No.-

In the Supreme Court of the United States

GLENN A. CHIN,
PETITIONER

v.

UNITED STATES,
RESPONDENT

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

PETITION FOR A WRIT OF CERTIORARI OF GLENN A. CHIN TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court clearly err in finding that the defendant's conduct involved a reckless risk of death or serious bodily injury, triggering a sentencing enhancement under U.S.S.G. §2B1.1(b) (16) (A), absent proof that the defendant was subjectively aware that his conduct involved such a risk? More generally, does this criminal sentencing enhancement contain a *mens rea* requirement, or does the civil standard for reckless conduct apply?

2. Did the Court of Appeals for the First Circuit err in holding that the portion of the defendant's gross salary which was withheld and paid for federal and state income taxes constituted "proceeds" which he "obtained" and were thus subject to forfeiture pursuant to 18 U.S.C. §1963 (a) (3)? More generally, can criminal defendants be ordered under this statute to forfeit to the government money which they have already paid to the government in taxes?

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- United States v. Glenn A. Chin, No. 14-cr-10363-2-RGS. U.S. District Court for the District of Massachusetts. Judgment entered Jan. 31, 2018.

- United States v. Glenn A. Chin, Nos. 18-1263, 18-1310, 18-1500. U.S. Court of Appeals for the First Circuit. Judgment remanding case entered July 9, 2020.

- United States v. Glenn A. Chin, No. 14-cr-10363-2-RGS. U.S. District Court for the District of Massachusetts,. Amended Judgment after remand entered Nov. 30, 2021.

- United States v. Glenn A Chin, No. 21-1574. U.S. Court of Appeals for the First Circuit. Judgment affirming sentence entered July 15, 2022.

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II. THIS COURT SHOULD HOLD, CONSISTENT WITH ITS DECISION IN *HONEYCUTT V. UNITED STATES* AND FUNDAMENTAL FAIRNESS, THAT MONIES WITHHELD FROM AND PAID BY CHIN AS FEDERAL AND STATE TAXES DO NOT CONSTITUTE "PROCEEDS" "OBTAINED" BY HIM WHICH ARE SUBJECT TO FORFEITURE UNDER 18 U.S.C. §1963(a)(3) 8

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OPINIONS BELOW

United States v. Glenn Chin, 965 F.3d 41 (1st Cir. 2020), set forth at Appendix A.

United States v. Glenn Chin, 41 F.4th 16 (1st Cir. 2022), set forth at Appendix A.

BASIS FOR JURISDICTION

The United States Court of Appeals for the First Circuit entered final judgment affirming the petitioner's sentence after remand on July 15, 2022. This petition is filed within 90 days of that date. This Court has jurisdiction to review a final judgment of a United States court of appeals pursuant to 28 U.S.C. § 1254.

STATUTORY AND GUIDELINES PROVISIONS INVOLVED

18 U.S.C. §1963 (a) (3).

> Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law—(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

U.S.S.G. §2B1.1 (b) (16) (A).

> (b) Specific Offense Characteristics. (16) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury. . . increase by 2 levels.

STATEMENT OF THE CASE

I. PETITIONER'S CONVICTION AND ORIGINAL SENTENCE.

Petitioner Glenn A. Chin ["Chin"] and 13 other defendants were charged with multiple offenses in an indictment returned in the United States District Court for the District of Massachusetts on December 16, 2014. That court had original jurisdiction pursuant to 18 U.S.C. §3231. The indictment addressed a national outbreak of fungal meningitis in 2012 involving hundreds of medical patients in various states who were injected with a contaminated steroid medication [methylprednisolone acetate or "MPA"] produced by the New England Compounding Center ["NECC"] in Framingham, Massachusetts. More than 60 patients died. Chin was a salaried employee at NECC who had compounded the contaminated MPA in his capacity as chief pharmacist.

After the district court ordered a severance of defendants, Chin proceeded to trial alone before a jury. He was convicted of racketeering, racketeering conspiracy, and multiple counts of mail fraud, introducing adulterated drugs into interstate commerce, and introducing misbranded drugs into interstate commerce. The district court sentenced him to 96 months of imprisonment and entered a forfeiture judgment of $175,000, App. C-1.[1/], and an order of restitution.

The government did not prove (or even claim) at trial that Chin knew that any of the MPA compounded at NECC and subsequently distributed to health care facilities was tainted. Moreover, the government was unable to prove precisely how the MPA was contaminated, at what stage of the manufacturing/distribution process the contamination occurred, or what specific acts or omissions by Chin (if any) caused the contamination. On a special verdict form, the jury did not find Chin liable

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[1/] Citations to the Appendices to this petition are abbreviated as "App. [letter]-[page number]."

for any of the charged predicate racketeering acts of second degree murder.

