App. No. _____

In The

Supreme Court of the United States

Hal Kreitman,

Petitioner,

v.

United States of America,

Respondent.

PETITIONER'S APPLICATION TO EXTEND TIME
TO FILE PETITION FOR A WRIT OF CERTIORARI

To the Honorable Clarence Thomas, as Circuit Justice for the United States Court of Appeals for the Eleventh Circuit:

Petitioner Hal Kreitman respectfully requests that the time to file a Petition for a Writ of Certiorari in this case be extended for sixty days to November 25, 2019. The court of appeals issued its opinion on May 20, 2019. App. A, *infra*. Petitioner timely filed a petition for rehearing on May 29, 2019. App. B, *infra*. The court denied Petitioner's motion for rehearing on June 28, 2019. App. C, *infra*. Absent an extension of time, the petition would be due on September 26, 2019. Petitioner is filing this Application at least ten (10) days before that date. *See* S.Ct. R. 13-5. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Background

Petitioner seeks review of the decision of the United States Court of Appeals for the Eleventh Circuit based on substantial questions relating to burdens of proof in the application of the sentencing guidelines and the imposition of restitution obligations in relation to the principal factor in white collar sentencing: calculation of intended and actual loss. The decision below deepens a circuit conflict relating to the level of proof necessary to impute criminal responsibility for loss to a conspirator. In addition, petitioner intends to address as part of the petition substantial questions relating to that Eleventh Circuit's extension of criminal liability for money laundering to an *employee* who receives a paycheck from a business that has received proceeds from criminal activity—in petitioner's case, a clinic that submitted insurance billing for unnecessary medical services. The Eleventh Circuit held, in its original decision in petitioner's case remanding for resentencing, *see* App. D, *infra*, that by accepting as payment funds that may have included fraud proceeds, the petitioner, as an employee of a temp agency assigned to a clinic, conspired to and committed promotional money laundering in violation of 18 U.S.C. §§ 1956(a)(1) and 1956(h). The Eleventh Circuit's original remand decision also deepens a circuit split on a sentencing guideline issue regarding whether a defendant who has a special skill, but does not employ it in committing the offense, is subject to sentence enhancement for abuse of skill under U.S.S.G. § 3B1.3. These issues may warrant granting a writ of certiorari and will require substantial legal research and review by counsel including as to circuit conflicts. The issues are complex. Briefing in the Eleventh Circuit was extensive, and the important issues and collateral impact

of the decision support granting this extension of time.

Reasons For Granting An Extension Of Time

The time to file a Petition for a Writ of Certiorari should be extended for sixty days for the following reasons:

1. Due to case-related and other reasons additional time is necessary and warranted for counsel to research the decisional conflicts, and prepare a clear, concise, and comprehensive petition for certiorari for the Court's review.

2. The press of other matters makes the submission of the petition difficult absent the requested extension. Petitioner's counsel faces numerous direct-appeal briefing deadlines in criminal cases over the next 45 days, as well as preparation for oral argument in *United States v. Grayson*, 7th Cir. No. 19-1367, on September 26, 2019, the date on which the petition is due. Additional filing deadlines through October 2019, include briefs in 11th Cir. Nos. 17-10010, 18-10334, 18-10755, 18-11350, 19-10740, 19-12272, 19-13238, and 19-13297. Counsel also faces filing deadlines in the first two weeks of November 2019 and oral argument during the week of November 18, 2019, in 11th Cir. No. 16-11049.

3. The forthcoming petition is likely to be granted in light of, among other things, the need to address the important circuit conflict regarding the scope and application of the money laundering statute and loss calculation for sentencing and restitution purposes.

Conclusion

For the foregoing reasons, the time to file a Petition for a Writ of Certiorari in this matter should be extended sixty days to and including November 25, 2019.

Respectfully submitted,

/s/ Richard C. Klugh

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September 2019

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12838
Non-Argument Calendar

D.C. Docket No. 9:11-cr-80106-KAM-25

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

HAL MARK KREITMAN,

Defendant - Appellant.

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

(May 20, 2019)

Before WILLIAM PRYOR, MARTIN, and GRANT, Circuit Judges.

PER CURIAM:

Hal Kreitman appeals the district court's sentence of 84 months of imprisonment and two years of supervised release. He also appeals the court's order to pay $795,945.51 in restitution. After careful consideration, we affirm his sentence and vacate and remand for reconsideration his restitution order.

I.

The facts of this case are set out in this Court's earlier decision addressing the direct appeal brought by Kreitman and his co-defendants. See United States v. Ramirez, 724 F. App'x 704 (11th Cir. 2018) (unpublished). We will briefly recount them here. Kreitman was convicted of mail fraud, conspiracy to commit mail fraud, money laundering, and conspiracy to commit money laundering for participating in a scheme that defrauded insurance companies. Id. at 709–10. The scheme was as elaborate as it was criminal. The conspirators recruited people to stage car accidents and seek "treatment" at one of several clinics operated by the conspirators. Id. at 709. At the clinic, a conspirator chiropractor, like Kreitman, would prescribe dozens of fake therapy sessions for the "injured" person, bill insurance companies for the cost, and pocket the money. Id. at 709–10.

For his role in this scheme, Kreitman was sentenced to 96-months imprisonment and 2 years of supervised release, and ordered to pay more than $1.5 million in restitution and an assessment of $2,500. Id. at 710. On appeal, this Court vacated his sentence and restitution order because the district court

improperly held him accountable "for all of the loss that was generated during the course of the conspiracy" as opposed to "all reasonably foreseeable" losses. Id. at 718–19 (quotation marks omitted). In addition, the district court failed to "make individualized findings on the scope of criminal activity undertaken by Mr. Kreitman." Id. at 719. This Court remanded Kreitman's case for resentencing. Id. at 720.

On remand, the district court reevaluated the evidence and found that the actual loss was $795,945.51 and that ten or more victims were involved. The court also declined to apply a two-level special skills enhancement because Kreitman did not use any special skills in service of the money laundering offense. As a result, the district court calculated Kreitman's new guideline range as 78 to 97 months, which the court characterized as "an appropriate range . . . to work with" and "sufficient but not greater than necessary to comply with the requirements of Section 3553." Before imposing a sentence, the district court heard arguments from counsel, who urged the court to vary downwards on account of Kreitman's exemplary behavior in prison. While in prison, Kreitman taught multiple GED courses and completed more than 900 hours of coursework in preparation for reentry.

The court imposed an 84-month sentence followed by two years of supervised release. The court also ordered Kreitman to pay $795,945.51 in

restitution. The court explained that it arrived at its sentence after considering "the statements of the parties, the information contained in the presentence investigation report, and the advisory guideline range, as well as the statutory factors set forth in 18 U.S.C. [§] 3553."

Kreitman timely appealed.

II.

"We review a district court's interpretation and application of the Sentencing Guidelines de novo but accept the court's factual findings unless they are clearly erroneous." United States v. Ford, 784 F.3d 1386, 1396 (11th Cir. 2015). We likewise review de novo "the legality of an order of restitution," and we review the factual findings undergirding the order for clear error. See United States v. Foley, 508 F.3d 627, 632 (11th Cir. 2007). We review the procedural reasonableness of a sentence under an abuse-of-discretion standard. United States v. Ellisor, 522 F.3d 1255, 1273 n.25 (11th Cir. 2008). A district court abuses its discretion if it follows improper procedures in setting a sentence. Id.

III.

Kreitman first argues the district court erred in calculating the guideline range by relying on unreliable government calculations of claims, failing to identify and exclude insurance claims involving legitimate patient treatment, and speculating that more than ten victim-entities were involved. We disagree.

The Sentencing Guidelines impose a 14-level enhancement if the actual loss attributable to the defendant is more than $550,000 and less than or equal to $1.5 million. USSG § 2B1.1(b)(1)(H). Kreitman argues the district court overcalculated the loss amount and suggests that he should have received a lower-level enhancement. The problem with his argument is this: counsel for Kreitman conceded at the sentencing hearing that even if the billings were off, the errors were "not going to be anywhere near getting [Kreitman] down to 550"—or $550,000. True, Kreitman asked the district court to calculate a loss amount no greater than 65% of $795,000, or $516,750, to account for Kreitman's actual culpability. But the district court was entitled to find, given counsel's concession, that the loss was above $550,000 and commensurate with a 14-level enhancement.[1]

Neither did the district court clearly err in finding that Kreitman's offenses involved ten or more victims. As Kreitman conceded at the hearing, there were "about 12" insurance companies affected by Kreitman's billings. Although Kreitman later maintained that the government failed to prove more than 8 insurance entities were the victims of Kreitman's fraudulent insurance claims, he

[1] The government argues that Kreitman cannot challenge the district court's calculated loss amount of $795,945.51 because he invited the error by agreeing at resentencing that the actual loss amount was around $795,000. However, the record is clear counsel was referring to the total potential loss amount—not how much Kreitman should be held liable for. As a result, the doctrine of invited error does not bar him from making these arguments on appeal.

