No. _____

In the
SUPREME COURT OF THE UNITED STATES

BELKIS SOCA-FERNANDEZ,

And

DAVID SOSA-BALADRON
Petitioners,

-v-

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

BRITT M. COBB (P69556)
WILLEY & CHAMBERLAIN LLP
Attorneys for Petitioners
300 Ottawa Avenue, N.W., Suite 810
Grand Rapids, Michigan 49503
(616) 458-2212
bmc@willeychamberlain.com

QUESTIONS RPESENTED FOR REVIEW BY THE COURT

I. Did a fatal variance occur when the charge was of one conspiracy but the proofs were of two, one of which there was no evidence of Petitioners' involvement?

II. Was there insufficient evidence of Petitioner Sosa's guilt on the substantive Mail Fraud and Health Care Fraud counts when there was no evidence he took any action to mail or submit false billings to the insurance companies?

III. Was it error to apply the risk of serious bodily injury sentencing guideline enhancement to Petitioners when the whole fraud scheme was designed around fake car accidents where no one got hurt and no one needed medical treatment?

IV. Was it error to apply the obstruction of justice sentencing guideline enhancement to Petitioners because they never suggested that the would-be witness should testify, or not testify, about anything and never asked the third party to relay any message?

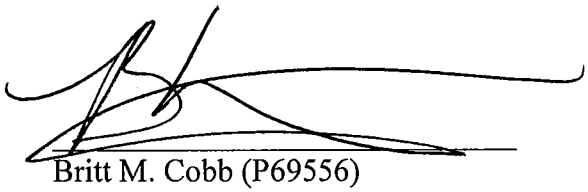
DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Supreme Court Rules 14.1(b) and 29.6, Britt Cobb makes the following disclosure on behalf of the Petitioners:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?
   NO

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?
   NO

Dated: May 29, 2020



Britt M. Cobb (P69556)
Attorney for Petitioners
WILLEY & CHAMBERLAIN LLP
300 Ottawa Avenue, N.W., Suite 810
Grand Rapids, Michigan 49503
(616) 458-2212
bmc@willeychamberlain.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authority

OPINION BELOW

The Opinion of the Sixth Circuit Court of Appeals was unpublished and issued on January 9, 2020. Appendix IA, Sixth Circuit Court of Appeals Opinion, 1.9.2020. The Petitioners are husband/wife and were co-defendants in a criminal case. Separate judgments entered against them in the district court. But the facts and issues raised by both Petitioners in the Sixth Circuit Court of Appeals were identical, sometimes overlapping, or closely related. Petitioners' cases in the Sixth Circuit Court of Appeals were consolidated and the Opinion sought to be reviewed here was consolidated and entered as to both Petitioners. Petitioners are filing a single petition pursuant to Rule 12(4) of the Supreme Court Rules.

STATEMENT OF JURISDICTION

The Order of the Sixth Circuit Court of Appeals was entered on January 9, 2020. The Court has jurisdiction under 28 U.S.C. §1254(1). This petition is timely, considering that the period for filing petitions has been extended to 150 days due to the COVID-19 pandemic.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first two questions presented for review involve the following Constitutional provisions that form the basis for the proof beyond a reasonable doubt and grand jury indictment requirements in criminal cases:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. AMEND. VI;

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, libeliy, or propeliy, without due process of law; nor shall private propeliy be taken for public use, without just compensation.

U.S. CONST. AMEND. V.

The third question presented for review involves Section 2Bl.l(b)(16)(A) of the Federal Sentencing Guidelines. That specific offense characteristic to the fraud guideline states:

> If the offense involved (A) the conscious or reckless risk of death or serious bodily injury...increase by 2 levels.

U.S.S.G. § 2B1.1(b)(16)(A).

The final question presented for review involves Section 3C1.1 of the Federal Sentencing Guidelines. It is an adjustment to the guidelines for obstruction of justice and states:

> If (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense, increase the offense level by 2 levels.

U.S.S.G. § 3C1.1.

STATEMENT OF THE CASE

Belkis Soca-Fernandez (hereinafter "Soca") and David Sosa-Baladron (hereinafter "Sosa") were charged in the United States District Court for the Western District of Michigan in 2016 with dozens of criminal fraud counts related to their participation in a scheme that defrauded automobile insurance companies. Soca and Sosa were convicted after jury trial in March 2017 of Conspiracy to Commit Mail Fraud, eleven substantive counts of Health Care Fraud, and six substantive counts of Mail Fraud in connection with an automobile insurance fraud scheme. The scheme involved "staging" or faking car accidents and then submitting medical bills for those who pretended to be

injured and treated.

Soca and Sosa lived in Tampa, Florida but allegedly set up two sham physical therapy clinics in Michigan to perpetrate the fraud. Soca and Sosa allegedly installed managers to run the two clinics, and then operated them from afar, traveling back to Michigan only periodically.

The original Indictment charged several Michigan-based co-defendants who were involved in the daily operations of the clinics. As deals with the co-defendants were made and co-defendants cooperated, Soca and her husband Sosa were indicted.

At trial, it was proven that Soca and Sosa were involved with two clinics that were arranging for patients to fake car accidents. The clinics with which Soca and Sosa were involved were Revive in Wyoming, Michigan, and Renue in Lansing, Michigan. The evidence about Soca was that she directed operations and supervised the billing at Revive and later, Renue. The evidence about Sosa mostly was that he accompanied Soca to Michigan and was around at Revive and Renue when Soca was doing her work there.

There was also a third clinic called H&H Rehab, also in Wyoming, Michigan. The operations of H&H were included as part of the Mail Fraud Conspiracy count. But, neither Soca nor Sosa had any involvement in or knowledge of H&H. Regardless, a charge of conspiracy was made against Soca and Sosa including the operations at *all three* clinics, not just the two with which they were involved.

This is a case where one conspiracy was charged, yet two different conspiracies proven. One conspiracy involved two clinics and Soca/Sosa. The other conspiracy involved H&H nut **not** Soca and Sosa. Soca and Sosa had no knowledge of H&H, and did not participate in it. They received no benefit from H&H. A variance from the indictment occurred due to the charging of multiple conspiracies in one count.

The issue about multiple conspiracies was preserved by pre-trial motion and a request for a multiple conspiracies jury instruction, both of which were denied.

Sosa moved for judgment of acquittal on all substantive counts. He argued that the evidence presented at trial was only that Sosa was usually with Soca in the clinics, but that he was never seen nor heard to be doing or orchestrating anything illegal. He argued unsuccessfully that the evidence might have been sufficient for a conspiracy conviction as it related to Revive and Renue, but not to the substantive Mail Fraud and Health Care Fraud counts.

Soca was sentenced to 135 months imprisonment on August 21, 2017. Sosa was sentenced to 120 months imprisonment on the same day. Soca's sentence was a within-guideline sentence. Sosa's sentence was a slight downward variance from the guidelines. However, the guidelines for both were calculated improperly. A two-level enhancement under § 2B1.1(b)(15)(A) for the risk of serious bodily harm or death was erroneously applied even though all of the "accidents" were fake and did not involve actual collisions with other unsuspecting drivers. Likewise, a two-level enhancement under § 3C1.1 for obstruction of justice was erroneously applied to both Soca and Sosa's guideline calculation because of contact Soca had with the wife of a co-defendant.

Timely appeals to the United States Court of Appeals for the Sixth Circuit followed. Soca and Sosa's cases were consolidated for consideration in the Sixth Circuit. The Sixth Circuit affirmed convictions for both Sosa and Soca on all issues and issued a consolidated opinion.

FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED

The indictments charged that Soca, Sosa, Yoisler Herrera-Enriquez (Herrera), Dolis Rojas-Lopez (Rojas), Antonio Ramon Martinez- Lopez (Martinez) and Gustavo Ramiro Acuna-Rosa (Acuna) committed Conspiracy to Commit Mail Fraud, Health Care Fraud and Mail Fraud in the

western district of Michigan from April 2012 to May 2015.

Generally, what the indictments alleged was that Soca and Sosa financed and opened physical therapy clinics in west Michigan. They alleged that Herrera, Martinez and Acuna owned and operated the various physical therapy clinics and that Rojas helped them commit fraud. The indictments said that:

> **Herrera** owned and operated **H&H Rehab Center (H&H)**;
> **Martinez** owned and operated **Revive Therapy Center (Revive)**; and,
> **Acuna** owned and operated **Renue Therapy Center (Renue)**.

There were a number of substantive Health Care Fraud counts alleged for each defendant relative to specific patient bills submitted on specific dates through the various clinics, and likewise substantive Mail Fraud counts that similarly tracked with specific patient bills and dates of mailing. Counts 7, 8 and 19 were counts that charged Health Care Fraud and Mail Fraud for bills submitted for Soca, who was allegedly involved in her own fake car accident with Sosa and others.

Count 1 charged Conspiracy to Commit Mail Fraud contrary to 18 U.S.C. §§ 1349 and 1341. It alleged that between April 2012 and May 2015 the defendants did knowingly conspire to defraud no-fault automobile insurance companies by causing false health insurance claim forms (HCFA 1500 and supporting documents) to be sent or delivered by the United States Postal Service. It stated that the object of the conspiracy was "to profit by billing no-fault automobile insurers for false and fraudulent therapy or medical treatment through these businesses:" H&H, Revive and Renue.

The basics of the fraud model were as follows:

- Physical therapy clinics were opened, staff was hired, including massage therapists. Under Michigan auto insurance law, massage therapists could provide covered physical therapy services.
- Putative patients were recruited and paid to be involved in staged car accidents.
- The "drivers" and "passengers" would fake a car accident and would be instructed by their

recruiter to call the police to get an official accident report.

- The drivers and passengers were coached by their recruiter on how to inform the insurance company of the accident.
- They were referred by their recruiter to a Spanish speaking pediatrician in Wyoming, Michigan, Dr. Flor Borerro, who would evaluate them and write a prescription for physical therapy.
- Prescription in hand, the drivers and passengers would go back to the clinic, sign blank therapy forms attesting falsely that they were receiving physical therapy at the clinic.
- The clinic staff would prepare and mail bills to the car insurance companies based on the information from the treatment forms. The massage therapist would have to sign the bills confirming treatment.

Sosa and Martinez were friends. Soca had previously worked in a clinic in Tampa. Soca and Sosa helped Martinez open up a physical therapy clinic in Wyoming, Michigan called Revive. Wyoming is a suburb of Grand Rapids.

Soca and Sosa started traveling to Michigan in the spring/summer of 2012. Revive was open and doing business from about April 2012 through late 2013. Martinez was the manager of Revive.

Dr. Borrero's son testified that Soca, Sosa and Martinez all met with his mother and proposed to her doing post-accident evaluations "on the side" of her regular practice as a pediatrician. She agreed and was paid a referral fee for each evaluation. Dr. Borrero's son never saw Soca and Sosa after that first meeting. His dealings going forward were with Martinez, Acuna or Hererra who brought the patients.