II. THE FIRST APPEAL.

Both Chin and the government appealed. Chin challenged his RICO convictions, and the government challenged the sentence. On July 9, 2020, the Court of Appeals for the First Circuit issued a decision on the cross-appeals. *United States v. Chin*, 965 F.3d 41 (1st Cir. 2020). App. A-1. Chin's convictions were affirmed. With respect to sentencing, the court took issue with the district court's analysis of three Guidelines enhancements sought by the government and remanded for further consideration of those enhancements, including whether Chin's offenses involved a conscious or reckless risk of death or serious bodily injury [U.S.S.G. §2B1.1(b)(16)(A)].

The court of appeals also vacated the district court's forfeiture and restitution orders. With respect to forfeiture, the court rejected Chin's argument that the amount of his salary that had been withheld for federal and state income taxes was not subject to forfeiture and held that the district court erred in failing to order Chin to forfeit the gross, pre-tax salary he earned ($473, 584.50) during the period of racketeering activity. Accordingly, the court directed the entry of a forfeiture order in that amount. The case was remanded for resentencing. [2/]

III. RESENTENCING.

On remand, Chin argued that the district court's prior rulings on the three sentencing enhancements sought by the government remained correct. He contended, *inter alia*, that the conscious or reckless risk enhancement did not apply. He also asserted (to preserve the issue) that the First Circuit's ruling respecting the forfeiture of pre-tax earnings was erroneous and inconsistent

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[2/] On the same date, the First Circuit decided a companion case, *United States v. Cadden*, 965 F.3d 1 (2020), where it addressed some of the same sentencing issues addressed in *Chin*. *Cadden* was also remanded for resentencing.

with recent Supreme Court precedent.

Cadden's resentencing hearing took place the day before Chin's and addressed some of the same Guidelines issues. With respect to the conscious or reckless risk enhancement, the district court noted at Cadden's sentencing hearing that the First Circuit had apparently adopted in *Cadden* the definition of "recklessness" articulated by the Court of Appeals for the Second Circuit in *United States v. Lucien*, 347 F.3d 45 (2d Cir. 2003), which the district court characterized as "more a should-have-known standard than it really is an assessment of a defendant's actual state of mind." The court then found that enhancement applicable to Cadden pursuant to "the new First Circuit test."

At Chin's sentencing hearing, the district court referred to the findings it had made during the Cadden sentencing hearing regarding the conscious or reckless risk enhancement. It reiterated its assumption that the First Circuit was "adopting or at least embracing the Second Circuit's view of how 'recklessness' would be defined in this case" and applied the enhancement over objection.[3/]

With respect to forfeiture, the court indicated it had no choice but to enter the amount directed by the court of appeals - - $473, 584.50. Based on its revised Guidelines calculation, the district court sentenced Chin to 126 months of imprisonment, two years of supervised release, forfeiture in the amount of $473, 584.50, restitution of $82,022,335.68, jointly and severally with Cadden, and a special assessment of $5,450. Amended judgment entered on November 30, 2021. App. B-1 .

IV. THE SECOND APPEAL.

Chin appealed his sentence on the grounds that the district court had erroneously applied two upward Guidelines adjustments, including the conscious or reckless risk of death or serious bodily

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[3/] Neither the government nor the district court relied on the "conscious" risk prong of that Guidelines provision. The dispute was about the meaning of the phrase "reckless risk" and its application to Chin.

injury enhancement. On July 15, 2022, the Court of Appeals for the First Circuit issued a decision affirming Chin's sentence. *United States v. Chin*, 41 F.4th 16 (1st Cir. 2022). App. A- . The court held that the term "reckless" in U.S.S.G. §2B1.1 (b) (16) (A) embodies "the traditional common-law understanding of the term in the civil context," rather than an "actual, subjective awareness of a risk" as generally employed in criminal law. *Id.* at 25. The court recognized that at least two circuits had ruled otherwise, but disagreed. *Id.* at 23.

REASONS FOR GRANTING THE PETITION

I. THERE IS A SPLIT IN THE CIRCUITS OVER THE CORRECT INTERPRETATION OF U.S.S.G. §2B1.1(b)(16)(A), WHICH THIS COURT SHOULD RESOLVE.

Section 2B1 of the Sentencing Guidelines pertains to crimes involving larceny, theft, embezzlement, and fraud. Section 2B1.1(b)(16) provides:

> If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels.

Neither §2B1.1(b)(16) itself nor any application note to that provision of the Guidelines defines the term "reckless". This Court has not had occasion to define that term, as set forth in U.S.S.G. §2B1.1(b)(16)(A), either.