Appendix A

has presented no argument on appeal that persuades us the district court's finding was clearly erroneous.[2]

Even assuming that only insurance claims filed by Kreitman's patients after August 28, 2010 may be counted,[3] the record reflects there were thirteen insurance companies that made payments on or after that date. Kreitman nonetheless argues there was not enough evidence to find more than ten victims because some of these payments involved only one exam as opposed to a pattern of repeated visits, which could be a sign that the victim was legitimately injured. But again, Kreitman admitted at the resentencing hearing that these single examinations were "borderline" cases and should be omitted under a "conservative" estimate.

Beyond Kreitman's admission, there was testimony that single payments would have been consistent with the fraud scheme because the government introduced only bills attributable to Kreitman—not those bills attributable to his co-conspirators or anyone else. In other words, a "patient" could have scheduled several fake therapy treatments and billed them separately through a co-conspirator, leaving Kreitman responsible for billing a fake x-ray and nothing else.

[2] The government also argues Kreitman invited error on the number of victims involved. However, because Kreitman did dispute the number of victims during the resentencing hearing, we will not apply the invited error doctrine to bar consideration of the merits of his claim.

[3] Kreitman argued during resentencing that August 28, 2010, the day the indictment says Kreitman fraudulently mailed an insurance claim, should serve as the start date for all loss calculations.

The district court was entitled to credit that testimony. The court therefore did not clearly err in finding that the government met its burden of proving by a preponderance of the evidence that more than ten victims were involved. See United States v. Castaneda–Pozo, 877 F.3d 1249, 1251 (11th Cir. 2017) (per curiam) ("We will not reverse a district court's factual finding unless we are left with a definite and firm conviction that a mistake has been committed." (quotation marks omitted)).

As for the restitution order, it appears the district court recognized that some of the billing numbers "might be inaccurate" but credited the government's proffered number anyway because the mistakes wouldn't lower the guideline range. This was improper. This Court has cautioned that "the amount of loss for restitution purposes will not always equal the amount of loss under the sentencing guidelines" and courts must be careful to narrowly tailor restitution so as not to "provide a windfall for crime victims." United States v. Bane, 720 F.3d 818, 827 (11th Cir. 2013) (quotation marks omitted). Kreitman raised several concerns during resentencing about how the government calculated loss. The most serious of these was the government's decision to include billing for a time period that may have predated Kreitman's employment with the clinic. If Kreitman is correct about these mistakes, it is doubtful he could be made to pay the restitution amount based on them, even if his guideline range remained the same. See United States

v. Dickerson, 370 F.3d 1330, 1341 (11th Cir. 2004) ("[A] criminal defendant cannot be compelled to pay restitution for conduct committed outside of the scheme, conspiracy, or pattern of criminal behavior underlying the offense of conviction.").

The district court did not meaningfully engage with Kreitman's arguments about the loss amount once it determined the guideline range would remain unchanged. We therefore vacate the restitution order and remand for the district court to reconsider all the evidence. If Kreitman wants to pursue his argument that some amount of money should be deducted from the restitution order because he actually treated injured patients, he must present some evidence about what that amount should be. See Bane, 720 F.3d at 829 n.10 ("The defendant bears the burden to prove the value of any medically necessary goods or services he provided that he claims should not be included in the restitution amount.").

IV.

Kreitman also argues the district court erred by failing to explain why it did not vary downwards from the guideline range. This argument fails to persuade.[4]

"It is sufficient that the district court considers the defendant's arguments at sentencing and states that it has taken the § 3553(a) factors into account." United

[4] We do not address whether our review of this issue should be for plain error, as the government argues, or abuse of discretion, as Kreitman contends. Kreitman's procedural challenge fails regardless of the standard of review.

States v. Irey, 612 F.3d 1160, 1195 (11th Cir. 2010) (en banc) (quotation marks omitted). As long as the record demonstrates that the district court "listened to the evidence and arguments and was aware of the various factors the defendant put forward for a lesser sentence," the court has adequately explained its sentence. Id. This district judge listened to Kreitman's statement at resentencing that he had completed more than a thousand credit hours of programming while incarcerated and actively taught other inmates as well. The court also heard Kreitman's arguments regarding his mother's poor health. The court chose nonetheless to adhere to the guideline range, determining that a sentence of 84 months was appropriate and sufficient under § 3553. This was no abuse of discretion. It was a reasoned consideration of the evidence that we are not at liberty to disturb on appeal.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

No. 18-12838-G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

HAL KREITMAN,

Defendant/Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

PETITION FOR PANEL REHEARING OF THE APPELLANT HAL KREITMAN

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

United States v. Hal Kreitman
Case No. 18-12838-G

Appellant Hal Kreitman files this Certificate of Interested Persons:

21st Century Insurance

Affirmative Insurance Service

AIG National Insurance Co.

Allied Property & Casualty Insurance Company

Alpha Property & Casualty Insurance Company

Apollo Casualty Co. of Florida

Bristol West Insurance

Corvel Corporation

Diehl, Hermann

Direct General Insurance Co.

Explorer Insurance Company

Fajardo Orshan, Ariana

Farmers Insurance Group

Ferrer, Wifredo A.

First Acceptance Insurance

First Community Insurance Company

Florida Farm Bureau Insurance Companies

Geico Indemnity Insurance

GMAC Insurance

Golder, Randee J.

Hallmark Insurance Company

Hayes, Anne M.

Infinity Select Insurance Company

Insurance Company of the State of Pennsylvania

Karow, Kenneth

Kim, Herbert

Kingsway Amigo Insurance Company

Klugh, Richard C.

Kreitman, Hal

Marra, Hon. Kenneth A.

Mendota Insurance Company

Mercury Insurance Group

MGA Insurance Group

Nationwide Insurance

New Hampshire Indemnity Co.

Occidental Fire & Casualty Co. of North Carolina

Ocean Harbor Casualty Insurance

Omni Insurance Company

Peak Property & Casualty

Progressive Select Insurance Redland Insurance Co.

Ramirez, Joel

Reizenstein, Philip

Rosado, Vivian

Safeco Insurance

Salantrie, Jr., Edward

Salyer, Kathleen M.

Security National Inc.

Selective Insurance Company of South Carolina

Seminole Casualty Insurance

Sentry Insurance

Smachetti, Emily

State Farm Fire & Casualty

State Farm Mutual Auto

Travelers of Florida

Unitrin

Victoria Fire & Casualty

Villafaña, Ann Marie

Yera, Evelio J.

PETITION FOR REHEARING

Appellant requests that this Court grant rehearing of its decision, a copy of which is attached to this petition as an Appendix. Appellant respectfully submits that the Court, in its decision, reaches the following three conclusions that warrant rehearing in the interests of both justice and judicial economy:

- that sentencing counsel's concession that the government's summary loss chart included at least $550,000 in actual-loss fraud claims associated with treatment by defendant Kreitman waived counsel's repeated sentencing objection that not all fraud charges on the chart should be counted as relevant conduct by Kreitman, because he did not join the conspiracy until approximately 35% of the billings had already occurred (*see* App:5);
- that sentencing counsel's use of the term "borderline" to refer to single-visit charges paid by three insurance companies admitted that there was proof of fraud or Kreitman's culpable knowledge as to those patients (*see* App:6); and
- that the sentencing record supports a finding of other charges billed, but not listed on the government's summary chart, as to patients who had only one treatment/visit (*see* App:6).

1. No waiver of loss objections. This Court should reconsider its determination that "the district court was entitled to find, given counsel's concession, that the loss was above $550,000." App:5 (concluding that "counsel for Kreitman

conceded at the sentencing hearing that even if the billings were off, the errors were 'not going to be anywhere near getting [Kreitman] down to 550'—or $550,000").

The concession the Court refers to relates to the content of a government summary chart that set forth a calculation of fraud loss attributable to patients treated by Kreitman. The government claimed all of the fraud losses on that chart constituted relevant conduct as to Kreitman; but Kreitman *disputed* that and never waived that objection, no matter the total fraudulent billing number on the chart. Kreitman conceded that the billings on the government's chart reached at least $550,000 in fraudulent payments for patients treated by Kreitman. But that concession as to the limits of the chart's reliability, was only *half the equation* for determining actual loss under *relevant conduct* standards. The defendant's two-part argument was:

Gov't Chart Amount	Loss Calculation If Court Relies on False Theory of Culpable Knowledge *Ab Initio* by Kreitman:	Loss Calculation If Court Finds No Proof of Joining Conspiracy until after August 2010:
If Left at $795,000 ➜	Loss = $795,000	Loss = less than $550,000

Gov't Chart Amount	Loss Calculation If Court Relies on False Theory of Culpable Knowledge *Ab Initio* by Kreitman:	Loss Calculation If Court Finds No Proof of Joining Conspiracy until after August 2010:
If Changed to $600,000 ➜	Loss = $600,000	Loss = less than $550,000

See DE:1899:6–7; DE:1912:4–5, 84; DE:1913:40–41. Kreitman argued that even if actual fraud loss exceeded $550,000, Kreitman was responsible for only 65% of that.

