaries were paid, Judge Jones argued that "these individuals were more appropriately described as co-conspirators than victims." *Id.*

In finding no error, the *Mazkouri* panel took care to distinguish the facts of its case from both *Barson* and *Ainabe* by saying the beneficiaries in *Mazkouri* "could reasonably be characterized as victims given the abhorrent way Mazcuri [sic] manipulated them for financial gain." *Id.* In so doing,

the panel satisfied itself by grounding its decision in a factual finding, thereby diluting the precedential value of *Barson* to its reasoning.

f. The Facts Of Ainabe's Case Do Not Support A Finding Of "Victims" Other Than Medicare.

The facts of Ainabe's case do not support a finding of "victims" other than Medicare. Poignantly, when arguing in front of the jury, the government said the word "victim" only one time during the entire 3-day trial. On the one occasion that the government did utter the word "victim," its statement conceded the fact in question here: that Medicare was the only victim. May 2 Trial Transcript at 446:19-20. ("Ms. Akharamen and Ms. Ainabe both knew that Medicare was the victim."). Likewise, the government sought, and the sentencing court ordered, restitution for only one victim: Medicare. Sentencing Transcript at 16:25-17:4.

The government failed to offer into evidence at trial or sentencing, and the sentencing court did not find, any evidence of harm, financial or otherwise, to any Medicare

beneficiary. To the contrary, the government took care to emphasize that several of the Medicare beneficiaries were paid for receiving treatment. *See, e.g.*, May 1 Trial Transcript at 152:17-135:8 ("Q. Were they all paid to sign up? A. Yes. Q. Who paid them, Ms. Akharamen? A. We did. Q. Did the defendant ever personally pay any of these people? A. Yes...Q. Did Texas Tender Care submit claims that Medicare paid for these patients? A. Yes.").

The facts presented by the government do not comport with the plain meaning of "victims" nor the intent of the Guidelines when applying that term in this case.

II. THE FIFTH CIRCUIT IMPROPERLY AFFIRMED USING GIFTER AND GULF TO ENHANCE AINABE'S SENTENCE.

Medicare billings for Gulf EMS and Gifter should not have been included in the loss calculation that resulted in an 18-level enhancement for intended loss and a 3-level enhancement for the loss to a federal health care program. The Fifth Circuit erroneously sanctioned the inclusion of

Gulf and Gifter within the Guidelines definition of "relevant conduct."

A sentencing court may consider certain acts and omissions not proven at trial beyond a reasonable doubt if those acts or omissions are shown by a preponderance of the evidence to be "relevant conduct." *Edwards v. United States*, 523 U.S. 511, 514 (1998). Relevant conduct must satisfy either prong of Section 1B1.3(a)(2) of the Guidelines. Relevant conduct includes "all acts and omissions [that the defendant] committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused" which "occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." *United States v. Barfield*, 941 F.3d 757, 762 (5th Cir. 2019).

For conduct to be considered part of a "common scheme or plan," the conduct "must be substantially connected" to the conduct of conviction "by at least one common factor, such as common victims, common

accomplices, common purpose, or similar modus operandi." U.S.S.G. § 1B1.3, Comment n.9(A). For conduct to be considered part of the same "course of conduct," it must be "sufficiently connected or related to" the conduct of conviction "as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses." U.S.S.G. § 1B1.3, Comment n.5(B)(ii). Appropriate factors to consider include the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses. *Id.*

There was no common scheme here. Gulf, Gifter, and Texas Tender Care were separate and distinct in every way. Ainabe was a principal for Gulf and Gifter; she was neither a principal nor a shadow owner for Texas Tender Care. Gulf was an ambulance company; Gifter was a diagnostics company; and Texas Tender Care was a home health care agency. Each company served a distinctly different function within the health care system, requiring different skills, different knowledge, and different medical billing practices.

Akharamen, the imputed co-conspirator for Texas Tender Care, had no involvement in Gulf or Gifter; Gifter involved a principal who was himself a physician, with no alleged participation in either Gulf or Texas Tender Care. The fact that all three companies filed claims with Medicare is insufficient to establish a common scheme or ongoing series of conduct. *See United States v. Catchings*, 708 F.3d 710 (6th Cir. 2013) (use of company credit card was not "relevant conduct" because it was not illegal).

Yet, the district court relied heavily on the language in Section 1B1.3(a)(2) defining relevant conduct as acts "that were part of the same course of conduct or common scheme or plan as the offense of conviction." The Notes to the Guidelines provide clear guidance on the Sentencing Commission's intent regarding "a common scheme." The Notes provided that "Subsections (a)(1) and (a)(2) adopt different rules because offenses of the character dealt with in subsection (a)(2)...often involve a pattern of misconduct that *cannot readily be broken into discrete, identifiable units*

that are meaningful for purposes of sentencing." U.S.S.G. § 1B1.3 (Background Comments) (emphasis added).

The Commentary to the Guidelines mention "certain" types of fraud where "the guidelines depend substantially on quantity" as opposed to offenses such as "assault, robbery and burglary" where the Guidelines counsel that a defendant who robs two banks will "**not**" have the amount of money stolen in one robbery taken into account to determine the Guideline range for the other robbery – "even if both robberies were part of a single course of conduct or the same scheme or plan." U.S.S.G. § 1B1.3 (Background Comments) (emphasis in original). On a plain reading of the Commentary to the Guidelines, this distinction between two robberies and recurring incidents of certain types of fraud makes sense because the two robberies can be discretely divided into separate incidents, and counts in an indictment, with readily calculable loss associated with each.

In the case of Ainabe, the government wants the benefit of ambiguity when it claims the fact of three clear,

separate incidents. Fairly applying the intent of the Guidelines, Gulf, Gifter, and Texas Tender Care are akin to the two bank robberies. Each company has a separate, unique Medicare provider number. That means Medicare can, and did, closely track each of these three entities separately. The Government has a clear accounting of the Medicare claims submitted using the Gulf Medicare provider number, for example, as opposed to that of Gifter or Texas Tender Care. Medicare also had the benefit of knowing the principals associated with each of these separate entities because of the vast paperwork and required certifications associated with participation in the Medicare program.

Moreover, the government introduced evidence at trial indicating that it knew exactly which patients were recruited by Ainabe, and by extension, which claims were submitted for those specific patients. *See, e.g.*, May 1 Trial Transcript at 149:19-150:3 (While showing copies of the referenced documents to the jury, the government asked "Q. What kinds of documents did you keep? A. I had a list of her

patients and certification periods and when, when we were going to meet, when they were paid, I have that record, and she had copies of that."); May 1 Trial Transcript at 254:25-255:4 (At trial, Kimble testified that Ainabe brought "35 to 40" of "60 to 70" patients treated by Texas Tender Care during her tenure); the PSR, filed under seal, provided a very specific number of patients recruited by Ainabe.

Lumping the three entities together also fails the temporal element of a "common scheme." Gulf's operations allegedly went back to at least 2003 and continued through 2010; Gifter allegedly operated in 2010; and dealings with Texas Tender Care resulted in Ainabe's conviction for conduct from approximately August 2011 to August 2015. This 12-year timeframe is disjointed and lacks the temporal nexus to support a "common scheme" or "spree."

There is no need to treat Gulf, Gifter, and Texas Tender Care as the "certain" type of fraud "that cannot readily be broken into discrete, identifiable units that are meaningful for purposes of sentencing." U.S.S.G. § 1B1.3

(Background Comments). These were three discrete, identifiable, separate units – separate organizations, separate incorporation, separate Medicare provider numbers, separate principals, separate industries, separate dates of operation, and separate claim types billed to Medicare.

The only purposes served by adding the three together was to avoid the higher evidentiary burden of facts proffered at trial, to increase the amount of loss calculation, and ultimately to increase the sentencing range. Doing so impermissibly violated Ainabe's constitutional rights. As meager as those rights may be under the Guidelines, this Court has a responsibility to protect those rights that remain for federal defendants.

A review of opinions from multiple federal circuits shows that, while properly extending deference on factual findings related to "relevant conduct" through application of the "clear error" standard, other circuits stick closer to the plain meaning of "same course of conduct" or "common

scheme or plan" than the Fifth Circuit did here. *See, e.g.*, *United States v. Moored*, 997 F.2d 139, 144 (6th Cir. 1993)(reversing loss calculation based on act of defrauding a college four months prior to the conduct of conviction involving loan fraud purportedly intended to repay the college); *United States v. Williams*, 10 F.3d 910, 913-14 (1st Cir. 1993)(affirming consideration of conduct occurring less than two years before the offense of conviction where defendant used two organizations to defraud (1) the same victim, (2) using the same improper requests for reimbursement, (3) where the two organizations had the same three principals, and (4) defendant committed the same underlying substantive offense of fraudulent failure to identify his "related party" status); *United States v. Heath*, 122 F.3d 682, 685 (8th Cir. 1997)(affirming use of conduct in loss calculation related to 53 admissions to 17 different hospitals within a 7-month period by the same defendant in an ongoing slip-and-fall scheme to obtain narcotics); *United States v. Hodge*, 588 F.3d 970, 974 (8th Cir. 2009)(affirming

consideration of 1,742 health exams submitted over a two-year period where each was presented to the company where defendant was a contractor, using the defendant's email address, and fraudulently listing the same insurance company as the referring entity); *United States v. Mathews*, 874 F.3d 698, 708 (11th Cir. 2017)(affirming consideration of conduct as occurring "during the commission of the offense of conviction" because the act happened two hours prior to defendant falsifying medical records to hide the act).

In this case, the sentencing court impermissibly stretched a "common scheme" over at least 12 years, three different organizations in three different service industries with three different sets of principals at the helm. This is not what was intended as "relevant conduct" under the Guidelines.

The loss to a Government health care program should have been calculated using Texas Tender Care only for loss greater than $1,000,000 but less than $7,000,000. This

would have resulted in a 2-level increase, not the 3-level increase applied. *See* U.S.S.G. §2B1.1(b)(7).

III. THE FIFTH CIRCUIT IMPROPERLY AFFIRMED THE CALCULATION OF LOSS ASSOCIATED WITH TEXAS TENDER CARE.

Finally, the Fifth Circuit should not have affirmed the loss calculation associated with Texas Tender Care where the sentencing court 1) articulated no findings related to the effort to separate legitimate from fraudulent claims, 2) overlooked a reasonably practicable method for doing so that the government established with facts offered without objection during the trial, and 3) used the aggregate amount of Medicare claims billed by Texas Tender Care between approximately August 2011 and August 2015 to determine the total loss.

Though Ainabe challenged the loss calculation in her written objections to the government's sentencing recommendations and maintained her objection on appeal to the Fifth Circuit, the specific point of error raised here has not previously been articulated. When a defendant fails to

object before the district court, the reviewing court applies a "plain error" standard under Federal Rule of Criminal Procedure 52(b). *Puckett v. United States*, 556 U.S. 129, 135 (2009). Under plain error review, the defendant has the burden to show "(1) an error; (2) that is clear and obvious; and (3) that affected h[er] substantial rights." *Id.*; *United States v. Hernandez-Martinez*, 485 F.3d 270, 273 (5th Cir. 2007). If all three conditions are present, the court may correct the error "only if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Puckett v. United States*, 556 U.S. 129, 135 (2009) (*quoting United States v. Olano*, 507 U.S. 725, 736 (1993)). The error here warrants such a correction.

First, the sentencing court erred when it failed to articulate its basis for using the amount of all claims submitted by Texas Tender Care to calculate intended loss. Generally, appellate courts review the application and interpretation of the Guidelines *de novo*, and review factual findings for "clear error." *United States v. Harris*, 597 F.3d

242, 250-51 (5th Cir. 2010). While estimating loss is a "factual finding reviewed for clear error," the sentencing court's "method of calculating those losses is an application of the guidelines subject to *de novo* review." *Id.*

De novo review of the method of calculating intended loss in this case is essentially impossible because the sentencing court failed to articulate its methodology for calculating loss. The failure to create a reviewable record on this substantial issue is plain error and grounds for reversal. *See, e.g.*, *United States v. Schaefer*, 291 F.3d 932 (7th Cir. 2002)(reversing fraud calculation where court failed to make explicit findings that all losses were the result of fraud).

Second, this error is clear and obvious. The sentencing transcript and order announced on the record contains no discussion of a basis for using all of Texas Tender Care's billings between August 2011 and August 2015 to calculate intended loss. The Fifth Circuit made no mention of this fact or the legal issue it creates for Ainabe, and future defendants, on review of her sentence. Both the sentencing

court and the Fifth Circuit focused their analysis on whether Ainabe had sufficiently rebutted the presumption that the amount billed was in fact the intended loss.[1] Use of aggregate billings stands here as an unsupported, and therefore unreviewable, assumption.

Third, the error affected Ainabe's substantial right. The loss calculation determines the level of enhancement to the Base Offense Level when calculating a recommended sentence under the Guidelines. In Ainabe's case, the loss calculation impacted two different sentence enhancement factors – total loss from the offense under Section 2B1.1(b)(1), and loss to a Government health care program under Section 2B1.1(b)(7). The sentencing court's assumption supported both an 18-level enhancement and a 3-level enhancement. This affected Ainabe's substantial due process right to liberty and property because it significantly

[1] Ainabe does not abandon that argument here and continues to assert that she sufficiently rebutted the presumption that actual billings equate to intended loss in her case. Ainabe stands on her prior objections regarding this point, which were properly preserved in the sentencing court and to the Fifth Circuit.

increased the recommended term of imprisonment and supervised release, as well as the amount of the fine and restitution.

Finally, failure to articulate the basis for not requiring the government to meet its burden of proof at sentencing "seriously affect[s] the fairness, integrity [and] public reputation of judicial proceedings." *Puckett v. United States*, 556 U.S. 129, 135 (2009) (*quoting United States v. Olano*, 507 U.S. 725, 736 (1993)). The "burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government." 18 U.S.C. § 3664(e); *United States v. Hearns*, 845 F.3d 641, 649 (5th Cir. 2017). There must be "some factual basis for the conclusion that those losses were the result of fraud." *United States v. Hebron*, 684 F.3d 554, 561 (5th Cir. 2012) ("[L]oss calculations in government-benefit cases include only fraudulent ones and not payments to which the [defendant] was legitimately entitled.") Once the government has proven by a preponderance of the evidence "that the fraud

was so extensive and pervasive that separating legitimate benefits from fraudulent ones is not reasonably practicable, the burden shifts to the defendant to make a showing that particular amounts are legitimate." *Id.* at 563.

In Ainabe's case, the error seriously affects the fairness of judicial proceedings because it impermissibly holds the government to no burden regarding the separation of legitimate claims from fraudulent ones. The sentencing court articulated no findings about the pervasiveness of the fraud at Texas Tender Care between August 2011 and August 2015. Nor did the sentencing court ask the government to present evidence on that issue. Our justice system depends on requiring the government to prove facts alleged against the defendant, both at trial and at sentencing. Without holding the government to its burden and creating a record that may later be reviewed by an appellate court, future defendants, or the public, this type of error seriously affects the integrity and public reputation of

judicial proceedings. *See Puckett*, 556 U.S. at 135. This plain error should be corrected.

Significantly, in Ainabe's case, the government introduced evidence that would support a "reasonably practicable" basis for separating legitimate claims from fraudulent claims. The government's evidence showed that Ainabe accounted for up to 80 percent of the patients at Texas Tender Care – a fact the government elicited multiple times. *See, e.g.*, May 1 Trial Transcript, p. 146 at 16-20. ("Q. At Texas Tender Care's highest patient level, the highest census, the greatest number of patients that Texas Tender Care had at one time, how many of those patients were Ms. Ainabe's? A. 75 to 80 percent." [2]

[2] Kimble testified that Ainabe brought up to 50% of the total patients. May 1 Trial Transcript, 254:25-255:4 ("Q. If you could just tell us approximately what was the census before Ms. Ainabe came onboard? A. I would say it was maybe around 40. Between 35 and 40 patients at first, when I first got there. When she came, it jumped, maybe went up to 60, 70."). Kimble's account suggests 1) not all Texas Tender Care patients were recruited patients and therefore not all Texas Tender Care claims were fraudulent, and 2) Ainabe accounted for 50 percent or less of the total patient population (60 minus 35 is 25; 25 divided by 60 is 41.67%; 70 minus 35 is 35; 35 divided by 70 is 50%).

While 80 percent seems like a high number, it is also a specific number – and nothing in the record undermines the specificity with which the government established and relied on this number. Erring on the side of crediting the government's evidence, a "reasonably practicable" assessment of the intended loss attributable to Ainabe is readily obtained by taking the Medicare claims submitted by Texas Tender Care between August 2011 and August 2015 ($3,590,141.92) and multiplying it by the 80 percent of patients brought in by Ainabe. The resulting loss calculation is $2,872,113.54. The resulting enhancement is 16 levels, not the 18 levels applied for the loss factor at sentencing. *See* U.S.S.G. §2B1.1(b)(1)(I).