As the First Circuit recognized in its decision affirming Chin's sentencing on direct appeal, there is a split in the circuits regarding the correct meaning of that Guidelines provision. *United States v. Chin*, 41 F.4th at 23. At least two circuits have adopted the definition of "reckless"contained in Application Note 1 to the involuntary manslaughter guideline, U.S.S.G. §2A1.4, which states:

> "Reckless" means a situation in which the defendant was aware of the risk created by his conduct and the risk was of such a nature and degree that to disregard that risk constituted a gross deviation from the standard of care that a reasonable person would exercise in such a situation.

See United States v. Mohsin, 904 F.3d 580, 584 (7th Cir. 2018); *United States v. McCord, Inc.*, 143 F.3d 1095, 1098 (8th Cir. 1998).

The Eleventh Circuit appears to have followed a similar approach. In *United States v. Mateos,* 623 F. 3d 1350 (11th Cir. 2010), a decision written by Retired Justice O'Connor, the court upheld the application of such an enhancement to a defendant nurse who worked in a clinic where HIV patients were unnecessarily injected with saline or diluted drugs in order to generate fraudulent Medicare payments. The court noted that the defendant nurse would have been "well aware" of the "specially high" risk of infection or other complications in providing such injections to these particular patients. *Id.* at 1371. *See also United States v. Sams*, 810 Fed. Appx. 738, 742 (11th Cir. 2020) (unpublished) (applying same standard under U.S.S.G. §3C1.2).

By contrast, the Second, Ninth, and Tenth Circuits have applied a strictly objective standard in determining whether or not to apply the "reckless" risk enhancement. *United States v. Maestas*, 642 F.3d 1315, 1321 (10th Cir. 2011) *Lucien*, 347 F.3d at 56; *United States v. Johansson*, 249 F.3d 848, 858 (9th Cir. 2001). These courts require only that the risk would have been obvious to a reasonable person; actual awareness of the risk is not required.

The term "reckless" also appears in another Guidelines provision, §3C1.2 (Reckless Endangerment During Flight). That provision provides for a two-level increase in offense level "[i]f the defendant recklessly created a substantial risk of death or serious bodily injury to another person

in the course of fleeing from a law enforcement officer." Application Note 2 to §3C1.2 defines "reckless" as in the application notes to §2A1.4.

The *mens rea* for "recklessness" has been defined in substantive federal court decisions, as well. In *Farmer v. Brennan*, 517 U.S. 825, 836-837 (1994), this Court distinguished between civil recklessness and criminal recklessness as follows:

> The civil law generally calls a person reckless who acts or [if the person has a duty to act] fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known [*citation omitted*]. The criminal law, however, generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware.

See also Voisine v. United States, ___ U.S. ___, 136 S.Ct. 2272 (2016) (describing reckless conduct as "acts undertaken with awareness of their substantial risk of causing injury" and "with conscious disregard of a substantial risk of harm"). The Court added: "The harm such conduct causes is the result of a deliberate decision to endanger another . . . ." *Id.* at 2279.

Chin contends that the term "reckless" as set forth in U.S.S.G. §2B1.1(b)(16)(A) should properly include a scienter or *mens rea* requirement which takes into account the defendant's actual state of mind, rather than considering only what the defendant "should have known." Where an individual's constitutional liberty interest in the form of additional years of imprisonment hangs in the balance, the Court should be loath to adopt a standard which more appropriately sounds in tort than in the criminal arena.

Since there was no evidence that Chin knew the MPA he compounded was contaminated or was aware that any particular act or omission by him was likely to cause such contamination, the district court erred in assessing a two-level upward adjustment in offense level under

§2B1.1(b)(16)(A). By the same token, the Court of Appeals for the First Circuit erred in affirming that upward adjustment and Chin's resulting sentence. This Court should grant the petition for certiorari, resolve the split in the circuits over the proper construction of that Guidelines provision, and remand this case for resentencing based on such construction.

II. THIS COURT SHOULD HOLD, CONSISTENT WITH ITS DECISION IN *HONEYCUTT V. UNITED STATES* AND FUNDAMENTAL FAIRNESS, THAT MONIES WITHHELD FROM AND PAID BY CHIN AS FEDERAL AND STATE TAXES DO NOT CONSTITUTE "PROCEEDS" "OBTAINED" BY HIM WHICH ARE SUBJECT TO FORFEITURE UNDER 18 U.S.C. §1963(a)(3).

The RICO forfeiture statute, 18 U.S.C. §1963 (a) (3), provides, in pertinent part, that a defendant convicted of racketeering under 18 U.S.C. §1962 shall forfeit ". . . any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity . . . ." In Chin's case, the district court initially ruled that the portion of Chin's salary withheld and subsequently paid as federal or state income taxes should be deducted from "proceeds" subject to forfeiture under that statute. The First Circuit disagreed and ordered that Chin be required to forfeit his entire gross salary during the period he engaged in a pattern of racketeering. That order was adhered to by the district court on remand for resentencing.