Rojas was the main patient recruiter. She herself was recruited to be involved in a staged car accident, she said by Soca who offered her $2,000. Rojas staged an accident by driving her car off the road to make it appear as if she struck a tree. Rojas said that she would see Sosa working on a laptop computer at Revive.

Rojas said Soca helped her with the insurance claim after Rojas's fake accident and that Soca told her what to say to the insurance company. Martinez paid Rojas $2000 and took Rojas to Dr.

Borrero for evaluation. Following the protocol described above, Rojas signed blank treatment forms and her insurance company was billed for services that she did not need and did not get. After her own accident, Rojas began recruiting others.

A number of people recruited by Rojas who participated in the fraud scheme at Revive testified at trial. They all described participating in the basic fraud model as above. Few of them had ever seen Soca before, and none of them said Soca recruited them in to the scheme. The recruiting and logistics at Revive were done by Martinez and Rojas. None of these "patients" dealt with Sosa for any reason related to the frauds.

The main massage therapist at Revive was the one who testified that Soca was running operations at Revive and that Soca was in charge of the fraudulent billing to the auto insurance companies. That massage therapist testified that she fraudulently signed treatment forms but said she did so at Soca's direction.

Acuna was a cousin of Sosa's and moved to Michigan. Acuna was involved in his own fake car accident in October 2012 and bills for treatment he never needed or got were submitted to insurance companies through Revive. Acuna eventually started helping Martinez and Rojas with the fraud scheme.

Herrera worked at another clinic in Grand Rapids that was doing a similar type of fraud. When that clinic no longer needed his services, the owner put him in touch with Martinez. Martinez hired Herrera to work as a massage therapist at Revive. But this was around the spring/summer of 2013 and Revive was winding down its operations. Herrera did not work at Revive for more than a few months.

Herrera testified at trial, having already pled guilty himself. He testified that he was involved with Soca, Sosa and Martinez in a conspiracy at Revive. He said he signed blank therapy forms saying he performed massage treatment services that he actually did not perform.

Hererra said he saw Soca at Revive maybe two times. He said that Soca did the billing at Revive and sometimes signed blank treatment forms. She would send the bills to the insurance company. Hererra never saw Soca pay any patients or receive money from Martinez. Soca never asked Hererra to find people to get involved in staged car accidents for Revive. Hererra never saw Sosa doing any billing, but he would see Sosa sitting next to Soca when Soca was doing the billing. Herrera said Martinez told him that he shared the money of the business with Soca and Sosa.

Sosa was captured on bank surveillance video with Martinez while Martinez conducted bank business for Revive. Revive officially closed in November 2013, but was winding down operations for a few months prior to that.

Acuna opened up a clinic in Lansing, Michigan which is about 45 minutes away from Grand Rapids. The clinic was called Renue. Acuna incorporated Renue on May 15, 2013, but records show that it started seeing "patients" in the late summer/early fall of 2013. Herrera testified that Acuna and Martinez opened this clinic and that Herrera worked there for a couple of weeks when it first opened. Acuna had Herrera doing the same type of fraud at Renue that Martinez had him doing at Revive. Acuna would take Renue "patients" to Dr. Borrero for evaluation, even though it was 45 minutes away.

Herrera never saw Soca or Sosa at Renue and it was Acuna that was orchestrating the fraud there according to Herrera. But according to others that worked at Renue, Soca and Sosa were the actual owners of Renue and were in charge of the fraud that was going on there.

Soca and Sosa were involved in a fake car accident in November 2013. Their car insurance companies billed for services they did not receive through Renue.

Recalling that Herrera worked at Revive for Martinez in the spring/summer of 2013, then for Acuna at Renue for a short period of time in the summer 2013, Herrera opened up his own clinic in

Wyoming, Michigan on August 7, 2013. It was called H&H. Herrera's father gave him some money to open the clinic. Martinez co-signed on the lease.

Herrera testified that H&H was his business and that he only opened it after he cut ties with Revive and Renue. Martinez introduced Herrera to Dr. Borrero and Herrera used her for H&H "patients." Martinez, Rojas and Acuna recruited "patients" for H&H. H&H operated well into the latter part of 2014.

According to Herrera, Soca and Sosa had nothing to do with H&H. Soca and Sosa were never inside H&H; Soca and Sosa never gave Herrera any money for H&H; Soca and Sosa had nothing to do with the operation of H&H; and, Soca and Sosa did not receive any profits from H&H. In fact, there was no evidence presented that Soca and Sosa even knew about the operation H&H.

The evidence was that Herrera used the same means and methods for the fraud developed at Revive and Renue to run a fraud scheme out of H&H. This included using the same doctor and even the same accountants and lawyers that Revive and Renue used. But no one that worked at H&H, and none of the H&H patients, recognized Soca and Sosa. And Soca and Sosa were not involved in H&H in any way.

Renue closed down in the spring/summer of 2014. Soca stopped traveling to Michigan in the spring of 2014. Her last trip to Michigan was in March 2014. Sosa made a few extra trips to Michigan until approximately the summer of 2014. H&H operated well into 2015.

Soca and Sosa moved for judgment of acquittal at the close of the government proofs. Regarding Count 1, they argued for acquittal due to lack of any evidence of Soca and Sosa's involvement in, or knowledge of, the operation at H&H, despite it being charged as part of the conspiracy. The district court denied the motion saying that the operation at H&H was linked with the operations at Revive and Renue.

Sosa's added basis for acquittal on all substantive Mail Fraud and Health Care Fraud counts (except the three counts where treatment for Soca was billed following the car accident allegedly staged by Sosa and Soca) was that there was no evidence that he was involved in doing anything fraudulent as to each of the specific bills in the substantive counts, other than being around or near Soca when she was in the clinics.

The defense requested that the district court give the pattern instructions on multiple conspiracies to the jury. Soca and Sosa continued to maintain that the charge was of one conspiracy but the proofs were of two: one involving Soca, Sosa and others at Revive and Renue and the other *not involving* Soca and Sosa at H&H. The request was denied. The jury returned guilty verdicts on all counts as to both Soca and Sosa.

A presentence report was prepared (PIR). Notably, the district court agreed that losses incurred at H&H should not be attributed to Soca and Sosa because they were not involved with H&H and received no money from it.

The PIR added a 2-level enhancement under § 2B1.1(b)(15)(A) for offenses involving the conscious or reckless risk of death or serious bodily injury. Soca and Sosa objected, stating that all of the accidents were fake and none of the accidents involved unsuspecting drivers or passengers because everyone in each "accident" was a knowing participant. Most of the time, the "accidents" were simply driving off the road slowly and touching a guardrail or a tree. And the whole point of the scheme was that nobody actually be injured so that the clinic could bill for services that were not needed or given. The district court applied the enhancement and the Sixth Circuit affirmed.

The PIR added a 2-level enhancement for obstruction of justice under § 3C1.1 for both Soca and Sosa due to two post-indictment contacts Soca had with Martinez's wife, Katie Mok-Tornes (Mok),

in Tampa, Florida. Mok testified at the sentencing hearing about the contacts. Mok described that she and Soca were friendly to each other, but more acquaintances than actual friends. Soca and Sosa visited the Tampa home of Mok and Martinez one time between August 2014 to June 2016. The visit was unannounced and was a short visit and occurred before Soca, Sosa and Martinez were indicted.

Soca made a second unannounced visit to Mok and Martinez's home in October 2016. This was after Soca, Sosa and Martinez had been indicted. Mok answered the door. Soca wanted to speak with Martinez. Mok told her she could not speak to Martinez because Martinez was ordered not to talk to any co-defendants. Soca and Sosa did not have that restriction on their bonds. Mok asked her to leave. Soca said she wanted Martinez to say that Acuna and "him had had (sic) like a fight and that was why" Acuna was "telling the government about her and her husband." Mok asked her again to leave and she left, without speaking to Martinez. Soca did not ask Mok to pass along any message to Martinez or say anything about him testifying. Soca had a younger woman with her. Sosa was not with her.

Martinez had his bond revoked in February 2017. Soca made another unannounced visit to Mok's home offering Mok money to help with her bills and her kids since her husband was in jail. Soca never told Mok she was offering her money to get Martinez not to cooperate with the government or anything like it. But that is what Mok thought Soca might be trying to do. Mok said she saw Sosa in the car when Soca visited her on this day, but she did not talk to Sosa.

Soca argued that the obstruction of justice enhancement should not apply because Soca never asked Mok to pass along any information to Martinez and never said he should not testify or cooperate with the government. Sosa argued the enhancement should not apply to him because he had nothing to do with Soca's encounters with Mok, and was sitting in the car for one of them while not present at the other. The district court applied the enhancement and the Sixth Circuit affirmed.

ARGUMENT FOR ALLOWANCE OF THE WRIT

I. Variance in Proof

As the Court has stated, when a single conspiracy is charged but the proof is of multiple conspiracies, a variance occurs. *Kotteakos v. United States*, 328 U.S. 750 (1946). Variances run afoul of constitutional requirements that charges be made by a grand jury and that proof in criminal cases be beyond a reasonable doubt. Variances that affect the substantial rights of a defendant are fatal and amount to reversible error. *Id.*

The gravamen of a conspiracy is an agreement to advance a common purpose. *Id.* at 769. A conspiracy does not exist when there are numerous separate ventures, albeit similar ventures of a like character, unless there is a common purpose amongst the participants. *Id.* Trying multiple conspiracies as one conspiracy can result in a finding of guilt as to all conspiracies even when the proof is only as to one, especially when there is no limiting instruction. *Id.* And our law does not tolerate that:

> when many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass. Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group. Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency.

Id. at 773.

In determining the number of conspiracies, the courts will analyze whether there was a common goal among the participants, the nature of the scheme, and the extent of overlap in the participants' various dealings. *See, e.g., United States v. Beals*, 698 F.3d 248, 258–59 (6th Cir. 2012); *United States v. Carnagie*, 533 F.3d 1231, 1239 (10th Cir. 2008); *United States v. Kemp*, 500 F.3d

257, 287 (3rd Cir. 2007); *United States v. Duran*, 189 F.3d 1071 (9th Cir. 1999). Individuals working toward a common goal can be involved in a single conspiracy even if they do not know the other conspirators or the details of what others are doing. *Beals*, 698 F.3d at 258-59. But, "it is necessary to show that each alleged member 'agreed to participate in what he knew to be a collective venture toward a common goal.'" *United States v. Swafford*, 512 F.3d 833, 841 (6th Cir. 2008). Without facts connecting putative co-conspirators working toward a common goal, conspiracies can be limitless enterprises. *Id.* at 842, n. 3.

What is required is proof of a *shared* single criminal objective, not just similar or parallel objectives between similarly situated individuals. *Carnagie*, 533 F.3d at 1239. There must be a "rim of the wheel to enclose the spokes" and that "rim" is the common objective. *Kotteakos*, 328 U.S. at 755; *United States v. Falcone,* 311 U.S. 205 (1940).

In this case, one conspiracy was charged but two were proven: one involved Soca and Sosa at Renue and Revive, and the other involved H&H. Soca and Sosa were not involved in, nor did they even know of the operation at, H&H.

