
No. _____

In the
Supreme Court of the United States

MICHAEL MIRANDO, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

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

Petition for Writ of Certiorari

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Question Presented

What standard of review applies to an appeal challenging a district court's methodology for calculating the loss amount under Section 2B1.1 of the United States Sentencing Guidelines?

Parties to the Proceeding

Petitioner is Michael Mirando, defendant-appellant below. The United States of America is the respondent on review.

Statement of Related Proceedings

United States v. Michael Mirando,
Case No. 2:16-cr-0215 (C.D. Cal.) (December 19, 2019)

United States v. Michael Mirando,
Case No. 19-50384 (9th Cir.) (October 25, 2021)

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Petition for Writ of Certiorari

Michael Mirando petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

Opinions Below

The opinion of the Court of Appeals is unreported and is included in the Appendix at App. 1-6. The Court's denial of rehearing and rehearing en banc is included in the Appendix at App. 7. The judgment of the District Court is also unreported and is included in the Appendix at App. 8-14.

Jurisdiction

The judgment of the Ninth Circuit Court of Appeals was entered on October 25, 2021. App. 1. The Court of Appeals denied a timely petition for rehearing and rehearing en banc on January 24, 2022. App. 7. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Introduction

This case presents an opportunity to resolve a circuit split regarding the standard of review for appeals challenging a loss amount calculation under United States Sentencing Guidelines § 2B1.1. Ten circuit courts have correctly concluded that while a district court’s factual findings about the loss amount are reviewed for clear error, the district court’s *methodology* for calculating loss is a legal determination that should be reviewed de novo. But in this case, the Ninth Circuit joined the Second Circuit in incorrectly applying clear-error review to a district court’s methodology for calculating the loss amount. This Court’s review is warranted to clarify that a district court’s methodology in calculating the loss amount involves an interpretation of the Sentencing Guidelines and should therefore be reviewed de novo.

Moreover, this case presents a strong vehicle to resolve the circuit split. Mirando was convicted at trial of committing 15 counts of healthcare fraud by submitting 15 fraudulent bills to insurers for a total loss of approximately \$10 thousand. While the trial evidence focused on the 15 bills charged in the indictment, one witness—the investigating FBI agent—provided some cursory testimony about the broader scope of the fraud and claimed that Mirando caused a total loss of approximately \$3 million. At sentencing, the District Court adopted the agent’s loss calculation in its entirety,

disregarding Mirando’s extensive critiques of the expert’s methodology for assessing the scope of the fraud. On appeal, the Court of Appeals affirmed the sentence because it concluded that the District Court’s loss calculation methodology was not clearly erroneous. But this ruling could not stand under the correct, less deferential standard of review; the agent’s—and consequently the District Court’s—loss calculation methodology was fundamentally unfit for the task of calculating the loss amount.

Statement of the Case

A. The indictment alleged a loss of \$10,245

The indictment charged Michael Mirando with 15 counts of healthcare fraud. ER 112-19.¹ Mirando owned Holter Labs, “which provided cardiac monitoring services to physicians through the use of a digital device called a holter recorder.” ER 112. The indictment alleged that in providing these services, Mirando fraudulently overbilled insurance companies. ER 116-17. Specifically, the indictment alleged that Mirando submitted 15 fraudulent billings to three insurance companies. ER 118-19. The 15 fraudulent

¹ Citations to “ER” refer to the Excerpts of Record filed in Mirando’s appeal to the Ninth Circuit Court of Appeals, case number 19-50384. “AOB” refers to Appellant’s Opening Brief filed in the Ninth Circuit. “GAB” refers to the Government’s Answering Brief.

billings were linked to services provided to four patients. ER 118-19. The total “amount falsely claimed” in the indictment was \$10,245. ER 118-19.

B. The trial focused on 15 allegedly fraudulent billings submitted to insurers for a total loss of \$10,245

The trial focused on the 15 allegedly fraudulent billings named in the indictment. The Government presented testimony from four doctors who had prescribed Holter Recorders, as well as the four patients who had received the services, and alleged through those witnesses that Holter Labs had billed insurers for 15 services that were not provided to the patients.

See, e.g., ER 254-56, 316-20, 332-35, 421-22, 456, 438-39.