While this Court has never directly addressed this issue, it did explicate the scope of criminal forfeiture in the context of a nearly-identical statute, 21 U.S.C. §853 (a) (1), in *Honeycutt v. United States*, ___ U.S. ___, 137 S.Ct. 1621 (2017). There, the Court noted that criminal forfeiture serves a number of important governmental interests, including "separating a criminal from his ill-gotten gains." *Id.* at 1631, *quoting Caplin & Drysdale, Chartered v. United States,* 491 U.S. 617, 629 (1989). The Court stated that such forfeiture was limited to "tainted property" and that the statute "defines forfeitable property solely in terms of personal possession or use." *Honeycutt*, 137 S.Ct.

at 1632. The Court proceeded to define "obtain" as "to bring into one's own possession," adding that "neither the dictionary definition nor the common usage of the word 'obtain' supports the conclusion that an individual 'obtains' property that was acquired by someone else." *Id.*

In reversing the district court's ruling that monies withheld from Chin's paycheck for taxes were not subject to forfeiture, the First Circuit relied on its prior decision in *United States v. Hurley,* 63 F.3d 1, 21 (1995). Several other circuits have also held that forfeiture applies to gross income, not net income. *E.g. United States v. Christensen*, 828 F.3d 763, 821-823 (9th Cir. 2015); *United States v. DeFries*, 129 F.3d 1293, 1314-1315 (D.C. Cir. 1997); *United States v. Lizza Indus., Inc.,* 775 F.2d 492, 498 (2d Cir. 1985). Significantly, all of these appellate decisions predated *Honeycutt.* Moreover, there seems to be a split in the circuits on this legal question, as well. *See United States v. Genova*, 333 F.3d 750, 760-763 (7th Cir. 2003) (holding that RICO forfeiture applies only to net proceeds obtained by defendant).

Chin contends that he never actually received, acquired, or "obtained" monies withheld from his salary by his employer and subsequently paid as federal or state income taxes, so those sums are not subject to forfeiture. Indeed, since that portion of Chin's salary has already been paid to the government, the government would be collecting double if Chin was required to pay it again in the form of forfeiture. To make matters worse, he would presumably be compelled to use completely untainted funds to meet that forfeiture allegation, which would totally contravene both the language and the intent of the criminal forfeiture statute.

This is one of numerous cases requiring lower courts to apply the RICO forfeiture statute. In order to resolve an important, recurring legal issue, resolve a split in the circuits, and rectify a miscarriage of justice in this case, the Court should grant the petition, hold that monies withheld

from a defendant's salary and previously paid as federal or state income taxes do not constitute "proceeds" "obtained" by that defendant subject to forfeiture under 18 U.S.C. §1963, and remand this case for resentencing.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

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APPENDIX C

18 U.S.C. §1963 (a) (3) C-1

U.S.S.G. §2B1.1 (b) (16) (A) C-1

965 F.3d 41
United States Court of Appeals, First Circuit.

United States v. Chin
United States Court of Appeals, First Circuit. | July 9, 2020 | 965 F.3d 41 | RICO Bus.Disp.Guide 13,364 *(Approx. 23 pages)*

V.

Glenn A. CHIN, Defendant, Appellant, Cross-Appellee.

Nos. 18-1263, 18-1310, 18-1500
July 9, 2020

Synopsis

Background: Defendant was convicted in the United States District Court for the District of Massachusetts, Richard G. Stearns, J., of racketeering, racketeering conspiracy, and other offenses, was sentenced to a 96-month prison term, and, 2018 WL 1399297, was ordered by pay restitution. Defendant appealed, and government cross-appealed.

Holdings: The Court of Appeals, Barron, Circuit Judge, held that:
1 evidence was sufficient to support convictions;
2 sentencing court's loss amount calculation was proper;
3 defendant could be subject to sentencing increase for offense involving conscious or reckless risk of death or serious injury;
4 sentencing increases for vulnerable victims could apply to defendant;
5 forfeiture amount would not be reduced by federal income taxes owed by defendant; and
6 forfeiture order in amount of defendant's salary would not be excessive.

Affirmed in part, vacated in part, and remanded.

West Headnotes (28)

Change View

1 **Racketeer Influenced and Corrupt Organizations** Weight and sufficiency

Evidence was sufficient to prove that pharmaceutical manufacturer for which defendant was employed engaged in a regular business practice of fraudulently representing to its customers that the medications that it was shipping to them had been produced in accord with certain safety standards when in fact they had not been, demonstrating a pattern of racketeering activity, as required to support convictions for racketeering and racketeering conspiracy; testimony from manufacturer's employees indicated that manufacturer, on at least 12 occasions, shipped customers medications that it had falsely represented were produced in compliance with required safety standards without first obtaining testing results, from which it could be reasonably inferred that such practice was continuing. 18 U.S.C.A. § 1962(c).