Hererra, the owner of H&H, said Soca had nothing to do with H&H. Hererra said he opened H&H with money loaned to him by his father and the help of Martinez, with whom he shared profits. Those who testified about doing fraud at H&H never saw Soca and Sosa, nor was there any evidence they were involved in the H&H fraud activities.

At best the government established that Herrera and Martinez at H&H were "inspired by the (former) conspiracy to create their own conspiracy operating in a substantially similar manner." *United States v. Mize*, 814 F.3d 401, 412 (6th Cir. 2016). In other words, Herrera and Martinez decided to open H&H and use a substantially similar fraud model based on what they had learned working at

the other clinics. But, at H&H, Hererra and Martinez were working toward their own goal, not a goal that they shared with Soca and Sosa. Hererra and Martinez were "copy cats" when they opened H&H, but that does not make Sosa and Soca conspirators with them in H&H.

A single conspiracy exists only when there is a common goal and agreement. A spin-off conspiracy will not be a single conspiracy with the original one when there is not any evidence of an agreement or common goal. The indictment was effectively altered here by the presentation of proof of two conspiracies when only one was charged. And there was no instruction to then jury about multiple conspiracies to mitigate the harm.

Inclusion of H&H in the conspiracy count was a fatal. It is a near certainty that Soca and Sosa were convicted of an offense other than the one charged by the grand jury and submitted to the petit jury. That is, they were convicted of a conspiracy relative to Revive and Renue, not H&H, even though the conspiracy charged included all three. There is no way any rational juror could have found Soca and Sosa were engaged in a common goal with H&H because of affirmative proof that they had nothing to do with H&H.

The Sixth Circuit found that even if Soca and Sosa did not directly conduct the operation at H&H, because the fraud going on at the three clinics had overlapping participants and methods, only one conspiracy existed and Soca and Sosa were involved in it. This conflicts with *Kotteakos, Mize, Carnagie, Duran* and *Kemp*, all of which require proof of a common goal not just similar or parallel goals.

We ask the Court to allow the Writ on the issue of multiple conspiracies and variance.

II. Insufficient Evidence for Sosa on Substantive Counts

The Fifth and Sixth Amendments to the United States Constitution require that guilt for a

criminal charge be found only when the prosecution has established proof beyond a reasonable doubt of each and every element of the offense charged. *See, e.g., Apprendi v. New Jersey*, 530 U.S. 466 (2000). Elements of an offense can be proved by direct evidence, circumstantial evidence and reasonable inferences that flow from that evidence. *Galloway v. United States*, 319 U.S. 372, 396 (1943). But the prosecution is only entitled to inferences that are reasonable, and it is unreasonable to pile inference upon inference to infer intent and knowledge. *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943).

Generally speaking, the elements of health care fraud and mail fraud as charged in this case required proof that the defendants knowingly participated in a scheme to defraud with the intent to defraud and to further that fraud, either used the mail or otherwise executed a scheme against a health-care benefit program. But both offenses require knowing participation and an intent to defraud.

In this case, as to the substantive mail fraud and health care fraud counts not involving Soca, there was no proof that Sosa had anything to do with mailing or submitting bills to the insurance companies. Not one person testified that Sosa had anything to do with preparing or submitting the bills to the insurance company. The most that could be said about Sosa is that he was involved in an overarching conspiracy to defraud, but as to the specific mailings and submissions of invoices to the insurance company, there was not one shred of evidence that he was involved in that process. The only evidence in the light most favorable to the government is that Sosa was in the clinics with Soca when she was preparing fraudulent bills and having them mailed. But it is improper to infer Sosa's intent as to each specific bill submitted in support of the substantive counts simply because he was around Soca and helped her set up the clinics.

The Sixth Circuit found that because Sosa participated in setting up the clinics, a reasonable

juror could infer that he had the specific intent to commit Mail Fraud and Health Care Fraud as to all of the substantive counts. But conspiracies and substantive offenses are separate crimes. The substantive counts require proof that the defendant consciously shared in a criminal act, not just that he entered an agreement broadly to participate in a fraud scheme. *See Pereira v. United States*, 347 U.S. 1, 11-12 (1954). Unlike substantive mail fraud counts, mail fraud conspiracies do not require proof of the actual use of the mails, just that the agreement formed reasonable anticipated use of the mails.

In this case, Mail Fraud required proof that Sosa used the mail, or aided and abetted someone in using the mail, as to the specific mailing for the specific patient on the specific date charged in the substantive count. Health Care Fraud required proof that Sosa executed a scheme to defraud health insurance companies by submission to the insurance companies of the specific form for the specific patient on the specific date charged in each substantive count. There was no such proof.

There was no proof in this case that Sosa ever did anything relative to any of the forms submitted or mailed to the insurance companies. He was never seen preparing them or mailing them. Not one of the participants in the fraud scheme ever said they interacted with Sosa, much less that Sosa directed them to sign or fill fraudulent forms or do something fraudulent.

The finding of sufficient evidence conflicts with *Pereira* which requires proof that Sosa consciously shared in a criminal act, not just that he agreed to the scheme more broadly. We ask the Court to allow the Writ on this issue.

III. Risk of Bodily Injury Enhancement

Section 2B1.1(b)(15)(A) of the Federal Sentencing Guidelines provides for a 2-level enhancement for fraud offenses involving the conscious or reckless risk of death or serious bodily injury.

In a fraud case, application of this enhancement applies only when the defendant's fraudulent course of conduct recklessly created a risk that others would suffer serious bodily injury. *United States v. Hall*, 71 F.3d 569 (6th Cir. 1995); *see also United States v. Vivit*, 214 F.3d 908, 921 (7th Cir. 2000); *United States v. Lucien*, 347 F.3d 45, 56-57 (2nd Cir. 2003). "Serious bodily injury" is defined at U.S.S.G. § 1B1.1, Application Note 1(L) as "extreme physical pain or the protracted impairment of a bodily member, organ or mental faculty" or requiring hospitalization, surgery or physical rehabilitation.

This enhancement was applied to both Soca and Sosa even though the fake collisions in this case were described as gentle bumps into guardrails, trees and the like, and sometimes no contact with anything was actually made. One of the "accidents" involved a participant smashing a headlight with a hammer. In another, most of the occupants exited the car before someone bumped into it. In other words, none of the collisions in this case were really accidents at all, they were only set up to look that way creating little to no risk of "serious bodily injury" as defined above.

The standard for application of the enhancement is whether "defendant's fraudulent conduct must have created a risk that others would suffer serious bodily injury...." *Lucien*, 347 F.3d at 56-57. It was not met here for Soca or Sosa. The fraudulent conduct attributed to Soca and Sosa was that they encouraged others to get involved in "fake" accidents where *no one actually got hurt*. The crux of the scheme was to make sure no one got hurt so that no one actually needed any of the treatment that was billed. The scheme only worked if there were *not any* actual injuries.

The Sixth Circuit's opinion was that this enhancement applied even if no one actually got injured simply because it was possible that someone could get injured. But this holding ignores the application notes and authority from other circuits focusing on the risk created by the conduct of the defendants and that the risk must be reckless as to serious bodily injury.

Soca and Sosa were convicted of devising a scheme where car insurance companies were billed

for treatment that participants in the scheme *did not get* and *did not need* because they were not actually injured. That was how the scheme would make money. If a person was actually injured and needed treatment, the scheme was not profitable.

Other circuits that have applied the enhancement to "staged" car accident situations have applied it because the defendants would crash their cars into other motorists who were not involved in the scheme. The Second Circuit in *Lucien* and the Eight Circuit in *United States v. Hoffman*, 9 F.3d 49 (8th Cir.1993) applied the enhancement in staged auto accident cases but the facts differed in a dispositive respect: those cases involved actual collisions that were considerably more dangerous because the conspirators crashed into unsuspecting motorists. In *Hoffman*, the fraud participants would be in one car and then "would drive in front of unsuspecting motorists who were traveling at slow speeds and slam on his brakes to cause collisions." *Hoffman*, 9 F.3d at 50. And in *Lucien,* the "defendants participated in this health care fraud by riding as a passenger in a vehicle that was intentionally crashed into another vehicle" and the driver of one of the intentionally hit cars "ended up in the opposite lane facing oncoming traffic." *Lucien*, 347 F.3d 45, 49-50, 56.

In other words, the *Lucien* and *Hoffman* collisions were planned, or "staged," but real. The defendants actually collided with unknowing participants creating a true risk of injury.

In this case, the collisions were planned, or "staged," but fake. These were not really accidents at all - they were only set up to look like accidents unlike the true collisions in *Lucien* and *Hoffman*. The Sixth Circuit said the focus is on *risk* of injury not *actual* injury. But this is incorrect and conflicts with *Lucien* and *Hoffman*. The focus is on whether there was a reckless risk of serious bodily injury based on Soca and Sosa's fraudulent conduct. If anything, Soca and Sosa would have encouraged participants to avoid any injury, especially anything that could come close to being serious, so that the

scheme would be profitable.

To allow the opinion of the Sixth Circuit to stand will result in this enhancement being applied in disparate ways amount the circuits. We ask the Court to grant the Writ due to the circuit conflict on this issue.

IV. Obstruction of Justice

Section 3C1.1 requires a defendant's offense level to be increased by two levels if the defendant willfully obstructed or impeded justice, or attempted to do so, in connection with the investigation, prosecution or sentencing of the offense of conviction. Application Note 4 provides a non-exhaustive list of examples of the types of conduct to which § 3C1.1 applies. Subsection (a) includes "threatening, intimidating or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so." U.S.S.G. § 3C1.1, Application Note 4(a). The enhancement was applied here because Soca's interactions with Mok were viewed as an *attempt* to influence Martinez through Mok.

Attempts to obstruct justice can be subtle and indirect, but there must be a "substantial step" towards accomplishing the obstruction. *United States v. Bingham*, 81 F.3d 617, 632 (6th Cir. 1996). There is disagreement among the circuits, however, whether the enhancement can apply when the obstruction attempt is directed at a third party and the would-be witness never learns of the attempt. The Sixth Circuit has held that this type of conduct can amount to obstruction of justice for purposes of § 3C1.1. But the Fourth Circuit has held that it cannot and to sustain a § 3C1.1 enhancement, there must be some showing that the would-be witness is likely to learn of the attempted obstruction. *United States v. Brooks*, 957 F.2d 1138, 1149-50 (4th Cir. 1992).

In this case, the enhancement was improperly applied to Soca and Sosa. As to Sosa, he did

not communicate with Mok. He was waiting in the car for Soca during her second interaction with Mok, only, not the first. There was no evidence that Sosa knew what Soca was saying to Mok or that he intended to further some attempt to obstruct justice. Soca's conduct was attributed to Sosa improperly.

But the enhancement should not have applied to Soca, either, under the Fourth Circuit's approach in *Brooks*. According to Mok, there was never an attempt to influence Martinez directly or an attempt to get Mok to communicate something to Martinez indirectly. Never once did Mok allege that Soca suggested that Martinez should testify, or not testify, about anything. Mok did not allege that Soca wanted anything to be passed on to Martinez. And there is no evidence Mok told Martinez any of this.