There were only two parts to Kreitman's actual loss argument: **(1)** the government's chart overstated the maximum potential loss number (including listing loss for one patient as $46,000, when the PIP maximum was $10,000 and the $46,000 calculation was obviously a gross error, DE:1912:60); and **(2)** the government's chart wrongly attributed culpable knowledge *ab initio* to temp worker Kreitman, when the jury never so concluded, the thin reed of an informal FBI interview of Kreitman did not confirm when he joined the conspiracy, and the key interview statement that the clinics sought to maximize billings was not an admission of *fraudulent* intent *ab initio*.

Every aspect of the two-day sentencing hearing showed defense counsel's preservation of the claim that the government's actual loss numbers—whether they be $795,000 or $775,000 or $550,000—should not *all* be attributed as relevant conduct, because the defendant had not joined a criminal conspiracy until he realized it existed and that *regardless* of the cap number the government landed on, the relevant conduct would still be below $550,000. DE:1913:40–41. Until he joined the conspiracy, his patient treatments—even if part of a general objective of maximizing billings—were not *fraudulently* designed to maximize billings.[1]

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[1] The maximize-the-billings notion as a substitute for fraudulent intent pervaded the government's brief. Gov't Brief 4, 6, 12, 13, 23. But on that theory, every law firm that tells associates to maximize their billable hours would be at risk. Similarly, Best Buy and other appliance companies may always try to sell the extended warranty, but that's not fraud. Maximizing billing is common in all kinds of businesses, *not* just fraudulent ones. As long as the maximized billing is justified by the patient's condition, there is no fraud, even if a more conservative chiropractor would have stopped billing at $9,500 and would not have ordered the last $500 of treatment. Fraud requires a misstatement or deceit; maximizing billing does not.

The district court never made any finding (nor, contrary to the government, did this Court in its prior decision) as to the date when Kreitman caught on that the bill-to-the-max practice at the clinics was premised on any type of fraudulent misstatements, much less a conspiracy to fake accidents.

The sentencing record shows that the concession as to the cap number was never a waiver by defense counsel of the second (i.e., relevant conduct) prong of his argument. Instead, the defense sought merely to "start" with challenging aspects of the government's loss chart and "then" work downward from that number to get the relevant conduct loss figure. DE:1912:4–5 (at beginning of sentencing hearing, defense counsel states *four times in a row for emphasis* that defense challenges to the work the government did on its summary chart were only a "start" to the defense objections to loss). Defense counsel renewed this explanation at the beginning of the second day of sentencing: "*One of my points* of—is ... the *objection to the summary chart*, and that arguably probably should go before the Government makes their argument." DE:1913:4 (emphasis added). The district court expressly acknowledged this bifurcated argument on relevant conduct as to loss: "THE COURT: Okay. Then why don't you make your argument *on the chart*, and then I'll hear from [federal prosecutor Ann Marie] Villafana." DE:1913:5 (emphasis added).

The sentencing court recognized that defense counsel maintained his relevant conduct/culpable knowledge argument independently from the argument as to the numbers "on the chart," and specifically that despite the government's chart numbers, which covered the *entire period* of Kreitman's provision of chiropractic treatment, the

sentencing court should nevertheless "shorten" the period, DE:1913:22, so that Kreitman would not wrongly be held responsible for fraud about which he knew nothing and which occurred before he joined the conspiracy. *See* U.S.S.G. § 1B1.3, comment. (n. 3(B)) ("A defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy ... .").

The district court's recognized that Kreitman maintained—even after conceding that total-period fraud losses of at least $550,000 were shown on the chart—that the government's loss figure, at the end of the day, should be reduced by *shortening* the relevant loss period to match when Kreitman knowingly took part in the conspiracy. Thus, the district court *accepted* the bifurcated way of addressing the problems with the government's loss calculations: "THE COURT: [W]hen the conspiracy started, it's alleged that he was a member of the conspiracy. Do those – do those billings fit within the – that timeframe? *I know you want to shorten the timeframe* ... .". DE:1913:22 (emphasis added).

The defense's focus on subtracting from the government's loss claim the percentage of fraud losses attributable to the period of time in which the government failed to prove the defendant's culpable knowledge and joinder in the conspiracy was exemplified by the cross-examination of the government's sole sentencing witness. Investigator Martin, who participated in the FBI interview of the defendant as well as interviews of cooperating patients and conspirators, admitted: "I don't know at what time [Kreitman] *realized* ... that there was *something shady* going on there." DE:1912:84 (emphasis added). The defense contended that when even the

investigator who interrogated the defendant could not say when Kreitman first realized that *anything* improper was going on at the clinics, it was not fair to say that *everything* Kreitman did at the clinics was fraudulent. The government had, and still has, no good answer to that point, and thus arose the government's imaginative claim on appeal that counsel waived the very argument that was at the heart of the defense.

Resolution of this petition will serve the interest of justice, avoid an otherwise inevitable ineffective assistance of counsel claim under 28 U.S.C. § 2255, and correct a manifest injustice created by the very unfair attribution to counsel of an action at direct odds with his client's interests and with the thrust of the preserved sentencing objections. In his sentencing memorandum, Kreitman fully explained his bifurcated objection. DE:1899:6–7 ("The actual loss figures submitted by the government ... should cap the maximum potential loss associated with the defendant[.] [I]t is not accurate to equate all of those losses with knowing wrongful conduct by the defendant, for a number of reasons. ... Losses occurring from May to August 2010 are not reliably attributed to the defendant for sentencing purposes. Second, even as to billings after August 2010 and before Kreitman complained and broke with the clinics, it is unclear that ... he knew that all of those patients were feigning injuries, or that there were no actual injured patients.").

This Court's decision fails to acknowledge that the district court believed the defense objection about "shorten[ing] the timeframe," DE:1913:22, was preserved even after the concession, DE:1913:18–19, that the errors in the government chart did not bring the government's total-period numbers below $550,000. The government

failed to meet its burden at sentencing to show by a preponderance of evidence when Kreitman joined the conspiracy; and the district court then failed to make a finding on the relevant period of Kreitman's criminal knowledge and fraudulent intent. This Court, having attempted to untangle the government's untrue argument about invited error, should also reconsider the theory of a concession by defense counsel that would imply either incompetence or client betrayal by appointed counsel.[2]

2. In context, reference to "borderline" billing evidence was not a waiver. Regarding the number of insurance company victims, this Court concluded that defense counsel's use of the word "borderline," in an exchange with the district court about whether the government had identified 10 or more companies that paid claims during the conspiracy period, admitted that the government proved the applicability of the number-of-victims enhancement. App:6. The Court should reconsider its conclusion for several reasons.

The district court's question that counsel answered using the term "borderline" was: "[A]ssuming you go from the date of the indictment, do you get billings attributable to Mr. Kreitman that relate to more – 10 or more insurance companies?" DE:1913:22. The district court's question itself did not ask counsel to concede away all of Kreitman's arguments regarding whether those billings were fraudulent, but to

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[2] *See* DE:1913:40 (defense counsel: "All I'm suggesting with regard to the number, all I'm suggesting with regard to the whole thing is let's stick with the indictment, stick with what the jury found, cap it at about 65 percent of what the losses were, which is the best you can guess from the jury – and even then you're still going on a *Pinkerton* theory. It's still a *Pinkerton* because that's all they convicted on, and then go from that point of view.").

concede that the shorten-the-timeframe argument was inapplicable to those claims. Kreitman conceded the temporal aspect of the treatment and billing, but argued that any as to three insurers, the evidence was borderline because they did not fit the maximize-the-billing protocol and instead contradicted it. In context, the defense argument was not a concession that such claims should be counted as fraudulent, much less that Kreitman knew them to be fraudulent.