Ainabe does not argue that this is the *only* permissible method for calculating the loss. The reviewing court should not substitute its judgment for that of the sentencing court on factual determinations, but the method of calculating loss is an application of the law, requiring *de novo* review. Without *any* record of the method used to separate

legitimate from fraudulent claims, *de novo* review has been forestalled in this case – to the substantial detriment of Ainabe. With evidence proffered by the government that does provide a reasonable method for separating legitimate from fraudulent claims, the error becomes more stark.

When an error is plain, the reviewing court is empowered to correct it. F.R.C.P. 52(b); *Puckett v. United States*, 556 U.S. 129, 135 (2009). This case should be remanded with instruction to make and articulate specific findings in the record to support the actual or intended loss attributable to Ainabe.

CONCLUSION

The petition for a writ of certiorari should be granted.

JUNE 12, 2020

Respectfully submitted,

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APPENDIX A

A-1

938 F.3d 685
United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Mercy O. AINABE, Defendant–Appellant.

No. 18-20689
|
FILED September 13, 2019

Synopsis

Background: Defendant was convicted in the United States District Court for the Southern District of Texas, Sim Lake, J., of one count of conspiracy to commit healthcare fraud, five counts of healthcare fraud, and one count of conspiracy to pay healthcare kickbacks, and was sentenced to 108 months' imprisonment. Defendant appealed.

Holdings: The Court of Appeals, Owen, Circuit Judge, held that:

[1] application of two-level enhancement for ten or more victims was warranted;

[2] defendant's prior conduct with two other companies was part of common scheme or plan, permitting consideration of losses defendant caused with those companies at sentencing based on losses defendant caused with a third company;

[3] defendant's conduct with other companies was sufficiently proximate in time to be relevant; and

[4] calculation of intended amount of loss based upon full amount billed to Medicare was warranted.

Affirmed.

Dennis, Circuit Judge, filed specially concurring opinion.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection.

West Headnotes (13)

[1] **Sentencing and Punishment** ⇐ False pretenses and fraud

Defendant's offense involved ten or more victims, and thus application of two-level enhancement was warranted at her sentencing following convictions for one count of conspiracy to commit healthcare fraud, five counts of healthcare fraud, and one count of conspiracy to pay healthcare kickbacks; while defendant asserted that many of the Medicare beneficiaries implicated in her offense did not spend any of their own money on their care, victim was defined sufficiently broadly to encompass Medicare beneficiaries, since it included any individuals whose means of identification were used unlawfully or without authority. 18 U.S.C.A. §§ 2, 371, 1347, 1349; Social Security Act § 1128B, 42 U.S.C.A. §§ 1320a-7b(b)(1), 1320a-7b(b)(2); U.S.S.G. § 2B1.1(b)(2)(A)(i).

2 Cases that cite this headnote

[2] **Sentencing and Punishment** ⇐ Value of loss or benefit

Submission of fraudulent claims to Medicare by two companies with which defendant had worked previously were part of defendant's common scheme or plan, as required to permit consideration of losses caused by such companies while sentencing defendant based on behavior at a third company, following convictions for one count of conspiracy to commit healthcare fraud, five counts of healthcare fraud, and one count of conspiracy to pay healthcare kickbacks; while companies provided different services to patients, they all submitted fraudulent bills for services purportedly provided to Medicare beneficiaries recruited through defendant's connections with group homes, then pocketed difference between amount reimbursed by Medicare and amount actually paid for services actually provided.

18 U.S.C.A. §§ 2, 371, 1347, 1349; Social Security Act § 1128B, 42 U.S.C.A. §§ 1320a-7b(b)(1), 1320a-7b(b)(2); U.S.S.G. §§ 2B1.1(b)(1)(J), 2B1.1(b)(7)(B)(ii).

[3] **Criminal Law** ⇐ Sentencing

A district court's determination of what constitutes relevant conduct for sentencing purposes, including what acts and omissions are part of a common scheme or plan as the offense of conviction, is a factual finding that Court of Appeals reviews for clear error.

[4] **Criminal Law** ⇐ Questions of Fact and Findings

A factual finding is not clearly erroneous if it is plausible in light of the record read as a whole.

[5] **Sentencing and Punishment** ⇐ Course of conduct

Defendant's actions on behalf of two health care companies that submitted fraudulent claims to Medicare had requisite temporal proximity to constitute relevant conduct at sentencing of defendant following convictions for one count of conspiracy to commit healthcare fraud, five counts of healthcare fraud, and one count of conspiracy to pay healthcare kickbacks based on her work with third company; while defendant's frauds with two previous companies might not have overlapped with third company, this did not foreclose conclusion that this was part of common scheme or plan, since all three frauds were closely related in time. 18 U.S.C.A. §§ 2, 371, 1347, 1349; Social Security Act § 1128B, 42 U.S.C.A. §§ 1320a-7b(b)(1), 1320a-7b(b)(2); U.S.S.G. § 1B1.3.

[6] **Sentencing and Punishment** ⇐ Use and effect of report

Consideration of fraud committed by defendant working with two health care companies, at sentencing based on her work with a third company, was warranted since such information was included in defendant's presentence report (PSR), even though such evidence was not introduced at trial convicting defendant of one count of conspiracy to commit healthcare fraud, five counts of healthcare fraud, and one count of conspiracy to pay healthcare kickbacks based on her work with third company; district court was not limited to evidence introduced at trial, and was permitted to include any evidence supported by sufficient indicia of reliability, including non-conclusory statements in PSR. 18 U.S.C.A. §§ 2, 371, 1347, 1349; Social Security Act § 1128B, 42 U.S.C.A. §§ 1320a-7b(b)(1), 1320a-7b(b)(2).

[7] **Sentencing and Punishment** ⇐ Evidence

At sentencing, district courts are not limited to the evidence introduced at trial.

[8] **Sentencing and Punishment** ⇐ Use and effect of report

Sentencing and Punishment ⇐ Evidence

At sentencing, district courts can consider any evidence with a sufficient indicia of reliability to support its probable accuracy, including non-conclusory statements in a presentence report (PSR).

[9] **Sentencing and Punishment** ⇐ Value of loss or benefit

Calculation of intended amount of loss caused by defendant based upon total amount fraudulently billed to Medicare was warranted, even though Medicare might not have reimbursed full amount billed, at sentencing of defendant convicted of one count of conspiracy to commit healthcare fraud, five counts of healthcare fraud, and one count of conspiracy to pay healthcare kickbacks; defendant did not rebut presumption that she intended for each company that billed Medicare

to receive full amount billed, as she merely asserted that one company in one industry received less than it billed to establish that she expected another company in another industry to receive less than it billed. 18 U.S.C.A. §§ 2, 371, 1347, 1349; Social Security Act § 1128B, 42 U.S.C.A. §§ 1320a-7b(b)(1), 1320a-7b(b)(2); U.S.S.G. § 2B1.1.

[10] **Criminal Law** ⇐ Application of guidelines

When reviewing a district court's conclusion as to the amount of intended loss, Court of Appeals first determines whether the trial court's method of calculating the amount of loss was legally acceptable. U.S.S.G. § 2B1.1.

[11] **Criminal Law** ⇐ Review De Novo

Court of Appeals reviews a district court's choice of a method for calculating the amount intended loss at sentencing de novo because that is an application of the sentencing guidelines, which is a question of law. U.S.S.G. § 2B1.1.

[12] **Criminal Law** ⇐ Sentencing

Sentencing and Punishment ⇐ Value of loss or benefit

Appropriate method of calculating the amount of intended loss within the meaning of the sentencing guidelines is determined by the facts of the case, and clear error review applies to the background factual findings that determine whether a particular method is appropriate. U.S.S.G. § 2B1.1.

[13] **Criminal Law** ⇐ Review De Novo

If Court of Appeals concludes that a district court's factual determination was not clearly erroneous, then it reviews de novo whether the district court applied the correct means of calculating the intended loss in light of that factual determination.

***687** Appeal from the United States District Court for the Southern District of Texas, Sim T. Lake, III, U.S. District Judge

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Before SMITH, DENNIS, and OWEN, Circuit Judges.

Opinion

PRISCILLA R. OWEN, Circuit Judge:

Mercy Ainabe was convicted of several health-care-related offenses in connection with recruiting and transporting individuals to Texas Tender Care (TTC) for treatment. At sentencing, the district court considered Ainabe's similar conduct at two other companies—Gulf EMS, LLC (Gulf) and Gifter Medical Services (Gifter)—and considered the amounts billed by all three of these companies in calculating the "loss" for sentencing purposes. Ainabe challenges the district court's application of (1) a two-level enhancement under § 2B1.1(b)(2)(A)(i) of the Guidelines for offenses involving more than ten victims; (2) an eighteen-level increase under § 2B1.1(b)(1)(J) for losses of more than $3.5 million; and (3) an increase of three levels under § 2B1.1(b)(7)(B)(ii) for a loss to a government healthcare program of more than $7 million. We affirm.

***688 I**

Gulf, an ambulance service owned and operated by Mercy Ainabe and her husband, began operating in 2003. Gulf

transported residents from group homes to and from partial hospitalization programs (PHPs).

Gulf falsely classified those group-home patients to justify their transportation via ambulance. Gulf submitted billings to Medicare for those transportation expenses, even though it often double-loaded residents into a single ambulance or transported them in private vehicles. Gulf also transported ambulatory dialysis patients and submitted false claims stating the patients were non-ambulatory. Gulf submitted approximately $4.3 million in claims from January 2007 through April 2010. Medicare paid approximately $1.1 million on the claims submitted by Gulf.

In April 2010, Ainabe enrolled Gifter as a Medicare provider. Although Gifter claimed to be a diagnostic testing company, evidence suggests that, like Gulf, it transported patients to and from PHPs. For example, Gifter received checks from a PHP identified as "Pristine Healthcare" under the name "Gifter Transport," and Ainabe signed a certification stating that Gifter was "bringing ... patients to [Pristine] for their group therapies and medical treatments." A Medicare contractor audit determined that Gifter presented false claims. From October through December of 2010, Gifter submitted approximately $300,000 in claims to Medicare. Medicare paid approximately $200,000 on those claims.

In September or October of 2010, Ainabe contacted Magdalene Akharamen, a social acquaintance who owned TTC, a home healthcare agency. Ainabe told Akharamen that "what she [Ainabe] does is refer patients to agencies," including home healthcare agencies and PHPs, and that she had "been doing this recruiting business for a while." Ainabe explained "the way she operated" to Akharamen. Ainabe said she referred patients to a provider and paid for all of the services received by the patients (nursing services, physician services, etc.). The provider then billed Medicare. When the provider was paid by Medicare, it reimbursed Ainabe for the payments she had made. The remaining funds from the Medicare payment—the "profit," as Akharamen described it—were then split evenly between Ainabe and the provider.

Akharamen agreed to this arrangement, and Ainabe began working with TTC. Ainabe caused TTC to grow "a lot." Ainabe recruited patients for TTC from group homes even though many of those patients did not qualify for home healthcare services. Further, many of the services for which TTC billed Medicare were never actually provided to patients. Between August 2011 and August 2015, TTC billed Medicare approximately $3.6 million for home healthcare services. Medicare paid approximately $3.2 million on those claims.

The Government charged Ainabe with seven counts stemming from her relationship with TTC: one count of conspiracy to commit healthcare fraud,[1] five counts of healthcare fraud,[2] and one count of conspiracy to pay healthcare kickbacks.[3] A jury convicted Ainabe on all counts.

Based on the information contained in a Presentence Report (PSR), the district court applied several sentencing enhancements. Over Ainabe's objections, the district court added (1) two levels under § 2B1.1(b)(2)(A)(i) of the Guidelines because ***689** the offense involved more than ten victims; (2) eighteen levels under § 2B1.1(b)(1)(J) because the loss was more than $3.5 million; (3) three levels under § 2B1.1(b)(7)(B)(ii) because there was more than $7 million in loss to a government healthcare program; and (4) two levels under § 3B1.3 because Ainabe's criminal conduct violated the public trust.[4] With a base offense level of six and a criminal history category of I, those enhancements brought Ainabe's Guidelines range to 108 to 135 months of imprisonment.[5] The district court sentenced Ainabe to 108 months.

Ainabe appeals, contending that the district court erred when it imposed the enhancements because it (1) used an incorrect definition of victims, (2) considered Ainabe's actions on behalf of Gulf and Gifter as relevant conduct, and (3) relied on the amounts billed to Medicare to calculate intended loss.

II

[1] Ainabe argues that the district court erred when it concluded that her offense involved ten or more victims and consequently merited a two-level enhancement under § 2B1.1(b)(2)(A)(i).[6] According to Ainabe, her offense did not involve ten or more victims because the many Medicare beneficiaries implicated in her offense "did not spend any of their own money on their care." However, as Ainabe concedes, that argument is foreclosed by *United States v. Barson*, which held that "Application Note 4(E) of U.S.S.G. § 2B1.1 defines 'victim' in a way that encompasses ... Medicare beneficiaries because it includes 'any individual whose means of identification was used unlawfully or without authority.' "[7] Therefore, the district

court did not err when it imposed the two-level enhancement under § 2B1.1(b)(2)(A)(i).

III

[2] The district court imposed an eighteen-level enhancement pursuant to § 2B1.1(b)(1)(J) of the Guidelines based on its conclusion that the relevant conduct involved a "loss" of more than $3.5 million.[8] The district court also imposed a three-level enhancement under § 2B1.1(b)(7)(B)(ii) based on its conclusion that the relevant conduct involved a "loss" of more than $7 million to a government healthcare program.[9] In reaching those conclusions, the district court considered the amounts billed to Medicare by TTC (approximately $3.6 million), Gulf (approximately $4.3 million), and Gifter (approximately $300,000).

Ainabe contends that the district court erred by considering the frauds perpetrated in conjunction with Gulf and Gifter as relevant conduct. Section 1B1.3(a)(2) of the Guidelines provides that the "relevant conduct" that a district court should consider when applying the Guidelines includes "all acts and omissions ... that were part of the same course of conduct or common scheme or plan as the offense of conviction."[10] "For two or more offenses to constitute part of a common scheme or plan, ***690** they must be substantially connected to each other by *at least one common factor*, such as common victims, common accomplices, common purpose, or similar *modus operandi*."[11]

[3] [4] The district court found that "the fraudulent claims submitted to Medicare by Gulf EMS and Gifter were part of the same scheme or plan as the offenses of conviction." A district court's determination of what constitutes relevant conduct for sentencing purposes, including what acts and omissions are part of a common scheme or plan as the offense of conviction, is a factual finding that this court reviews for clear error.[12] "A factual finding is not clearly erroneous if it is plausible in light of the record read as a whole."[13]

Ainabe stresses two types of factual differences among the three frauds: the services provided by the companies and the time periods during which the fraudulent claims were submitted. She also argues that the district court improperly considered evidence beyond what was introduced at trial.

A

Gulf was an ambulance company, Gifter purported to provide diagnostic testing, and TTC was a home healthcare agency. However, the fraud accomplished through each company began with Ainabe's contacts at group homes, PHPs, and home healthcare agencies. Gulf submitted fraudulent bills for transporting residents of group homes to PHPs. The record indicates that Gifter also submitted fraudulent bills for transporting patients to PHPs for group therapy. TTC, a home healthcare agency, similarly benefited from Ainabe's relationship with group homes, the source of many of the unnecessary referrals to TTC. Each business submitted fraudulent bills for Medicare services purportedly provided to Medicare beneficiaries recruited through Ainabe's connections with group homes then pocketed the difference between the amount reimbursed by Medicare and the amount it had paid for the services actually provided. Given these similarities, it is at least plausible that the three frauds were "substantially connected to each other by at least one common factor, such as common victims, ... common purpose, or similar *modus operandi*."[14] Therefore, the district court did not clearly err when it found that Gulf, Gifter, and TTC submitted fraudulent claims to Medicare as part of a common scheme or plan.