2 **Racketeer Influenced and Corrupt Organizations** Time and duration

Individual predicate acts of racketeering that occur within ten years of one another must be related to one another in order to meet the pattern element of a racketeering conviction. 18 U.S.C.A. § 1962(c).

1 Case that cites this headnote

APPENDIX A

3 **Racketeer Influenced and Corrupt Organizations** Continuity or relatedness; ongoing activity

Predicate acts of racketeering must amount to or pose a threat of continued criminal activity to constitute a pattern of racketeering activity, as required to support racketeering conviction. 18 U.S.C.A. § 1962(c).

1 Case that cites this headnote

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4 **Racketeer Influenced and Corrupt Organizations** Time and duration

The continuity requirement to establish a pattern of racketeering activity, as necessary to support a racketeering conviction, may be satisfied by showing "closed-ended" continuity, which depends on a showing that the related predicated acts occurred during a closed period of repeated conduct. 18 U.S.C.A. § 1962(c).

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5 **Racketeer Influenced and Corrupt Organizations** Time and duration

Closed-ended continuity to establish a pattern of racketeering activity, as necessary to support a racketeering conviction, may be demonstrated by proving a series of related predicates extending over a substantial period of time that is nonetheless finite. 18 U.S.C.A. § 1962(c).

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6 **Racketeer Influenced and Corrupt Organizations** Continuity or relatedness; ongoing activity

The continuity requirement to establish a pattern of racketeering activity, as necessary to support a racketeering conviction, may be satisfied by showing "open-ended" continuity, which depends on a showing that the related predicate acts constituted past conduct that by its nature projects into the future with a threat of repetition. 18 U.S.C.A. § 1962(c).

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7 **Racketeer Influenced and Corrupt Organizations** Continuity or relatedness; ongoing activity

Related predicate acts may reflect the kind of "open-ended continuity" that suffices to show a pattern of racketeering activity, as necessary to support a racketeering conviction, when they involve a distinct threat of long-term racketeering activity, as when a criminal's extortionary demand is accompanied by a promise, implicit or explicit, to regularly make similar illegal requests in the future. 18 U.S.C.A. § 1962(c).

1 Case that cites this headnote

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8 **Racketeer Influenced and Corrupt Organizations** Continuity or relatedness; ongoing activity

Related predicate acts may be found to reflect open-ended continuity that suffices to show a pattern of racketeering activity, as necessary to support a racketeering conviction, when they are part of an ongoing entity's regular way of doing business, when the entity's business is, at least in part, legitimate. 18 U.S.C.A. § 1962(c).

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9 **Criminal Law** Review De Novo

Criminal Law Sentencing

The Court of Appeals reviews the district court factfinding at sentencing for clear error and affords de novo consideration to its interpretation and application of the Sentencing Guidelines. U.S.S.G. § 1B1.1 et seq.

1 Case that cites this headnote

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10 **Sentencing and Punishment** Value of loss or benefit

Calculation of loss amount by identifying specific shipments of medication that pharmaceutical manufacturer fraudulently represented to its customers was produced in accord with certain safety standards when in fact it had not been

and using manufacturer's revenue from those shipments, rather than using manufacturer's total sales during the relevant time period, was proper, in determining total offense level in sentencing defendant, manufacturer's employee, for racketeering and racketeering conspiracy, absent showing that all manufacturer's products were sold pursuant to a fraudulent scheme. 18 U.S.C.A. § 1962(c); U.S.S.G. § 2B1.1(b)(1).

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11 **Sentencing and Punishment** Risk of death or bodily injury

Defendant convicted of racketeering and racketeering conspiracy, in connection with his employment for pharmaceutical manufacturer that fraudulently represented to its customers that medications it was shipping to them had been produced in accord with certain safety standards when in fact they had not been, could be subject to sentencing increase for an offense involving conscious or reckless risk of death or serious injury, even though direct victims of the fraudulent scheme were hospitals and medical providers, rather than patients who were at-risk of being harmed by medication, if defendant's relevant conduct involved conscious or reckless risk of death or serious bodily injury. U.S.S.G. § 2B1.1(b)(16).

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12 **Sentencing and Punishment** Vulnerability of victim

Sentencing increases for vulnerable victims could apply to defendant convicted of racketeering and racketeering conspiracy, in connection with his employment for pharmaceutical manufacturer that fraudulently represented to its customers that medications it was shipping to them had been produced in accord with certain safety standards, notwithstanding that direct targets of the fraudulent scheme were hospitals and medical providers, rather than patients who were at risk of being harmed by the medication. U.S.S.G. §§ 3A1.1(b)(1), 3A1.1(b)(2).

