

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAR 30 2022

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ELSEDDIG ELMARIOUD MUSA, DBA
Arizona One Medical Transportation, LLC.,

Defendant-Appellant.

MOLLY C. DWYER, CLE
U.S. COURT OF APPEAL

Nos. 21-16467, 21-17008

D.C. Nos. 2:19-cv-01676-DLR
2:15-cr-01265-DLR-1

District of Arizona,
Phoenix

ORDER

Before: CALLAHAN and MILLER, Circuit Judges.

Appeal No. 21-16467 is an appeal from the district court's denial of appellant's 28 U.S.C. § 2255 motion. Appeal No. 21-17008 is an appeal from the district court's denial of appellant's motion to stay the § 2255 judgment pending appeal.

In both appeals, the requests for a certificate of appealability are denied because appellant has not shown that "jurists of reason would find it debatable whether the [section 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Appendix A

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

APR 28 2022

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ELSEDDIG ELMARIOUD MUSA, DBA
Arizona One Medical Transportation, LLC,

Defendant-Appellant.

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

No. 21-16467

D.C. Nos. 2:19-cv-01676-DLR
2:15-cr-01265-DLR-1

District of Arizona,
Phoenix

ORDER

Before: GRABER and TALLMAN, Circuit Judges.

Appellant has filed a combined motion for reconsideration and motion for reconsideration en banc (Docket Entry No. 9).

The motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Elseddig Elmarioud Musa,

No. CV-19-01676-PHX-DLR (JFM)

Movant,

ORDER

v.

USA.

Respondent.

15 Before the Court is the Report and Recommendation (“R&R”) of Magistrate Jud.
16 James F. Metcalf (Doc. 41) regarding Movant’s Amended Motion to Vacate, Set Aside,
17 Correct Sentence Pursuant to 28 U.S.C. § 2255 (Doc. 8). The R&R recommends that
18 Amended Motion to Vacate, Set Aside or Correct Sentence and a Certificate
19 Appealability be denied. The Magistrate Judge advised the parties that they had fourteen
20 days from the date of service of a copy of the R&R to file specific written objections with
21 the Court. Movant filed an objection to the R&R on May 26, 2021 (Doc. 42),
22 Respondent filed its response on June 10, 2021 (Doc. 43). The Court has considered
23 objections and reviewed the R&R de novo. *See* Fed. R. Civ. P. 72(b); 28 U.S.C.
24 636(b)(1). The Court overrules each of Movant’s objections to the R&R, in turn.

I. The request for a hearing

Movant argues that a hearing is required on some of his ineffective assistance counsel claims because of credibility issues created by conflicting testimony contained in his declaration and that of his trial attorney, Magnus Eriksson. First, according to Movant,

1 declaration, Eriksson did not obtain or review the contents of his civil attorney's forfeiture
2 files. Eriksson does not necessarily dispute this contention, stating, "I do not remember
3 whether I spoke directly to Musa's prior counsel in his civil matter. I likely did exchange
4 emails or a phone call." (Doc. 29-1 at 2.) Second, Movant alleges a credibility issue arose
5 from their conflicting declarations concerning the retention of an investigator and forensic
6 accountant.

7 The recommendation of the R&R to deny an evidentiary hearing did not turn on a
8 credibility assessment but instead on the determination that the conflicting information is
9 immaterial. Particularly, the R&R found that Movant has not shown that Eriksson's
10 decision to take certain discovery but not other discovery and his failure to retain an
11 investigator or forensic accountant fell below an objective standard of reasonableness. The
12 Court agrees with Movant that, in a case this complex and this serious—in which the
13 government's case was built on an enormous volume of business records and a forensic
14 analysis of those records—if he could show that counsel without good cause failed to
15 review the files in the related civil matter and failed to retain an investigator and forensic
16 accountant, his conduct would fall below an objective standard of reasonableness.

17 Nevertheless, the R&R correctly found that Movant failed to show how any of
18 counsel's alleged shortcomings would have probably changed the outcome of the case. He
19 has not shown that the "untaken discovery" would have revealed relevant and exculpatory
20 evidence, what evidence or testimony an investigator would have discovered, what
21 assistance or testimony he would expect from a forensic accountant or that such testimony
22 would have assisted his defense. Rather, he admits, "[w]e don't know what the expert for
23 the defense will testify to because Eriksson didn't hire one." (Doc. 42 at 2.) Movant's lack
24 of recognition of the burden he carries in presenting his habeas petition is obvious when he
25 argues,

26 That failure [to hire an expert] is part of what this proceeding
27 exists to cure. It was a failure of ultimate consequence which
28 led to an unreliable result. Just that piece at an evidentiary
hearing would demonstrate a reasonable probability that the
result of the case would be different.