There is no precedent for referring to *borderline* proof as sufficient to meet a preponderance standard at sentencing. Instead, this Court has held that as to guideline sentencing, "the preponderance standard is *not* toothless." *United States v. Lawrence*, 47 F.3d 1559, 1566 (11th Cir. 1995) (emphasis added). Neither the Court nor the government cited any decision where the term "borderline" was used to assert sufficiency of proof; instead it has a negative or equivocal connotation—not just in the dictionary sense, *see*, *e.g.,* Merriam Webster's first definition, "being in an intermediate position or state: not fully classifiable as one thing or its opposite"—but specifically as used in this case, where counsel clarified that his position as to evidence for counting three of the insurance companies was that, "It's ambiguous, that's all I'm saying. It's ambiguous." DE:1913:24 (counsel: "I don't feel comfortable saying I know that Mr. Kreitman knew that this patient, who he *cleared* after one visit, that he was trying to rip off an insurance company.") (emphasis added).

This inherent ambiguity in the evidence—the billing occurred during the period in which Kreitman was found to have joined the conspiracy, but it did not fit the fraud pattern and was instead consistent with government witness testimony that some

patients were legitimate, *see* DE:1913:22 (defense counsel cites testimony of clinic owner Maria Testa that there were legitimate patients treated at the clinic)—extended first to whether the billing was fraudulent at all *and* second to whether Kreitman knew it. Further, there is nothing in the record to indicate that the district court believed that by using the term "borderline," counsel was abandoning his argument that the government had made no showing of fraud as to the three patients with insurance claims for their single visits, where those patients were not interviewed by the government and there was no evidence of their participation in any fraud.

3. There were no other charges paid by the three purported victim insurers as to the patients at issue. This Court, in addition to treating the "borderline" term as an admission, asserted that even though three insurance companies at issue submitted only single-visit claims as to Kreitman, there might have been other charges as to those patients by other members of the conspiracy. App.6 ("In other words, a 'patient' could have scheduled several fake therapy treatments and billed them separately through a co-conspirator, leaving Kreitman responsible for billing a fake x-ray and nothing else."). The Court's theory is refuted by the record, where the government's sentencing witness explained that as to the losses charted by the government, Kreitman was the chiropractor who saw the patients—there were no other treatments prescribed for the patients at issue. Indeed, that was the thrust of the government's summary chart itself. *See* DE:1912:21 (testimony of Investigator Martin: "Q. And in reviewing those files, did you see any other people, any other chiropractors, who were prescribing treatment during the period that Dr. Kreitman was

prescribing treatment? A. During the period he did, no. There was some maybe before and after his time there."). As to the three insurance companies, for patients seen in the middle of Kreitman's time at the clinic, he was the only chiropractor, there were no other treatments or charges, and the government never suggested the contrary as to those three purported victim companies.

Nor did the burden ever shift from the government to prove fraud loss. Thus, even if record did not fully refute the hypothesis of other losses relating to those patients (and it does), the hypothesis itself would still not meet the government's evidentiary burden at sentencing. *See United States v. Sepulveda*, 115 F.3d 882, 890–91 (11th Cir. 1997) (government's speculative analysis of unauthorized cellular telephone calls that might have been made by the defendants was insufficient to meet its preponderance of evidence burden in proving the loss caused by the defendants' conduct; courts must not speculate concerning the existence of a fact which would permit a more severe sentence under the guidelines).

The billings at issue were for initial visits. Kreitman examined the patients, prescribed one set of x-rays, and then judged the patients to be in need of no further treatment, such that no other billings for those patients occurred either before or after they were seen by Kreitman. Correcting the Court's view of the record on this point is quite important, not just because it confirms that there was *no proof of fraud* as to these three insurance companies (and, necessarily, also no proof of any culpability by Kreitman), but also because it refutes the government's erroneous claim that Kreitman *always* prescribed treatment protocols that would maximize billings. These patients,

and these three insurance companies' payments, are entirely *inconsistent* with that premise. These claims—and thus insurance company victims 10, 11, and 12—were improperly attributed to Kreitman as relevant fraud conduct. At a minimum, the district court should have made some finding that would justify characterizing these treatments as fraudulent.

CONCLUSION

Appellant asks this Court to grant his request for limited panel rehearing.

Respectfully submitted,

s/ Richard C. Klugh
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CERTIFICATE OF COMPLIANCE

I CERTIFY that this petition complies with the type-volume limitation of FED. R. APP. P. 32(a)(7). According to the WordPerfect program on which it is written, the numbered pages of this brief contain 2,800 words.

s/ Richard C. Klugh
Richard C. Klugh, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing petition was sent on May 29, 2019, by U.S. mail to Daniel Matzkin, Assistant United States Attorney, 99 N.E. 4th Street, Miami, Florida 33132-2111.

s/ Richard C. Klugh
Richard C. Klugh, Esq.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-12838-GG

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

HAL MARK KREITMAN,

Defendant - Appellant.

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

BEFORE: WILLIAM PRYOR, MARTIN, and GRANT, Circuit Judges.

PER CURIAM:

The petition(s) for panel rehearing filed by the Appellant is DENIED.

ENTERED FOR THE COURT:

Barkett F. Martin

UNITED STATES CIRCUIT JUDGE

ORD-41

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-14689

D.C. Docket No. 9:11-cr-80106-KAM-17

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOEL ANTONIO SIMON RAMIREZ,

Defendant,

KENNETH KAROW,
HERMANN J. DIEHL,
HAL MARK KREITMAN,

Defendants-Appellants.

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

(January 31, 2018)

Before WILLIAM PRYOR, MARTIN, and BOGGS,[*] Circuit Judges.

MARTIN, Circuit Judge:

The opinion issued yesterday in this case is VACATED, and this one is issued in its stead. The only change made is in Section VII of the opinion, related to the restitution portion of Mr. Kreitman's sentence.

Kenneth Karow, Hermann Diehl, and Hal Kreitman appeal their convictions and sentences imposed after a jury found them guilty of mail fraud; conspiracy to commit mail fraud; money laundering; and conspiracy to commit money laundering. After careful consideration, and with the benefit of oral argument, we affirm Mr. Karow's and Mr. Diehl's convictions and sentences. We also affirm Mr. Kreitman's convictions but vacate his sentence and remand for further proceedings.

I. BACKGROUND

Florida law requires all car insurance policies to include personal injury ("PIP") coverage. See Fla. Stat. § 627.730 et seq. Each car insurance policy has a minimum of $10,000 of PIP coverage per person involved in an accident, regardless of fault. See id. § 627.736(1). After the insured person has paid his co-pay and deductible, the PIP coverage pays 80% of all reasonably necessary medical expenses, subject to certain conditions. See id. § 627.736(1)(a).

[*] Honorable Danny J. Boggs, United States Circuit Judge for the Sixth Circuit, sitting by designation.

A group of friends from Pinar del Rio, Cuba, all living in South Florida, wanted to take advantage of Florida's PIP coverage. They opened several clinics in South Florida, beginning in October 2006. These clinics intentionally maximized patients' medical expenses to the mandatory PIP coverage amount. Patients were recruited for the scheme in two ways. Sometimes, the conspirators found people who had been involved in legitimate car accidents. Other times, they used recruiters who found people to stage accidents. The recruiters and the participants in the staged accidents would get kickbacks for their work. The pay varied, depending on how many passengers were in the staged accident, because PIP coverage is per person. The pay also varied based on which insurance company insured the participant, because certain companies paid out claims faster and more easily than others. The average rate for recruiting two participants in an accident was $4,500. The drivers in these "accidents" would agree in advance on where and how to get in an accident. Sometimes they damaged the cars in advance. For example, an informant for the FBI videotaped one of these stagings. In this video, a recruiter used a sledgehammer on the participants' cars in a parking lot. Then, the participants drove onto the road, stopped their cars, and called the police to report the "accident."

Regardless of whether a recruited participant was in a real or staged accident, after the accident the recruit would go to one of the clinics in the scheme

to become a patient. At the clinic, the participants were coached on what to say to the clinic's chiropractor and the insurance company. They would then see a chiropractor who routinely prescribed 35 to 40 therapy sessions to cure their injuries. This was just about the number of sessions needed to maximize the PIP coverage of each patient. Patients also pre-signed a number of therapy session forms so the clinic could bill claims for several sessions without actually seeing the patient again. These "patients" were instructed to tell their insurance companies that the clinic collected copays and deductibles that were never actually collected and that each therapy session lasted over an hour, which they hadn't.

Mr. Karow, Mr. Diehl, and Mr. Kreitman were all chiropractors involved in this scheme. Mr. Karow's and Mr. Diehl's roles in the scheme, however, grew in light of some provisions of Florida law. Florida regulates health care clinics in the state through the Florida Agency for Health Care Administration ("AHCA"). Fla. Stat. § 400.9905. Generally, health care clinics are required to have a license from the AHCA in order to bill insurance companies. The licensing process is quite extensive, and requires inspections and background checks for the owner, medical director, financial officer, all medical practitioners, and anyone who has contact with clients or client funds. It also requires any "nonimmigrant aliens" with an ownership interest in the clinic to file a surety bond of at least $500,000. Id. § 408.8065(2). This requirement for a license does not apply to health care clinics

"wholly owned" by a licensed chiropractor. Id. § 400.9905(4)(g). These "wholly owned" health care clinics can get a "certificate of exemption" from the AHCA.