Application of the enhancement here conflicts with *Brooks*. We ask the Court to allow the Writ, again based on the disparate treatment the enhancement receives among the circuits.

CONCLUSION

WHEREFORE, Soca and Sosa request the Court to allow the Writ on any or all of the issues raised.

Dated: May 29, 2020

Respectfully submitted,

Britt M. Cobb (P69556)
WILLEY & CHAMBERLAIN LLP
Attorneys for Petitioners
300 Ottawa Avenue, N.W., Suite 810
Grand Rapids, Michigan 49503
(616) 458-2212
bmc@willeychamberlain.com

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 33

I hereby certify that this brief complies with the type-volume limitation set forth in Rule 33. This brief contains 28 pages with 6,526 words composed with 12-point Times New Roman proportionally spaced type.

Respectfully submitted,

Dated: May 29, 2020

Britt M. Cobb (P69556)
WILLEY & CHAMBERLAIN LLP
Attorneys for Petitioners
300 Ottawa Avenue, N.W., Suite 810
Grand Rapids, Michigan 49503
(616) 458-2212
bmc@willeychamberlain.com

CERTIFICATE OF SERVICE

It is hereby certified that on May 29, 2020, service of the *Motion for Leave to Proceed in Forma Pauperis* and *Petition for Writ of Certiorari* was made upon the following by placing the original, plus 1 copy, in an envelope addressed to:

Supreme Court of the United States
Clerk of the Court
1 First Street, NE
Washington, DC 20543

and depositing the envelope in First Class mail, delively prepaid thereon. Further, service of the same was made upon the following by placing a copy of the *Motion for Leave to Proceed in Forma Pauperis* and *Petition for Writ of Certiorari* in an envelope addressed to:

Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

and depositing the envelopes in the United States mail, postage prepaid thereon.

Dated: May 29, 2020

Respectfully submitted,

Britt M. Cobb (P69556)
WILLEY & CHAMBERLAIN LLP
Attorneys for Petitioners
300 Ottawa Avenue, N.W., Suite 810
Grand Rapids, Michigan 49503
(616) 458-2212
bmc@willeychamberlain.com

Appendix IA

NOT RECOMMENDED FOR PUBLICATION
File Name: 20a0013n.06

Nos. 17-1987 / 2032

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DAVID SOSA-BALADRON (17-1987) and BELKIS SOCA-FERNANDEZ (17-2032), Defendants-Appellants.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

BEFORE: COLE, Chief Judge; BOGGS and GIBBONS, Circuit Judges.

JULIA SMITH GIBBONS, Circuit Judge. David Sosa-Baladron and Belkis Soca-Fernandez were convicted of health care fraud, mail fraud, and conspiracy to commit mail fraud. Their scheme involved opening massage therapy clinics, staging car accidents, and submitting false claims for services to insurance companies. On appeal, Sosa-Baladron and Soca-Fernandez challenge their convictions based on the sufficiency of evidence, constructive amendments, and evidentiary rulings. They also appeal the district court's decision to impose three sentence enhancements. Because their arguments lack merit, we affirm.

I.

In 2012, Sosa-Baladron and Soca-Fernandez came to Michigan to open massage therapy clinics. Their business plan involved billing insurance companies for treatments the clinics did

not provide. Patients often staged accidents and injuries in return for payment by the clinics' owners and operators.

In April 2012, Soca-Fernandez and Sosa-Baladron opened their first clinic, Revive Therapy Center, LLC ("Revive"), in the city of Wyoming, Michigan, along with Antonio Martinez-Lopez. Martinez-Lopez served as Revive's manager, while Soca-Fernandez and Sosa-Baladron purported to be its "investors." Soca-Fernandez hired Dolis Rojas-Lopez to refer people who had automobile accidents—"real or unreal"—to Revive. DE 365, Trial Tr. Vol. II, Page ID 2531–32. Rojas-Lopez then started recruiting people to participate in fake accidents and offering them cash.

Martinez-Lopez, Soca-Fernandez, and Sosa-Baladron met with Dr. Flor Borrero, a local pediatrician, to convince her to see "patients" from Revive, indicating that their clinic was serving the low-income Hispanic community in Wyoming. Dr. Borrero agreed, and Martinez-Lopez began bringing patients to see her. Dr. Borrero saw many patients who had not suffered real injuries but had instead participated in staged car accidents. Rojas-Lopez had recruited these patients, and Soca-Fernandez and Martinez-Lopez coached them on the symptoms they should report to Dr. Borrero. After obtaining a prescription from Dr. Borrero for physical therapy, the participants signed blank therapy treatment forms that later were filled in to overstate the treatment received at Revive. Generally, patients received very little physical therapy treatment or no treatment at all, yet Revive billed insurance companies for treatments and services it did not provide. "Patients" would typically be paid between one and two thousand dollars for their participation in the fraud.

In May 2012, Sosa-Baladron and Martinez-Lopez interviewed and hired Revive's first massage therapist, Martha Zavala, who was then trained by Soca-Fernandez. On Soca-Fernandez's instructions, Zavala had patients sign blank forms and filled them out for treatment services she never actually performed. In May 2013, Yoisler Herrera-Enriquez joined Revive as

a massage therapist. Herrera-Enriquez similarly began filling out already-signed therapy forms for treatment services he did not provide, and Soca-Fernandez used the forms to falsely bill insurance companies. Sosa-Baladron observed the false billings. While working at Revive, Herrera-Enriquez learned that Martinez-Lopez, Soca-Fernandez, and Sosa-Baladron "shared the money of the business." DE 365, Trial Tr. Vol. II, Page ID 2373. And while running Revive, Sosa-Baladron, Soca-Fernandez, Martinez-Lopez, and Rojas-Lopez organized numerous staged accidents.

Martinez-Lopez's friend Gustavo Acuna-Rosa became involved in the fraud scheme at Revive, first as an accident participant and patient. Later, Acuna-Rosa, Martinez-Lopez, and Soca-Fernandez discussed opening another clinic, and Acuna-Rosa officially opened Renue Therapy Center, LLC ("Renue") in Lansing, Michigan in May 2013.

Renue used the same scheme as Revive—staging car accidents and fraudulently billing insurers for treatment that was never provided. Renue also sent its "patients" to Dr. Borrero for physical therapy prescriptions. Soca-Fernandez hired Herrera-Enriquez from Revive to join Renue as a massage therapist and to sign forms for treatment services he never performed. Sosa-Baladron and Soca-Fernandez, along with two other recruited participants, staged their own accident and submitted false billings for services from Renue.

In August 2013, Herrera-Enriquez opened H&H Rehab Center, LLC ("H&H") in Wyoming, Michigan, down the street from Revive. H&H operated under the same system as Revive and Renue: Martinez-Lopez and Rojas-Lopez recruited participants, the participants staged car accidents, and Dr. Borrero ordered therapy treatment. Some of these participants staged accidents and signed fraudulent therapy forms for both H&H and Revive.

In March 2014, Maria Sanchez-Jimenez, a confidential informant, became a Renue patient after being recruited by Rojas-Lopez. Sanchez-Jimenez gave a false accident report to Rojas-Lopez, who coached her on reporting false symptoms. After meeting with Dr. Borrero, Sanchez-Jimenez met with Acuna-Rosa and Martinez-Lopez to sign blank Renue therapy forms, which were then submitted to an insurance company for payment, even though Sanchez-Jimenez never received any treatment. Sanchez-Jimenez later signed blank treatment forms for H&H after being told that Acuna-Rosa had shut down Renue Therapy. H&H submitted Sanchez-Jimenez's fraudulent therapy treatment bills.

Members of this scheme were first indicted in the Western District of Michigan in March 2016. Over the next several months, more individuals were indicted, many of whom entered into plea agreements. Finally, in February 2017, a grand jury charged Sosa-Baladron and Soca-Fernandez with conspiracy to commit mail fraud in violation of 18 U.S.C. § 1349 (Count 1), health-care fraud in violation of 18 U.S.C. § 1347 (Counts 2–5, 7–13), and mail fraud in violation of 18 U.S.C. § 1341 (Counts 14–17, 19, 21).[1] After a seven-day trial, the jury found both defendants guilty on all counts.

The district court sentenced Sosa-Baladron to 120 months' imprisonment and Soca-Fernandez to 135 months' imprisonment. Sosa-Baladron and Soca-Fernandez filed timely notices of appeal, and their appeals were consolidated.

[1] Sosa-Baladron and Soca-Fernandez were tried jointly with Martinez-Lopez, who faced related mail-fraud and wire-fraud charges and an additional charge of unlawful procurement of naturalization (Count 22). The jury found Martinez-Lopez guilty and the district court sentenced him to 87 months' imprisonment. Martinez-Lopez appealed separately, and we affirmed his conviction and sentence. *See United States v. Martinez-Lopez*, 747 F. App'x 326 (6th Cir. 2018).

II.

Sufficiency of the Evidence. Sosa-Baladron challenges his convictions for mail fraud and health care fraud based on the sufficiency of the evidence and argues that the district court erred in denying his motion for judgment of acquittal under Fed. R. Crim. P. 29. We review *de novo* the district court's denial of a motion for judgment of acquittal based on insufficient evidence. *United States v. Graham*, 622 F.3d 445, 448 (6th Cir. 2010). We must affirm if the evidence, viewed in the light most favorable to the government, would allow any rational trier of fact to find Sosa-Baladron guilty beyond a reasonable doubt. *See United States v. Carmichael*, 232 F.3d 510, 519 (6th Cir. 2000).

The government proceeded on an aiding-and-abetting theory at trial with regard to the mail-fraud and health-care-fraud counts, and the district court instructed the jury accordingly. Sosa-Baladron therefore need not have "personally committed the crime" to be convicted, but rather it was sufficient if he "intentionally helped [or encouraged] someone else to commit the [fraud]." Sixth Circuit Pattern Jury Instruction 4.01 (first brackets in original); *see also* 18 U.S.C. § 2(a) ("Whoever . . . aids, abets, counsels, commands, induces or procures [the commission of an offense], is punishable as a principal."). Thus, the district court properly denied Sosa-Baladron's Rule 29 motion if the evidence sufficiently demonstrated that Sosa-Baladron intentionally assisted the individuals who carried out the criminal acts giving rise to those counts and sought by his actions to make the scheme to defraud succeed.

To prove mail fraud under 18 U.S.C. § 1341, the government must show that (1) the defendant knowingly participated in or devised a scheme to defraud in order to obtain money; (2) the scheme included material misrepresentations or concealment of a material fact; (3) the defendant had the intent to defraud; and (4) the defendant used the mail or caused another to use

the mail in furtherance of the scheme. Sixth Circuit Pattern Jury Instruction 10.01; *see also United States v. Frost*, 125 F.3d 346, 354 (6th Cir. 1997).