1 (Doc. 42 at 2.) The time to make a showing—that counsel's errors prevented the
2 presentation of exculpatory evidence at trial that probably would have resulted in a
3 different outcome—is at petition-filing; Movant cannot simply fish for potentially useful
4 information in support of his theory during an evidentiary hearing.

5 Therefore, the R&R correctly determined that no material factual dispute existed
6 that required an evidentiary hearing to resolve. It accurately underscored that the burden
7 to produce evidence showing that there is an expert prepared to give testimony that would
8 have likely changed the outcome of the trial rests with the Movant and noted that Movant's
9 unsupported arguments about what an evidentiary hearing would establish, without more
10 than speculation, would be a "fishing expedition for new claims." (Doc. 41 at 3.) Movant's
11 first objection is overruled.

12 **II. Trial preparation ineffective assistance of counsel claim**

13 Relying on *Vega v. Ryan*, 757 F.3d 960 (9th Cir. 2014), Movant claims that
14 Eriksson's representation did not meet the objective standards of reasonableness because
15 he failed to meet with and review the files from Movant's prior counsel in the civil
16 forfeiture action, review the entirety of the matter seized from Movant, interview material
17 witnesses (including employees, patients, and medical providers), and hire a forensic
18 accountant. The Court agrees that, if the evidence showed those actions were not taken,
19 counsel's conduct would have likely been below the objective standard of reasonableness.

20 However, Movant's declaration argues only the first prong of the ineffective
21 assistance of counsel test set out by *Strickland v. Washington*, 466 U.S. 668 (1984).² Even
22 if an evidentiary hearing would show that Eriksson failed to meet with and review the files
23 of previous counsel, review the entirety of the matter seized from Movant, interview

24 ¹ As stated above, the complexity of the case and the nature of the evidence was
25 such that an objective standard of reasonableness warranted defense counsel to perform all
the aforementioned steps.

26 ² In *Strickland*, the Supreme Court explained that, to prevail on such a claim
27 Movant must show both that counsel's representation fell below the objective standard of
reasonableness and that there is a reasonable probability that, but for counsel's
unprofessional errors, the result of the proceeding would have been different. *Id.* at 687
28 88.

1 material witnesses, and hire a forensic accountant—and such shortcomings brought
2 Eriksson's representation below the objective reasonableness standard—there has been no
3 showing that the files contained exculpatory evidence or that the witnesses would testify
4 in a way favorable to his defense. Without a showing that the acts Movant claims his
5 counsel should have performed would have resulted in the discovery of admissible
6 exculpatory evidence, Movant has failed to show that the result would have probably been
7 different. Without that showing, Movant has not established met his burden on the
8 ineffective of assistance of counsel claim. Movant's second objection is overruled.

9 **III. Motion to bifurcate trial**

10 The R&R found that a motion to bifurcate trial or exclude evidence of uncharged
11 fraudulent activity would have been futile. Movant's objection does not offer evidence in
12 support or any basis for the Court to conclude that the R&R was incorrect or that he was
13 prejudiced by the failure of counsel to bring a bifurcation motion. Movant's third objection
14 is overruled.

15 **IV. Jury selection infective assistance of counsel claim**

16 In his objection, Movant questions what happened to the one Black juror. However,
17 the R&R correctly found that this jury selection claim is without merit because Movant
18 failed to show any impropriety or allege ineffectiveness of counsel. In his objection,
19 Movant nevertheless argues that the government has not explained why the one Black juror
20 was not one of the jurors who decided the case. (Doc. 42 at 9.) The burden is not on the
21 government but on Movant. Yet, he has not identified the juror to which he refers or
22 identified what counsel did or did not do, causing his conduct to fall below the objective
23 standard of reasonableness. Movant's fourth objection is overruled.

24 **V. Identity theft counts objection**

25 The R&R correctly determined that defense counsel was not deficient for failing to
26 object to the jury instruction on the identity theft counts because it was a correct statement
27 of the law under the facts of his case. Movant's objection to this R&R recommendation
28 does not raise any specific objections. Fed. R. Civ. P. 72(b)(3). Instead, he stands by his

1 contention that *United States v. Hong*, 938 F.3d 1040, 1051 (9th Cir. 2019) is applicable.
2 To the contrary, the R&R provided a detailed analysis as to why it was inapplicable. (Doc.
3 41 at 23.) Movant's objection does not address or point to any alleged error in the R&R's
4 analysis. As pointed out by Respondent's response, the recent decision in *United States v.*
5 *Harris*, 983 F.3d 1125 (9th Cir. 2020) confirms that there was no basis for counsel to object
6 to the jury instruction. Movant's fifth objection is overruled.