On October 1, 2007, Florida updated its PIP statutes. Compare Fla Stat. §§ 627.736, 627.739 (2007), with id. §§ 627.736, 627.739 (2008). Among other things, Florida law imposed a requirement that health care clinics be licensed continuously for three years before they were allowed to bill insurance companies for reimbursement under the PIP coverage. Id. § 627.736(1)(a). But the law again provided for an exception for health care clinics "wholly owned" by a licensed chiropractor. Id. Because of this legal framework under Florida law, the leaders of the scheme looked for chiropractors to serve as "straw owners" for their clinics.

Mr. Karow was the straw owner for Florida Therapy & Rehab Center, Franco Chiropractor Center, and New York Medical & Rehab Center. He also owned and operated his own clinic, the Karow Chiropractic Center. He allowed two of the scheme's leaders to run a "back clinic" out of the Karow Chiropractic Center's office space, but with a separate entrance, staff, and bank account. The "back clinic" served primarily Spanish-speaking clients. Over time, the scheme's leaders became suspicious of Mr. Karow, fearing he was stealing money from the back clinic's reimbursements. For that reason, they closed the back clinic as well as New York Medical & Rehab Center. They then opened Florida Mango Massage Therapy Center in the same building where New York Medical had been

and set up a new arrangement with Mr. Karow. They sent accident participants to Mr. Karow at Karow Chiropractic Center to be prescribed therapy at Florida Mango. Mr. Karow billed for the evaluation, and Florida Mango billed for the prescribed therapies.

Mr. Diehl was the straw owner for Febre's Medical Center and 36 Rehabilitation Center. He signed a fraudulent bill of sale saying he paid $200 to purchase Febre's. The AHCA documentation for Febre's, signed by Mr. Diehl, said he was an "owner[] of a financial interest . . . and supervise[d] the business activities and is legally responsible for . . . compliance with all federal and state laws." And he signed AHCA documentation for 36 Rehab with the same language. In February 2009, Mr. Diehl signed another fraudulent bill of sale saying he sold both Febre's and 36 Rehabilitation to another codefendant who is not part of this appeal.

Mr. Kreitman was not a straw owner. He first worked as an independent contractor for AllCare Consultants, which is a company that provides chiropractic staffing and placement services. AllCare placed him at three clinics that played a part in the scheme: Universal Rehabilitation, 36 Rehabilitation, and Elite Rehabilitation. After some time, he also began working directly for the owner of Progressive Rehabilitation, who was yet another codefendant in this scheme, but is not part of this appeal.

After a 24-day trial, the jury convicted Mr. Karow and Mr. Kreitman on all counts, and Mr. Diehl on all but one count. Mr. Karow was convicted of 1 count of conspiracy to commit mail fraud, 48 counts of mail fraud, 1 count of conspiracy to commit money laundering, and 11 counts of money laundering. He was sentenced to 132-months imprisonment and 2 years of supervised release, and ordered to pay $6,640,354.07 in restitution and an assessment of $6,100.

Mr. Diehl was convicted of 1 count of conspiracy to commit mail fraud, 2 counts of mail fraud, 1 count of conspiracy to commit money laundering, and 3 counts of money laundering. He was sentenced to 108-months imprisonment and 2 years of supervised release, and ordered to pay $1,685,345.01 in restitution and an assessment of $700.

Mr. Kreitman was convicted of 1 count of conspiracy to commit mail fraud, 21 counts of mail fraud, 1 count of conspiracy to commit money laundering, and 2 counts of money laundering. He was sentenced to 96-months imprisonment and 2 years of supervised release, and ordered to pay $1,634,195.83 in restitution and an assessment of $2,500.

II. SUFFICIENCY OF THE EVIDENCE

All three defendants challenge the sufficiency of the evidence for their convictions. "We review both a challenge to the sufficiency of the evidence and the denial of a Rule 29 motion for judgment of acquittal de novo." United States v.

Chafin, 808 F.3d 1263, 1268 (11th Cir. 2015) (quotation omitted). "We examine the evidence in the light most favorable to the government and resolve all reasonable inferences and credibility issues in favor of the guilty verdicts." Id. (quotation omitted and alteration adopted). This Court will not overturn a guilty verdict nor disturb the denial of a Rule 29 motion unless no reasonable trier of fact could find guilt beyond a reasonable doubt. Id.

A. MAIL FRAUD

To prove a conspiracy to commit mail fraud under 18 U.S.C. § 1349, the government must prove beyond a reasonable doubt "(1) that a conspiracy [to commit mail fraud] existed; (2) that the defendant knew of it; and (3) that the defendant, with knowledge, voluntarily joined it." United States v. Vernon, 723 F.3d 1234, 1273 (11th Cir. 2013) (quotation omitted). For the substantive mail fraud charges under 18 U.S.C. § 1341, the government must prove beyond a reasonable doubt: "(1) an intentional participation in a scheme to defraud a person of money or property, and (2) the use of the mails in furtherance of the scheme." United States v. Hill, 643 F.3d 807, 858 (11th Cir. 2011) (quotation omitted).

All three defendants challenge the knowledge and intent elements of their mail fraud and conspiracy to commit mail fraud convictions. Mr. Karow says "he was an honest doctor" and that the only witness who directly linked him to the conspiracy was one of his patients, Wilfredo Sauceda. Mr. Sauceda testified that

Mr. Karow told him where his pain was located, and that he had been told that Mr. Karow was in on the conspiracy. Mr. Karow argues that Mr. Sauceda's testimony alone was not enough to find him guilty of conspiracy to commit mail fraud. But Mr. Sauceda's testimony was not the only evidence the government presented against Mr. Karow. Among other things, the government presented evidence that Mr. Karow signed examination forms and prescribed therapies for patients he never saw. A massage therapist who worked for Mr. Karow testified that Mr. Karow gave him $6,000 to pay recruited patients. And his secretary participated in two staged accidents and performed patient examinations that Mr. Karow later signed as having performed himself. Under this Court's precedent, knowledge of a conspiracy as well as intent to commit mail fraud can be inferred from circumstantial evidence of a scheme and the defendant's conduct. United States v. Bradley, 644 F.3d 1213, 1239 (11th Cir. 2011); United States v. Molina, 443 F.3d 824, 828 (11th Cir. 2006). On this record, we cannot say "no reasonable trier of fact could find guilt beyond a reasonable doubt." Chafin, 808 F.3d at 1268 (quotation omitted).

Mr. Diehl says he was an unwitting participant in this scheme. He argues that his patient files show, contrary to the government's assertions, that he did not order standard courses of treatments for patients that were designed to maximize PIP payments. Nevertheless, the government presented evidence that Mr. Diehl

admitted to an FBI agent that he had filled out therapy prescriptions designed to "max [the PIP]," backdated forms, and routinely saw patients for only five minutes. Mr. Diehl also admitted to the agent that prescribing approximately 28 to 36 therapy sessions was "standard protocol" and that "he considered [backdating] to be fraud." Mr. Diehl said "he felt it was obvious that patients were just signing for therapy and were not receiving [it]" and knew "there was no way the clinic could handle the volume of therapies that were being prescribed." Although Mr. Diehl disputes the testimony of the FBI agent about his statements, the jury was free to make its own credibility determinations and draw reasonable conclusions from the evidence presented. United States v. Garcia, 447 F.3d 1327, 1334 (11th Cir. 2006). On this record, we cannot say "no reasonable trier of fact" could conclude Mr. Diehl knew about the conspiracy and intentionally participated in the scheme. See Chafin, 808 F.3d at 1268 (quotation omitted).[1]

Mr. Kreitman also says he was an unknowing participant. He claims that he worked at the fake clinics only because he was assigned to them by AllCare, and that he never actually knew a conspiracy was going on. He also argues that while any forms he signed without seeing patients, the similarities in treatment plans, and his statements to law enforcement agents may be suspicious, such evidence fails to

[1] Because we affirm on this theory of the government's case, we need not and do not address Mr. Diehl's argument about the government's alternative theory of the case, that his convictions cannot stand because the Florida statutes the government alleged he violated are constitutionally void for vagueness or should be interpreted using the rule of lenity.

show that he knowingly participated in the conspiracy. But again, the government presented additional evidence that would allow a reasonable factfinder to conclude otherwise. The jury was shown photographs of Mr. Kreitman going into Elite Rehab and leaving after one hour and ten minutes. One-half hour after he left, a patient went in. Despite Mr. Kreitman and the patient not being there at the same time, Mr. Kreitman signed an examination form and prescribed treatment for the patient that was billed to AllState. Mr. Kreitman also admitted to an FBI agent that he thought patients were being coached and paid. He told the agent that he followed a "standard prescription" for all patients aimed at "trying to maximize the $10,000 PIP limit." He described things to the agent as "not on the up and up." On this record, we cannot say "no reasonable trier of fact" could conclude Mr. Kreitman knew of and intentionally participated in the scheme. See Chafin, 808 F.3d at 1268 (quotation omitted).