B

[5] Ainabe also insists that her actions on behalf of Gulf and Gifter do not have the requisite temporal proximity to qualify as relevant conduct. The district court concluded that the frauds perpetrated at Gulf and Gifter were relevant conduct under § 1B1.3(a)(2), which instructs district courts to consider "all acts and omissions described in subdivisions 1(A) and 1(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction."[15] Ainabe seems to argue that § 1B1.3(a)(2) incorporates the ***691** last segment of § 1B1.3(a)(1), thereby limiting the acts that can be considered under § 1B1.3(a)(2) to those "that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense."[16]

We rejected this argument in an unpublished opinion. In *United States v. Valenzuela-Contreras*, we noted that "[t]he plain language of § 1B1.3(a)(2) only refers to (1)(A) and (1)(B), not the 'occurred during the commission' language which belongs more generally to § 1B1.3(a)(1). Otherwise, (a)(2) would have referred broadly to section (a)(1)."[17] We also noted that "the commentary accompanying § 1B1.3 contemplates scenarios in which acts and omissions that are part of the 'same course of conduct or common scheme or plan' may be included under § 1B1.3(a)(2) but do not occur during, in preparation for, or in the course of attempting to avoid detection or responsibility for the offense of conviction."[18] The reasoning in *Valenzuela-Contreras* is cogent and persuasive because it is supported by the text of the Guidelines, and we apply that reasoning here.

Accordingly, the fact that the Gulf and Gifter frauds may not have occurred during, in preparation for, or in the course of attempting to avoid detection or responsibility for the fraud perpetrated by Ainabe and TTC did not foreclose the district court from concluding that the fraud perpetrated by Ainabe in concert with two other companies was part of a common scheme or plan. Rather, the timing of the fraudulent schemes is a fact to be considered when determining whether they were sufficiently similar to the TTC scheme to be part of a common scheme or plan. Here, the three frauds were closely related in time: Ainabe enrolled Gifter with Medicare in April 2010, when Gulf stopped submitting fraudulent claims; and Ainabe contacted Akharamen about working with TTC in September or October of 2010, while Gifter was submitting fraudulent claims. Given these circumstances, the fraudulent claims submitted by Gulf and Gifter are sufficiently similar to qualify as relevant conduct for sentencing purposes.

C

[6] **[7]** **[8]** Ainabe also argues that the evidence introduced at trial did not establish that any fraud ever occurred at Gulf or Gifter. However, at sentencing, district courts are not limited to the evidence introduced at trial.[19] Rather, they can consider any evidence with a "sufficient indicia of reliability to support its probable accuracy," including non-conclusory statements in a PSR.[20] Ainabe did not challenge the reliability of the information regarding Gulf and Gifter included in the PSR. Therefore, Ainabe's argument fails.

*692 IV

[9] Ainabe maintains that the district court erred when it relied on the amount billed by Gulf, Gifter, and TTC to calculate "loss." For the purposes of § 2B1.1 of the Guidelines, "loss is the greater of actual loss or intended loss"[21]—"that is, the greater of the pecuniary harm that foreseeably resulted or that was intended to result from the offense."[22] The Guidelines include a specific note on calculating intended loss for federal healthcare offenses involving government healthcare programs:

> In a case in which the defendant is convicted of a Federal health care offense involving a Government health care program, the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss, *i.e.*, is evidence sufficient to establish the amount of the intended loss, if not rebutted.[23]

Ainabe contends that evidence that Gulf only received $1.1 million after billing $4.3 million to Medicare sufficiently rebuts the presumption established by the Guidelines. According to Ainabe, "the fact that Medicare paid $1.1 million on $4.3 million in billings for Gulf EMS shows that Ainabe knew that only [some] portion of the billed amount would be paid."

[10] **[11]** **[12]** When reviewing a district court's conclusion as to the amount of intended loss, this court "first determine[s] whether the trial court's method of calculating the amount of loss was legally acceptable."[24] We review the district court's choice of a method for calculating the intended loss de novo "because that is an application of the guidelines, which is a question of law."[25] However, the appropriate method of calculating the amount of intended

loss is determined by the facts of the case,[26] and "clear error review applies to the background factual findings that determine whether ... a particular method is appropriate."[27]

[13] In this case, the district court determined that the appropriate method for calculating the intended loss was to add together the total amounts billed by Gulf, Gifter, and TTC. The district court's determination as to the appropriate means of calculating the intended loss was based on its implicit factual determination that Ainabe expected each company to be paid the full amount billed. We review that factual determination for clear error.[28] If we conclude that the district court's factual determination was not clearly erroneous, then ***693** we review de novo whether the district court applied the correct means of calculating the intended loss in light of that factual determination.[29]

The district court's factual determination that Ainabe expected each company to be paid the full amount that it billed was plausible and therefore not clearly erroneous.[30] As discussed, the Guidelines impose a presumption that Ainabe intended for each company to be paid the full amount that it billed, and Ainabe has the burden of rebutting that presumption.[31] Although Ainabe points to some evidence suggesting that she did not expect each company to receive the full amount billed—specifically the fact that Gulf only received about 25% of what it billed—that evidence does not conclusively establish that Ainabe did not expect each company to receive the full amount billed. Put another way, even after considering that evidence, it is nonetheless plausible that Ainabe intended for each company to receive the full amount billed.

Comparing the evidence in this case with the evidence before the court in *United States v. Isiwele* is instructive. In *Isiwele*, there was evidence that the defendant knew Medicare paid on a fixed fee schedule for the services he provided but that he submitted claims for higher amounts "[knowing] he would receive these lower capped amounts."[32] Accordingly, we remanded the case to the district court to consider whether that evidence rebutted the presumption that the amount billed equaled the intended loss.[33] No such evidence is present in this case. Instead, Ainabe relies on evidence that one company in one industry received less than it billed to establish that she expected another company in another industry to receive less than it billed. Ainabe has pointed to no evidence explaining why Gulf received less than it billed. Nor has she pointed to any evidence that would suggest that TTC, a different company in a different industry, would receive less than it billed for the same reason.

Ainabe has failed to produce sufficient evidence to rebut the presumption under the Guidelines that she intended for each company to be paid the full amount billed.[34] Therefore, the district court did not clearly err when it found that Ainabe expected Gulf, Gifter, and TTC to be paid the full amounts billed. Nor did the district court err when it used the aggregate amounts billed to calculate the intended loss.

* * *

For the foregoing reasons, we AFFIRM the district court's sentence.

JAMES L. DENNIS, Circuit Judge, specially concurring:
I join the judgment of the panel but write separately to express my disagreement with circuit precedent upon which the panel relies and is bound.

Along with affirming the other sentencing enhancements applied to Ainabe, we uphold the two-level increase pursuant to ***694** § 2B1.1(b)(2)(A)(i), which applies when the offense "involve[s] 10 or more victims." U.S.S.G. § 2B1.1(b)(2)(A)(i). Ainabe's offense satisfies this quantitative requirement based on the number of Medicare beneficiaries whose identities she stole. The determination that Medicare beneficiaries who have their identity stolen constitute "victims" under the Guidelines stems from this court's decision in *United States v. Barson*, 845 F.3d 159, 167 (5th Cir. 2016). In that case, we held that Application Note 4(E) to section 2B1.1 "defines 'victim' in a way that encompasses ... Medicare beneficiaries because it includes 'any individual whose means of identification was used unlawfully or without authority.' "[1] *Id.* (quoting U.S.S.G. § 2B1.1 cmt. n.4(E)). I believe this reading of "victim" is incorrect.

The dissent in *Barson* noted that, in 2009, the Sentencing Commission expanded the definition of "victim" to include individuals in cases of identity theft whose "means of identification w[ere] used unlawfully or without authority, regardless of whether any pecuniary harm was incurred." Office of General Counsel, *Victim Primer* § 2B1.1(b)(2),

U.S. SENTENCING COMM'N (2013), at 8; *see* 845 F.3d at 168-70 (Jones, J., concurring in part and dissenting in part). Reviewing the purpose behind the amendment, the dissent explained:

> while a victim of identity theft may be reimbursed by a third-party or bank, the [Sentencing] Commission explained that "such an individual [victim], even if fully reimbursed, must often spend significant time resolving credit problems and related issues, and such lost time may not be adequately accounted for in the loss calculations under the guidelines." According to the Commission, this hassle and lost time justified considering as a victim for sentencing purposes anyone whose identity was stolen ... [In this case, t]he government has not established that the Medicare claimants [whose identities defendants used] had to spend "significant time," or any time at all, resolving credit or related issues. Even real Medicare beneficiaries are not normally victims of Medicare fraud because Medicare, not the patient, pays the billing provider directly. The real victim is the U.S. taxpayer, through Medicare, and that has been accounted for by the guidelines in this case. There is no proof at all that the purported beneficiaries in this case suffered any harm, pecuniary or otherwise. [2]

Barson, 845 F.3d at 170.

Similarly here, the record does not show that Medicare beneficiaries spent "significant time"—or any time at all—resolving credit problems or related issues due to Ainabe's use of their identities. Based on the express rationale behind Application Note 4(E), the government ought shoulder the burden of proving this hardship to Medicare beneficiaries before they can properly be deemed "victims" under the Guidelines. *See* *United States v. Watts*, 519 U.S. 148, 156, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997) (government must prove conduct ***695** by a preponderance of the evidence at the sentencing phase). Further, the loss to the real victim—the American taxpayer—has already been accounted for in Ainabe's three-level sentencing enhancement under section 2B1.1(b)(7)(B)(ii) and the eighteen-level enhancement under section 2B1.1(b)(1)(J).

Bound by *Barson*'s incorrect interpretation of "victim," I respectfully concur.

All Citations

938 F.3d 685

Footnotes

1 18 U.S.C. §§ 1347, 1349.

2 18 U.S.C. §§ 2, 1347.

3 18 U.S.C. § 371; 42 U.S.C. § 1320a-7b(b)(1), (b)(2).

4 *See* U.S. SENTENCING GUIDELINES MANUAL §§ 2B1.1(b), 3B1.3 (U.S. SENTENCING COMM'N 2016) [hereinafter U.S.S.G.].

5 *Id.* ch. 5, pt. A.

6 *Id.* § 2B1.1(b)(2)(A)(i) ("If the offense ... involved 10 or more victims ... increase by 2 levels....").

7 845 F.3d 159, 167 (5th Cir. 2016) (per curiam) (quoting U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.4(E) (U.S. SENTENCING COMM'N 2009)).

8 *See* U.S.S.G. § 2B1.1(b)(1)(J).

9 *Id.* § 2B1.1(b)(7)(B)(ii).

10 *Id.* § 1B1.3(a)(2).

11 *Id.* § 1B1.3 cmt. n.5(B)(i) (emphasis added); *see* *United States v. Buck*, 324 F.3d 786, 796 (5th Cir. 2003); *see also United States v. Ochoa–Gomez*, 777 F.3d 278, 282 (5th Cir. 2015) ("The application notes

accompanying a Guideline generally bind federal courts unless they are inconsistent with the text of the Guideline.").

12 *Buck*, 324 F.3d at 796 (citing *United States v. Nevels*, 160 F.3d 226, 229 (5th Cir. 1998)).

13 *United States v. Cooper*, 274 F.3d 230, 238 (5th Cir. 2001) (citing *United States v. Puig–Infante*, 19 F.3d 929, 943 (5th Cir. 1994)).

14 U.S.S.G. § 1B1.3 cmt. n.5(B)(i).

15 *Id.* § 1B1.3(a)(2).

16 *Id.* § 1B1.3(a)(1).

17 340 F. App'x 230, 235 n.5 (5th Cir. 2009) (per curiam).

18 *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 cmt. n.3 (U.S. SENTENCING COMM'N 2007)); *see also* U.S.S.G. § 1B1.3 cmt. n.5(A) ("For example, where the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine, as part of the same course of conduct or common scheme or plan, subsection (a)(2) provides that the total quantity of cocaine involved (45 grams) is to be used to determine the offense level even if the defendant is convicted of a single count charging only one of the sales.").

19 *See* *United States v. Malone*, 828 F.3d 331, 336-37 (5th Cir. 2016).

20 *United States v. Zuniga*, 720 F.3d 587, 590-91 (5th Cir. 2013) (per curiam) (quoting *United States v. Harris*, 702 F.3d 226, 230 (5th Cir. 2012) (per curiam)).

21 U.S.S.G. § 2B1.1 cmt. n.3(A).

22 *United States v. Harris*, 821 F.3d 589, 602 (5th Cir. 2016) (citing U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3(A) (U.S. SENTENCING COMM'N 2014)); *see* U.S.S.G. § 2B1.1 cmt. n.3(A)(i), (ii).

23 U.S.S.G. § 2B1.1 cmt. n.3(F)(viii); *see United States v. Isiwele*, 635 F.3d 196, 203 (5th Cir. 2011) ("[T]he amount fraudulently billed to Medicare/Medicaid is 'prima facie evidence of the amount of loss [the defendant] intended to cause,' but 'the amount billed does not constitute conclusive evidence of intended loss; the parties may introduce additional evidence to suggest that the amount billed either exaggerates or understates the billing party's intent.' " (quoting *United States v. Miller*, 316 F.3d 495, 504 (4th Cir. 2003))).

24 *United States v. Klein*, 543 F.3d 206, 214 (5th Cir. 2008) (quoting *United States v. Olis*, 429 F.3d 540, 545 (5th Cir. 2005)).

25 *Id.* (citing *United States v. Saacks*, 131 F.3d 540, 542-43 (5th Cir. 1997)).

26 *Isiwele*, 635 F.3d at 202.

27 *Id.* (citing *United States v. Harris*, 597 F.3d 242, 251 n.9 (5th Cir. 2010)).

28 *Id.* (citing *Harris*, 597 F.3d at 251 n.9).

29 *See* *Klein*, 543 F.3d at 214 (citing *Saacks*, 131 F.3d at 542-43).

30 *See* *United States v. Cooper*, 274 F.3d 230, 238 (5th Cir. 2001) ("A factual finding is not clearly erroneous if it is plausible in light of the record read as a whole." (citing *United States v. Puig–Infante*, 19 F.3d 929, 943 (5th Cir. 1994))).

31 U.S.S.G. § 2B1.1 cmt. n.3(F)(viii).

32 *Isiwele*, 635 F.3d at 202-03.

33 *Id.*

34 *See* U.S.S.G. § 2B1.1 cmt. n.3(F)(viii) ("[T]he aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss ... if not rebutted.").

1 Application Note 4(E) provides in full: Cases Involving Means of Identification.--For purposes of subsection (b)(2), in a case involving means of identification "victim" means (i) any victim as defined in Application Note 1; or (ii) any individual whose means of identification was used unlawfully or without authority. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.4(E).

2 One salient distinction between *Barson* and the case at bar is that in *Barson* some of the Medicare beneficiaries whose identity defendants used as part of their fraudulent scheme "were paid to do so and ... [c]onsequently ... could have been considered co-conspirators in the fraud." 845 F.3d at 169 (internal quotation marks omitted). Nevertheless, the reasoning expressed in Judge Jones's partial dissent applies to the facts of this case.

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APPENDIX B

A-11

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	.	CR. NO. H-17-412-1
	.	HOUSTON, TEXAS
VS.	.	
	.	OCTOBER 4, 2018
MERCY O AINABE	.	2:18 P.M. to 2:48 P.M.

TRANSCRIPT of SENTENCING
BEFORE THE HONORABLE SIM LAKE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

APPEARANCES CONTINUED

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P R O C E E D I N G S

THE COURT: United States versus Mercy Ainabe, Criminal Action 17-412. Will counsel please come forward and identify themselves.

:18:42 *MR. PENNEBAKER:* Drew Pennebaker and Beth Young for the government, Your Honor.

MR. KRETZER: Good afternoon, Your Honor. Seth Kretzer and Edmond O'Suji for the defendant, Your Honor.

MR. O'SUJI: Good afternoon.

:18:51 *THE COURT:* Would you stand in the middle, Ms. Ainabe, please. Who is your lawyer?

THE DEFENDANT: Mr. Kretzer and Mr. Edward O'Suji.

THE COURT: See, the problem is, they both filed certain objections and requests for departure. I don't know

:19:06 who I'm supposed to rely on. Their arguments are inconsistent. You normally have one lawyer. So, if I want an answer from one of these people, who do I look to?

THE DEFENDANT: You can just ask Mr. Seth Kretzer.

THE COURT: I should look to Mister --

:19:21 *THE DEFENDANT:* Mr. Seth Kretzer is fine.

THE COURT: All right.

THE DEFENDANT: Yes, sir.

THE COURT: Have you read the presentence investigation report before today?

:19:27 *THE DEFENDANT:* Yes, My Lord.

THE COURT: Have you discussed it with your attorney?

THE DEFENDANT: Yes, My Lord.

THE COURT: Which attorney have you discussed it with?

THE DEFENDANT: Mr. Seth Kretzer.

THE COURT: All right. He has filed under Docket Entry 84 objections to the presentence report and under Docket Entry 93 objections to the addendum to the report. The government has responded under Docket Entry 101. I'm now prepared to rule on the objections.