7 **VI. Deficient performance**

8 The R&R correctly found that Movant failed to show deficient performance of
9 counsel resulting in accumulated prejudice. Movant's objection does not specifically
10 identify an error in the R&R. (Doc. 42 at 9.) Without a specific objection, Movant's
11 general objection fails and is overruled.

12 **VII. Applicability of *Cronic*'s presumed prejudice standard**

13 Movant argues that he should not be required to meet the *Strickland* prejudice
14 standard but that it should be presumed pursuant to *United States v. Cronic*, 466 U.S. 648
15 (1984), because his counsel "entirely failed to subject the prosecution's case to meaningful
16 adversarial testing." (Doc. 9 at 2, 21.) The R&R found that Movant is not entitled to the
17 *Cronic* presumption because he neglected to show that Eriksson "failed to show up for the
18 game." (Doc. 41 at 25.) The R&R cited *Bell v. Cone*, 535 U.S. 685, 696-97 (2002), in
19 which the Supreme Court stated, "[f]or purposes of distinguishing between the rule of
20 *Strickland* and that of *Cronic*, this difference is not degree but of kind." Herc, the R&R
21 points out that Eriksson cross-examined witnesses to show the unsupported claims resulted
22 from innocent clerical errors, fraud by his drivers, or from patients who just wanted a ride
23 across town. And, while Movant points out several alleged deficiencies in counsel's
24 performance, he does not identify anything counsel did or did not do that could have
25 impacted the verdict given the strength of the evidence. Movant has not shown that the
26 R&R was wrong when it found that the *Cronic* presumption does not apply. Movants'
27 seventh objection is overruled.

28 **VIII. AHCCCS regulation interpretation**

1 Movant claims that counsel failed to explain to the jury that he underbilled his
2 mileage as a business practice—to avoid the hassle of prior authorization requirements for
3 trips over 100 miles—because AHCCCS regulations enabled him to do so. The evidence
4 of the appropriateness of this practice was attempted to be brought out in Eriksson's cross-
5 examination of a former AHCCCS medical claims policy and audit manager. However,
6 that witness did not agree with Movant's claimed interpretation of the regulation. Instead,
7 she testified that underbilling attempts would be caught in an audit and clarified on re-
8 direct examination that underbilling to avoid prior authorization was not permitted. (Case
9 2:15-cr-01265-DLR, Doc. 97 at 39.) Movant's interpretation of the regulation therefore
10 proved incorrect. Nonetheless, Eriksson attempted to bring out that interpretation and use
11 it as part of the defense. Movant is wrong both in his interpretation of the regulation and
12 in his assertion that his counsel fell below the standard of objective reasonableness by
13 failing to bring it out. Movant's final objection is overruled.

14 Consequently, the Court overrules Movant's objections to the R&R and rejects
15 Movant's constitutional claims on the merits. Jurists of reason would not find the Court's
16 assessment of the constitutional claims debatable or wrong.

17 **IT IS ORDERED** that Movant's objection to the R&R (Doc. 42), is
18 **OVERRULED**.

19 · **IT IS FURTHER ORDERED** that the R&R (Doc.41) is **ACCEPTED**.

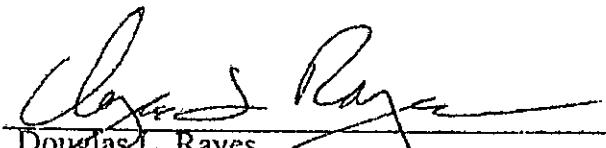
20 **IT IS FURTHER ORDERED** that Movant's Motion to Vacate, Set Aside or
21 Correct Sentence pursuant to 28 U.S.C. § 2255 (Doc. 8) is **DENIED**.

22 **IT IS FURTHER ORDERED** that a Certificate of Appealability is **DENIED**.

23 **IT IS FURTHER ORDERED** that the Clerk of the Court shall enter judgment
24 accordingly and terminate this action.

25 Dated this 31st day of August, 2021.

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Douglas L. Rayes
United States District Judge

CERTIFICATE OF SERVICE

Original and ten (10) copies of the foregoing Petition and Motion for Leave to Proceed in Forma Pauperis was mailed this 18 day of July, 2022 to:

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

WASHINGTON, D.C. 20543-0001

Ninth Circuit Court of Appeals

James R. Browning United States Courthouse.