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13 **Sentencing and Punishment** Vulnerability of victim

To come within the definition of victim under the vulnerable victim sentencing guidelines provisions, one need not be a victim of the charged offense so long as one is a victim of the defendant's other relevant conduct. U.S.S.G. §§ 3A1.1(b)(1), 3A1.1(b)(2).

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14 **Criminal Law** Judgment, sentence, and punishment

The Court of Appeals may affirm the district court's application of an increase under the sentencing guidelines where it can infer the lower court's reasoning based on what was argued by the parties or contained in the pre-sentence report. U.S.S.G. § 1B1.1 et seq.

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15 **Forfeitures** Amount, particular cases

Forfeiture amount that defendant convicted of racketeering and racketeering conspiracy in connection with his employment for pharmaceutical manufacturer, arising from scheme of fraudulently representing that medications were produced in accord with certain safety standards when in fact they were not, was required to pay was full amount of salary that defendant received from manufacturer during the time period of the offenses, rather than the net income defendant would receive after payment of federal income taxes. 18 U.S.C.A. § 1963(a)(3).

1 Case that cites this headnote

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16 **Forfeitures** Plenary or de novo review

The Court of Appeals reviews questions of law in connection with a forfeiture order de novo.

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17 **Forfeitures** Questions of fact and evidence

The Court of Appeals considers mixed questions of law and fact regarding forfeiture orders under the deferential clear error standard.

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18 **Forfeitures** Funds and property held by third party
A defendant convicted of racketeering must forfeit property even when it has merely been held in custody by that individual and has been passed along to its true owner.

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19 **Forfeitures** Limitation of amount in general
Fact that a defendant convicted of a racketeering offense in connection with his employment is required to pay a certain portion of his salary to the federal government as taxes does not affect the fact that he obtained that portion, for purpose of calculating forfeiture amount.

1 Case that cites this headnote

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20 **Fines** Excessive fines
Forfeitures Particular forfeitures
Forfeiture order in the amount of $473,584.50 was not excessive fine in violation of Eighth Amendment for defendant convicted of racketeering and racketeering conspiracy in connection with his employment for pharmaceutical manufacturer, arising from scheme of fraudulently representing that medications were produced in accord with certain safety standards when in fact they were not; amount represented defendant's salary during the relevant time period, defendant had net worth of about $423,000, and defendant and his wife spent almost $700,000 in 16 months prior to entry of forfeiture order. U.S. Const. Amend. 8; 18 U.S.C.A. § 1963(a)(3).

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21 **Forfeitures** Questions of fact and evidence
The factual findings made by the district courts in conducting the Eighth Amendment excessiveness inquiry must be accepted upon appellate review of a forfeiture order unless clearly erroneous. U.S. Const. Amend. 8.

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22 **Forfeitures** Plenary or de novo review
The Court of Appeals reviews the question of whether the amount of a forfeiture order violates the Eighth Amendment prohibition against excessive fines de novo. U.S. Const. Amend. 8.

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23 **Fines** Excessive fines
A defendant's inability to satisfy a forfeiture at the time of conviction, in and of itself, is not at all sufficient to render a forfeiture an unconstitutional excessive fine. U.S. Const. Amend. 8.

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24 **Forfeitures** Excessiveness and Proportionality
The bar for a forfeiture order to be unconstitutionally excessive on ground that the defendant may be deprived of his future ability to earn a living is a high one. U.S. Const. Amend. 8.

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25 **Criminal Law** Requisites and sufficiency of judgment or sentence
The appellate court treats a restitution order as an appealable final judgment even when it does not indicate the amount of restitution. 18 U.S.C.A. § 3664(o).

1 Case that cites this headnote

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26 **Sentencing and Punishment** Cause of loss in general
The analysis of the restitution amount under the Mandatory Victims Restitution Act (MVRA) focuses on the causal relationship between the conduct and the

loss, not between the nature of the statutory offense and the loss. 18 U.S.C.A. § 3663A(a)(2).

27 **Sentencing and Punishment** Nexus to offense of conviction
In assessing whether the proximate cause requirement under the Mandatory Victims Restitution Act (MVRA) has been satisfied, an appellate court reviewing a restitution order asks whether the harm alleged has a sufficiently close connection to the conduct at issue. 18 U.S.C.A. § 3663A(a)(2).

1 Case that cites this headnote

28 **Sentencing and Punishment** Nexus to offense of conviction
Restitution under the Mandatory Victims Restitution Act (MVRA) is warranted if the harm is a foreseeable result of defendant's conduct. 18 U.S.C.A. § 3663A(a)(2).