Objection 1 objects to Paragraph 10, which states that Ainabe was never a shadow owner of the Texas Tender Care. That objection is sustained.

Objection 2 objects to Paragraphs 37 through 40 of the presentence report. That objection deals with the amount of loss attributable to Gulf EMS and Gifter. That objection is denied.

Pursuant to Guideline Section 1B1.3(a)(2), the fraudulent claims submitted to Medicare by Gulf EMS and Gifter were part of the same scheme or plan as the offenses of conviction. The information contained in Paragraphs 37 through 40 is reliable, and the defendant has offered no evidence to the contrary.

Objection 3 complains of a use of gross billings to calculate the amount of loss. The defendant argues that she has rebutted the presumption that the loss is to be the greater

of the actual loss or the intended loss. The Court is not persuaded by this argument. The defendant has presented no credible evidence to rebut the presumption. Moreover, even if the Court used actual loss, the loss would be $4,593,378.71, which would not affect the enhancement of plus 18 for the loss due to Medicare. Moreover, even if the Court were to exclude the losses attributable to Gulf EMS and Gifter, the intended loss caused by the false claims submitted to Medicare by Texas Tender Care would be $3,590,141.92 and this would still result in an 18 level increase in Paragraph 53. The fact that Medicare paid $1.1 million of the 4.3 million billed by Gulf EMS from 2007 to 2010 does not rebut the presumption that the $3,590,141.92 billed to Medicare by Texas Tender Care from August 2011 to August 2015 was the intended loss. The amounts paid by Medicare to Gulf EMS have no relationship to the amounts billed and paid to Texas Tender Care. All of the other objections to the amount of loss are denied.

The fourth objection complains of Paragraph 54, which concludes that Medicare beneficiaries are victims. That objection is denied.

Under Docket Entry 89, the defendant has filed supplemental objections to the two level increase in Paragraph 57 for the defendant's role in the offense because of abuse of public trust. That objection is denied for the reasons stated in the second addendum to the presentence report.

Do you have any additional objections to the presentence report?

(Defendant conferring with counsel.)

THE DEFENDANT: Whatever objections my lawyer made, that's fine with me.

THE COURT: Have you read the report?

THE DEFENDANT: We went through the report, sir.

THE COURT: Did you read the report?

THE DEFENDANT: Yes, sir, I did.

THE COURT: Is there anything else you wish to complain of or object to about the report?

(Defendant conferring with counsel.)

THE DEFENDANT: I want to make a speech, but just -- no objection.

(Defendant conferring with counsel.)

THE COURT: I'll let you talk later. Here's the problem: I don't want you telling me a month from now or two years from now that you had other objections, but your lawyer was ineffective because he wouldn't let you make those objections. This is the time and the only time for you to tell me if there's something else in the report you want to object to. I don't -- I'm not saying you have to. But I want you to tell me now, not sometime in the future, if there's anything else incorrect in the report.

THE DEFENDANT: I want to clear my conscience, so when

I go home --

(Defendant conferring with counsel.)

THE DEFENDANT: For me, whatever they're written, I have objection to that. Because the lady in question, to me -- I'll just address the allegation. The lady in question that I work with, I only work with her. I heard what you read, but those things don't pertain to me. But it's like I have to just accept even though I'm right, I just say, okay, I'm wrong. That's the way I'm feeling right now.

THE COURT: All right. Let the record reflect that I've given the defendant --

(Defendant conferring with counsel.)

THE COURT: I've given the defendant multiple opportunities to make other specific objections and she has declined to do so.

I find that your total offense level is 31 --

THE DEFENDANT: Excuse me, sir. Can I talk, please?

THE COURT: Yes.

THE DEFENDANT: Sir, I really wanted to talk, that way, whatever happens, I don't go home crying or get my punishment and say, Oh, I should have said this. I want to clear my conscience so that the God Almighty will know what is going on.

They say Gulf and Gifter. When I did get Gulf and Gifter, CMS never complained that I did Gulf and Gifter

wrong. Everything was done accurately according to the law and the law that is citizen. So, I'm surprised they're not bringing Gulf and Gifter to try to manipulate the system to attach this to Texas Tender Care.

I only work for Ms. Akharamen. Whatever she was doing in her business, I don't know any of that. I was not in control of any of that, any of those things.

I know this is not the time to complain or -- but because you asked me, that I want to air my view. I did not know what she was doing in her business. I only worked for her because I believed she was a minister. Of course, she's a pastor. She came to approach me for me to work for her. I didn't know what took place in her office. She only paid me the way she wanted to pay me. I didn't know how -- what was going on.

So, my -- to my greatest surprise, when I read the PSR was saying I did this, I did that, My Honor, I did not do any of that. The Lord God knows I did not partake. Whatever she did in her business, I was not partaking of that. I was just a worker for her.

THE COURT: All right. What you told me is a complete lie. If you were under oath, you would perjure yourself and I would refer you to the U.S. attorney for criminal prosecution. Since you're not under oath, I can't do that. What you just told me is completely inconsistent with the credible evidence

of this trial. So, I hear what you're saying. I don't believe a word of it.

THE DEFENDANT: Yes.

THE COURT: All right. There's also several motions. Under Docket Entry 89, there's a motion for downward departure based on culture heritage and sociological factors. Under Docket Entry 95, there's an opposed motion for downward departure under Guideline Sections 5K2 and 5H1.6 and/or 18, United States Code, Section 3553(a).

I've considered the motions, the attached letters, and the oppositions. And the motions are denied, because the advisory guidelines adequately address all of the statutory sentencing factors. The Court is not persuaded that there's any basis for a downward departure or downward variance in this case.

You may now make a statement and present any information in mitigation and then I will allow the government's lawyer to speak and your lawyer to speak.

THE DEFENDANT: Thank you, My Honor. Thank you for the time given to me to voice my opinion. I've been in this country for 31 years. I came to this country when I was a teenager. I have never committed any offense. I've never committed any fraud. I'm a community activist. I work for the community. I work for the less privileged people. I'm also a social worker, especially with people with disability. That is

what I'm accustomed with.

People in my community, they know me as a law-abiding citizen. No accolades. I'm not saying I'm perfect. Only God is perfect. I try to do my best to stay within the law, and I also try to obey the great law of this country.

I have four kids. And my little one has Form 501, the accommodation in school. So, I'm very close to him. Every day we cry together. He's confused. He doesn't know what is going on. I would really love to be with him, so I can also work with him.

If you look at my children, my four kids, they are also law-abiding citizens. They have never committed any crime. That is the way I taught them.

And this is my first offense I've ever done ever since I've been in this country for 31 years. I love to be in the community. I love to work with at church people, with different churches. That is all I know how to do. And it was just unfortunately that I worked with Ms. Akharamen. So, I'm asking the Lord and the Judge, My Lord, to have mercy on me.

I have discussed with my lawyer the sentence, and I'm seeking for probation, so that way I can be close to my son that needs me around and also to be able to work with those churches that I've been working with and the less privileged people that I'm accustomed to work with.

When I spoke to them, they told me they cannot make any decision. The only person that has the right to make decision is My Lord. So, I'm at your mercy and I'm begging that I will be granted probation so that way I can be close to my family, I will be close to my son and continue my outreach program that I've been doing in the community. Thank you, sir.

THE COURT: Does the government wish to say anything?

MR. PENNEBAKER: Yes, Your Honor. Just to re-encapsulate what the government mentioned in the sentencing memorandum. Ms. Ainabe has obviously been at health care fraud for a long time, since at least 2003. The records that we have do not go back further than that, so beyond that, I can't say.

What I can say is that it appears that Ms. Ainabe learned her lesson after Gulf and Gifter. Don't put your own name on the documents and you won't get caught as easily, because both Gulf and Gifter got jammed up CMS. There were major recoupments. There were obviously anonymous complaints. There can be no doubt that the entirety of the existence of those companies was fraud.

Ms. Ainabe when she joined Texas Tender Care joined perhaps a fraudulent operation. There is little doubt in my mind that Ms. Akharamen was already up to no good. There's also little doubt in my mind that once Ms. Ainabe joined the operation, it went from a three on a fraud scale to a ten on a fraud scale. They started to go to group homes and

buy patients from group homeowners. And group homes, by the way, are not nice places to be. It's where people with disabilities, intellectual disabilities, psychiatric disorders are generally housed under one roof. They're very vulnerable. And what happens is, recruiters will go and pay the group home owners for their product, basically. And, so, Ms. Ainabe brought that and a lot of other trends to Texas Tender Care that weren't ongoing when she first got there.

Now, Ms. Ainabe has shown that she will not stop after those around her get caught. The Atrium PHP that was mentioned in the sentencing memorandum got shut down. She moved to Texas Tender Care. That got shut down. She moved her patients to other entities that were actually -- evidence of that was introduced at trial, where Agent Nixon showed the jury summary charts where Ms. Ainabe's beneficiaries went from Texas Tender Care to Maxcare to Bathfol, and it was just like a musical chairs for these beneficiaries that were part of her patients' stable.

On top of all that, Ms. Ainabe's statements to Pretrial Services are wildly inaccurate, to say the least. In particular, looking at the tax situation, her tax returns reflect that her gross adjusted income was $10,310 in 2016. That's coming off of a year where she made well over a $100,000 just from Texas Tender Care, as a 1099 that her first attorney provided to the government reflects. The bank records that are

attached to the government's sentencing memorandum show that in one account, just one account with one bank, and there are several accounts with several banks, the cash and deposits from that year are over $30,000, which is obviously a lot more than the $10,000 reported.

And on top of all of that, something that isn't mentioned in the sentencing memorandum but that the government just noticed right before this hearing, there's mention at Paragraph 92 in the presentence investigation report, that Ms. Ainabe sold her house in March of 2018. Two paragraphs later, in 94, it says that her net worth is $126.

So, as Your Honor might recall, we went to trial -- we were supposed to go to trial in March. We actually went in April. And there is absolutely no accounting for the money that Ms. Ainabe made off the sale of her home. It's just zero dollars back to the taxpayer.

So, a sentence at the top of the guidelines is consistent with the 3553(a) factors. The nature and circumstances and seriousness of the offense, that health care fraud is a serious offense. It deprives people that genuinely need health care of honest services. Protection of the public, again, Ms. Ainabe has demonstrated again and again and again, that if she's out and free, she's going to be committing fraud against the government in whatever form.

And then deterrence, patient recruiters are the

glue that hold together a lot of these health care fraud schemes. And the government would urge that a sentence at the top of the guidelines range would send the appropriate message to the rest of the patient recruiters in the community, that this is a serious offense. You're not just going to skate and --

THE COURT: How will anybody know about the sentence?

MR. PENNEBAKER: It's a pretty tight-knit community, Your Honor. Word about this kind of thing gets around.

THE COURT: All right. Do you have anything else?

MR. PENNEBAKER: No, Judge.

THE COURT: Mr. Kretzer?

MR. KRETZER: Yes, Judge. Let me just begin by responding to the argument Mr. Pennebaker just said at the end. He didn't make it before right now. So, this is only my initial impression. I don't know any of the details of the sale of the home; but, of course, Texas is a community property state. I don't know what her husband's interest in the home was versus hers, but I don't know that we can say there was anything fraudulent about it.

More to the substance of the arguments, Judge, even -- and we certainly do respect your denying our motion for downward departure or downward variance. Of course, we're asking for the low end of the guideline range, which in this case is substantial. I think it's about two years between the

high end and the low end. Even within the guideline range, of course, the Court is still governed by the 3553 factors for substantive reasonableness.

You can see here in the courtroom, Judge, Ms. Ainabe has a deep set of community support. I think some of these people were here for the trial. Some of them have not been. But when you craft the substantively correct sentence for Ms. Ainabe, we would, of course, ask the Court to take into consideration the things that you've seen otherwise. That she does have four beautiful children. I believe one's in college. As she mentioned, one is somewhat special needs. And that in crafting the punishment for her, of course, to ask about those other effects on people in her solar system of friends.

With regard to the qualification in 3553 that the sentence be at least sufficient but not greater than necessary to deter future acts as not to be punitive, I think our concern should be the same that Your Honor asked Mr. Pennebaker, which is there's certainly no mechanism for, you know, this punishment being greater than some similarly situated person to, you know, be filtered through the community. Mr. Pennebaker said it's a tight-knit group. I don't know how one measures tight-knit in the era of twitter and mass communication versus loose and dispersed.

But all those things notwithstanding, we would say -- or would urge the Court to impose a sentence at the low

end of the guideline range, which I assume will still be qualitatively different or greater than that which the lead complainant who testified at the trial would get, who, as Mr. Pennebaker said, was likely engaged in fraudulent activity before she ever met my client much less that she came into her employ.

THE COURT: You both made good arguments. I think the low end of the guideline range is still a substantial sentence in this case and I think it adequately addresses all of the statutory sentencing objectives.

Ms. Ainabe, I sentence you to 108 months in prison as to Counts 1 through 6 and 60 months as to Count 7, to run concurrently, for a total sentence of 108 months in prison.

Upon release from imprisonment, you will serve a term of three years of supervised release on Counts 1 through 7, all terms to run concurrently.

In addition to the standard conditions, you will provide the probation officer with access to any requested financial information and you will authorize the release of any financial information. The probation office may share financial information with the United States Attorney's Office.

You must not incur new credit charges or open additional lines of credit without the approval of the probation office.

You will pay restitution in the amount of

$3,444,791.70 to Medicare.

It is ordered that you're jointly and severally liable with Magdalene Akharamen in 16-cr-263 to pay restitution in the amount of $2,926,100.29 to Medicare.

You will pay the United States a special assessment of $700.

Because you do not have an ability to pay a fine in addition to restitution, no fine will be imposed. Because you do not have a current ability to pay the full amount of restitution, you will pay now a lump sum payment of $700, and the balance will be due while you're in prison in payments of the greater of $25 per quarter or 50 percent of any wages earned while in prison. The remaining balance will be paid in monthly installments of $200 beginning 60 days after you're released from prison.

I will allow voluntary surrender as long as the same condition of home confinement and electronic monitoring will remain in effect.

You have a right to appeal. If you wish to appeal, Mr. Kretzer will continue to represent you.

Does either counsel wish to say anything else?

MR. PENNEBAKER: Judge, we would just urge that the Court reconsider the voluntary surrender and remand the defendant to the custody of the marshals.

THE COURT: Mr. Kretzer?

:42:18 *MR. KRETZER:* Judge, obviously we're opposed. We would ask for voluntary sender. Ms. Ainabe has been on bond for now over a year. I've represented her since May. There's never been any inkling of an issue of noncompliance. As you :42:30 see, she has children here. It would just allow that she have a little bit more time with them before she does surrender. And I have no doubt that she will do so, just as she's complied with all the other conditions.

THE COURT: My concern, which I expressed the day the :42:43 jury returned its verdict, is that she's a longstanding fraudster and has ties with Nigeria. She has every incentive to flee to Nigeria. Why wouldn't home confinement and electronic monitoring be adequate to prevent that?

MR. PENNEBAKER: Well, Judge, the government received :43:01 an alert, as a matter of fact, around the time of the sale of the home, that there had been a substantial wire transfer between the U.S. and Nigeria. That is one reason for the increased reservations that the government has at this point.

But further, Judge, the defendant seems to :43:31 have -- at least until this point had some unrealistic expectations about what was going to happen in this case. So long as the sentence was pending, there was still kind of the hope that I'm going to show up at court and this all -- I can explain it all and it's going to go away. Now Your Honor has :43:50 sentenced the defendant to nearly ten years in prison, the

flight risk, of course, is greater than it ever was; and based on the seriousness of the crime, the seriousness of the sentence, the government would just urge, Your Honor, that she be remanded straightaway.

MR. KRETZER: May I respond briefly, Judge?

THE COURT: Just a minute.

MR. KRETZER: Sure.

THE COURT: Hasn't her passport been turned other?

PROBATION OFFICER: It should have been in -- it should be in the custody of Pretrial Services. I don't know for sure, but I would assume that it is.

THE COURT: Well, can you check on that and be sure?

PROBATION OFFICER: Yes, I can.

THE COURT: And what?

MR. KRETZER: Judge, very briefly. I was not representing Ms. Ainabe at the time that she was originally indicted. I would assume her passport was surrendered as in every other case.

With regard to -- I don't know anything about the wire transfer that Mr. Pennebaker just mentioned. If we were trying to -- if anyone was trying to hide money, I don't imagine a wire transfer would be a very effective way of doing that.

Also, Mr. Pennebaker said that these heightened suspicions arose back in March of this year, but when he spoke

just a little while ago, he said that they had never mentioned or even noticed anything about the sale of the home until just before today's hearing began. So, I'm not sure those two things can be completely consistent, without reiterating the points you've heard.