95 Seventh Street. San Francisco, CA 94103-1518.

Clerk, United States District Court

Sandra Day O'Connor U.S. Courthouse, Suite 130

401 W. Washington Street, SPC1

Phoenix, Arizona 85004

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Two Renaissance Square

40 N. Central Ave., Suite 1200

Phoenix Arizona 85004

Elseddig Musa

Elseddig E. Musa

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Elseddig Elmarioud Musa,
Movant.

NO. CV-19-01676-PHX-DLR
CR-15-01265-PHX-DLR

v.
United States of America,
Respondent.

JUDGMENT

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED accepting the Report and Recommendation of the Magistrate Judge as the order of this court; Movant's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 is DENIED.

IT IS FURTHER ORDERED that a Certificate of Appealability is DENIED. The civil action opened in connection is hereby dismissed.

Debra D. Lucas
District Court Executive/Clerk of Court

August 31, 2021

By s/ W. Poth
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

DEC 15 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ELSEDDIG ELMARIOUD MUSA, DBA
Arizona One Medical Transportation, LLC.,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 21-17008

D.C. Nos. 2:19-cv-01676-DLR
2:15-cr-01265-DLR-1

District of Arizona,
Phoenix

ORDER

Before: Lisa B. Fitzgerald, Appellate Commissioner.

This case appears to arise under 28 U.S.C. § 2255 and thus is subject to the requirements of 28 U.S.C. § 2253(c). This case is remanded to the district court for the limited purpose of granting or denying a certificate of appealability at the court's earliest convenience. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b); *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997).

If the district court chooses to issue a certificate of appealability, the court should specify which issue or issues meet the required showing; if the district court declines to issue a certificate, the court is requested to state its reasons. *See* 28 U.S.C. § 2253(c)(3); *Asrar*, 116 F.3d at 1270.

The Clerk will send a copy of this order to the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Elseddig Elmarioud Musa

Petitioner,

V.

United States of America.

Respondent.

No. CV-19-01676-PHX-DLR

ORDER

Petitioner Elseddig Elmarioud Musa was convicted and sentenced on 38 counts of Health Care Fraud and 5 counts of Aggravated Identity Theft, and he moved to vacate, set aside, or correct the sentence. The Court denied the motion in August 2021, and because reasonable jurists would not disagree, also denied a certificate of appealability. (Doc. 45.) Then, in September 2021, Musa filed an emergency motion to stay judgment of the clerk pending appeal of that order. The Court denied relief in October 2021, explaining that Musa merely rehashed the same arguments and was thus not entitled to relief or a certificate of appealability for the exact same reasons as in the August appeal.

Musa has now filed a notice of appeal of that October 2021 order. (Doc. 54.) That appeal is not viable because, as this Court now intones again, reasonable jurists would not find the Court's reasoning in the August order debatable. Accordingly:

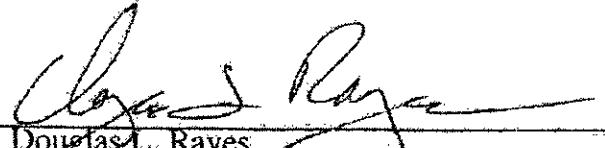
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Appendix E

2 November 23, 2021 order denying Petitioner's emergency motion to stay judgment
3 pending appeal is **DENIED**.

4 Dated this 17th day of December, 2021.

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9 Douglas L. Rayes
United States District Judge

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NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AUG 1 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 17-10174

Plaintiff-Appellee,

D.C. No.
2:15-cr-01265-DLR-1

v.

ELSEDDIG ELMARIOUD MUSA,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the District of Arizona
Douglas L. Rayes, District Judge, Presiding

Submitted July 12, 2018**
San Francisco, California

Before: GRABER and HURWITZ, Circuit Judges, and LEMELLE,*** Senior District Judge.

Elseddig Musa appeals his convictions and sentence for health care fraud and aggravated identity theft in violation of 18 U.S.C. §§ 1349 and 1028A. We

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See Fed. R. App. P. 34(a)(2).*

*** The Honorable Ivan L.R. Lemelle, Senior United States District Judge for the Eastern District of Louisiana, sitting by designation.

have jurisdiction under 28 U.S.C. § 1291. We affirm Musa's convictions, vacate his sentence, and remand for resentencing.

Musa operated a company that provided non-emergency medical transportation for members of Arizona's Medicaid program, the Arizona Health Care Cost Containment System (AHCCCS). When Musa's company provided transportation to an AHCCCS member, Musa submitted a reimbursement claim containing the member's AHCCCS identification number. After August 2013, Musa was also required to submit a standardized trip form with each claim.