The only trial witness who discussed any fraudulent billings other than the 15 named in the indictment was the FBI agent who investigated Mirando—Special Agent Kathleen Kennedy—and her testimony would later form the basis of the sentencing enhancements at issue in this petition. ER 662. Kennedy testified that her investigation of Holter Labs focused on the 15 billings alleged in the indictment. ER 667-99. As to those 15 billings, Kennedy interviewed the four relevant patients and their physicians, reviewed the relevant medical records, and compared the tests ordered by the doctors to the billings Holter Labs submitted to the insurers. ER 667. She concluded that Holter Labs submitted fifteen billings—corresponding to the 15 charged counts—for services that were never performed. ER 667.

Even though she only fully investigated the billings as to the four patients named in the indictment, Kennedy did draw some conclusions about the scope of the fraud. She did so by reviewing thousands of insurance claims submitted by Holter Labs between 2005 and 2016. Kennedy drew conclusions about which of the thousands of billings were fraudulent without consulting an expert, contacting treating physicians around the country, or seeing the medical reports produced for those patients; that is, except for the four patients named in the indictment, she never investigated what tests the thousands of patients actually received. *See* ER 709. As to the other thousands of insurance claims, Kennedy testified that she used basic internet searches on Google, relying on websites she “felt were reliable,” to investigate which billing codes could properly be used for services performed on a Holter Recorder. ER 670-71. Kennedy then analyzed Holter Labs’ billings and determined, based on her internet research, which billings were “fraudulent.” *See* ER 670-71. Kennedy ultimately asserted that Holter Labs had submitted a total of approximately \$8.4 million of fraudulent billings to insurers, and that the insurers actually paid approximately \$3 million to Holter Labs on those fraudulent billings. ER 693, 1166.

Kennedy also calculated Holter Labs’ legitimate billings; while Holter Labs submitted a total of \$1,578,367.28 of legitimate billings, the insurers

only paid \$399,250.32 for these legitimate services performed. ER 1166.

That is, the insurers underpaid Holter Labs by approximately \$1.2 million for legitimate claims.

The jury returned guilty verdicts on all 15 counts, meaning that the jury found that Mirando submitted 15 fraudulent bills, for a total loss of \$10,245, to three insurance companies. ER 828-32.

C. The Court of Appeals vacated Mirando's original sentence based on errors in the District Court's loss calculation methodology

Before Mirando's first sentencing, the Probation Office calculated a Sentencing Guidelines range of 97 to 121 months' imprisonment. ER 1132. That Guidelines range was based on an intended loss figure of approximately \$8.4 million, which was the amount Kennedy claimed Mirando fraudulently billed insurers. ER 1132-34.

Mirando objected to the intended loss calculation based on errors in Kennedy's methodology for tallying the scope of the fraud. *See* ER 833-50. In support of his methodological critique, Mirando submitted an expert report detailing flaws in Kennedy's loss calculation methodology. *See* ER 853-1020. Mirando also testified at the sentencing hearing that Kennedy's calculation was incorrect in assuming that he intended to benefit at the full amount

billed to insurers since he knew that insurers routinely paid only 30% of the amount billed. ER 1199-1201.

The District Court discounted Mirando's testimony and accepted the intended loss amount and other enhancements calculated by the Probation Office. ER 1202-1204, 1215. The Court then sentenced Mirando to 97 months' imprisonment and ordered restitution in the amount of \$3,025,329.47. ER 1220.

Mirando appealed, and the Court of Appeals vacated and remanded for resentencing. *See United States v. Mirando*, 768 F. App'x 596 (9th Cir. 2019); ER 1231 (copy of order). The Court of Appeals first concluded that because of the dramatic effect the loss calculation had on the Guidelines range, the Government bore the burden to prove the loss by clear and convincing evidence. *Mirando*, 768 F. App'x at 597. The Court then concluded that the District Court abused its discretion in concluding that the Government met its burden to prove an intended loss of approximately \$8.4 million, especially since Mirando's testimony at sentencing rebutted the intended loss amount. *Id.* at 597-98.