The evidence was sufficient to support a jury finding that all three defendants had knowledge of the mail fraud conspiracy and intentionally participated in both it and the substantive mail fraud scheme. And the government presented evidence that claim documentation in the conspiracy was frequently sent to insurance providers through the U.S. mail. Our precedent provides that "[p]roof of a routine practice of using the mail to accomplish a business end is sufficient to support a jury's determination that mailing occurred in a particular instance."

United States v. Waymer, 55 F.3d 564, 571 (11th Cir. 1995). Viewing the evidence in the light most favorable to the government, we affirm the mail fraud and conspiracy to commit mail fraud convictions of all three defendants.

B. MONEY LAUNDERING

To prove a conspiracy to commit money laundering under 18 U.S.C. § 1956(h), the government must prove: "(1) agreement between two or more persons to commit a money-laundering offense; and (2) knowing and voluntary participation in that agreement by the defendant." United States v. Broughton, 689 F.3d 1260, 1280 (11th Cir. 2012). The underlying money laundering offenses were charged in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i), 1956(a)(1)(B)(i), and 1956(a)(1)(B)(ii). To prove money laundering, the government must show the defendant (1) engaged in a financial transaction that (2) he knew involved funds that were the proceeds of some unlawful activity, and (3) those funds were in fact the proceeds of that unlawful activity. See 18 U.S.C. § 1956(a). Here, the unlawful activity is mail fraud. In addition to these three requirements, the government is required to show either: (1) the defendant intended to promote the carrying on of the unlawful activity, see id. § 1956(a)(1)(A)(i); (2) the defendant knew the transaction was designed to conceal the nature of the proceeds of the unlawful activity, see id. § 1956(a)(1)(B)(i); or (3) the defendant knew the transaction was designed to avoid a state or federal reporting requirement, see id.

§ 1956(a)(1)(B)(ii). These three types of money laundering are called promotion money laundering, concealment money laundering, and structuring transactions, respectively.

The evidence was sufficient to support a jury finding that all three defendants conspired to commit money laundering. In United States v. Azmat, 805 F.3d 1018 (11th Cir. 2015), we upheld a conviction for conspiracy to commit promotion money laundering under facts similar to those offered at trial here. In that case involving a "pill mill" scheme, we concluded that trial testimony permitted the jury to infer that Azmat's codefendants agreed to dispense controlled substances for cash, which was then used to support further activities of the "pill mill." Id. at 1037–38. We also concluded that sufficient evidence had been presented for the jury to find that Azmat had knowingly and voluntarily participated in that agreement. Azmat knew patients paid the clinic in cash and received his salary in cash. Although Azmat "may not have been aware of all of the uses of the clinic's proceeds, it was reasonable for the jury to infer that he knew that the cash was used to pay salaries and cover the clinic's operating costs." Id. at 1038. We also found it reasonable for the jury to conclude that, because Azmat had already agreed "to dispense medications outside the course of his usual professional practice[,] . . . and by continuing to work and generate profits, Dr.

Azmat had knowingly joined a conspiracy to launder money, in which illegal proceeds were used to 'promote' [the clinic]'s drug-dispensing activities." Id.

As in Azmat, the evidence introduced in the District Court would permit a jury to determine that various individuals at the center of the conspiracy, including Luis Ivan Hernandez, Maria Testa, Lazaro Vigoa Mauri, and Vladimir Lopez, agreed to submit fraudulent insurance reimbursement claims and use that money to pay the participants in the scheme, fund clinics, and pay the salaries of the employees at the clinics where the chiropractors worked. The trial evidence was also sufficient to permit a jury to find that Mr. Karow, Mr. Diehl, and Mr. Kreitman knew that their salaries, as well as the expenses of the clinics, were funded with the fraudulent insurance proceeds. Because all three codefendants continued to work and generate profits knowing that fraudulent insurance proceeds were being used to pay their salaries and clinic expenses, the jury could determine that all three had joined the conspiracy to commit money laundering. See id.

Because the evidence was sufficient to establish that the chiropractors participated in a conspiracy to commit promotion money laundering, the jury could also find the chiropractors guilty of all of the substantive counts of money laundering under the rule of coconspirator liability established by Pinkerton v. United States, 328 U.S. 640, 66 S. Ct. 1180 (1946). "Under Pinkerton, each member of a conspiracy is criminally liable for any crime committed by a

Appendix D

coconspirator during the course and in furtherance of the conspiracy, unless the crime did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement." United States v. Alvarez, 755 F.2d 830, 847 (11th Cir. 1985) (quotation omitted). In other words, a coconspirator is liable for "all of the acts and foreseeable consequences of the conspiracy." United States v. Silvestri, 409 F.3d 1311, 1335 (11th Cir. 2005) (emphasis and quotation omitted). This doctrine "has been applied to money laundering conspiracy cases; a defendant who joins a money laundering conspiracy may be found substantively liable for money laundering offenses committed by co-conspirators." Id. at 1336.

Under this theory, the evidence was sufficient to support a jury verdict for the substantive money laundering counts involving paychecks written to Mr. Karow, Mr. Diehl, and Mr. Kreitman. Evidence was introduced to establish that the leaders of the conspiracy wrote the paychecks to ensure the chiropractors would continue to serve as "owners" of the clinic, show up to work, and write fraudulent prescriptions. Such payments were within the scope of the conspiracy to commit money laundering because they paid the expenses of the clinics,

including the salaries of the employees, and thus, were designed to promote the carrying on of the mail fraud scheme.[2]

We also affirm the substantive money laundering counts that did not involve paychecks to the three codefendants. Mr. Karow's conviction for count 112 involved a check payable to Dagoberto Milian drawn on the New York Medical checking account, signed by Vladimir Lopez. Evidence established that Mr. Milian was a recruiter paid to bring in patients to the clinics and that he staged accidents and participated in an accident himself. From this evidence, a reasonable factfinder could infer that Mr. Milian was paid for his participation in the conspiracy, with the intent to encourage him to continue participating in it and to bring more patients into the clinics. Such a payment would be within the scope of the conspiracy to commit promotion money laundering.

[2] We asked for supplemental briefing on the question of whether there was sufficient evidence to support the convictions for counts 80–83 in light of the Supreme Court's decision in United States v. Santos, 553 U.S. 507, 128 S. Ct. 2020 (2008). In that case, a plurality of the Supreme Court held that "proceeds" in the money laundering statute should be read to mean "profits" not "receipts." Id. at 514, 128 S. Ct. at 2025. Applying this definition would mean that the payment of salaries and other essential expenses would not be sufficient to support a conviction for money laundering. The year after Santos was decided, Congress amended the money laundering statute to define "proceeds" as "gross receipts," effectively superseding the interpretation in Santos. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 2, 123 Stat. 1617, 1618 (codified at 18 U.S.C. § 1956(c)(9)). Counts 80–83 were based on conduct that occurred between when Santos was decided and when the statute was amended. However, prior panels of this Court have held that the narrower definition of "proceeds" set out in Santos should only be applied to conduct relating to unlicensed gambling operations that took place between when Santos was issued and the statute was amended. See United States v. Jennings, 599 F.3d 1241, 1252 (11th Cir. 2010); United States v. Demarest, 570 F.3d 1232, 1242 (11th Cir. 2009). Because our prior precedent requires us to confine Santos to the unlicensed gambling context, we apply the broader definition of "proceeds" to this case, which includes the payment of salaries. We therefore affirm counts 80–83 under the logic set out above.

The evidence was also sufficient to support Mr. Karow's convictions on counts 87 and 96. Both counts involved checks for $9,000, payable to Maykel Marquez, Vladimir Lopez's brother in law. Count 87 involved a check drawn on the New York Medical account, and count 96 involved a check drawn on the account for the "back clinic" at Karow Chiropractic Center. Mr. Karow was a signatory on both accounts but did not sign either check. Testimony established that Mr. Marquez would cash checks for Mr. Lopez, and that the check that formed the basis of count 87 was a check cashed on behalf of Mr. Lopez. Testimony also established that at least once Mr. Marquez was paid for his participation in a staged accident, but that the check in count 87 was not related to that activity. Both Mr. Marquez and Mr. Lopez were involved in the underlying conspiracy, and sufficient evidence was presented to allow the jury to find that the payments were made to compensate either or both of them for their participation in the scheme and to encourage them to continue participating. Because Mr. Karow is liable for all of the acts and foreseeable consequences of the conspiracy, there was sufficient evidence to support his convictions under these counts. Silvestri, 409 F.3d at 1335. We therefore affirm the codefendants' convictions on all of the money laundering counts.