THE COURT: Why can't you alert Customs or Border Parole or Homeland Security and give the information, so if she goes through a border point, she'll be stopped?

MR. PENNEBAKER: Judge, we do that. I mean, the sort of sad fact of it is, that there are stopgaps that you can put in place, an ankle monitor notifying Homeland Security, that be on the lookout for plane tickets and purchases. But as Your Honor may know, ankle monitoring is a far from perfect, more of a -- well, I wouldn't say more of an art than a science, but there are often problems with the ankle monitor.

There was a defendant in one of these health care cases that fled to Cameroon on the day of the sentence. He had an ankle monitor and was on home confinement. So, there are those things and also these be on the lookouts. First of all, one can obtain a fraudulent passport and buy a ticket under that name. That's something that you can still do and you can still get away with it. That's how the Cameroonian defendant was able to leave the country. And these metrics -- or these mechanisms that we have to prevent flight are imperfect.

So, out of an abundance of caution and given that

the Court has, again, sentenced the defendant and the burden is on the defendant after conviction to show why she should be able -- allowed to remain free, the government would just strongly urge that she be remanded at this time.

THE COURT: All right. Just a moment.

18, United States Code -- 18, United States Code, Section 3143(b) says, "Except as provided in Paragraph 2, the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment and who has filed an appeal or a petition for writ of certiorari be detained unless the judicial officer finds (A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community and then (B) that the appeal is not for purpose of delay."

I'm not in a position to address the B factors. But I am persuaded that the defendant has not shown by clear and convincing evidence that she is not likely to flee. So, I'm going to change my mind. You're remanded to the custody of the marshal.

Court is adjourned.

(Concluded at 2:48 p.m.)

* * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled cause, to the best

of my ability.

/s/ Kathy L. Metzger
Kathy L. Metzger
Official Court Reporter

10-15-2018
Date

APPENDIX C

A-33

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-20689

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

MERCY O. AINABE,

Defendant - Appellant

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

ON PETITION FOR REHEARING EN BANC

(Opinion September 13, 2019, 5 Cir., _____, _____ F.3d _____)

Before OWEN, Chief Judge, SMITH, and DENNIS, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court

having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Priscilla R. Owen

UNITED STATES CIRCUIT JUDGE

APPENDIX D

A-35

United States Code Annotated
Federal Sentencing Guidelines (Refs & Annos)
Chapter Two. Offense Conduct (Refs & Annos)
Part B. Basic Economic Offenses
1. Theft, Embezzlement, Receipt of Stolen Property, Property Destruction, and Offenses Involving Fraud or Deceit (Refs & Annos)

USSG, § 2B1.1, 18 U.S.C.A.

§ 2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

Currentness

(a) Base Offense Level:

(1) 7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or

(2) 6, otherwise.

(b) Specific Offense Characteristics

(1) If the loss exceeded $6,500, increase the offense level as follows:

Loss (apply the greatest)	Increase in Level
(A) $6,500 or less	no increase
(B) More than $6,500	add 2
(C) More than $15,000	add 4
(D) More than $40,000	add 6
(E) More than $95,000	add 8
(F) More than $150,000	add 10
(G) More than $250,000	add 12
(H) More than $550,000	add 14

(I) More than $1,500,000 ..... add 16

(J) More than $3,500,000 ..... add 18

(K) More than $9,500,000 ..... add 20

(L) More than $25,000,000 ..... add 22

(M) More than $65,000,000 ..... add 24

(N) More than $150,000,000 ..... add 26

(O) More than $250,000,000 ..... add 28

(P) More than $550,000,000 ..... add 30.

(2) (Apply the greatest) If the offense--

(A)(i) involved 10 or more victims; (ii) was committed through mass-marketing; or (iii) resulted in substantial financial hardship to one or more victims, increase by 2 levels;

(B) resulted in substantial financial hardship to five or more victims, increase by 4 levels; or

(C) resulted in substantial financial hardship to 25 or more victims, increase by 6 levels.

(3) If the offense involved a theft from the person of another, increase by 2 levels.

(4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by 2 levels.

(5) If the offense involved theft of, damage to, destruction of, or trafficking in, property from a national cemetery or veterans' memorial, increase by 2 levels.

(6) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1037; and (B) the offense involved obtaining electronic mail addresses through improper means, increase by 2 levels.

(7) If (A) the defendant was convicted of a Federal health care offense involving a Government health care program; and (B) the loss under subsection (b)(1) to the Government health care program was (i) more than $1,000,000, increase by 2 levels; (ii) more than $7,000,000, increase by 3 levels; or (iii) more than $20,000,000, increase by 4 levels.

(8) (Apply the greater) If--

(A) the offense involved conduct described in 18 U.S.C. § 670, increase by 2 levels; or

(B) the offense involved conduct described in 18 U.S.C. § 670, and the defendant was employed by, or was an agent of, an organization in the supply chain for the pre-retail medical product, increase by 4 levels.

(9) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

(10) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(11) If the offense involved (A) the possession or use of any (i) device-making equipment, or (ii) authentication feature; (B) the production or trafficking of any (i) unauthorized access device or counterfeit access device, or (ii) authentication feature; or (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification, or (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(12) If the offense involved conduct described in 18 U.S.C. § 1040, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(13) If the defendant was convicted under 42 U.S.C. 408(a), 1011(a), or 1383a(a) and the statutory maximum term of ten years' imprisonment applies, increase by 4 levels. If the resulting offense level is less than 12, increase to level 12.

(14) (Apply the greater) If the offense involved misappropriation of a trade secret and the defendant knew or intended--

(A) that the trade secret would be transported or transmitted out of the United States, increase by 2 levels; or

(B) that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by 4 levels.

If subparagraph (B) applies and the resulting offense level is less than level 14, increase to level 14.

(15) If the offense involved an organized scheme to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

(16) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

(17) (Apply the greater) If--

(A) the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by 2 levels; or

(B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; or (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had 1,000 or more employees, increase by 4 levels.

(C) The cumulative adjustments from application of both subsections (b)(2) and (b)(17)(B) shall not exceed 8 levels, except as provided in subdivision (D).

(D) If the resulting offense level determined under subdivision (A) or (B) is less than level 24, increase to level 24.

(18) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1030, and the offense involved an intent to obtain personal information, or (B) the offense involved the unauthorized public dissemination of personal information, increase by 2 levels.

(19)(A) (Apply the greatest) If the defendant was convicted of an offense under:

(i)18 U.S.C. § 1030, and the offense involved a computer system used to maintain or operate a critical infrastructure, or used by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by 2 levels.

(ii)18 U.S.C. § 1030(a)(5)(A), increase by 4 levels.

(iii)18 U.S.C. § 1030, and the offense caused a substantial disruption of a critical infrastructure, increase by 6 levels.

(B) If subdivision (A)(iii) applies, and the offense level is less than level 24, increase to level 24.

(20) If the offense involved--

(A) a violation of securities law and, at the time of the offense, the defendant was (i) an officer or a director of a publicly traded company; (ii) a registered broker or dealer, or a person associated with a broker or dealer; or (iii) an investment adviser, or a person associated with an investment adviser; or

(B) a violation of commodities law and, at the time of the offense, the defendant was (i) an officer or a director of a futures commission merchant or an introducing broker; (ii) a commodities trading advisor; or (iii) a commodity pool operator,

increase by 4 levels.

(c) Cross References

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of any such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), § 2D2.1 (Unlawful Possession; Attempt or Conspiracy), § 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate.

(2) If the offense involved arson, or property damage by use of explosives, apply § 2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.

(3) If (A) neither subdivision (1) nor (2) of this subsection applies; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (e.g., 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and (C) the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.

(4) If the offense involved a cultural heritage resource or a paleontological resource, apply § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources), if the resulting offense level is greater than that determined above.

CREDIT(S)

(Effective November 1, 1987; amended effective June 15, 1988; November 1, 1989; November 1, 1990; November 1, 1991; November 1, 1993; November 1, 1995; November 1, 1997; November 1, 1998; November 1, 2000; November 1, 2001; November 1, 2002; January 25, 2003; November 1, 2003; November 1, 2004; November 1, 2005; November 1, 2006; November 1, 2007; February 6, 2008; November 1, 2008; November 1, 2009; November 1, 2010; November 1, 2011; November 1, 2012; November 1, 2013; November 1, 2015; November 1, 2018.)

COMMENTARY

<**Statutory Provisions:**7 U.S.C. §§ 6, 6b, 6c, 6h, 6*o*, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644, 6821; 18 U.S.C. §§ 38, 225, 285-289, 471-473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 664, 1001-1008, 1010-1014, 1016-1022, 1025, 1026, 1028, 1029, 1030(a)(4)-(5), 1031, 1037, 1040, 1341-1344, 1348, 1350, 1361, 1363, 1369, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail, is involved), 1708, 1831,

1832, 1992(a)(1), (a)(5), 2113(b), 2282A, 2282B, 2291, 2312-2317, 2332b(a)(1), 2701; 19 U.S.C. § 2401f; 29 U.S.C. § 501(c); 42 U.S.C. § 1011; 49 U.S.C. §§ 14915, 30170, 46317(a), 60123(b). For additional statutory provision(s) see Appendix A (Statutory Index).>

<**Application Notes**>

<**1. Definitions.**--For purposes of this guideline:>

<"Cultural heritage resource" has the meaning given that term in Application Note 1 of the Commentary to § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources).>

<"Equity securities" has the meaning given that term in section 3(a)(11) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(11)).>

<"Federal health care offense" has the meaning given that term in 18 U.S.C. § 24.>

<"Financial institution" includes any institution described in 18 U.S.C. § 20, § 656, § 657, § 1005, § 1006, § 1007, or § 1014; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical, or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. "Union or employee pension fund" and "any health, medical, or hospital insurance association," primarily include large pension funds that serve many persons (e.g., pension funds or large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.>

<"Firearm" and "destructive device" have the meaning given those terms in the Commentary to § 1B1.1 (Application Instructions).>

<"Foreign instrumentality" and "foreign agent" have the meaning given those terms in 18 U.S.C. § 1839(1) and (2), respectively.>

<"Government health care program" means any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by federal or state government. Examples of such programs are the Medicare program, the Medicaid program, and the CHIP program.>

<"Means of identification" has the meaning given that term in 18 U.S.C. § 1028(d)(7), except that such means of identification shall be of an actual (i.e., not fictitious) individual, other than the defendant or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct).>

<"National cemetery" means a cemetery (A) established under section 2400 of title 38, United States Code; or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.>

<"Paleontological resource" has the meaning given that term in Application Note 1 of the Commentary to § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources).>

<"Personal information" means sensitive or private information involving an identifiable individual (including such information in the possession of a third party), including (A) medical records; (B) wills; (C) diaries; (D) private correspondence, including e-mail; (E) financial records; (F) photographs of a sensitive or private nature; or (G) similar information.>

<"Pre-retail medical product" has the meaning given that term in 18 U.S.C. § 670(e).>

<"Publicly traded company" means an issuer (A) with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78*l*); or (B) that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78*o*(d)). "Issuer" has the meaning given that term in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. § 78c).>

<"Supply chain" has the meaning given that term in 18 U.S.C. § 670(e).>

<"Theft from the person of another" means theft, without the use of force, of property that was being held by another person or was within arms' reach. Examples include pick-pocketing and non-forcible purse-snatching, such as the theft of a purse from a shopping cart.>

<"Trade secret" has the meaning given that term in 18 U.S.C. § 1839(3).>

<"Veterans' memorial" means any structure, plaque, statue, or other monument described in 18 U.S.C. § 1369(a).>

<"Victim" means (A) any person who sustained any part of the actual loss determined under subsection (b)(1); or (B) any individual who sustained bodily injury as a result of the offense. "Person" includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.>

<2. Application of Subsection (a)(1).-->

<(A) "Referenced to this Guideline".--For purposes of subsection (a)(1), an offense is "referenced to this guideline" if (i) this guideline is the applicable Chapter Two guideline specifically referenced in Appendix A (Statutory Index) for the offense of conviction, as determined under the provisions of § 1B1.2 (Applicable Guidelines); or (ii) in the case of a conviction for conspiracy, solicitation, or attempt to which § 2X1.1 (Attempt, Solicitation, or Conspiracy) applies, this guideline is the appropriate guideline for the offense the defendant was convicted of conspiring, soliciting, or attempting to commit.>

<(B) Definition of "Statutory Maximum Term of Imprisonment."--For purposes of this guideline, "statutory maximum term of imprisonment" means the maximum term of imprisonment authorized for the offense of conviction, including any increase in that maximum term under a statutory enhancement provision.>

<(C) Base Offense Level Determination for Cases Involving Multiple Counts.--In a case involving multiple counts sentenced under this guideline, the applicable base offense level is determined by the count of conviction that provides the highest statutory maximum term of imprisonment.>

<3. Loss Under Subsection (b)(1).--This application note applies to the determination of loss under subsection (b)(1).>

<(A) General Rule.--Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.>

<(i) Actual Loss.--"Actual loss" means the reasonably foreseeable pecuniary harm that resulted from the offense.>

<**(ii) Intended Loss.**--"Intended loss" (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).>

<**(iii) Pecuniary Harm.**--"Pecuniary harm" means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.>

<**(iv) Reasonably Foreseeable Pecuniary Harm.**--For purposes of this guideline, "reasonably foreseeable pecuniary harm" means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.>

<**(v) Rules of Construction in Certain Cases.**--In the cases described in subdivisions (I) through (III), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:>

<**(I) Product Substitution Cases.**--In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim's business operations caused by the product substitution.>

<**(II) Procurement Fraud Cases.**--In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correct the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.>

<**(III) Offenses Under 18 U.S.C. § 1030.**--In the case of an offense under 18 U.S.C. § 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: Any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.>

<**(B) Gain.**--The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.>

<**(C) Estimation of Loss.**--The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).>

<The estimate of the loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances, factors such as the following:>

<**(i)** The fair market value of the property unlawfully taken, copied, or destroyed; or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property.>

<**(ii)** In the case of proprietary information (e.g., trade secrets), the cost of developing that information or the reduction in the value of that information that resulted from the offense.>

<**(iii)** The cost of repairs to damaged property.>

<**(iv)** The approximate number of victims multiplied by the average loss to each victim.>

<**(v)** The reduction that resulted from the offense in the value of equity securities or other corporate assets.>

<**(vi)** More general factors, such as the scope and duration of the offense and revenues generated by similar operations.>

<**(D) Exclusions from Loss.--**Loss shall not include the following:>

<**(i)** Interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs.>

<**(ii)** Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense.>

<**(E) Credits Against Loss.--**Loss shall be reduced by the following:>

<**(i)** The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency.>

<**(ii)** In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.>

<**(iii)** Notwithstanding clause (ii), in the case of a fraud involving a mortgage loan, if the collateral has not been disposed of by the time of sentencing, use the fair market value of the collateral as of the date on which the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.>

<In such a case, there shall be a rebuttable presumption that the most recent tax assessment value of the collateral is a reasonable estimate of the fair market value. In determining whether the most recent tax assessment value is a reasonable estimate of the fair market value, the court may consider, among other factors, the recency of the tax assessment and the extent to which the jurisdiction's tax assessment practices reflect factors not relevant to fair market value.>

<**(F) Special Rules.--**Notwithstanding subdivision (A), the following special rules shall be used to assist in determining loss in the cases indicated:>

<**(i) Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes.--**In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device and shall be not less than $500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/ mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the

commission of the offense, loss shall be not less than $100 per unused means. For purposes of this subdivision, "counterfeit access device" and "unauthorized access device" have the meaning given those terms in Application Note 10(A).>

<**(ii) Government Benefits.**--In a case involving government benefits (e.g., grants, loans, entitlement program payments), loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be. For example, if the defendant was the intended recipient of food stamps having a value of $100 but fraudulently received food stamps having a value of $150, loss is $50.>

<**(iii) Davis-Bacon Act Violations.**--In a case involving a Davis-Bacon Act violation (i.e., a violation of 40 U.S.C. § 3142, criminally prosecuted under 18 U.S.C. § 1001), the value of the benefits shall be considered to be not less than the difference between the legally required wages and actual wages paid.>

<**(iv) Ponzi and Other Fraudulent Investment Schemes.**--In a case involving a fraudulent investment scheme, such as a Ponzi scheme, loss shall not be reduced by the money or the value of the property transferred to any individual investor in the scheme in access of that investor's principal investment (i.e., the gain to an individual investor in the scheme shall not be used to offset the loss to another individual investor in the scheme).>