D. At the resentencing, the District Court again adopted the Government's loss calculation methodology

Upon remand, the Government argued that rather than focus on an intended loss amount, the Court should resentence Mirando based on the

actual loss Kennedy calculated, approximately \$3 million. *E.g.*, ER 9-10. The Defense argued that the trial evidence could not establish the Government's alleged actual loss calculation of approximately \$3 million. ER 1324-40. Indeed, the Defense argued, the jury was not called upon to determine a loss amount and was instead tasked with determining whether Mirando submitted 15 fraudulent claims valuing approximately \$10,000. ER 1326. Additionally, the Government's trial evidence about the scope of the fraud—namely, Kennedy's testimony—was cursory and riddled with methodological errors in how it counted fraudulent claims. ER 1326-39.

The District Court overruled the Defense's objections, finding that Kennedy's testimony, along with other trial evidence, established an actual loss of approximately \$3 million by clear and convincing evidence. ER 70-71.

The parties then jointly argued for a variance to a 60-month sentence. ER 80-82. The District Court denied the parties' joint request for a variance, and instead sentenced Mirando to 87 months' imprisonment, to be followed by three years of supervised release. ER 93. The Court also ordered restitution in the amount of \$3,025,329.47. ER 93.

E. The Court of Appeals denied Mirando’s second appeal by incorrectly reviewing the District Court’s loss-calculation methodology for clear error

On appeal from the resentencing, Mirando argued, among other things, that the District Court erred by adopting wholesale Kennedy’s flawed methodology for calculating the loss amount, and that the Court abused its discretion by imposing a sentence based on that erroneous loss amount. *See AOB 31-40.* Mirando also argued that because the appearance of justice demands it, the case should be remanded to a different district court judge for resentencing. *AOB 55-60.*

The Court of Appeals affirmed the District Court’s judgment. App. 1-6. As to the loss amount, the Court of Appeals stated: “We review the district court’s findings of fact, including the loss amount calculation, for clear error[.]” App. 2. The Court of Appeals then reviewed each of Mirando’s critiques of the District Court’s methodology for calculating loss under the clear-error standard. *See App. 2-4.* Under that deferential standard of review, the Court of Appeals concluded that the “district court did not clearly err in finding by clear and convincing evidence that Mirando caused more than \$1.5 million in actual losses.” App. 2.

Mirando then filed a petition for rehearing or rehearing en banc, which the Court denied. App. 7.

Reasons for Granting the Writ

A. There is a longstanding circuit split on the question presented

Section 2B1.1(b)(1) of the Sentencing Guidelines delineates incremental enhancements to a defendant's offense level for theft and fraud crimes based on the loss caused by the offense. *See U.S.S.G. § 2B1.1(b)(1).* This petition concerns the standard of review a court of appeals should apply when reviewing a district court's methodology for calculating the loss amount. And there is a longstanding circuit split on this issue. Indeed, every single Court of Appeals has addressed the question (except for the Federal Circuit). While ten circuit courts have ruled that a district court's methodology in calculating the loss amount is reviewed *de novo*, one circuit court—the Second Circuit—reviews such claims for clear error. And while the Ninth Circuit has previously held that such claims are reviewed *de novo*, the Ninth Circuit broke from that precedent in this case and sided with the Second Circuit by applying clear-error review to Mirando's appeal.

i. Ten circuit courts have held that, as the D.C. Circuit put it, the "appropriate method for calculating loss amounts under the Guidelines is a prototypical question of legal interpretation, and we review *de novo*." *United States v. Bae*, 250 F.3d 774, 775 (D.C. Cir. 2001) (citation omitted); *United States v. Walker*, 234 F.3d 780, 783 (1st Cir. 2000) (same); *United States v.*

Fumo, 655 F.3d 288, 309 (3d Cir. 2011); *United States v. Allen*, 491 F.3d 178, 193 (4th Cir. 2007); *United States v. Brooks*, 681 F.3d 678, 713 (5th Cir. 2012); *United States v. Warshak*, 631 F.3d 266, 328 (6th Cir. 2010); *United States v. Wasz*, 450 F.3d 720, 725–26 (7th Cir. 2006); *United States v. Hartstein*, 500 F.3d 790, 795 (8th Cir. 2007); *United States v. Maynard*, 984 F.3d 948, 956 (10th Cir. 2020); *United States v. Lulseged*, 688 F. App'x 719, 723–24 (11th Cir. 2017). Under this approach, a circuit court reviews “a district judge’s findings of fact concerning the loss amount for clear error,” but the “the methodology for calculating loss” is reviewed “de novo.” *Lulseged*, 688 F. App'x at 723-24 (citing *United States v. Woodard*, 459 F.3d 1078, 1087 (11th Cir. 2006)).