*44 APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. [Hon. Richard G. Stearns, U.S. District Judge]

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Before Barron, Stahl, and Lipez, Circuit Judges.

Opinion

BARRON, Circuit Judge.

These consolidated appeals, like those we also decide today in United States v. Cadden, ——— F.3d ———, 2020 WL 3868247 (1st Cir. 2020) [Nos. 17-1694, 17-1712, 17-2062], concern convictions *45 that stem from a 2012 scandal involving the Massachusetts-based New England Compounding Center ("NECC"). The scandal broke after federal investigators traced the cause of a deadly nationwide outbreak of fungal meningitis and other illnesses to medications that NECC had produced at its facilities. Federal criminal charges were then brought against a number of NECC employees, including the defendant in this case, Glenn Chin, who was NECC's supervising pharmacist at the time. For his role in the scandal, he was convicted in 2017 of numerous federal crimes, and, in consequence, sentenced to a lengthy term of imprisonment, subjected to an order of forfeiture, and ordered to pay restitution.

Chin now challenges two of those convictions, for racketeering and racketeering conspiracy, respectively. He contends that they must be reversed because the evidence did not suffice to support them. He also contends that, in consequence, his prison sentence must be vacated. If he is right about the lack of evidence to support his convictions, then the order of forfeiture also must be reversed.

The government, for its part, brings its own appeal. It challenges the prison sentence that Chin received as well as both the $175,000 order of forfeiture that the District Court imposed on him and its award of restitution of an as-yet-unspecified amount.

We affirm both of Chin's federal racketeering-related convictions. However, we vacate and remand the prison sentence, the forfeiture order, and the restitution order.

I.

Our opinion in Cadden addresses the consolidated appeals in the criminal case against Chin's boss and alleged co-conspirator at NECC, Barry Cadden. He was charged in the

same indictment as Chin but his trial on those charges was severed from Chin's. See Cadden, 965 F.3d at 8. The issues that we confront here overlap in many respects with those that we address in our opinion in Cadden's case. We thus refer to our reasoning there throughout the analysis that follows. We also refer the reader to that opinion for additional details about NECC's practices and the federal criminal investigation into them. Briefly stated, however, the facts relevant to the appeals in Chin's case are the following.

The practice of compounding involves combining drugs with other substances to produce medications. As a compounding pharmacy, NECC -- which was based in Framingham, Massachusetts -- prepared specialized medications, otherwise unavailable in the wider market, to hospitals and other medical providers upon their request.

Chin was a trained pharmacist who served as a supervisor at both of NECC's clean rooms. The company's compounding operations that produced the medications tied to the outbreak took place in one of these clean rooms.

On December 16, 2014, following an extensive federal criminal investigation into NECC's role in the outbreak, Chin was charged, along with Cadden and twelve other individuals affiliated with NECC, in a 131-count indictment in the United States District Court for the District of Massachusetts. The indictment charged Chin with racketeering in violation of 18 U.S.C. § 1962(c); racketeering conspiracy in violation of 18 U.S.C. § 1962(d); forty-three counts of federal mail fraud in violation of 18 U.S.C. § 1341; and thirty-two counts of violating the Federal Food, Drug, and Cosmetic Act ("FDCA"), see 21 U.S.C. §§ 331(a), 333(a).

*46 The racketeering charge alleged sixty-eight predicate acts of racketeering to support the allegation that Chin participated in the conduct of NECC through a "pattern of racketeering activity." See 18 U.S.C. § 1962(c). These alleged predicate acts of racketeering included forty-three that were premised on mail fraud allegations, as mail fraud is a racketeering activity. See id. § 1961(1)(B). These allegations corresponded to the mail fraud allegations set forth in forty-three of the stand-alone mail fraud counts.

The alleged mail fraud entailed NECC misrepresenting its various safety protocols to customers who purchased its medications. Those medications included the contaminated "high-risk" sterile medication, methylprednisolone acetate ("MPA"), that NECC had compounded during Chin's tenure as the supervising pharmacist there and that had given rise to the outbreak. In particular, NECC was alleged to have misrepresented that it had complied with the safety standards set forth in Chapter 797 of the United States Pharmacopeia ("USP-797"), which applies to high-risk sterile compounded medications, including MPA.

The sixty-eight alleged predicate acts of racketeering also included twenty-five that were premised on allegations of second-degree murder, which is itself a racketeering activity. See id. § 1961(1)(A). The allegations of second-degree murder were tied to twenty-five patients who had died from having been injected with the contaminated MPA that NECC had compounded.

The racketeering conspiracy charge did not identify specific predicate acts of racketeering that it alleged that Chin conspired to commit. See id. § 1962(d). Rather, the indictment alleged that Chin conspired to commit a racketeering violation through a pattern of racketeering activity that involved only unspecified instances of mail fraud.