To prove health-care fraud under 18 U.S.C. § 1347, the government must show that (1) the defendant knowingly and willfully executed a scheme to defraud a health-care benefit program or to obtain its money or property by fraudulent pretenses, representations, or promises; (2) the scheme related to or included a material misrepresentation or concealment of material fact; and (3) the defendant had the intent to defraud. Sixth Circuit Pattern Jury Instruction 10.05; *see also United States v. Hunt*, 521 F.3d 636, 645 (6th Cir. 2008).

A.

Four counts (Counts 2, 4, 14, and 16) stemmed from a staged accident in October 2012 involving Ana Hidalgo and Lorena Aguilar. Hidalgo and Aguilar testified that Rojas-Lopez recruited them to sit in Hidalgo's car while Rojas-Lopez hit it from behind. Martinez-Lopez took Hidalgo and Aguilar to Dr. Borrero after coaching them on what symptoms to report. Revive subsequently billed insurance companies for treatment it did not provide. During this process, Aguilar met Soca-Fernandez and Sosa-Baladron. Aguilar and Hidalgo were paid for their participation in the scheme.

Two counts (5 and 17) relate to a January 2013 staged accident involving Alex Watters. Watters testified that he met with Martinez-Lopez, who informed Watters that he needed insurance and that the staged accident must involve enough damage to justify a police report. Watters intentionally drove off an icy road and hit a tree. Revive then billed Watters's insurance company for massage therapy services Watters did not receive. Watters and two other participants in the accident were each paid $1,000.

Two counts (9 and 19) pertain to a November 2013 staged automobile accident involving Soca-Fernandez, Sosa-Baladron, and passengers Yosvany Gonzalez and Eduardo Pardo-Oiz. Gonzalez and Pardo-Oiz testified that Sosa-Baladron purposely drove his vehicle off the roadway and then instructed them to report false symptoms to Dr. Borrero. A massage therapist at Renue testified that he never treated Soca-Fernandez or Sosa-Baladron, yet the clinic submitted false bills to the insurer for his treatment of them.

Five counts (10, 11, 12, 13, and 21) all relate to the government's confidential informant, Sanchez-Jimenez. As discussed above, Rojas-Lopez recruited Sanchez-Jimenez to participate in the fraud scheme, after which Sanchez-Jimenez saw Dr. Borrero and signed blank treatment forms for both Renue and H&H. Both Renue and H&H submitted false billings to Sanchez-Jimenez's insurance company.

The evidence shows that the individuals running these clinics knowingly devised and executed a scheme to defraud health insurance companies to obtain money and made material misrepresentations in the billings sent via U.S. mail, in violation of 18 U.S.C. §§ 1341 and 1347. On this evidence, a reasonable juror could infer that Sosa-Baladron had the specific intent to defraud the insurance companies and was an accomplice to mail fraud and health-care fraud. The government presented sufficient evidence that Sosa-Baladron aided and abetted Rojas-Lopez, Martinez-Lopez, and other co-conspirators in the scheme to submit fraudulent claims to the insurance companies—based on the staged accidents described above—in order to obtain money. As the owner and investor in the clinics falsely billing insurers via U.S. mailings, Sosa-Baladron "participate[d] in [the scheme] as in something that he wishe[d] to bring about, . . . [and] s[ought] by his action to make it succeed." *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949). Even

if Sosa-Baladron did not sign the insurance billings or seal the envelopes, the evidence demonstrates that Sosa-Baladron assisted in the success of the scheme to defraud.

Thus, because a rational trier of fact could have found Sosa-Baladron guilty on these charges beyond a reasonable doubt, the district court did not err in denying Sosa-Baladron's Rule 29 motion.

III.

Multiple Conspiracies. Soca-Fernandez and Sosa-Baladron both argue that the proof at trial demonstrated the existence of two conspiracies rather than one. They challenge their conspiracy convictions under different legal theories. Sosa-Baladron argues that the district court erred in refusing to instruct the jury on multiple conspiracies. Soca-Fernandez, on the other hand, contends that there was an impermissible constructive amendment to or fatal variance from the indictment, which charged one count of conspiracy to commit mail fraud. Both Sosa-Baladron and Soca-Fernandez's claims require analyzing whether the proof at trial demonstrated multiple conspiracies and, if so, whether the defendants were prejudiced by jury instructions that failed to mitigate the evidence of multiple conspiracies. We therefore address whether the combination of trial evidence and jury instructions created a constructive amendment or fatal variance, which are different types of modifications to an indictment. *See United States v. Kuehne*, 547 F.3d 667, 683 (6th Cir. 2008). We review a claim of constructive amendment or variance *de novo*. *United States v. Mize*, 814 F.3d 401, 408 (6th Cir. 2016).

"A constructive amendment 'results when the terms of an indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged such that there is a substantial likelihood that the defendant may have been convicted of an offense other than the one charged in the indictment." *Id.* at 409 (quoting *United*

States v. Martinez, 430 F.3d 317, 338 (6th Cir. 2005)). A constructive amendment is *per se* prejudicial and requires reversal of the defendant's conviction. *Kuehne*, 547 F.3d at 683.

A variance, on the other hand, results "when the charging terms [of the indictment] are unchanged, but the evidence at trial proves facts materially different from those alleged in the indictment." *Id.* (alteration in original) (quoting *United States v. Prince*, 214 F.3d 740, 756–57 (6th Cir. 2000)). To be fatal, a variance must also affect a substantial right of the defendant. *Kuehne*, 547 F.3d at 683. "The substantial rights of the defendant 'are affected only when the defendant shows prejudice to his ability to defend himself at trial, to the general fairness of the trial, or to the indictment's sufficiency to bar subsequent prosecutions.'" *Id.* (quoting *United States v. Hynes*, 467 F.3d 951, 962 (6th Cir. 2006)). Thus, a defendant may succeed in getting his conviction reversed based on a variance only where he also proves prejudice.

Here, the defendants cannot establish a constructive amendment or a fatal variance.

A. Constructive Amendment

Count 1 of the indictment charged Soca-Fernandez, Sosa-Baladron, and their partner, Martinez-Lopez, with conspiracy to commit mail fraud by staging car accidents, opening therapy clinics, and mailing fraudulent claims for therapy services to car insurance companies. On appeal, the defendants argue that the government presented evidence of two conspiracies: one conspiracy involving Revive and Renue and another conspiracy involving H&H. Because the district court denied their request to instruct the jury on two separate conspiracies, Soca-Fernandez and Sosa-Baladron claim the court constructively amended the indictment as to Count 1.

The Supreme Court has long held that the charges in an indictment may not be broadened through the presentation of evidence at trial. *Stirone v. United States*, 361 U.S. 212, 218–19 (1960). When a district court allows a defendant to be convicted on a charge the grand jury never

made, it commits fatal error. *Id.* at 219. On the other hand, the presentation of evidence that narrows the scheme alleged in the indictment does not violate the Fifth Amendment guarantee of indictment by a grand jury. *United States v. Miller*, 471 U.S. 130, 134–35 (1985). As long as the proof at trial corresponds to an offense clearly charged in the indictment, a conviction for such offense and based upon that proof should be sustained. *Id.* at 136. Thus, only when the proof at trial *broadens* the scope of an alleged conspiracy or scheme beyond that charged in the indictment—unmitigated by jury instructions—does a constructive amendment result. *See Mize*, 814 F.3d at 410–411.

In *Mize*, we found that the government's proof at trial focused predominantly on an uncharged conspiracy and, in doing so, broadened the scope of the indictment and altered its terms. *Id.* at 409–10. There was no constructive amendment, however, because the district court instructed the jury on multiple conspiracies. *Id.* at 409. Soca-Fernandez relies on *Mize* for the proposition that the evidence of two conspiracies, without mitigating jury instructions, constitutes a constructive amendment when only one is charged. Her argument is misguided. Here, the government presented evidence that all three clinics engaged in one conspiracy to commit mail fraud as charged in the indictment: the clinics involved overlapping management and recruiters, used the same law firm, employed the same scheme, and targeted the same participants. Unlike in *Mize*, the government's proof here did not broaden the conspiracy. The government's proof of the fraudulent scheme and false mailings from Revive, Renue, and H&H did not so alter the terms of the indictment as to create a substantial likelihood that Soca-Fernandez and Sosa-Baladron may have been convicted of an uncharged offense. Therefore, the district court did not err in refusing to give a mitigating jury instruction, and no constructive amendment to Count 1 of the indictment occurred.

B. Variance

Even if no constructive amendment occurred, a defendant may still prevail if he can prove that the evidence presented at trial amounted to a variance and that the variance prejudiced him. *Kuehne*, 547 F.3d at 683. In the conspiracy context, proof of a fatal variance requires a showing that the "indictment allege[d] one conspiracy, but the evidence can reasonably be construed *only* as supporting a finding of multiple conspiracies." *United States v. Caver*, 470 F.3d 220, 235–36 (6th Cir. 2006) (alteration in original) (quoting *United States v. Warner*, 690 F.2d 545, 548 (6th Cir. 1982)). Thus, to succeed on this theory, Soca-Fernandez and Sosa-Baladron must show that the *only* reasonable conclusion based on the evidence was that two separate conspiracies existed and that they were prejudiced by such variance from the indictment.

In determining whether a single conspiracy existed, the court considers three factors: (1) "the existence of a common goal," (2) "the nature of the scheme," and (3) "the overlapping of the participants in various dealings." *United States v. Smith*, 320 F.3d 647, 652 (6th Cir. 2003). "A single conspiracy is not converted to multiple conspiracies simply because it can be subdivided, or because there are changes in the individuals involved or the roles that they play in the conspiracy." *United States v. Beals*, 698 F.3d 248, 259 (6th Cir. 2012) (quoting *United States v. Walls*, 293 F.3d 959, 967 (6th Cir. 2002)). The participants need not know each of the other co-conspirators nor the details of their actions or roles in the conspiracy. *Id.* But the government must show that the alleged co-conspirators agreed to participate in "a collective venture directed toward a common goal." *United States v. Swafford*, 512 F.3d 833, 841 (6th Cir. 2008) (quoting *Warner*, 690 F.2d at 549). "A tacit or material understanding among the parties to a conspiracy is sufficient to establish the agreement, [and] conspiracy may be inferred from circumstantial

evidence which may reasonably be interpreted as participation in a common plan." *United States v. Hughes*, 505 F.3d 578, 593 (6th Cir. 2007) (quoting *Walls*, 293 F.3d at 967).

The evidence presented at trial proved one, overarching conspiracy with a common goal to defraud insurance companies. All three clinics used the same scheme of recruiting "patients," staging car accidents, and submitting false claims for physical therapy services they never rendered. The overlapping of participants in their dealings was rampant. The clinics used the same lawyers. The clinics used the same physician to order physical therapy for their accident participants. The clinics employed overlapping patient recruiters. Even if Soca-Fernandez and Sosa-Baladron did not directly conduct the operation at H&H, the evidence overwhelmingly demonstrated a single conspiracy involving Revive, Renue, and H&H and that the defendants participated in that conspiracy. On these facts, the defendants cannot prove that the *only* reasonable conclusion was the existence of two separate conspiracies. Therefore, the government's trial proof did not create a variance from Count 1 of the indictment. And because Soca-Fernandez and Sosa-Baladron cannot prove a variance from the indictment, we need not address whether they suffered prejudice.