ii. In contrast, the Second Circuit has repeatedly stated that clear-error review applies to a district court’s methodology for calculating the loss amount. In *United States v. Binday*, 804 F.3d 558 (2d Cir. 2015), the defendants challenged “the method used to calculate actual losses, and thus their Guidelines ranges.” *Id.* at 596. But the court denied the appeal by concluding that the district court’s methodology for calculating the loss “was not a clearly erroneous approach.” *Id.* at 598. Thus, in conflict with 10 other circuit courts, the Second Circuit applied clear-error review to a district court’s methodology for calculating the loss amount. *See also United States*

v. Villa, 744 F. App'x 716, 721 (2d Cir. 2018) (holding that the district court did not clearly err by choosing the loss calculation “methodology promoted by the government”); *United States v. Bursey*, 801 F. App'x 1, 4 (2d Cir. 2020) (same).²

iii. With its decision in this Case, the Ninth Circuit has deepened the Circuit Split by joining the Second Circuit in the minority position of reviewing a district court’s loss calculation methodology for clear error. This, despite the fact that the Ninth Circuit has previously stated that a district court’s methodology for calculating the loss amount “involves an interpretation of the Guidelines” and is therefore reviewed *de novo*. *United States v. Silver*, 245 F.3d 1075, 1080 (9th Cir. 2001). The Ninth Circuit’s decision here thus created an intra-circuit conflict and deepened the circuit split.

In this case, the Ninth Circuit sided with the Second Circuit and applied clear-error review to the District Court’s methodology for calculating

² There appears to be some conflict within the Second Circuit’s decisions, as the court has, at times, appeared to recognize that choosing a methodology for calculating loss is a legal determination. *See United States v. Vilar*, 729 F.3d 62, 95–96 (2d Cir. 2013) (“[W]e are obliged to determine whether the trial court’s method of calculating the amount of loss was legally acceptable, but we will not disturb a district court’s reasonable estimate of the loss, given the available information.” (internal quotation marks and citation omitted)).

loss. As the Government acknowledged in its brief to the Ninth Circuit, Mirando’s appeal challenged the “the court’s methodology” for calculating the loss amount. GAB 47. Indeed, Mirando’s appeal specified four ways in which Kennedy’s—and consequently the District Court’s—methodology for calculating the loss was far over-inclusive. AOB 32-39. For example, Mirando argued that Kennedy overestimated the loss by approximately \$1.2 million by failing to deduct from the loss calculation the amount the insurers underpaid Holter Labs for legitimate services provided. *See* AOB 34-36. This deduction was warranted, Mirando argued, under U.S.S.G. § 2B1.1 cmt. n.3(E)(i), which requires that “loss shall be reduced” by ‘the fair market value of the services rendered by the defendant to the victim before the offense was detected.” *United States v. Martin*, 796 F.3d 1101, 1108 (9th Cir. 2015) (quoting U.S.S.G. § 2B1.1 cmt. n.3(E)(i)) (alterations omitted). Thus, Mirando did not raise factual challenges to the Court’s calculations; he raised a methodological critique. Given that Mirando’s appeal focused on the District Court’s loss calculation methodology, the Ninth Circuit sided with the Second Circuit by applying clear-error review to the appeal.

App. 2-4.

B. The Ninth Circuit’s decision is incorrect

The majority of the Courts of Appeals are correct; a district court’s methodology for calculating the loss amount is a legal determination that should be reviewed *de novo*. The Ninth Circuit’s decision to the contrary, along with the Second Circuit’s, is incorrect.

It is axiomatic that while reviewing courts defer to district courts’ factual determinations, their legal interpretations are reviewed *de novo*.

See Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1200 (2021); *Gonzales v. O Centro Espírito Beneficente União do Vegetal*, 546 U.S. 418, 428 (2006). And, as the vast majority of the Courts of Appeals have recognized, “[t]he appropriate method for calculating loss amounts under the Guidelines is a prototypical question of legal interpretation” that should be reviewed *de novo*.

Walker, 234 F.3d at 783; *see also, e.g.*, *Bae*, 250 F.3d at 775. Stated otherwise, reviewing a district court’s loss calculation involves a two-step process; “we first determine whether the trial court’s method of calculating the amount of loss was legally acceptable” in light of the relevant Guideline provisions, and, second, the reviewing court assesses the district court’s calculations, which are factual determinations. *United States v. Harris*, 597 F.3d 242, 250–51 (5th Cir. 2010) (cleaned up). The Ninth and Second

Circuits are incorrect for applying clear-error review to both steps of this process.

This appeal demonstrates why a district court's *methodology* in calculating loss is a matter of interpreting the Guidelines, which should be reviewed de novo. As addressed above, one of Mirando's chief claims on appeal was that the District Court overestimated the loss by approximately \$1.2 million by failing to deduct from the loss calculation the amount the insurers underpaid Holter Labs for legitimate services provided.

See AOB 34-36. This deduction was warranted, Mirando argued, under U.S.S.G. § 2B1.1 cmt. n.3(E)(i), which requires that "loss shall be reduced by . . . the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected." U.S.S.G. § 2B1.1 cmt. n.3(E)(i). The Ninth Circuit rejected this argument by accepting the District Court's definition of "fair market value." App. 3-4. That is, the issue was defining the term "fair market value" in the Guideline commentary; this was a "prototypical question of legal interpretation" that should have been reviewed de novo. *Walker*, 234 F.3d at 783.

This Court should thus adopt the position reached by the vast majority of the Courts of Appeals, namely that a district court’s methodology for calculating the loss amount is a legal determination reviewed *de novo*.

C. This case presents a strong vehicle for the question presented

This case presents a strong vehicle for the question presented; the Ninth Circuit explicitly applied clear-error review to Mirando’s challenge to the District Court’s methodology for calculating loss, and that erroneous standard of review was not harmless. Mirando’s appeal demonstrated that the District Court erred by adopting wholesale Kennedy’s flawed methodology. AOB 31-39. Under the correct standard of review, Mirando’s sentence could not stand and his case should have been remanded to a different district court judge for resentencing. *See* AOB 55-60.

At minimum, this Court should grant review to clarify the standard of review and remand for the Court of Appeals to apply the correct standard of review to the facts of this case. *See Wilson v. Seiter*, 501 U.S. 294, 306 (1991) (remanding for “reconsideration under the appropriate standard” even though “any error on the point may have been harmless”); *Hicks v. United States*, 137 S. Ct. 2000, 2000 (2017) (mem.) (Gorsuch, J., concurring) (“When this Court identifies a legal error, it routinely remands the case so the court

of appeals may resolve whether the error was harmless in light of other proof in the case.”).

i. Kennedy’s investigation could not carry the Government’s burden to prove the loss amount by clear and convincing evidence. GAB 46-47 (Government agreeing that it bore burden to prove loss by clear and convincing evidence). Kennedy’s investigation focused on the 15 billings charged in the indictment. Those 15 billings involved a total loss of \$10,245, which was approximately 0.3 percent of the losses later claimed by the Government for purposes of sentencing. Kennedy’s investigation was fundamentally unfit for the task for which the District Court used it, namely proving the total losses for sentencing purposes.

Kennedy testified that she began her investigation by receiving claims data for thousands of patients from all over the United States who used Holter Recorders provided by Holter Labs. ER 667. But during her investigation, Kennedy contacted only “seven or eight” of those patients, and she ended up interviewing four of them. ER 667, 699. After she interviewed those four patients, she contacted their treating doctors, obtained their medical records, and compared the tests ordered by the doctors to the billings Holter Labs submitted to the insurers. ER 667. She concluded that Holter Labs submitted fifteen billings—corresponding to the 15 charged

counts—for services that were never performed. ER 667. Kennedy did not claim to investigate a random or statistically significant selection of the thousands of patients and doctors who used Holter Labs’ services nationwide; she selected the particular patients she investigated because they were located within the “area for the Los Angeles field office,” where Kennedy was based. ER 667, 699.