<**(v) Certain Other Unlawful Misrepresentation Schemes.**--In a case involving a scheme in which (I) services were fraudulently rendered to the victim by persons falsely posing as licensed professionals; (II) goods were falsely represented as approved by a governmental regulatory agency; or (III) goods for which regulatory approval by a government agency was required but not obtained, or was obtained by fraud, loss shall include the amount paid for the property, services or goods transferred, rendered, or misrepresented, with no credit provided for the value of those items or services.>

<**(vi) Value of Controlled Substances.**--In a case involving controlled substances, loss is the estimated street value of the controlled substances.>

<**(vii) Value of Cultural Heritage Resources or Paleontological Resources.**--In a case involving a cultural heritage resource or paleontological resource, loss attributable to that resource shall be determined in accordance with the rules for determining the "value of the resource" set forth in Application Note 2 of the Commentary to § 2B1.5.>

<**(viii) Federal Health Care Offenses Involving Government Health Care Programs.**--In a case in which the defendant is convicted of a Federal health care offense involving a Government health care program, the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss, *i.e.*, is evidence sufficient to establish the amount of the intended loss, if not rebutted.>

<**(ix) Fraudulent Inflation or Deflation in Value of Securities or Commodities.**--In a case involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity, the court in determining loss may use any method that is appropriate and practicable under the circumstances. One such method the court may consider is a method under which the actual loss attributable to the change in value of the security or commodity is the amount determined by-->

<**(I)** calculating the difference between the average price of the security or commodity during the period that the fraud occurred and the average price of the security or commodity during the 90-day period after the fraud was disclosed to the market, and>

<**(II)** multiplying the difference in average price by the number of shares outstanding.>

<In determining whether the amount so determined is a reasonable estimate of the actual loss attributable to the change in value of the security or commodity, the court may consider, among other factors, the extent to which the amount so determined includes significant changes in value not resulting from the offense (e.g., changes caused by external market forces, such as changed economic circumstances, changed investor expectations, and new industry-specific or firm-specific facts, conditions, or events).>

<4. Application of Subsection (b)(2).-->

<(A) Definition.--For purposes of subsection (b)(2), "mass-marketing" means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (i) purchase goods or services; (ii) participate in a contest or sweepstakes; or (iii) invest for financial profit. "Mass-marketing" includes, for example, a telemarketing campaign that solicits a large number of individuals to purchase fraudulent life insurance policies.>

<(B) Applicability to Transmission of Multiple Commercial Electronic Mail Messages.--For purposes of subsection (b)(2), an offense under 18 U.S.C. § 1037, or any other offense involving conduct described in 18 U.S.C. § 1037, shall be considered to have been committed through mass-marketing. Accordingly, the defendant shall receive at least a two-level enhancement under subsection (b)(2) and may, depending on the facts of the case, receive a greater enhancement under such subsection, if the defendant was convicted under, or the offense involved conduct described in, 18 U.S.C. § 1037.>

<(C) Undelivered United States Mail.-->

<(i) In General.--In a case in which undelivered United States mail was taken, or the taking of such item was an object of the offense, or in a case in which the stolen property received, transported, transferred, transmitted, or possessed was undelivered United States mail, "victim" means (I) any victim as defined in Application Note 1; or (II) any person who was the intended recipient, or addressee, of the undelivered United States mail.>

<(ii) Special Rule.--A case described in subdivision (C)(i) of this note that involved-->

<(I) a United States Postal Service relay box, collection box, delivery vehicle, satchel, or cart, shall be considered to have involved at least 10 victims.>

<(II) a housing unit cluster box or any similar receptacle that contains multiple mailboxes, whether such receptacle is owned by the United States Postal Service or otherwise owned, shall, unless proven otherwise, be presumed to have involved the number of victims corresponding to the number of mailboxes in each cluster box or similar receptacle.>

<(iii) Definition.--"Undelivered United States mail" means mail that has not actually been received by the addressee or the addressee's agent (e.g., mail taken from the addressee's mail box).>

<(D) Vulnerable Victims.--If subsection (b)(2)(B) or (C) applies, an enhancement under § 3A1.1(b)(2) shall not apply.>

<**(E) Cases Involving Means of Identification.**--For purposes of subsection (b)(2), in a case involving means of identification "victim" means (i) any victim as defined in Application Note 1; or (ii) any individual whose means of identification was used unlawfully or without authority.>

<**(F) Substantial Financial Hardship.**--In determining whether the offense resulted in substantial financial hardship to a victim, the court shall consider, among other factors, whether the offense resulted in the victim-->

<**(i)** becoming insolvent;>

<**(ii)** filing for bankruptcy under the Bankruptcy Code (title 11, United States Code);>

<**(iii)** suffering substantial loss of a retirement, education, or other savings or investment fund;>

<**(iv)** making substantial changes to his or her employment, such as postponing his or her retirement plans;>

<**(v)** making substantial changes to his or her living arrangements, such as relocating to a less expensive home; and>

<**(vi)** suffering substantial harm to his or her ability to obtain credit.>

<**5. Enhancement for Business of Receiving and Selling Stolen Property under Subsection (b)(4).**--For purposes of subsection (b)(4), the court shall consider the following non-exhaustive list of factors in determining whether the defendant was in the business of receiving and selling stolen property:>

<**(A)** The regularity and sophistication of the defendant's activities.>

<**(B)** The value and size of the inventory of stolen property maintained by the defendant.>

<**(C)** The extent to which the defendant's activities encouraged or facilitated other crimes.>

<**(D)** The defendant's past activities involving stolen property.>

<**6. Application of Subsection (b)(6).**--For purposes of subsection (b)(6), "improper means" includes the unauthorized harvesting of electronic mail addresses of users of a website, proprietary service, or other online public forum.>

<**7. Application of Subsection (b)(8)(B).**--If subsection (b)(8)(B) applies, do not apply an adjustment under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).>

<**8. Application of Subsection (b)(9).**-->

<**(A) In General.**--The adjustments in subsection (b)(9) are alternative rather than cumulative. If, in a particular case, however, more than one of the enumerated factors applied, an upward departure may be warranted.>

<**(B) Misrepresentations Regarding Charitable and Other Institutions.**--Subsection (b)(9)(A) applies in any case in which the defendant represented that the defendant was acting to obtain a benefit on behalf of a charitable educational, religious, or political organization, or a government agency (regardless of whether the defendant actually was associated with the organization or government agency) when, in fact, the defendant intended to divert

all or part of that benefit (e.g., for the defendant's personal gain). Subsection (b)(9)(A) applies, for example, to the following:>

<**(i)** A defendant who solicited contributions for a non-existent famine relief organization.>

<**(ii)** A defendant who solicited donations from church members by falsely claiming to be a fundraiser for a religiously affiliated school.>

<**(iii)** A defendant, chief of a local fire department, who conducted a public fundraiser representing that the purpose of the fundraiser was to procure sufficient funds for a new fire engine when, in fact, the defendant intended to divert some of the funds for the defendant's personal benefit.>

<**(C) Fraud in Contravention of Prior Judicial Order.**--Subsection (b)(9)(C) provides an enhancement if the defendant commits a fraud in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. A defendant who does not comply with such a prior, official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment. If it is established that an entity the defendant controlled was a party to the prior proceeding that resulted in the official judicial or administrative action, and the defendant had knowledge of that prior decree or order, this enhancement applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business previously was enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, is subject to this enhancement. This enhancement does not apply if the same conduct resulted in an enhancement pursuant to a provision found elsewhere in the guidelines (e.g., a violation of a condition of release addressed in § 3C1.3 (Commission of Offense While on Release) or a violation of probation addressed in § 4A1.1 (Criminal History Category)).>

<**(D) College Scholarship Fraud.**--For purposes of subsection (b)(9)(D):>

<"Financial assistance" means any scholarship, grant, loan, tuition, discount, award, or other financial assistance for the purpose of financing an education.>

<"Institution of higher education" has the meaning given that term in section 101 of the Higher Education Act of 1954 (20 U.S.C. § 1001).>

<**(E) Non-Applicability of Chapter Three Adjustments.**-->

<**(i) Subsection (b)(9)(A).**--If the conduct that forms the basis for an enhancement under subsection (b)(9)(A) is the only conduct that forms the basis for an adjustment under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill), do not apply that adjustment under § 3B1.3.>

<**(ii) Subsection (b)(9)(B) and (C).**--If the conduct that forms the basis for an enhancement under subsection (b)(9)(B) or (C) is the only conduct that forms the basis for an adjustment under § 3C1.1 (Obstructing or Impeding the Administration of Justice), do not apply that adjustment under § 3C1.1.>

<**9. Application of Subsection (b)(10).**-->

<**(A) Definition of United States.**--For purposes of subsection (b)(10)(B), "United States" means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.>

<**(B) Sophisticated Means Enhancement under Subsection (b)(10)(C).**--For purposes of subsection (b)(10)(C), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means.>

<**(C) Non-Applicability of Chapter Three Adjustment.**--If the conduct that forms the basis for an enhancement under subsection (b)(10) is the only conduct that forms the basis for an adjustment under § 3C1.1, do not apply that adjustment under § 3C1.1.>

<**10. Application of Subsection (b)(11).**-->

<**(A) Definitions.**--For purposes of subsection (b)(11):>

<"Authentication feature" has the meaning given that term in 18 U.S.C. § 1028(d)(1).>

<"Counterfeit access device" (i) has the meaning given that term in 18 U.S.C. § 1029(e)(2); and (ii) includes a telecommunications instrument that has been modified or altered to obtain unauthorized use of telecommunications service.>

<"Device-making equipment" (i) has the meaning given that term in 18 U.S.C. § 1029(e)(6); and (ii) includes (I) any hardware or software that has been configured as described in 18 U.S.C. § 1029(a)(9); and (II) a scanning receiver referred to in 18 U.S.C. § 1029(a)(8). "Scanning receiver" has the meaning given that term in 18 U.S.C. § 1029(e)(8).>

<"Produce" includes manufacture, design, alter, authenticate, duplicate, or assemble. "Production" includes manufacture, design, alteration, authentication, duplication, or assembly.>

<"Telecommunications service" has the meaning given that term in 18 U.S.C. § 1029(e)(9).>

<"Unauthorized access device" has the meaning given that term in 18 U.S.C. § 1029(e)(3).>

<**(B) Authentication Features and Identification Documents.**--Offenses involving authentication features, identification documents, false identification documents, and means of identification, in violation of 18 U.S.C. § 1028, also are covered by this guideline. If the primary purpose of the offense, under 18 U.S.C. § 1028, was to violate, or assist another to violate, the law pertaining to naturalization, citizenship, or legal resident status, apply § 2L2.1 (Trafficking in a Document Relating to Naturalization) or § 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization), as appropriate, rather than this guideline.>

<**(C) Application of Subsection (b)(11)(C)(i).**-->

<**(i) In General.**--Subsection (b)(11)(C)(i) applies in a case in which a means of identification of an individual other than the defendant (or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct)) is used without that individual's authorization unlawfully to produce or obtain another means of identification.>

<**(ii) Examples.**--Examples of conduct to which subsection (b)(11)(C)(i) applies are as follows:>

<**(I)** A defendant obtains an individual's name and social security number from a source (e.g., from a piece of mail taken from the individual's mailbox) and obtains a bank loan in that individual's name. In this example, the account number of the bank loan is the other means of identification that has been obtained unlawfully.>

<**(II)** A defendant obtains an individual's name and address from a source (e.g., from a driver's license in a stolen wallet) and applies for, obtains, and subsequently uses a credit card in that individual's name. In this example, the credit card is the other means of identification that has been obtained unlawfully.>

<**(iii) Non-applicability of Subsection (b)(11)(C)(i).**--Examples of conduct to which subsection (b)(11)(C)(i) does not apply are as follows:>

<**(I)** A defendant uses a credit card from a stolen wallet only to make a purchase. In such a case, the defendant has not used the stolen credit card to obtain another means of identification.>

<**(II)** A defendant forges another individual's signature to cash a stolen check. Forging another individual's signature is not producing another means of identification.>

<**(D) Application of Subsection (b)(11)(C)(ii).**--Subsection (b)(11)(C)(ii) applies in any case in which the offense involved the possession of 5 or more means of identification that unlawfully were produced or obtained, regardless of the number of individuals in whose name (or other identifying information) the means of identification were so produced or so obtained.>

<**11. Interaction of Subsection (b)(13) and § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).**--If subsection (b)(13) applies, do not apply § 3B1.3.>

<**12. Application of Subsection (b)(15).**--Subsection (b)(15) provides a minimum offense level in the case of an ongoing, sophisticated operation (e.g., an auto theft ring or "chop shop") to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment. For purposes of this subsection, "vehicle" means motor vehicle, vessel, or aircraft. A "cargo shipment" includes cargo transported on a railroad car, bus, steamboat, vessel, or airplane.>

<**13. Gross Receipts Enhancement under Subsection (b)(17)(A).**-->

<**(A) In General.**--For purposes of subsection (b)(17)(A), the defendant shall be considered to have derived more than $1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded $1,000,000.>

<**(B) Definition.**--"Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).>

<**14. Application of Subsection (b)(17)(B).**-->

<**(A) Application of Subsection (b)(17)(B)(i).**--The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the safety and soundness of a financial institution was substantially jeopardized:>

<**(i)** The financial institution became insolvent.>

<**(ii)** The financial institution substantially reduced benefits to pensioners or insureds.>

<**(iii)** The financial institution was unable on demand to refund fully any deposit, payment, or investment.>

<**(iv)** The financial institution was so depleted of its assets as to be forced to merge with another institution in order to continue active operations.>

<**(v)** One or more of the criteria in clauses (i) through (iv) was likely to result from the offense but did not result from the offense because of federal government intervention, such as a "bailout".>

<**(B) Application of Subsection (b)(17)(B)(ii).**-->

<**(i) Definition.**--For purposes of this subsection, "organization" has the meaning given that term in Application Note 1 of § 8A1.1 (Applicability of Chapter Eight).>

<**(ii) In General.**--The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the solvency or financial security of an organization that was a publicly traded company or that had more than 1,000 employees was substantially endangered:>

<**(I)** The organization became insolvent or suffered a substantial reduction in the value of its assets.>

<**(II)** The organization filed for bankruptcy under Chapters 7, 11, or 13 of the Bankruptcy Code (title 11, United States Code).>

<**(III)** The organization suffered a substantial reduction in the value of its equity securities or the value of its employee retirement accounts.>

<**(IV)** The organization substantially reduced its workforce.>

<**(V)** The organization substantially reduced its employee pension benefits.>

<**(VI)** The liquidity of the equity securities of a publicly traded company was substantially endangered. For example, the company was delisted from its primary listing exchange, or trading of the company's securities was halted for more than one full trading day.>

<**(VII)** One or more of the criteria in subclauses (I) through (VI) was likely to result from the offense but did not result from the offense because of federal government intervention, such as a "bailout".>

<**15. Application of Subsection (b)(19).**-->

<**(A) Definitions.**--For purposes of subsection (b)(19):>

<"Critical infrastructure" means systems and assets vital to national defense, national security, economic security, public health or safety, or any combination of those matters. A critical infrastructure may be publicly or privately owned. Examples of critical infrastructures include gas and oil production, storage, and delivery systems, water supply systems, telecommunications networks, electrical power delivery systems, financing and banking systems, emergency services (including medical, police, fire, and rescue services), transportation systems and services

(including highways, mass transit, airlines, and airports), and government operations that provide essential services to the public.>

<"Government entity" has the meaning given that term in 18 U.S.C. § 1030(e)(9).>

<**(B) Subsection (b)(19)(A)(iii).**--If the same conduct that forms the basis for an enhancement under subsection (b)(19)(A)(iii) is the only conduct that forms the basis for an enhancement under subsection (b)(17)(B), do not apply the enhancement under subsection (b)(17)(B).>

<**16. Application of Subsection (b)(20).**-->

<**(A) Definitions.**--For purposes of subsection (b)(20):>

<"Commodities law" means (i) the Commodity Exchange Act (7 U.S.C. § 1 et seq.) and 18 U.S.C. § 1348; and (ii) includes the rules, regulations, and orders issued by the Commodity Futures Trading Commission.>

<"Commodity pool operator" has the meaning given that term in section 1a(11) of the Commodity Exchange Act (7 U.S.C. § 1a(11)).>

<"Commodity trading advisor" has the meaning given that term in section 1a(12) of the Commodity Exchange Act (7 U.S.C. § 1a(12)).>

<"Futures commission merchant" has the meaning given that term in section 1a(28) of the Commodity Exchange Act (7 U.S.C. § 1a(28)).>

<"Introducing broker" has the meaning given that term in section 1a(31) of the Commodity Exchange Act (7 U.S.C. § 1a(31)).>

<"Investment adviser" has the meaning given that term in section 202(a)(11) of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-2(a)(11)).>