IV.

Accomplice Liability. Soca-Fernandez argues that the district court's decision to instruct the jury under an accomplice liability theory as to the mail fraud counts constituted a constructive amendment to the indictment, which charged her as a principal. As noted above, a constructive amendment occurs where the indictment is effectively altered by the presentation of evidence and jury instructions which change the material elements of an offense. We review such a claim *de novo*. *Mize*, 814 F.3d at 408.

Even if the indictment charges a defendant as a principal, the jury may convict the defendant as an accomplice if the proof at trial shows that she "merely aided and abetted." *United States v. Bradley*, 421 F.2d 924, 927 (6th Cir. 1970) (quoting *United States v. Russo*, 284 F.2d 539, 540 n.1 (2d Cir. 1960)). This is because an aiding and abetting theory is "embodied in every federal indictment, whether specifically charged or not." *United States v. McGee*, 529 F.3d 691, 695 (6th Cir. 2008) (quoting *United States v. Floyd*, 46 F. App'x 835, 836 (6th Cir. 2002)).

Here, the fourth superseding indictment specifically charged Soca-Fernandez as an accomplice as to the health-care fraud counts and cited 18 U.S.C. § 2, the aiding and abetting statute. The indictment did not, however, explicitly charge Soca-Fernandez as an accomplice as to the mail fraud counts.

Soca-Fernandez argues that the jury instructions altered the terms of the indictment such that a constructive amendment occurred. She cites no authority to support this proposition, instead pointing to an absence of authority permitting the court to instruct on aiding and abetting when the indictment charged a defendant as a principal on some counts and as an accomplice on other counts. She also asserts that the difference in theories of liability as recited in the indictment and jury instructions implicates notice and due process concerns. We have held, however, that a defendant "may be indicted for the commission of a substantive crime as a principal offender and convicted of aiding and abetting its commission . . . without violating federal due process." *United States v. VanderZwaag*, 467 F. App'x 402, 407 (6th Cir. 2012) (quoting *Hill v. Perini*, 788 F.2d 406, 407 (6th Cir. 1986)).

Because an aiding-and-abetting theory is implicitly embodied in every federal indictment, *McGee*, 529 F.3d at 695, Soca-Fernandez fails to show how the trial evidence and the accomplice liability jury instruction together altered the terms of the indictment such that she was convicted

of a crime other than the one the indictment charged. *See Hynes*, 467 F.3d at 962. Therefore, Soca-Fernandez has not proven a constructive amendment.

V.

Multiplicity in the Indictment. Soca-Fernandez further challenges her conviction by arguing that the fourth superseding indictment impermissibly charged her for a "single scheme" of health-care fraud in multiple counts and that this multiplicity violates double jeopardy. For the reasons that follow, we reject this argument.

When an indictment charges a single offense in separate counts, it is multiplicitous and implicates the Double Jeopardy clause. *United States v. Davis*, 306 F.3d 398, 417 (6th Cir. 2002). "Where an indictment includes more than one count charging the same statutory violation, the question is whether Congress intended the facts underlying each count to constitute a separate unit of prosecution." *United States v. Richards*, 659 F.3d 527, 547 (6th Cir. 2011). Whether an indictment is multiplicitous is a legal question that we review *de novo*. *Id.*

As explained above, to prove health-care fraud under 18 U.S.C. § 1347, the government had to prove that Soca-Fernandez: "(1) knowingly devised a scheme or artifice to defraud a health care benefit program in connection with the delivery of or payment for health care benefits, items, or services; (2) executed or attempted to execute this scheme or artifice to defraud; and (3) acted with intent to defraud." *Hunt*, 521 F.3d at 645 (citation omitted). A defendant need not have specific intent to commit a violation of the health care fraud statute. 18 U.S.C. § 1347(b).

Our court has not addressed the issue of whether an indictment can permissibly charge multiple counts of health care fraud when each count stems from a single scheme. Both Soca-Fernandez and the government implore us to resolve the multiplicity issue by looking to cases involving multiple counts of bank fraud under 18 U.S.C. § 1344. Like the health-care fraud statute,

the bank fraud statute proscribes the *execution of a scheme or artifice*. 18 U.S.C. § 1344. Because the health-care fraud statute was patterned after the bank fraud statute, we analyze Soca-Fernandez's multiplicity argument in the same way we have analyzed similar arguments in bank fraud cases.

A bank fraud scheme may be "executed" by one act or many acts, and whether each act is a separate execution—which may give rise to separate counts—depends on the nature of the scheme and how it is defined in the indictment. *United States v. Anders*, 14 F.3d 602, at *11–14 (6th Cir. 1993) (unpublished table decision); *see also United States v. Abboud*, 438 F.3d 554, 567 (6th Cir. 2006) (finding each check in a check-kiting scheme amounted to a separate execution of bank fraud and may be charged separately). In *Anders*, the indictment charged the defendant with multiple counts of bank fraud in furtherance of a single scheme to defraud. *Id.* at *11–12. The indictment described the general scheme, and each count charged the specific amount of money and the day it was diverted. *Id.* at *12–13. Because each count constituted a separate and distinct execution of the fraud scheme, we held that the indictment was not multiplicitous. *Id.* at *14.

As in *Anders*, the indictment described Soca-Fernandez's fraud scheme and then charged her fraudulent submissions of health-care forms as separate executions of that scheme. Soca-Fernandez concedes that "each fraudulent submission of health care benefit forms can sometimes support a single count for each submission." CA6 R. 39, Soca-Fernandez Br., at 58. She argues here that all of the health-care fraud counts in her indictment amount to one execution of "a broad and general scheme." *Id.* Her argument is unconvincing. The indictment recites the language contained in 18 U.S.C. § 1347 and defines the scheme to defraud as one involving false claims about physical therapy services provided for victims of staged automobile accidents. The indictment then describes each count separately, noting the patient involved, the insurance

company billed, the dates of alleged service, the date of claim, the amount claimed, and which clinic submitted the claim. This is akin to the scheme and indictment in *Anders* because each count constituted a separate execution of the fraud scheme.

Health care fraud cases from the Fifth and Ninth Circuits support this conclusion. In addressing an ex post facto argument in *United States v. Hickman*, the Fifth Circuit reasoned that "any scheme can be executed a number of times, and each execution may be charged as a separate count." 331 F.3d 439, 446 (5th Cir. 2003). The *Hickman* court defined the defendant's scheme as one that involved submitting fraudulent claims to health insurers and found that each submission of a health-care claim form constituted a separate execution of the fraud scheme. *Id.* at 446–47. The court concluded that, "with each claim submission, [the defendant] owed a new, independent obligation to be truthful to the insurer." *Id.* at 447. In *United States v. Awad*, the Ninth Circuit adopted *Hickman*'s reasoning and upheld an indictment charging twenty-four health-care fraud counts over the defendant's multiplicity challenge. 551 F.3d 930, 938 (9th Cir. 2009). Like the Fifth Circuit in *Hickman*, the *Awad* court analogized the health-care fraud statute to the bank fraud statute. *Id.* The Ninth Circuit had previously held that each execution of a bank fraud scheme may be charged as a separate count in an indictment. *Id.* (citing *United States v. Molinaro*, 11 F.3d 853, 860 (9th Cir. 1993)). The court extended this rule to health-care fraud and held that "[e]ach submission of a fraudulent claim to a health care benefit program, rather than being simply an act in furtherance of a larger scheme to defraud, is a separate execution of the scheme and is itself chargeable as a separate count." *Id.*

We find *Hickman* and *Awad* persuasive and adopt the analysis the Fifth and Ninth Circuits have applied. As we have previously ruled in the bank fraud context, we now hold that each fraudulent claim submitted by Soca-Fernandez amounted to a separate execution of her health-

care fraud scheme. Thus, the health-care fraud counts in Soca-Fernandez's indictment were not multiplicitous.

VI.

Evidentiary Rulings. Soca-Fernandez argues that the district court erroneously admitted two pieces of evidence: (1) text messages between Acuna-Rosa and herself, and (2) photos of her house. We review evidentiary rulings for an abuse of discretion. *United States v. Marrero*, 651 F.3d 453, 471 (6th Cir. 2011). Under this standard, we may reverse only when we "lack[] a fair assurance that the outcome of a trial was not affected by evidentiary error" and are "firmly convinced that a mistake has been made." *United States v. Johnson*, 440 F.3d 832, 847 (6th Cir. 2006) (quoting *McCombs v. Meijer, Inc.*, 395 F.3d 346, 358 (6th Cir. 2005)). Here, the district court did not abuse its discretion in admitting the challenged evidence, and we thus affirm its evidentiary rulings.

A. Text Messages

At trial, the government sought to introduce text messages between Acuna-Rosa and Soca-Fernandez, which were sent between August 2015 and April 2016 and discussed meeting with their lawyers, making bank withdrawals, sending funds, and contacting Sosa-Baladron. The district court found that the messages constituted admissions by a party opponent and statements made by a party's co-conspirator, and thus were excluded from the definition of hearsay by rule. *See* Fed. R. Evid. 801(d)(2)(A), (E). On appeal, Soca-Fernandez argues that the district court incorrectly admitted these messages because they lack relevance and are unduly prejudicial, and because Acuna-Rosa's statements do not fall within the co-conspirator exception to the rule against hearsay.

The co-conspirator rule provides that a statement is not hearsay if it "is offered against an opposing party and . . . was made by the party's coconspirator during and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2). For Acuna-Rosa's statements to qualify as co-conspirator admissions, the court must find—by a preponderance of the evidence—that a conspiracy existed, that Soca-Fernandez and Acuna-Rosa belonged to the conspiracy, and that the statements were made in the course of and in furtherance of the conspiracy.[2] *United States v. Gonzales*, 501 F.3d 630, 636 (6th Cir. 2007). Whether a statement is made in furtherance of a conspiracy depends on the conspiracy's objectives. *United States v. Johnson*, 443 F. App'x 85, 92–93 (6th Cir. 2011). If an out-of-court statement is "intended to promote" a continued objective of the conspiracy, then it is made in furtherance of the conspiracy and qualifies as an admission under Rule 801(d)(2)(E). *United States v. Warman*, 578 F.3d 320, 338 (6th Cir. 2009) (citing *United States v. Henderson*, 307 F. App'x 970, 977 (6th Cir. 2009)).

In *United States v. Johnson*, we found that statements made by the defendant about "hush money" following a murder were made in furtherance of a conspiracy because an additional objective of the murder-for-hire conspiracy was the collection of insurance proceeds. 443 F. App'x at 92–93. Like the conspiracy in *Johnson*, the conspiracy here involved the additional or continued objective of collecting and distributing the money from insurance proceeds. At trial, the district court specifically found that the messages addressed "the object of the conspiracy, which of course, [was] to collect money." DE 368, Trial Tr. Vol. V, Page ID 3288. Because the content of the text messages promoted an objective of the conspiracy, the statements were made in furtherance of the conspiracy.