III. JURY INSTRUCTIONS

We review for an abuse of discretion the District Court's refusal to give a requested jury instruction. United States v. Tokars, 95 F.3d 1520, 1531 (11th Cir. 1996). This Court will reverse a conviction for the failure to give a requested jury instruction only where the instruction: "(1) was correct, (2) was not substantially covered by a charge actually given, and (3) dealt with some point in the trial so important that failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense." United States v. Dohan, 508 F.3d 989, 993 (11th Cir. 2007) (per curiam) (quotation omitted).

Three of Mr. Karow's requested jury instructions were refused by the District Court. The first was a "theory of defense" instruction. Mr. Karow's proposed instruction on his theory of defense emphasized the requirements that the jury find "he knowingly and voluntarily participated in fraudulent conduct." His proffered instruction also said that "being a bad business manager" or "being a joint signatory on a bank account" could not alone support the charges. Although the District Court did not give Mr. Karow's requested charge verbatim, it included several instructions that expressly required the jury to find knowledge and voluntary participation. We agree with the District Court that these other instructions substantially covered Mr. Karow's requested instruction.

Mr. Karow's second requested instruction was a modified pattern instruction about the "spillover effect" of codefendants' statements. Mr. Karow asked the District Court to add a clause to the standard Eleventh Circuit jury instruction. Mr. Karow asked that the court say: "Any such [codefendant] statement is not evidence about any other Defendant and cannot be used by you to infer knowledge or intent of any other Defendant." The District Court instead said: "Any such statement is not evidence about any other defendant." We conclude that the given instruction substantially covered Mr. Karow's proposed instruction here as well.

Mr. Karow's third request was for a "failure to record interviews" instruction. This instruction pointed out that the FBI testimony about Mr. Karow's statements was based on the FBI agents' recollections, as it is FBI policy not to record interviews. The requested instruction told the jury to be cautious with this testimony as a result of this failure to record. The District Court instead instructed the jury to consider all the evidence cautiously, including "the circumstances under which it was made." We are aware of no legal requirement, nor has Mr. Karow shown us one, that the FBI must record its interviews. Rather, it is the role of the jury to weigh the credibility of witnesses on the basis of their testimony. The District Court's instruction substantially covered Mr. Karow's requested instruction. And in any event, we conclude the failure to give Mr. Karow's requested instruction did not seriously impair his ability to conduct his defense.

The District Court did not abuse its discretion with regard to these jury charges. See Tokars, 95 F.3d at 1531.

IV. EVIDENTIARY CHALLENGE

We review for an abuse of discretion the District Court's decision to admit evidence under Federal Rule of Evidence 404(b). United States v. Phaknikone, 605 F.3d 1099, 1107 (11th Cir. 2010). Whether the District Court abused its discretion in admitting evidence of a prior bad act under Rule 404(b) is evaluated with a three-part test:

> First, the evidence must be relevant to an issue other than the defendant's character. Second, as part of the relevance analysis, there must be sufficient proof so that a jury could find that the defendant committed the extrinsic act. Third, the probative value of the evidence must not be substantially outweighed by its undue prejudice, and the evidence must meet the other requirements of Rule 403.

Id. (quotations and citations omitted). Rule 404(b) allows evidence of a defendant's prior bad acts to show "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2).

Mr. Diehl challenges the testimony of one of the government's witnesses, Yoandra Marrero. Over Mr. Diehl's objection, Ms. Marrero testified about Christ Medical, a clinic she owned that was not named in the indictment. In addition to the clinics in this case, Mr. Diehl also worked at Christ Medical. Christ Medical employed an insurance fraud scheme similar to the one in this case, where patients

visited the clinic only a handful of times, but insurance companies were billed for many more visits. The government introduced evidence that Mr. Diehl worked at Christ Medical and told Ms. Marrero he would pay her $1,000 for each clinic she referred him to. Ms. Marrero said she referred Mr. Diehl to several clinics. She also testified that she taught Mr. Diehl how to run insurance fraud schemes. Specifically, she told him how to schedule billing to minimize the chance of investigation and to list injuries to the extremities to maximize the rate at which PIP would be exhausted. At Mr. Diehl's request, however, the District Court did read a limiting instruction about this testimony.

Mr. Diehl argues this testimony was not relevant to this case and inadmissible under Rule 404(b). But applying our test from Phaknikone, we conclude that the District Court did not abuse its discretion. First, this evidence was relevant to an issue other than Mr. Diehl's character: his intent and knowledge. See Phaknikone, 605 F.3d at 1107; see also Fed. R. Evid. 404(b)(2). Indeed as we have discussed, the government was required to prove knowledge and intent for all of his charged offenses. Second, although Mr. Diehl concedes that witness testimony can be sufficient to show the existence of a prior act, he disputes that the record evidence does so. However, we conclude that Ms. Marrero's testimony was itself sufficient proof that Mr. Diehl committed the "extrinsic acts." Third, the probative value of this evidence outweighed any "undue prejudice." See

Phaknikone, 605 F.3d at 1107 (quotation omitted). Mr. Diehl's knowledge and intent were key issues at trial, and this evidence spoke to those issues. The proof this testimony offered outweighed any "undue" prejudice to Mr. Diehl from the jury learning he had been involved in a similar scheme before. Considering the "overall similarity between the extrinsic act and the charged offense," as well as the District Court's limiting instruction, we cannot say the District Court abused its discretion. See United States v. Jernigan, 341 F.3d 1273, 1282 (11th Cir. 2003) (quotation omitted).

V. MOTION TO SUPPRESS

The District Court's denial of a motion to suppress involves mixed questions of fact and law. We review de novo the District Court's legal conclusions and its findings of fact for clear error. United States v. Hollis, 780 F.3d 1064, 1068 (11th Cir. 2015). We review the entire record in the light most favorable to the prevailing party. Id. The voluntariness of a confession is a question of law, so it is subject to de novo review. Hubbard v. Haley, 317 F.3d 1245, 1252 (11th Cir. 2003). We evaluate voluntariness under the totality of the circumstances. Id.

Mr. Kreitman argues the District Court erred when it denied his motion to suppress statements he made to federal agents. He says the circumstances under which he made his statements rendered them involuntary. In 2005 and 2011, Mr. Kreitman worked as a cooperating witness for the FBI in investigations into

steroids and MDMA. Mr. Kreitman was not granted immunity for his assistance in these investigations. But neither was he charged with any crime as a result of the investigations and, in fact, the DEA paid him for his help. While working with the FBI in 2011, Mr. Kreitman said he was interested in assisting the FBI with health care fraud investigations. In 2013, FBI agents contacted Mr. Kreitman about this case. They set up a meeting where he told them about his involvement in the clinics. The FBI then set up a second meeting, during which Mr. Kreitman requested immunity and, to his surprise, was denied. Mr. Kreitman argues his previous work with the government led him to believe he would not be prosecuted for assisting with this case. In other words, he argues the FBI made him an "implied promise."

A confession is voluntary if "it is the product of the defendant's free and rational choice." Harris v. Dugger, 874 F.2d 756, 761 (11th Cir. 1989). It may "not be extracted by any sort of threats or violence, or obtained by any direct or implied promises, or by the exertion of any improper influence." Id. We have said that "even a mild promise of leniency" can "undermine[] the voluntariness of a confession." United States v. Lall, 607 F.3d 1277, 1285 (11th Cir. 2010) (quotation omitted). Our review of the record, however, shows no promises or assurances were made to Mr. Kreitman that he would not be prosecuted. He acknowledges as much. Neither does our review of the record show any "implied"

promises. Had the FBI agents explicitly lied to Mr. Kreitman, misrepresented their authority, or given any indication (however slight) that he was safe from prosecution, then the result here might be different. But on this record, we agree with the District Court that, based on the totality of the circumstances, Mr. Kreitman's statements were voluntary.

VI. GUIDELINES CALCULATIONS

We review de novo the District Court's interpretation and application of the Sentencing Guidelines but accept the court's factual findings unless they are clearly erroneous. United States v. Ford, 784 F.3d 1386, 1396 (11th Cir. 2015). Mr. Kreitman challenges the procedural reasonableness of three of the District Court's determinations in calculating his guidelines range. We address each in turn.