<"Person associated with a broker or dealer" has the meaning given that term in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(18)).>

<"Person associated with an investment adviser" has the meaning given that term in section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-2(a)(17)).>

<"Registered broker or dealer" has the meaning given that term in section 3(a)(48) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(48)).>

<"Securities law" (i) means 18 U.S.C. §§ 1348, 1350, and the provisions of law referred to in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(47)); and (ii) includes the rules, regulations, and orders issued by the Securities and Exchange Commission pursuant to the provisions of law referred to in such section.>

<**(B) In General.**--A conviction under a securities law or commodities law is not required in order for subsection (b)(20) to apply. This subsection would apply in the case of a defendant convicted under a general fraud statute if the defendant's conduct violated a securities law or commodities law. For example, this subsection would apply if an officer of a publicly traded company violated regulations issued by the Securities and Exchange Commission by

fraudulently influencing an independent audit of the company's financial statements for the purposes of rendering such financial statements materially misleading, even if the officer is convicted only of wire fraud.>

<**(C) Nonapplicability of § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).**--If subsection (b)(20) applies, do not apply § 3B1.3.>

<**17. Cross Reference in Subsection (c)(3).**--Subsection (c)(3) provides a cross reference to another guideline in Chapter Two (Offense Conduct) in cases in which the defendant is convicted of a general fraud statute, and the count of conviction establishes an offense involving fraudulent conduct that is more aptly covered by another guideline. Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. § 1001, or similarly general statute, although the offense involves fraudulent conduct that is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which § 2S1.3 (Structuring Transactions to Evade Reporting Requirements) likely would be more apt, and false statements to a customs officer, for which § 2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property) likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state employee who improperly influenced the award of a contract and used the mails to commit the offense may be prosecuted under 18 U.S.C. § 1341 for fraud involving the deprivation of the intangible right of honest services. Such a case would be more aptly sentenced pursuant to § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions).>

<**18. Continuing Financial Crimes Enterprise.**--If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the "continuing financial crimes enterprise".>

<**19. Partially Completed Offenses.**--In the case of a partially completed offense (e.g., an offense involving a completed theft or fraud that is part of a larger, attempted theft or fraud), the offense level is to be determined in accordance with the provisions of § 2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. See Application Note 4 of the Commentary to § 2X1.1.>

<**20. Multiple-Count Indictments.**--Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction. See Chapter Three, Part D (Multiple Counts).>

<**21. Departure Considerations.**-->

<**(A) Upward Departure Considerations.**--There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:>

<**(i)** A primary objective of the offense was an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm.>

<**(ii)** The offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest (through, for example, the theft of personal information such as medical, educational, or financial records).>

<An upward departure would be warranted, for example, in an 18 U.S.C. § 1030 offense involving damage to a protected computer, if, as a result of that offense, death resulted.>

<An upward departure also would be warranted, for example, in a case involving animal enterprise terrorism under 18 U.S.C. § 43, if, in the course of the offense, serious bodily injury or death resulted, or substantial scientific research or information were destroyed.>

<Similarly, an upward departure would be warranted in a case involving conduct described in 18 U.S.C. § 670 if the offense resulted in serious bodily injury or death, including serious bodily injury or death resulting from the use of the pre-retail medical product.>

<**(iii)** The offense involved a substantial amount of interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs, not included in the determination of loss for purposes of subsection (b)(1).>

<**(iv)** The offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1), such as a risk of a significant disruption of a national financial market.>

<**(v)** In a case involving stolen information from a "protected computer", as defined in 18 U.S.C. § 1030(e)(2), the defendant sought the stolen information to further a broader criminal purpose.>

<**(vi)** In a case involving access devices or unlawfully produced or unlawfully obtained means of identification:>

<**(I)** The offense caused substantial harm to the victim's reputation, or the victim suffered a substantial inconvenience related to repairing the victim's reputation.>

<**(II)** An individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in that individual's name.>

<**(III)** The defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual's identity.>

<**(B) Upward Departure for Debilitating Impact on a Critical Infrastructure.**--An upward departure would be warranted in a case in which subsection (b)(19)(A)(iii) applies and the disruption to the critical infrastructure(s) is so substantial as to have a debilitating impact on national security, national economic security, national public health or safety, or any combination of those matters.>

<**(C) Downward Departure Consideration.**--There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.>

<For example, a securities fraud involving a fraudulent statement made publicly to the market may produce an aggregate loss amount that is substantial but diffuse, with relatively small loss amounts suffered by a relatively large number of victims. In such a case, the loss table in subsection (b)(1) and the victims table in subsection (b)(2) may combine to produce an offense level that substantially overstates the seriousness of the offense. If so, a downward departure may be warranted.>

<**(D) Downward Departure for Major Disaster or Emergency Victims.--**If (i) the minimum offense level of level 12 in subsection (b)(12) applies; (ii) the defendant sustained damage, loss, hardship, or suffering caused by a major disaster or an emergency as those terms are defined in 42 U.S.C. § 5122; and (iii) the benefits received illegally were only an extension or overpayment of benefits received legitimately, a downward departure may be warranted.>

<**Background:** This guideline covers offenses involving theft, stolen property, property damage or destruction, fraud, forgery, and counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United States).>

<Because federal fraud statutes often are broadly written, a single pattern of offense conduct usually can be prosecuted under several code sections, as a result of which the offense of conviction may be somewhat arbitrary. Furthermore, most fraud statutes cover a broad range of conduct with extreme variation in severity. The specific offense characteristics and cross references contained in this guideline are designed with these considerations in mind.>

<The Commission has determined that, ordinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the loss caused or intended by their crimes. Accordingly, along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under this guideline.>

<Theft from the person of another, such as pickpocketing or non-forcible purse-snatching, receives an enhanced sentence because of the increased risk of physical injury. This guideline does not include an enhancement for thefts from the person by means of force or fear; such crimes are robberies and are covered under § 2B3.1 (Robbery).>

<A minimum offense level of level 14 is provided for offenses involving an organized scheme to steal vehicles or vehicle parts. Typically, the scope of such activity is substantial, but the value of the property may be particularly difficult to ascertain in individual cases because the stolen property is rapidly resold or otherwise disposed of in the course of the offense. Therefore, the specific offense characteristic of "organized scheme" is used as an alternative to "loss" in setting a minimum offense level.>

<Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or the generosity and charitable motives of victims. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct; rather, defendants who exploit victims' charitable impulses or trust in government create particular social harm. In a similar vein, a defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.>

<Offenses that involve the use of financial transactions or financial accounts outside the United States in an effort to conceal illicit profits and criminal conduct involve a particularly high level of sophistication and complexity. These offenses are difficult to detect and require costly investigations and prosecutions. Diplomatic processes often must be used to secure testimony and evidence beyond the jurisdiction of United States courts. Consequently, a minimum offense level of level 12 is provided for these offenses.>

<Subsection (b)(5) implements the instruction to the Commission in section 2 of Public Law 105-101 and the directive to the Commission in section 3 of Public Law 110-384.>

<Subsection (b)(7) implements the directive to the Commission in section 10606 of Public Law 111-148.>

<Subsection (b)(8) implements the directive to the Commission in section 7 of Public Law 112-186.>

<Subsection (b)(9)(D) implements, in a broader form, the directive in section 3 of the College Scholarship Fraud Prevention Act of 2000, Public Law 106-420.>

<Subsection (b)(10) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105-184.>

<Subsections (b)(11)(A)(i) and (B)(i) implement the instruction to the Commission in section 4 of the Wireless Telephone Protection Act, Public Law 105-172.>

<Subsection (b)(11)(C) implements the directive to the Commission in section 4 of the Identity Theft and Assumption Deterrence Act of 1998, Public Law 105-318. This subsection focuses principally on an aggravated form of identity theft known as "affirmative identity theft" or "breeding", in which a defendant uses another individual's name, social security number, or some other form of identification (the "means of identification") to "breed" (i.e., produce or obtain) new or additional forms of identification. Because 18 U.S.C. § 1028(d) broadly defines "means of identification", the new or additional forms of identification can include items such as a driver's license, a credit card, or a bank loan. This subsection provides a minimum offense level of level 12, in part because of the seriousness of the offense. The minimum offense level accounts for the fact that the means of identification that were "bred" (i.e., produced or obtained) often are within the defendant's exclusive control, making it difficult for the individual victim to detect that the victim's identity has been "stolen." Generally, the victim does not become aware of the offense until certain harms have already occurred (e.g., a damaged credit rating or an inability to obtain a loan). The minimum offense level also accounts for the non-monetary harm associated with these types of offenses, much of which may be difficult or impossible to quantify (e.g., harm to the individual's reputation or credit rating, inconvenience, and other difficulties resulting from the offense). The legislative history of the Identity Theft and Assumption Deterrence Act of 1998 indicates that Congress was especially concerned with providing increased punishment for this type of harm.>

<Subsection (b)(12) implements the directive in section 5 of Public Law 110-179.>

<Subsection (b)(14) implements the directive in section 3 of Public Law 112-269.>

<Subsection (b)(16)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103-322.>

<Subsection (b)(17)(A) implements, in a broader form, the instruction to the Commission in section 2507 of Public Law 101-647.>

<Subsection (b)(17)(B)(i) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101-73.>

<Subsection (b)(18) implements the directive in section 209 of Public Law 110-326.>

<Subsection (b)(19) implements the directive in section 225(b) of Public Law 107-296. The minimum offense level of level 24 provided in subsection (b)(19)(B) for an offense that resulted in a substantial disruption of a critical infrastructure reflects the serious impact such an offense could have on national security, national economic security, national public health or safety, or a combination of any of these matters.>

Notes of Decisions (1225)

Federal Sentencing Guidelines, § 2B1.1, 18 U.S.C.A., FSG § 2B1.1
As amended to 3-16-20.

End of Document

APPENDIX E

A-57

United States Code Annotated
Federal Sentencing Guidelines (Refs & Annos)
Chapter One. Introduction, Authority, and General Application Principles (Refs & Annos)
Part B. General Application Principles

USSG, § 1B1.3, 18 U.S.C.A.

§ 1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

Currentness

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were--

(i) within the scope of the jointly undertaken criminal activity,

(ii) in furtherance of that criminal activity, and

(iii) reasonably foreseeable in connection with that criminal activity;

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

CREDIT(S)

(Effective November 1, 1987; amended effective January 15, 1988; November 1, 1989; November 1, 1990; November 1, 1991; November 1, 1992; November 1, 1994; November 1, 2001; November 1, 2004; November 1, 2010; November 1, 2015.)

COMMENTARY

<*Application Notes:*>

<**1. Sentencing Accountability and Criminal Liability.**--The principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability. Under subsections (a)(1) and (a)(2), the focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator.>

<**2. Accountability Under More Than One Provision.**--In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. If a defendant's accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established.>

<**3. Jointly Undertaken Criminal Activity (Subsection (a)(1)(B)).**-->

<**(A) In General.**--A "jointly undertaken criminal activity" is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.>

<In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was:>

<**(i)** within the scope of the jointly undertaken criminal activity;>

<**(ii)** in furtherance of that criminal activity; and>

<**(iii)** reasonably foreseeable in connection with that criminal activity.>

<The conduct of others that meets all three criteria set forth in subdivisions (i) through (iii) (i.e., "within the scope," "in furtherance," and "reasonably foreseeable") is relevant conduct under this provision. However, when the conduct of others does not meet any one of the criteria set forth in subdivisions (i) through (iii), the conduct is not relevant conduct under this provision.>

<**(B) Scope.**--Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the "jointly undertaken criminal activity" is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant's accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement). In doing so, the court may consider any explicit

agreement or implicit agreement fairly inferred from the conduct of the defendant and others. Accordingly, the accountability of the defendant for the acts of others is limited by the scope of his or her agreement to jointly undertake the particular criminal activity. Acts of others that were not within the scope of the defendant's agreement, even if those acts were known or reasonably foreseeable to the defendant, are not relevant conduct under subsection (a)(1)(B).>

<In cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the contraband that was the object of that jointly undertaken activity) may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities.>

<A defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct (e.g., in the case of a defendant who joins an ongoing drug distribution conspiracy knowing that it had been selling two kilograms of cocaine per week, the cocaine sold prior to the defendant joining the conspiracy is not included as relevant conduct in determining the defendant's offense level). The Commission does not foreclose the possibility that there may be some unusual set of circumstances in which the exclusion of such conduct may not adequately reflect the defendant's culpability; in such a case, an upward departure may be warranted.>

<**(C) In Furtherance.**--The court must determine if the conduct (acts and omissions) of others was in furtherance of the jointly undertaken criminal activity.>

<**(D) Reasonably Foreseeable.**--The court must then determine if the conduct (acts and omissions) of others that was within the scope of, and in furtherance of, the jointly undertaken criminal activity was reasonably foreseeable in connection with that criminal activity.>

<Note that the criminal activity that the defendant agreed to jointly undertake, and the reasonably foreseeable conduct of others in furtherance of that criminal activity, are not necessarily identical. For example, two defendants agree to commit a robbery and, during the course of that robbery, the first defendant assaults and injures a victim. The second defendant is accountable for the assault and injury to the victim (even if the second defendant had not agreed to the assault and had cautioned the first defendant to be careful not to hurt anyone) because the assaultive conduct was within the scope of the jointly undertaken criminal activity (the robbery), was in furtherance of that criminal activity (the robbery), and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).>

<With respect to offenses involving contraband (including controlled substances), the defendant is accountable under subsection (a)(1)(A) for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity under subsection (a)(1)(B), all quantities of contraband that were involved in transactions carried out by other participants, if those transactions were within the scope of, and in furtherance of, the jointly undertaken criminal activity and were reasonably foreseeable in connection with that criminal activity.>

<The requirement of reasonable foreseeability applies only in respect to the conduct (i.e., acts and omissions) of others under subsection (a)(1)(B). It does not apply to conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes; such conduct is addressed under subsection (a)(1)(A).>

<4. Illustrations of Conduct for Which the Defendant is Accountable under Subsections (a)(1)(A) and (B).-->

<(A) Acts and omissions aided or abetted by the defendant.-->

<**(i)** Defendant A is one of ten persons hired by Defendant B to off-load a ship containing marihuana. The off-loading of the ship is interrupted by law enforcement officers and one ton of marihuana is seized (the amount on the ship as well as the amount off-loaded). Defendant A and the other off-loaders are arrested and convicted of importation of marihuana. Regardless of the number of bales he personally unloaded, Defendant A is accountable for the entire one-ton quantity of marihuana. Defendant A aided and abetted the off-loading of the entire shipment of marihuana by directly participating in the off-loading of that shipment (i.e., the specific objective of the criminal activity he joined was the off-loading of the entire shipment). Therefore, he is accountable for the entire shipment under subsection (a)(1)(A) without regard to the issue of reasonable foreseeability. This is conceptually similar to the case of a defendant who transports a suitcase knowing that it contains a controlled substance and, therefore, is accountable for the controlled substance in the suitcase regardless of his knowledge or lack of knowledge of the actual type or amount of that controlled substance.>

<In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. As noted in the preceding paragraph, Defendant A is accountable for the entire one-ton shipment of marihuana under subsection (a)(1)(A). Defendant A also is accountable for the entire one-ton shipment of marihuana on the basis of subsection (a)(1)(B) (applying to a jointly undertaken criminal activity). Defendant A engaged in a jointly undertaken criminal activity and all three criteria of subsection (a)(1)(B) are met. First, the conduct was within the scope of the criminal activity (the importation of the shipment of marihuana). Second, the off-loading of the shipment of marihuana was in furtherance of the criminal activity, as described above. And third, a finding that the one-ton quantity of marihuana was reasonably foreseeable is warranted from the nature of the undertaking itself (the importation of marihuana by ship typically involves very large quantities of marihuana). The specific circumstances of the case (the defendant was one of ten persons off-loading the marihuana in bales) also support this finding. In an actual case, of course, if a defendant's accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established. See Application Note 2.>

<(B) Acts and omissions aided or abetted by the defendant; acts and omissions in a jointly undertaken criminal activity.-->

<**(i)** Defendant C is the getaway driver in an armed bank robbery in which $15,000 is taken and a teller is assaulted and injured. Defendant C is accountable for the money taken under subsection (a)(1)(A) because he aided and abetted the act of taking the money (the taking of money was the specific objective of the offense he joined). Defendant C is accountable for the injury to the teller under subsection (a)(1)(B) because the assault on the teller was within the scope and in furtherance of the jointly undertaken criminal activity (the robbery), and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).>