[2] The district court made these preliminary findings and issued a conditional ruling on the statements' admissibility. It later made the required findings regarding this application of the co-conspirator exclusion to the hearsay rule, pursuant to *United States v. Enright*, 579 F.2d 980 (6th Cir. 1978), and ruled that statements made by all conspirators in this case were admissible.

Soca-Fernandez also challenges the district court's finding that a conspiracy existed, at least at the time the text messages were exchanged. She argues that "[t]he text messages themselves were the only basis for the finding [of] an ongoing conspiracy and cannot be used foundationally for admission under Rule 801(d)(2)(E)." CA6 R. 39, Soca-Fernandez Br., at 63. According to Soca-Fernandez, the government could only show the existence of a conspiracy by impermissibly "bootstrapping" the content of the messages, using them to lay a foundation for their own admissibility. *Id.* But while "the contents of the declarant's statement do not alone suffice to establish a conspiracy in which the declarant and the defendant participated," Fed. R. Evid. 801 (Advisory Committee Note), the district court may consider such statement when making a preliminary determination of admissibility under Fed. R. Evid. 104(a). *United States v. Wilson*, 168 F.3d 916, 920–21 (6th Cir. 1999) (citing *Bourjaily v. United States*, 438 U.S. 171, 181 (1987)). The district court thus did not err by considering the messages' content in finding the existence of a conspiracy.[3]

Soca-Fernandez additionally argues that the district court should not have admitted the text messages because they lacked relevance and were unduly prejudicial. Of course, only relevant evidence is admissible. Fed. R. Evid. 402. Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without that evidence. Fed. R. Evid. 401(a)–(b). We employ an "extremely liberal" relevancy standard. *United States v. Ramer*, 883 F.3d 659, 681 (6th Cir. 2018) (quoting *United States v. Collins*, 799 F.3d 554, 578 (6th Cir. 2015)). The text messages between Soca-Fernandez and Acuna-Rosa discussed meeting with

[3] It is unclear from the transcript what other circumstances, if any, the district court considered in determining the existence of an ongoing conspiracy at the time the text messages were exchanged. Soca-Fernandez argues that this is fatal and constitutes an abuse of discretion. However, there was ample evidence introduced at trial regarding the continued conspiracy and collection of insurance proceeds. For example, the Whiting Law Firm was still sending settlement checks to Acuna-Rosa after the firm terminated its relationship with the three clinics in early 2016. Thus, any alleged shortcoming in the district court's analysis was harmless.

lawyers, withdrawing money from the bank, sending funds, and, importantly, contacting Sosa-Baladron. These statements easily meet the low bar of relevancy because they make a fact of consequence—whether Soca-Fernandez, Sosa-Baladron, and Acuna-Rosa were in a conspiracy to defraud insurance companies—more probable.

Finally, Soca-Fernandez contends that the danger of unfair prejudice from the text messages outweighed any probative value they had. According to Soca-Fernandez, the messages' admission prejudiced her "by the danger of confusion or misinterpretation by the jury," and she goes on to explain that the messages' relevance depended on "[f]ar too many . . . impermissible inferences" connecting the messages to the fraud. CA6 R. 39, Soca-Fernandez Br., at 62–64. Rule 403 instructs courts to exclude relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice." *Huddleston v. United States*, 485 U.S. 681, 687 (1988); Fed. R. Evid. 403. While the district court did not balance these considerations on the record below, we may do so on appeal. *See United States v. Jackson-Randolph*, 282 F.3d 369, 378 (6th Cir. 2002) (balancing the probative value against the risk of unfair prejudice when the district court failed to do so explicitly); *United States v. Sanders*, 95 F.3d 449, 453 (6th Cir. 1996) (same).

The text messages are relevant; they tend to show that Acuna-Rosa, Soca-Fernandez, and Sosa-Baladron were engaged in a conspiracy and that they were distributing proceeds. Simply because the messages were exchanged after the clinics closed does not make the statements contained therein unfairly prejudicial or any less probative, and neither does the fact that the messages' relevance to the conspiracy required drawing inferences. On balance, the probative value of the text messages was not substantially outweighed by any risk of undue prejudice to Soca-Fernandez. The district court therefore did not abuse its discretion when it admitted the statements.

B. Photographs of Soca-Fernandez's House

At trial, the government introduced into evidence two photos of Soca-Fernandez's home in Tampa, Florida, where she lived with Sosa-Baladron and their children. The district court overruled Soca-Fernandez's objection, finding that the probative value of the photos was not substantially outweighed by the danger of unfair prejudice. The court reasoned that "[i]t's natural to present evidence of possible expenditures by defendants in terms of how they are spending money from the alleged fraud," and that the jury should see the evidence. DE 369, Trial Tr. Vol. VI, Page ID 3309.

We first address relevance. Soca-Fernandez correctly points out that the home has no direct connection to this case beyond the fact that Soca-Fernandez and Sosa-Baladron lived there during the years in which they were engaged in a conspiracy to defraud the insurance companies through their clinics. Despite the lack of a direct connection to the fraud scheme and conspiracy, the photographs of the home are relevant as evidence of unexplained wealth. *See Jackson-Randolph*, 282 F.3d at 378. A court may admit this "lifestyle evidence" if three factors are satisfied: "(1) there is other credible evidence, direct or circumstantial, of the illegal activity; (2) the money spent was not available to the defendant from a legitimate source; and (3) the accumulation of great wealth or extravagant spending relates to the period of the alleged illegal activity." *Id.* The government introduced credible evidence in the form of numerous witnesses who testified that Soca-Fernandez participated in the fraud scheme and shared in its profits. There was no evidence that Soca-Fernandez had other sources of income to make her monthly mortgage payments of $2,300. Finally, even though the purchase of the house predated the opening of the first clinic, Soca-Fernandez owned and lived in the house during the period of the conspiracy and fraud scheme.

The lack of a direct connection between the house—as portrayed in the photos at trial—and Soca-Fernandez's illegal activity does not negate the admissibility of the photos as lifestyle, or unexplained wealth, evidence. "While demonstrating a direct connection would certainly enhance the probative value of such evidence, it is not necessary." *Jackson-Randolph*, 282 F.3d at 379. What is important is a "natural connection" from which the jury may reasonably infer that the funds derived from the illegal activity financed the subject of the wealth evidence. *See United States v. Amerine*, 411 F.2d 1130, 1132 (6th Cir. 1969). Here, a jury could reasonably infer a natural connection between Soca-Fernandez's home and the proceeds of her fraud scheme. Because the photos of the home support this inference, they satisfy the "extremely liberal" standard of relevance this court applies. *See Ramer*, 883 F.3d at 681. The district court, therefore, did not abuse its discretion in determining that the photos were relevant.

Turning to unfair prejudice, we now ask whether the probative value of the photos is substantially outweighed by the risk of unfair prejudice. The balancing test of Rule 403 "is strongly weighted toward admission." *United States v. Asher*, 910 F.3d 854, 860 (6th Cir. 2018). We must "review the admitted evidence 'in the light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect.'" *Id.* (quoting *United States v. Carney*, 387 F.3d 436, 451 (6th Cir. 2004).

Soca-Fernandez argues that the photos were unduly prejudicial because the government theorized that her "nice home" must have been financed by the cash profits of the fraud scheme. CA6 R. 39, Soca-Fernandez Br., at 61. In closing, the government alluded to the photos when it argued that Soca-Fernandez and Sosa-Baladron implemented the fraud scheme in Michigan so they could "sit on their beach in their beautiful Florida home, and never come back." DE 370, Trial Tr. Vol. VII, Page ID 3548. Her argument is unpersuasive for two reasons. First, Soca-

Fernandez did not object to this statement. Second, closing argument is not *evidence*. And while "the government may not rely on prejudicial facts not in evidence when making its closing arguments," *United States v. Roach*, 502 F.3d 425, 434 (6th Cir. 2007), the government did not do so here. The prosecutor indirectly referenced Soca-Fernandez's home in closing, and the fact that Soca-Fernandez lived in a "nice home" was in evidence. CA6 R. 39, Soca-Fernandez Br., at 61.

Giving the photos their maximum probative value and minimal prejudicial effect, their probative value was not substantially outweighed by the danger of unfair prejudice. We conclude that the district court did not abuse its discretion in admitting the photos of Soca-Fernandez's home into evidence.

VII.

Sentence Enhancements. Finally, Soca-Fernandez and Sosa-Baladron challenge the sentence enhancements imposed by the district court. Both argue that the district court erroneously applied enhancements for obstruction of justice, U.S.S.G. § 3C1.1, and for participation in a fraudulent scheme that created a risk of serious bodily harm, U.S.S.G. § 2B1.1(b)(15).[4] Sosa-Baladron further challenges the aggravating-role adjustment, U.S.S.G. § 3B1.1, for his leadership in the offense. In applying the Guidelines, we review the district court's factual findings for clear error and its legal conclusions *de novo*. *United States v. Moon*, 513 F.3d 527, 539–40 (6th Cir. 2008). The government need only show by a preponderance of the evidence that a sentence enhancement applies. *United States v. Donadeo*, 910 F.3d 886, 901 (6th Cir. 2018). Giving due

[4] Soca-Fernandez and Sosa-Baladron were sentenced in August 2017, and thus the 2016 version of the U.S. Sentencing Guidelines governed at their sentencing. *See Huff v. United States*, 734 F.3d 600, 608 (6th Cir. 2013) ("Generally, a district court applies the version of the Guidelines in effect at the time of sentencing."). The enhancement for creating a risk of serious bodily harm was moved to § 2B1.1(b)(16) in the 2018 Guidelines.

deference to the district court's factual findings, we hold that the district court properly found that the sentence enhancements applied and thus affirm the defendants' sentences.

A. Obstruction of Justice

The Guidelines provide for a sentence enhancement if a "defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction." U.S.S.G. § 3C1.1. Relevant here, obstructive conduct includes the "threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so," *id.* § 3C1.1 cmt. n.4(A), as well as "attempting to suborn perjury," *id.* § 3C1.1 cmt. n.4(B).

In its presentence investigation reports ("PSR") for Soca-Fernandez and Sosa-Baladron, the Probation Office recommended a two-level enhancement for obstruction of justice based on their pretrial contacts with Martinez-Lopez's wife, Katia Mok-Tornes. Soca-Fernandez visited Mok-Tornes in October 2016 and insisted on speaking with Martinez-Lopez. After Mok-Tornes refused to let her inside, Soca-Fernandez said she wanted Martinez-Lopez to tell prosecutors that Acuna-Rosa was testifying against Martinez-Lopez, Sosa-Baladron, and Soca-Fernandez because of a family feud. Soca-Fernandez returned to Mok-Tornes's house in February 2017—this time with Sosa-Baladron. Soca-Fernandez went inside and offered Mok-Tornes money while Sosa-Baladron sat in the vehicle. Knowing that Martinez-Lopez's bail had been revoked, Soca-Fernandez claimed that she offered the money to "help" Mok-Tornes with home and family expenses. DE 383, Soca-Fernandez Sentencing Tr., Page ID 3754. Mok-Tornes testified, however, that she believed the offer of money "could be about [Martinez-Lopez] not going against [Soca-Fernandez] and [Sosa-Baladron]," *id.* at 3755, and that, if she accepted the money, Soca-Fernandez and Sosa-Baladron would expect Martinez-Lopez not to testify against them.