An AHCCCS audit revealed that Musa had submitted a large number of "unmatched" claims. A claim is "unmatched" if there is no corresponding claim for a medical service, such as a doctor's appointment, for the member on the day of transportation. Musa was ultimately indicted on 35 counts of health care fraud for submitting claims for "medical transports that never occurred" and four counts of aggravated identity theft for using AHCCCS identification numbers in the commission of health care fraud.

1. The district court did not plainly err in denying Musa's motion for acquittal. Musa argues that the Government offered insufficient evidence of his knowing fraud against AHCCCS. The evidence showed that Musa had no documentation for the 35 reimbursement claims charged in the indictment, could point to no evidence these claims were legitimate, conceded he submitted claims

for more transports than his company could have provided, and the volume of Musa's claims fell after AHCCCS required more stringent documentation. Musa also testified that he knowingly submitted inaccurate claims.

Viewing this evidence in the light most favorable to the prosecution, *see* *United States v. Nevils*, 598 F.3d 1158, 1163-64 (9th Cir. 2010) (en banc), a rational trier of fact could reasonably infer that Musa knowingly defrauded AHCCCS, *see United States v. Sullivan*, 522 F.3d 967, 974 (9th Cir. 2008) (per curiam). Because there was sufficient evidence that Musa used AHCCCS identification numbers to commit health care fraud, there was also sufficient evidence that Musa used the identification numbers without lawful authority. *See United States v. Osuna-Alvarez*, 788 F.3d 1183, 1185-86 (9th Cir. 2015) (per curiam).

2. The district court did not abuse its discretion in denying Musa's motion for a new trial. The district court heard the evidence and evaluated the credibility of the witnesses who testified (including Musa himself). The record supports the district court's conclusion; this is not "an exceptional case in which the evidence weighs heavily against the verdict." *United States v. Merriweather*, 777 F.2d 503, 507 (9th Cir. 1985).

3. We do not address Musa's ineffective assistance of counsel claim because the record is not sufficiently developed for direct review. *See United*

States v. Moreland, 622 F.3d 1147, 1157-58 (9th Cir. 2010).

4. In sentencing, the district court calculated a \$1.2 million loss was caused by Musa's crimes, based on Government data regarding the value of over 15,000 "unmatched" claims. Musa objected and argued that not all "unmatched" claims were necessarily fraudulent. A district court "need only make a reasonable estimate of the loss based on the available information." *United States v. Walter-Eze*, 869 F.3d 891, 912 (9th Cir. 2017) (internal quotation marks omitted). But, while a "district court can certainly rely on a government estimate," the court has an "obligation to ensure the information underlying the estimate possesses sufficient indicia of reliability to support its probable accuracy." *United States v. Garcia-Sanchez*, 189 F.3d 1143, 1149 (9th Cir. 1999) (internal quotation marks omitted).

Trial testimony supports Musa's argument that "unmatched" claims are not always fraudulent, as the Government acknowledges in its briefing on appeal. Musa's argument also finds support in the Government's data for trips after August 2013, which appear to show "unmatched" claims even when Musa included required documentation and when the number of claims was generally consistent with Musa's trip reports and daily schedules.

In light of this evidence, the record does not adequately demonstrate that relying entirely on the amount of "unmatched claims" was a sufficiently reliable

method of estimating loss. *See Garcia-Sanchez*, 189 F.3d at 1148-50; *United States v. Chase*, 499 F.3d 1061, 1070-71 (9th Cir. 2007). We remand for the district court to determine whether review of the trip reports and daily schedules is a more accurate method of calculating loss; if the court concludes that it is not, it may again base the loss calculation on the value of unmatched claims. *See United States v. Scrivener*, 189 F.3d 944, 949-50 (9th Cir. 1999); *see also* U.S.S.G. § 2B1.1 cmt. n.3(C). On remand, the district court must find the loss by clear and convincing evidence if the loss has a disproportionate effect on Musa's sentence. *See United States v. Hymas*, 780 F.3d 1285, 1289-93 (9th Cir. 2015). The loss should not be reduced by the value of forfeited property because forfeiture was ordered after Musa's fraud was discovered. *See United States v. Stoddard*, 150 F.3d 1140, 1146 (9th Cir. 1998); *see also* U.S.S.G. § 2B1.1 cmt. n.3(E)(i).

Convictions AFFIRMED, sentence VACATED, REMANDED.