<As noted earlier, a defendant may be accountable for particular conduct under more than one subsection. In this example, Defendant C also is accountable for the money taken on the basis of subsection (a)(1)(B) because the taking of money was within the scope and in furtherance of the jointly undertaken criminal activity (the robbery), and was reasonably foreseeable (as noted, the taking of money was the specific objective of the jointly undertaken criminal activity).>

<(C) Requirements that the conduct of others be within the scope of the jointly undertaken criminal activity, in furtherance of that criminal activity, and reasonably foreseeable.-->

<**(i)** Defendant D pays Defendant E a small amount to forge an endorsement on an $800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a down payment in a scheme to fraudulently obtain $15,000 worth of merchandise. Defendant E is convicted of forging the $800 check and is accountable for the forgery of this check under subsection (a)(1)(A). Defendant E is not accountable for the $15,000 because

the fraudulent scheme to obtain $15,000 was not within the scope of the jointly undertaken criminal activity (i.e., the forgery of the $800 check).>

<**(ii)** Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains $20,000. Defendant G fraudulently obtains $35,000. Each is convicted of mail fraud. Defendants F and G each are accountable for the entire amount ($55,000). Each defendant is accountable for the amount he personally obtained under subsection (a)(1)(A). Each defendant is accountable for the amount obtained by his accomplice under subsection (a)(1)(B) because the conduct of each was within the scope of the jointly undertaken criminal activity (the scheme to sell fraudulent stocks), was in furtherance of that criminal activity, and was reasonably foreseeable in connection with that criminal activity.>

<**(iii)** Defendants H and I engaged in an ongoing marihuana importation conspiracy in which Defendant J was hired only to help off-load a single shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marihuana. Defendant J is accountable for the entire single shipment of marihuana he helped import under subsection (a)(1)(A) and any acts and omissions of others related to the importation of that shipment on the basis of subsection (a)(1)(B) (see the discussion in example (A)(i) above). He is not accountable for prior or subsequent shipments of marihuana imported by Defendants H or I because those acts were not within the scope of his jointly undertaken criminal activity (the importation of the single shipment of marihuana).>

<**(iv)** Defendant K is a wholesale distributor of child pornography. Defendant L is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Similarly, Defendant M is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Defendants L and M are aware of each other's criminal activity but operate independently. Defendant N is Defendant K's assistant who recruits customers for Defendant K and frequently supervises the deliveries to Defendant K's customers. Each defendant is convicted of a count charging conspiracy to distribute child pornography. Defendant K is accountable under subsection (a)(1)(A) for the entire quantity of child pornography sold to Defendants L and M. Defendant N also is accountable for the entire quantity sold to those defendants under subsection (a)(1)(B) because the entire quantity was within the scope of his jointly undertaken criminal activity (to distribute child pornography with Defendant K), in furtherance of that criminal activity, and reasonably foreseeable. Defendant L is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K because he is not engaged in a jointly undertaken criminal activity with the other defendants. For the same reason, Defendant M is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K.>

<**(v)** Defendant O knows about her boyfriend's ongoing drug-trafficking activity, but agrees to participate on only one occasion by making a delivery for him at his request when he was ill. Defendant O is accountable under subsection (a)(1)(A) for the drug quantity involved on that one occasion. Defendant O is not accountable for the other drug sales made by her boyfriend because those sales were not within the scope of her jointly undertaken criminal activity (i.e., the one delivery).>

<**(vi)** Defendant P is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but otherwise operate independently. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity with them. In contrast, Defendant Q, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant Q is engaged in a jointly undertaken criminal activity and, therefore, he is accountable under subsection (a)(1)(B) for the quantities of drugs sold by the four other dealers during the course of his joint

undertaking with them because those sales were within the scope of the jointly undertaken criminal activity, in furtherance of that criminal activity, and reasonably foreseeable in connection with that criminal activity.>

<**(vii)** Defendant R recruits Defendant S to distribute 500 grams of cocaine. Defendant S knows that Defendant R is the prime figure in a conspiracy involved in importing much larger quantities of cocaine. As long as Defendant S's agreement and conduct is limited to the distribution of the 500 grams, Defendant S is accountable only for that 500 gram amount (under subsection (a)(1)(A)), rather than the much larger quantity imported by Defendant R. Defendant S is not accountable under subsection (a)(1)(B) for the other quantities imported by Defendant R because those quantities were not within the scope of his jointly undertaken criminal activity (i.e., the 500 grams).>

<**(viii)** Defendants T, U, V, and W are hired by a supplier to backpack a quantity of marihuana across the border from Mexico into the United States. Defendants T, U, V, and W receive their individual shipments from the supplier at the same time and coordinate their importation efforts by walking across the border together for mutual assistance and protection. Each defendant is accountable for the aggregate quantity of marihuana transported by the four defendants. The four defendants engaged in a jointly undertaken criminal activity, the object of which was the importation of the four backpacks containing marihuana (subsection (a)(1)(B)), and aided and abetted each other's actions (subsection (a)(1)(A)) in carrying out the jointly undertaken criminal activity (which under subsection (a)(1)(B) were also in furtherance of, and reasonably foreseeable in connection with, the criminal activity). In contrast, if Defendants T, U, V, and W were hired individually, transported their individual shipments at different times, and otherwise operated independently, each defendant would be accountable only for the quantity of marihuana he personally transported (subsection (a)(1)(A)). As this example illustrates, the scope of the jointly undertaken criminal activity may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities. See Application Note 3(B).>

<5. Application of Subsection (a)(2).-- >

<**(A) Relationship to Grouping of Multiple Counts.**--"Offenses of a character for which § 3D1.2(d) would require grouping of multiple counts," as used in subsection (a)(2), applies to offenses for which grouping of counts would be required under § 3D1.2(d) had the defendant been convicted of multiple counts. Application of this provision does not require the defendant, in fact, to have been convicted of multiple counts. For example, where the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine, as part of the same course of conduct or common scheme or plan, subsection (a)(2) provides that the total quantity of cocaine involved (45 grams) is to be used to determine the offense level even if the defendant is convicted of a single count charging only one of the sales. If the defendant is convicted of multiple counts for the above noted sales, the grouping rules of Chapter Three, Part D (Multiple Counts) provide that the counts are grouped together. Although Chapter Three, Part D (Multiple Counts) applies to multiple counts of conviction, it does not limit the scope of subsection (a)(2). Subsection (a)(2) merely incorporates by reference the types of offenses set forth in § 3D1.2(d); thus, as discussed above, multiple counts of conviction are not required for subsection (a)(2) to apply.>

<As noted above, subsection (a)(2) applies to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, had the defendant been convicted of multiple counts. For example, the defendant sells 30 grams of cocaine (a violation of 21 U.S.C. § 841) on one occasion and, as part of the same course of conduct or common scheme or plan, attempts to sell an additional 15 grams of cocaine (a violation of 21 U.S.C. § 846) on another occasion. The defendant is convicted of one count charging the completed sale of 30 grams of cocaine. The two offenses (sale of cocaine and attempted sale of cocaine), although covered by different statutory provisions, are of a character for which § 3D1.2(d) would require the grouping of counts, had the defendant been convicted of

both counts. Therefore, subsection (a)(2) applies and the total amount of cocaine (45 grams) involved is used to determine the offense level.>

<**(B) "Same Course of Conduct or Common Scheme or Plan."**--"Common scheme or plan" and "same course of conduct" are two closely related concepts.>

<**(i) Common scheme or plan.** For two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi. For example, the conduct of five defendants who together defrauded a group of investors by computer manipulations that unlawfully transferred funds over an eighteen-month period would qualify as a common scheme or plan on the basis of any of the above listed factors; i.e., the commonality of victims (the same investors were defrauded on an ongoing basis), commonality of offenders (the conduct constituted an ongoing conspiracy), commonality of purpose (to defraud the group of investors), or similarity of modus operandi (the same or similar computer manipulations were used to execute the scheme).>

<**(ii) Same course of conduct.** Offenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses. Factors that are appropriate to the determination of whether offenses are sufficiently connected or related to each other to be considered as part of the same course of conduct include the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses. When one of the above factors is absent, a stronger presence of at least one of the other factors is required. For example, where the conduct alleged to be relevant is relatively remote to the offense of conviction, a stronger showing of similarity or regularity is necessary to compensate for the absence of temporal proximity. The nature of the offenses may also be a relevant consideration (e.g., a defendant's failure to file tax returns in three consecutive years appropriately would be considered as part of the same course of conduct because such returns are only required at yearly intervals).>

<**(C) Conduct Associated with a Prior Sentence.**--For the purposes of subsection (a)(2), offense conduct associated with a sentence that was imposed prior to the acts or omissions constituting the instant federal offense (the offense of conviction) is not considered as part of the same course of conduct or common scheme or plan as the offense of conviction.>

<**Examples:** (1) The defendant was convicted for the sale of cocaine and sentenced to state prison. Immediately upon release from prison, he again sold cocaine to the same person, using the same accomplices and modus operandi. The instant federal offense (the offense of conviction) charges this latter sale. In this example, the offense conduct relevant to the state prison sentence is considered as prior criminal history, not as part of the same course of conduct or common scheme or plan as the offense of conviction. The prior state prison sentence is counted under Chapter Four (Criminal History and Criminal Livelihood). (2) The defendant engaged in two cocaine sales constituting part of the same course of conduct or common scheme or plan. Subsequently, he is arrested by state authorities for the first sale and by federal authorities for the second sale. He is convicted in state court for the first sale and sentenced to imprisonment; he is then convicted in federal court for the second sale. In this case, the cocaine sales are not separated by an intervening sentence. Therefore, under subsection (a)(2), the cocaine sale associated with the state conviction is considered as relevant conduct to the instant federal offense. The state prison sentence for that sale is not counted as a prior sentence; see § 4A1.2(a)(1).>

<Note, however, in certain cases, offense conduct associated with a previously imposed sentence may be expressly charged in the offense of conviction. Unless otherwise provided, such conduct will be considered relevant conduct under subsection (a)(1), not (a)(2).>

<6. Application of Subsection (a)(3).-->

<(A) Definition of "Harm".--"Harm" includes bodily injury, monetary loss, property damage and any resulting harm.>

<(B) Risk or Danger of Harm.--If the offense guideline includes creating a risk or danger of harm as a specific offense characteristic, whether that risk or danger was created is to be considered in determining the offense level. See, e.g., § 2K1.4 (Arson; Property Damage by Use of Explosives); § 2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides). If, however, the guideline refers only to harm sustained (e.g., § 2A2.2 (Aggravated Assault); § 2B3.1 (Robbery)) or to actual, attempted or intended harm (e.g., § 2B1.1(Theft, Property Destruction, and Fraud); § 2X1.1 (Attempt, Solicitation or Conspiracy)), the risk created enters into the determination of the offense level only insofar as it is incorporated into the base offense level. Unless clearly indicated by the guidelines, harm that is merely risked is not to be treated as the equivalent of harm that occurred. In a case in which creation of risk is not adequately taken into account by the applicable offense guideline, an upward departure may be warranted. See generally § 1B1.4 (Information to be Used in Imposing Sentence); § 5K2.0 (Grounds for Departure). The extent to which harm that was attempted or intended enters into the determination of the offense level should be determined in accordance with § 2X1.1 (Attempt, Solicitation or Conspiracy) and the applicable offense guideline.>

<7. Factors Requiring Conviction under a Specific Statute.--A particular guideline (in the base offense level or in a specific offense characteristic) may expressly direct that a particular factor be applied only if the defendant was convicted of a particular statute. For example, in § 2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), subsection (b)(2)(B) applies if the defendant "was convicted under 18 U.S.C. § 1956". Unless such an express direction is included, conviction under the statute is not required. Thus, use of a statutory reference to describe a particular set of circumstances does not require a conviction under the referenced statute. An example of this usage is found in § 2A3.4(a)(2) ("if the offense involved conduct described in 18 U.S.C. § 2242").>

<Unless otherwise specified, an express direction to apply a particular factor only if the defendant was convicted of a particular statute includes the determination of the offense level where the defendant was convicted of conspiracy, attempt, solicitation, aiding or abetting, accessory after the fact, or misprision of felony in respect to that particular statute. For example, § 2S1.1(b)(2)(B) (which is applicable only if the defendant is convicted under 18 U.S.C. § 1956) would be applied in determining the offense level under § 2X3.1 (Accessory After the Fact) in a case in which the defendant was convicted of accessory after the fact to a violation of 18 U.S.C. § 1956 but would not be applied in a case in which the defendant is convicted of a conspiracy under 18 U.S.C. § 1956(h) and the sole object of that conspiracy was to commit an offense set forth in 18 U.S.C. § 1957. See Application Note 3(C) of § 2S1.1.>

<8. Partially Completed Offense.--In the case of a partially completed offense (e.g., an offense involving an attempted theft of $800,000 and a completed theft of $30,000), the offense level is to be determined in accordance with § 2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. See Application Note 4 in the Commentary to § 2X1.1. Note, however, that Application Note 4 is not applicable where the offense level is determined under § 2X1.1(c)(1).>

<9. Solicitation, Misprision, or Accessory After the Fact.-- In the case of solicitation, misprision, or accessory after the fact, the conduct for which the defendant is accountable includes all conduct relevant to determining the offense level for the underlying offense that was known, or reasonably should have been known, by the defendant.>

<*Background:* *This section prescribes rules for determining the applicable guideline sentencing range, whereas § 1B1.4 (Information to be Used in Imposing Sentence) governs the range of information that the court may consider in adjudging sentence once the guideline sentencing range has been determined. Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range. The range of information that may be considered at sentencing is broader than the range of information upon which the applicable sentencing range is determined.*>

<Subsection (a) establishes a rule of construction by specifying, in the absence of more explicit instructions in the context of a specific guideline, the range of conduct that is relevant to determining the applicable offense level (except for the determination of the applicable offense guideline, which is governed by § 1B1.2(a)). No such rule of construction is necessary with respect to Chapters Four and Five because the guidelines in those Chapters are explicit as to the specific factors to be considered.>

<Subsection (a)(2) provides for consideration of a broader range of conduct with respect to one class of offenses, primarily certain property, tax, fraud and drug offenses for which the guidelines depend substantially on quantity, than with respect to other offenses such as assault, robbery and burglary. The distinction is made on the basis of § 3D1.2(d), which provides for grouping together (i.e., treating as a single count) all counts charging offenses of a type covered by this subsection. However, the applicability of subsection (a)(2) does not depend upon whether multiple counts are alleged. Thus, in an embezzlement case, for example, embezzled funds that may not be specified in any count of conviction are nonetheless included in determining the offense level if they were part of the same course of conduct or part of the same scheme or plan as the count of conviction. Similarly, in a drug distribution case, quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction. On the other hand, in a robbery case in which the defendant robbed two banks, the amount of money taken in one robbery would **not** be taken into account in determining the guideline range for the other robbery, even if both robberies were part of a single course of conduct or the same scheme or plan. (This is true whether the defendant is convicted of one or both robberies.)>

<Subsections (a)(1) and (a)(2) adopt different rules because offenses of the character dealt with in subsection (a)(2) (i.e., to which § 3D1.2(d) applies) often involve a pattern of misconduct that cannot readily be broken into discrete, identifiable units that are meaningful for purposes of sentencing. For example, a pattern of embezzlement may consist of several acts of taking that cannot separately be identified, even though the overall conduct is clear. In addition, the distinctions that the law makes as to what constitutes separate counts or offenses often turn on technical elements that are not especially meaningful for purposes of sentencing. Thus, in a mail fraud case, the scheme is an element of the offense and each mailing may be the basis for a separate count; in an embezzlement case, each taking may provide a basis for a separate count. Another consideration is that in a pattern of small thefts, for example, it is important to take into account the full range of related conduct. Relying on the entire range of conduct, regardless of the number of counts that are alleged or on which a conviction is obtained, appears to be the most reasonable approach to writing workable guidelines for these offenses. Conversely, when § 3D1.2(d) does not apply, so that convictions on multiple counts are considered separately in determining the guideline sentencing range, the guidelines prohibit aggregation of quantities from other counts in order to prevent "double counting" of the conduct and harm from each count of conviction. Continuing offenses present similar practical problems. The reference to § 3D1.2(d), which provides for grouping of multiple counts arising out of a continuing offense when the offense guideline takes the continuing nature into account, also prevents double counting.>

<Subsection (a)(4) requires consideration of any other information specified in the applicable guideline. For example, § 2A1.4 (Involuntary Manslaughter) specifies consideration of the defendant's state of mind; § 2K1.4 (Arson; Property Damage By Use of Explosives) specifies consideration of the risk of harm created.>

Notes of Decisions (795)

Federal Sentencing Guidelines, § 1B1.3, 18 U.S.C.A., FSG § 1B1.3
As amended to 3-16-20.

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