The district court found that the defendants intended to influence the prosecution in this case by the two visits to Mok-Tornes and applied the two-level enhancements to the sentences of both defendants. In light of Mok-Tornes's testimony, the court inferred that Soca-Fernandez unlawfully attempted to influence Martinez-Lopez's testimony by providing a false story to Mok-Tornes's wife and offering her money. With regard to Sosa-Baladron, the court found that he was "the functional equivalent of the wheel man in an armed robbery," that he knew "the nature of the conversation that [Soca-Fernandez] was going to have with [Mok-Tornes]," and that Sosa-Baladron and Soca-Fernandez were clearly "working together" to influence Martinez-Lopez's testimony. DE 381, Sosa-Baladron Sentencing Tr., Page ID 3693–94.

We review this decision for clear error because "the determination of whether a set of facts constitutes obstruction of justice is a fact-bound decision." *Jackson-Randolph*, 282 F.3d at 389.[5]

For the obstruction-of-justice enhancement to apply, the defendants must have taken some substantial step toward obstruction and intended to obstruct justice. *See United States v. Huntley*, 530 F. App'x 454, 457 (6th Cir. 2013). Moreover, in considering whether a defendant had the requisite intent, other circuits have said that the court may draw all reasonable inferences from the defendant's words and conduct, as well as other relevant circumstances. *See United States v. Reeves*, 586 F.3d 20, 23 (D.C. Cir. 2009); *United States v. Sisti*, 91 F.3d 305, 313 (2d Cir. 1996). The enhancement applies when obstructive conduct targets an intermediary, either directly or indirectly. *See United States v. Pinkney*, 644 F. App'x 478, 484 (6th Cir. 2016); *United States v. Moss*, 9 F.3d 543, 553–54 (6th Cir. 1993). Further, even subtle attempts to persuade a witness or

[5] At times, we have applied *de novo* review to this question, reasoning that whether specific facts amount to obstructive conduct is a mixed question of fact and law. *See, e.g., Donadeo*, 910 F.3d at 893; *United States v. Henry*, 819 F.3d 856, 872 (6th Cir. 2016). However, because the district court's legal decision here "depend[ed] heavily upon an understanding of the significance of case-specific details," *Jackson-Randolph*, 282 F.3d at 389 (quoting *Buford v. United States*, 532 U.S. 59, 65 (2001)), the appropriate standard of review is clear error.

co-defendant to testify falsely justify this enhancement. *See United States v. Cannon*, 552 F. App'x 512, 515 (6th Cir. 2014) (noting that "the obstruction enhancement covers subtle efforts no less than brazen ones"); *United States v. Bingham*, 81 F.3d 617, 632 (6th Cir. 1996) (upholding the enhancement where defendant attempted "indirectly, and perhaps even somewhat ambiguously, to have" a witness testify falsely).

Under the government's theory, Soca-Fernandez obstructed justice by indirectly "plant[ing] the seed" of false testimony with Mok-Tornes and then doubled down by offering money. DE 383, Soca-Fernandez Sentencing Tr., Page ID 3778–79. The district court agreed and found that Soca-Fernandez intended to obstruct justice and took a substantial step by providing the false story of a family feud to Mok-Tornes and offering her money. The district court additionally found that Sosa-Baladron's role in driving Soca-Fernandez amounted to obstructive conduct as well, inferring Sosa-Baladron's knowledge and intent based on the circumstances of his relationship with Soca-Fernandez throughout the conspiracy.

That Soca-Fernandez contacted Mok-Tornes with the intention of persuading Martinez-Lopez to testify falsely is an entirely plausible and likely explanation of her two pre-trial visits and offer of money. The district court's finding as to Sosa-Baladron's intent to obstruct is a closer question. However, the circumstantial evidence and nature of Soca-Fernandez and Sosa-Baladron's partnership throughout the conspiracy justifies the district court's inference on that issue. The mere possibility of an alternative interpretation of the facts—that Soca-Fernandez simply wanted to be charitable and Sosa-Baladron was unaware of the exact conversations with Mok-Tornes—is not enough to show clear error. Considering the evidence and according due deference to the district court's findings, we conclude the district court's determination that Soca-

Fernandez and Sosa-Baladron obstructed justice by attempting to persuade a witness to provide false testimony passes clear-error review.

B. Risk of Serious Bodily Injury

The 2016 Guidelines also provide for a two-level sentence enhancement if the offense involved the conscious or reckless risk of death or serious bodily injury. U.S.S.G. § 2B1.1(b)(15)(A). "Serious bodily injury" is defined as one "involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation." *Id.* § 1B1.1 cmt. n.1(L).

The Probation Office recommended this sentence enhancement for both Sosa-Baladron and Soca-Fernandez based on the numerous staged or planned car accidents involved in their scheme to defraud insurance companies. Various participants in the defendants' scheme testified at trial that they staged their accidents by running into a tree or bush, running off the road, or running into another vehicle. The defendants left the decision regarding the method up to the participants as long as it resulted in a police report. Even though the co-conspirators reassured participants that no one would get hurt in these staged accidents, they arranged for some accidents to occur under conditions of rain, snow, or ice. At least one of the participants had a headache and aggravated a back injury after sliding off an icy road and hitting a tree. Based on the proof at trial concerning the circumstances of the accidents, the district court determined that the defendants' offenses involved the risk contemplated by section 2B1.1(b)(15)(A) and overruled their objections to this enhancement.

In a fraud case, this enhancement applies if the risk of serious bodily injury is "part and parcel of the scheme to defraud." *United States v. Hall*, 71 F.3d 569, 571 (6th Cir. 1995).[6] This enhancement does not require actual injury, but it does require that the reckless risk was "actual, not conjectural." *United States v. Vivit*, 214 F.3d 908, 922 (7th Cir. 2000). While we have not considered the enhancement in this particular type of fraud scheme, two of our sister circuits have found the enhancement applicable in staged car accident schemes. *See United States v. Lucien*, 347 F.3d 45, 56 (2d Cir. 2003) (upholding sentence enhancement in a fraud scheme involving staged accidents where the district court found that the "risk of bodily injury inheres in any deliberately caused accident" and that "the risk of bodily injury is patent in this type of criminal activity"); *United States v. Hoffman*, 9 F.3d 49, 50 (8th Cir. 1993) (per curiam) (upholding sentence enhancement for a defendant who arranged low-speed automobile accidents and submitted fraudulent claims to insurance companies because the risk of seriously bodily injury was "inherent" in the staged accidents). Soca-Fernandez and Sosa-Baladron attempt to distinguish *Hoffman* and *Lucien* by arguing that those cases involved actual collisions with unsuspecting motorists. Their argument is inapposite. As in *Hoffman* and *Lucien*, the focus here is on actual *risk* of serious bodily injury, not on whether there were actual injuries. Soca-Fernandez and Sosa-Baladron's fraud scheme involved staging accidents that carried an inherent risk of seriously bodily injury to the participants and other drivers or pedestrians. Therefore, we hold that the district court properly applied the enhancement under U.S.S.G. § 2B1.1(b)(15)(A) to Sosa-Baladron's and Soca-Fernandez's sentences.

[6] *Hall* and other cases that we cite *infra* interpret an enhancement under U.S.S.G. § 2F1.1(b) in a prior version of the Guidelines, which provided for an enhancement if a fraud or deceit offense involved "the conscious or reckless risk of serious bodily injury." *See, e.g.*, *Hall*, 71 F.3d at 571. Section 2F1.1 was deleted from the Guidelines in 2001 when it was consolidated with § 2B1.1. Because the enhancement under § 2B1.1(b)(15)(A) of the 2016 Guidelines contains the same language as this prior enhancement, we continue to rely on these cases.

C. Leadership Role in the Offense

The Guidelines provide for a sentence enhancement based on a defendant's leadership role "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants." U.S.S.G. § 3B1.1(a). Relevant considerations include "the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others." *Id.* § 3B1.1 cmt. n.4; *see also United States v. Walls*, 546 F.3d 728, 735 (6th Cir. 2008) (quoting *United States v. McDaniel*, 398 F.3d 540, 551 (6th Cir. 2005)). Further, for this enhancement to apply, the "defendant must have exerted control over at least one individual within a criminal organization." *United States v. Vandeberg*, 201 F.3d 805, 811 (6th Cir. 2000) (quoting *United States v. Gort Didonato*, 109 F.3d 318, 321 (6th Cir. 1997)).

Based on this Guideline, the Probation Office recommended a four-level adjustment to Sosa-Baladron's offense level for his aggravating role in the fraud scheme. The district court accepted the recommendation and applied the enhancement to Sosa-Baladron's sentence for being a leader or organizer. In reaching this conclusion, the district court made the following findings. First, Sosa-Baladron participated in the recruitment of Dr. Borrero to play the role of ordering treatment for the individuals in staged accidents. The district court described this recruitment meeting as "one of the linchpins of this conspiracy." DE 381, Sosa-Baladron Sentencing Tr., Page ID 3694. Moreover, the district court found that Sosa-Baladron was involved in almost all of the "critical events" in the course of the fraud scheme, and that he specifically supervised or exerted control over Gonzalez and Pardo-Oiz in the November 11, 2013 staged accident. *Id.* at 3695. The

district court further noted that Sosa-Baladron had an important role in managing and collecting the proceeds of the fraud scheme based on the text messages indicating that Sosa-Baladron was "demanding [Acuna-Rosa] collect and share money," the photo showing Sosa-Baladron making bank withdrawals, and the evidence that Sosa-Baladron assisted Soca-Fernandez in preparing false billings. *Id.* Finally, the district court found that this fraud scheme clearly involved five or more participants.

On appeal, Sosa-Baladron submits that Soca-Fernandez was the actual "mastermind behind the operation" and that the district court erred when it attributed her actions to Sosa-Baladron. CA6 R. 36, Sosa-Baladron Br., at 26. He argues that the trial evidence only proved his presence and involvement in peripheral aspects of the clinics' operations. His arguments are unavailing. Even if Soca-Fernandez played a leading role in the fraud scheme, that would not diminish Sosa-Baladron's leadership or organizational role. Indeed, the Guidelines contemplate criminal activities involving "more than one person who qualifies as a leader or organizer of a criminal association or conspiracy." U.S.S.G. § 3B1.1 cmt. n.4. Further, the district court did not credit Sosa-Baladron with Soca-Fernandez's actions. The court made explicit findings regarding Sosa-Baladron's own role in making decisions, recruiting accomplices, sharing in the scheme's profits, and exerting control over multiple individuals within the scheme.

The district court did not clearly err in its factual findings, and these findings satisfy the criteria for a four-level enhancement to Sosa-Baladron's Guideline calculation under U.S.S.G. § 3B1.1.

VIII.

For the foregoing reasons, we affirm the convictions and sentences of Sosa-Baladron and Soca-Fernandez.