A. LOSS AND NUMBER OF VICTIMS

Mr. Kreitman first argues the District Court miscalculated the amount of loss and number of victims under the United States Sentencing Guidelines § 2B1.1(b)(1) and (2). The District Court "needs only to make a reasonable estimate of the loss amount . . . . because often the amount of loss caused by fraud is difficult to determine accurately." United States v. Medina, 485 F.3d 1291, 1304 (11th Cir. 2007) (quotation omitted). Estimates are permissible, but they

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cannot be overly speculative. Id. "The amount of loss must be proven by a preponderance of the evidence, and the burden must be satisfied with reliable and specific evidence." Id. (quotation omitted).

At sentencing, the government sought to hold Mr. Kreitman responsible for $2,333,172.15 in loss. The District Court found Mr. Kreitman responsible for a $1,634,195.83 loss to 30 victim insurance companies. Mr. Kreitman objected to this loss amount. While he conceded that it reflected the proceeds the clinics got from insurance companies, he argued that it did not accurately reflect his conduct because he was not the only chiropractor at the clinics. On appeal, Mr. Kreitman raises this same argument and says he should be held responsible for much less than this figure because he worked at the clinics only part time and other chiropractors were responsible for substantial portions of the loss amount. In particular, Mr. Kreitman argues that the District Court failed to make factual findings "that misconduct on the part of other chiropractors was reasonably foreseeable to Kreitman," as it was required to under USSG § 1B1.3(a)(1)(B).

The District Court based its calculation of the loss amount and number of victims on the testimony of a federal agent who examined clinic bank accounts and PIP claim reimbursement information from insurance companies. The agent presented spreadsheets showing the PIP claims for each insurance company. At Mr. Kreitman's request, the same agent produced a special calculation representing

the loss amount specifically for the time frame he worked at those clinics. The agent acknowledged it was not possible to determine which chiropractor's submission resulted in each PIP payment. The District Court determined this was sufficient to establish Mr. Kreitman's loss amount because "[a]s a member of a conspiracy he is held accountable for all of the loss that was generated during the course of the conspiracy. So it's all relevant conduct that is attributable to him."

This was an incorrect statement of the law. The Sentencing Guidelines provide that a defendant is only responsible for "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." USSG § 1B1.3(a)(1)(B) (2013). The Application Notes further state that "[b]ecause a count may be worded broadly," the jointly undertaken criminal activity can be narrower than the scope of the entire conspiracy. Id. § 1B1.3, cmt. n.2. In 2015, the Sentencing Commission amended Section 1B1.3 to state that a defendant is responsible for all acts and omissions of others that were "(i) within the scope of the jointly undertaken criminal activity, (ii) in furtherance of that criminal activity, and (iii) reasonably foreseeable in connection with that criminal activity." USSG § 1B1.3(a)(1)(B) (2015). Because this amendment was clarifying, it applies retroactively to Mr. Kreitman's sentence. See United States v. Presendieu, No. 15-14830, slip op. at *14 (11th Cir. Jan. 19, 2018). As a result, when determining Mr. Kreitman's accountability for the conduct of others, the

District Court should have (1) made "individualized findings concerning the scope of criminal activity undertaken by [the] defendant" and (2) "determine[d] reasonable foreseeability." United States v. Hunter, 323 F.3d 1314, 1319 (11th Cir. 2003) (quotation omitted).

Here, the District Court did not make individualized findings on the scope of criminal activity undertaken by Mr. Kreitman, or whether the actions of the other chiropractors were reasonably foreseeable acts taken "in furtherance of the jointly undertaken criminal activity." See USSG § 1B1.3(a)(1)(B). Instead, the District Court attributed a loss amount and number of victims to Mr. Kreitman merely based on his participation in the conspiracy. This was clear error. We therefore vacate Mr. Kreitman's sentence and remand for the District Court to make individualized factual findings in calculating the loss amount and number of victims attributable to Mr. Kreitman.

B. ABUSE OF A POSITION OF TRUST OR USE OF A SPECIAL SKILL

Mr. Kreitman next argues the District Court erred by finding he abused a position of trust or used a special skill under USSG § 3B1.3. We agree that Mr. Kreitman's conduct did not rise to an "abuse of trust." See United States v. Ghertler, 605 F.3d 1256, 1264 (11th Cir. 2010) (explaining that in the fraud context, this enhancement applies "where the defendant is in a fiduciary, or other personal trust, relationship to the victim of the fraud, and the defendant takes

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advantage of this relationship to perpetuate or conceal the offense" (quotation omitted)). In Ghertler, we said sentencing courts must be careful not to be "overly broad" in applying this enhancement because all fraud involves some abuse of trust. Id. (quotation omitted). Thus, we concluded, "there must be a showing that the victim placed a special trust in the defendant beyond ordinary reliance on the defendant's integrity and honesty that underlies every fraud scenario." Id. (quotation omitted). In Mr. Kreitman's case, there was no showing made by the government that Mr. Kreitman stood in a fiduciary relationship to the victim insurance companies or that they placed special trust in him. In this case, "there is no basis for concluding that he is 'more culpable' than any common fraudster." Id. at 1267.

On the other hand, Mr. Kreitman did use a special skill. The Guidelines define a "special skill" as "a skill not possessed by members of the general public and usually requiring substantial education, training or licensing." USSG § 3B1.3 cmt. n.4. Mr. Kreitman does not contest that being a licensed chiropractor qualifies him as possessing a "special skill." Instead, he says that § 3B1.3 requires he "used a special skill." Id. § 3B1.3 (emphasis added). Mr. Kreitman points out that the government's position was that he often did not examine patients and that when he did, he did so only in a perfunctory manner. He asks us to adopt the approach used by the Sixth Circuit in United States v. Weinstock, 153 F.3d 272

(6th Cir. 1998), and to differentiate between his status as a chiropractor and using his skills as one. Id. at 281. To the contrary, the government asks us to adopt the Third Circuit's approach from United States v. Tai, 750 F.3d 309 (3d Cir. 2014), which views the use of a special skill as including any action that requires the "skill and credentials [as] the means by which [a defendant] could participate." Id. at 318.

We adopt the Sixth Circuit's approach to interpreting USSG § 3B1.3. Our reading of the word "use" does not by its plain language include refraining from the use of one's skills. See, e.g., Black's Law Dictionary 1775 (10th ed. 2014) (defining "use" as "[t]he application or employment of something"). But under either definition, the record shows that Mr. Kreitman did indeed use his skills as a licensed chiropractor. Mr. Kreitman admits he examined at least some patients and prescribed them therapies. This necessarily required him to apply and employ his skills, even if he was prescribing unnecessary therapies. We therefore affirm the District Court on this issue.

C. SOPHISTICATED MEANS

Mr. Kreitman last argues the District Court improperly applied an enhancement based on sophisticated means under USSG § 2B1.1(b)(10)(C). The Guidelines define "sophisticated means" as "especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense."

Id. § 2B1.1 cmt. n.9(B). Also, "[t]here is no requirement that each of a defendant's individual actions be sophisticated in order to impose the enhancement. Rather, it is sufficient if the totality of the scheme was sophisticated." Ghertler, 605 F.3d at 1267.

Mr. Kreitman argues that the enhancement is inapplicable because he did not use sophisticated means and because the use of sophisticated means by others was not reasonably foreseeable. We disagree. The scheme in this case involved a large number of defendants operating a network of clinics. It included staging accidents; recruiting patients; training patients; setting treatment schedules aimed at maximizing benefits; completing extensive paperwork; and billing a large number of insurance claims. It is hardly plausible for Mr. Kreitman to say that the sophisticated means used by his co-conspirators were unforeseeable. On this record, we agree with the District Court that this enhancement was appropriate.

VII. RESTITUTION

We review de novo the legality of a restitution order. United States v. Foley, 508 F.3d 627, 632 (11th Cir. 2007). We review for clear error the District Court's factual findings about the specific amount of restitution. Id.

Mr. Kreitman makes the same argument here as he did in his challenge to the District Court's calculation of the loss amount for which he was responsible under the Guidelines. A restitution order can hold a defendant responsible for the

losses caused by the "reasonably foreseeable acts of others committed in furtherance of the conspiracy." United States v. Odom, 252 F.3d 1289, 1299 (11th Cir. 2001). Because we vacated Mr. Kreitman's sentence in order to allow the District Court to reconsider the loss amount, we recognize that the District Court may wish to reconsider the restitution amount as well.

VIII. CONCLUSION

We affirm Mr. Karow's and Mr. Diehl's convictions and sentences for mail fraud, conspiracy to commit mail fraud, money laundering, and conspiracy to commit money laundering. We affirm Mr. Kreitman's convictions but vacate his sentence and remand for further proceedings.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.