Kennedy’s investigation about Holter Labs’ thousands of other billings was deeply flawed, and her resultant claims about the scope of the fraud were unreliable. She considered the scope of the fraud by reviewing thousands of insurance claims submitted by Holter Labs between 2005 and 2016, and hypothesizing which of the billings were for services Holter Labs did not perform. Kennedy drew conclusions about which of the thousands of billings were fraudulent without consulting an expert, contacting treating physicians around the country, or seeing the medical reports produced for those patients; that is, except for the four patients named in the indictment, she never investigated what tests the thousands of patients actually received.

See ER 709.

Instead, Kennedy investigated the scope of the fraud as follows. Kennedy testified that she had limited experience investigating healthcare fraud—Mirando’s case was only her second-ever healthcare investigation.

ER 703. She therefore used basic internet searches on Google, relying on websites she “felt were reliable,” to investigate which billing codes could properly be used for services performed on a Holter Recorder. ER 670-71. Kennedy then analyzed Holter Labs’ billings and determined, based on her internet research, which billings were for services Holter Labs was “unable to perform.” ER 689-93, 1147-69.

Additionally, if a billing used a code corresponding to services that Holter Labs *could* perform, but was billed twice for the same patient within a short period of time, Kennedy marked that billing as a fraudulent “duplicate date of service.” ER 691. Kennedy explained that she marked a billing as a “duplicate date of service” if it occurred “within six months of the first day of the service.” ER 692-93. Although Kennedy claimed to have been “conservative” in determining which billings were fraudulent, she gave no explanation of why she deemed a Holter Recorder test fraudulent if it occurred within six months of a prior test. *See* ER 692-93.

Based on these expansive definitions of fraudulent and duplicate billings, Kennedy then calculated a total loss amount of more than three million dollars, which the District Court adopted at sentencing. *See* ER 70-75, 693, 1147-69.

While Kennedy's investigation may have sufficed as to the 15 billings charged in the indictment, it was unfit for the task of proving a total loss amount by clear and convincing evidence. In light of the limited investigation Kennedy conducted—actually investigating fewer than 10 of Holter Labs' thousands of billings—and her unreliable sources—websites she “felt were reliable”—the District Court erred by adopting her methodology wholesale in calculating the loss amount.

In affirming the District Court's methodology for calculating the loss, the Ninth Circuit emphasized the Guidelines' directive that a district court “need only make a reasonable estimate of the loss.” App. 3 (quoting U.S.S.G. § 2B1.1 cmt. n.3(C).) But this statement in the Guideline “does not obviate the requirement” for the District Court to employ a reasonably accurate methodology for calculating loss. *United States v. Berger*, 587 F.3d 1038, 1045 (9th Cir. 2009). “Rather, the plain language of the Guidelines commentary merely indicates that, in arriving at the loss figure, some degree of uncertainty is tolerable.” *Id.* (vacating sentence since district court's loss calculation methodology “troubles us”). The Ninth Circuit erred by rubber-stamping the District Court's wholly inadequate method for calculating the loss amount.

ii. Not only was Kennedy's investigation unfit for the task of proving a total loss amount by clear and convincing evidence, but Mirando showed that her loss calculation was over-inclusive in three specific ways: (1) Kennedy's decision to mark any two services performed within six months of each other as "duplicate dates of service" was far over-inclusive and was not based on any reason, let alone clear and convincing evidence; (2) Kennedy failed to deduct from the loss amount the undisputed amount—approximately \$1.2 million—the insurers underpaid Holter Labs for legitimate services provided; and (3) Kennedy's list of services Holter Labs was "unable to perform" was based on her unreliable "basic internet searches," and was contradicted by trial evidence showing that Holter Recorders actually could perform some of the services she counted as fraudulent. AOB 32-38.

The Ninth Circuit rejected these arguments under the deferential clear-error standard; applying the correct standard of review must yield a different result. Take, for example, the issue of the \$1.2 million of unpaid bills for legitimate services that the District Court refused to deduct from the loss amount. As addressed above, the Guidelines require that the amount of "loss shall be reduced" by 'the fair market value of the services rendered by the defendant to the victim before the offense was detected.'" *Martin*, 796

F.3d at 1108 (quoting U.S.S.G. § 2B1.1 cmt. n.3(E)(i)) (alterations omitted). Kennedy testified that Holter Labs validly billed insurers \$1,578,367.28 for services performed, but the insurers paid Holter Labs only \$399,250.32 for those valid billings. ER 692, 1166. That is, the insurers did not pay Holter Labs for nearly \$1.2 million of legitimate billings. The Government never alleged that Holter Labs overbilled for these legitimate services; indeed, Kennedy testified that they all “appear[] to be valid.” ER 692. These underpayments by the insurance companies for legitimate services should have been subtracted from the loss amount.

In rejecting the argument that the value of unpaid legitimate billings should have been deducted from the loss amount, the Ninth Circuit reasoned that the “district court could have concluded that the amount the insurers paid to Holter Labs (and not the amount billed) was the fair market value of the services rendered.” App. 3-4. But there was no evidence—let alone clear and convincing evidence—that the underpayment amounts were the fair market value for the legitimate services performed.

To support the notion that the amounts the insurance companies paid might have been the fair market price for the services rendered, the Ninth Circuit pointed only to the record evidence showing that “insurers pay healthcare providers, on average, a quarter of the amount billed, and that is

roughly what Mirando received.” App. 4. Indeed, the Defense’s expert report explained that because of insurers’ bargaining power, insurers routinely do not pay the full amounts billed for services rendered, and instead typically pay for approximately 25-30 percent of billings. *See* ER 862. And, as the Ninth Circuit decision pointed out, Mirando testified at the original sentencing hearing that he knew that insurance companies would not pay the full amounts billed. ER 1199-1201.

But the fact that insurers routinely pay only a fraction of the amounts billed does not prove that their underpayments are the *fair* market price; it shows only that they use their bargaining power to routinely pay a lower amount than that billed. The Guidelines requires that the loss amount be reduced by the “*fair* market value” of the “services rendered.” U.S.S.G. § 2B1.1 cmt. n.3(E)(i) (emphasis added). The Ninth Circuit’s reasoning boils down to the following dubious result: By routinely underpaying for services, a party can exempt itself from paying the full price.

Moreover, the Defense expert report undermined any notion that insurers’ routine underpayments represent the fair market price. As the expert explained, “those who do not pay for hospital care via an intermediary payer (i.e., the uninsured) are actually subject to the listed charges”—that is, the full amounts billed. ER 862. Thus, while the insurers routinely

underpay for services provided, those underpayments do not shift the fair market price of the services; they merely show that the insurers routinely underpay service providers. *See* ER 876-77 (expert report stating that under the Government’s own analysis, the insurers underpaid Holter Labs for legitimate services).

The Ninth Circuit thus erroneously conflated the “fair market value” with the amount Mirando knew the insurers would pay based on their market power. *Cf.* GAB 54-56 (Government citing Defense expert report to argue that the fair market value for the legitimate services is whatever the insurers paid for those services). The Ninth Circuit decision’s reference to the concept of judicial estoppel is thus also mistaken. The Ninth Circuit reasoned that because Mirando testified that he always knew the insurers would not pay him the full price for billings, and because the Court “credited that argument when we vacated Mirando’s initial sentence,” Mirando “is judicially estopped from now claiming that the opposite is true.” App. 4. But Mirando never claimed that the insurers’ routine underpayments shifted the fair market price for services rendered; he only pointed out that he knew that insurers do routinely underpay service providers.

There was no evidence that the insurers’ underpayments represented the fair market value for the services Holter Labs legitimately billed for.

The District Court should have reduced the loss amount by the approximately \$1.2 million of unpaid bills for legitimate services provided.

Moreover, the issue of deducting the unpaid bills for legitimate services is only one of several methodological flaws Mirando presented to the Court of Appeals. Kennedy's investigation was fundamentally ill-equipped to prove loss by clear and convincing evidence. Once the correct standard of review is applied to Mirando's appeal, the District Court's loss calculation cannot stand. The question presented is thus outcome determinative in this case.

Conclusion

For the foregoing reasons, Mirando respectfully requests that this Court grant his petition for a writ of certiorari

Respectfully submitted,

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