The District Court severed Chin's case from Cadden's and the other defendants'. Chin's case proceeded to trial, and the jury found him guilty on all counts. A special verdict form indicated that, for the purposes of the racketeering offense, the jury found that the government had proved twelve of the sixty-eight alleged predicate acts of racketeering, each of which concerned only mail fraud. The special verdict form expressly made clear that the jury did not find any of the twenty-five alleged predicate acts of second-degree murder, which, again, were relevant only to the racketeering count, not the racketeering conspiracy count. As to the FDCA counts, the special verdict form showed that the jury found that Chin acted with an "intent to defraud or mislead," an aggravating factor, on two of the counts. See 21 U.S.C. § 333(a)(2). It did not so find for the other thirty FDCA counts.

The District Court calculated Chin's sentencing range under the United States Sentencing Guidelines ("Guidelines") to be seventy-eight to ninety-seven months' imprisonment. The District Court then sentenced Chin to ninety-six months' imprisonment. The District Court

also issued a forfeiture order against Chin in the amount of $175,000. Finally, the District Court ruled on the government's motion for restitution. It ordered that it would "calculate the total restitution award as the loss suffered by the hospitals and clinics that purchased lots of degraded or defective drugs during the life of the racketeering enterprise," but stated that it would await the trial of Chin's co-defendants before apportioning the restitution amount among those found guilty and so did not identify a dollar amount for the award of restitution.

*47 The government issued a notice of appeal, and Chin followed suit.

II.

We begin with Chin's appeal, in which he challenges his convictions for racketeering and racketeering conspiracy. See 18 U.S.C. § 1962(c), (d).[1] He contends that each must be reversed due to insufficient evidence. His sufficiency challenges focus solely on what the record shows -- or, more precisely, fails to show -- about whether a juror reasonably could find satisfied the "pattern of racketeering activity," Id. § 1961(5), element that is common to each of the underlying offenses, see Id. § 1962(c), (d).

1 As we will explain, the challenges to these convictions turn on whether the evidence sufficed to show that NECC was -- as of 2012 -- engaged in a regular business practice of fraudulently representing to its customers that the medications that it was shipping to them had been produced in accord with certain safety standards when in fact they had not been. For, if the evidence did support that conclusion, then a reasonable juror supportably could have found not merely isolated acts of racketeering activity but a "pattern" of it.

We begin with Chin's challenge to the racketeering conviction. We then briefly consider his racketeering conspiracy conviction.

A.

Congress has provided little guidance as to the meaning of the "pattern of racketeering activity" element for the offense of racketeering. See Id. § 1961(5). It has made clear that there must be at least two predicate acts of racketeering within ten years of one another for there to be a "pattern of racketeering activity." See Id. But, the relevant statutory text is otherwise silent as to what makes a pair -- or more -- of individual predicate acts of racketeering a "pattern of racketeering activity."

2 3 The United States Supreme Court has fleshed out this "pattern" element in the following ways. First, the Court has made clear that the individual predicate acts of racketeering that occur within ten years of one another must have been "related" to one another. H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 239, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). Second, the Court has made clear that the predicate acts must "amount to or pose a threat of continued criminal activity" to constitute such a "pattern." Id. (emphasis added).

As we have noted, the special verdict form revealed that the jury based its finding of guilt on the racketeering charge on twelve of sixty-eight alleged predicate acts of racketeering and that each of the twelve involved mail fraud.[2] Chin does not dispute *48 that the evidence sufficed to prove those twelve alleged predicate acts of racketeering or that they were "related" to one another. But, Chin does contend that the evidence did not suffice to permit a juror reasonably to find that they could satisfy the requirement of continuity. For that reason alone, he contends, his racketeering conviction must be reversed for insufficient evidence of a "pattern of racketeering activity." We thus turn our attention to the continuity requirement and what the evidence shows regarding it in Chin's case.

B.

4 5 There are two distinct means by which the continuity requirement may be satisfied. The first requires a showing of "closed-ended" continuity, which depends on a showing that the related predicated acts occurred during "a closed period of repeated conduct." H.J., 492 U.S. at 241, 109 S.Ct. 2893. Such closed-ended continuity may be demonstrated "by proving a series of related predicates extending over a substantial period of time" that is nonetheless finite. Id. at 242, 109 S.Ct. 2893.

6 The second type of continuity requires a showing of "open-ended" continuity. Id. at 241, 109 S.Ct. 2893. That type of continuity depends on a showing that the related predicate acts constituted "past conduct that by its nature projects into the future with a threat of repetition." Id.

7 8 The Supreme Court has provided two examples of what constitutes evidence of open-ended continuity. In the first example, related predicate acts may reflect the kind of open-ended continuity that suffices to show a "pattern of racketeering activity" because they "involve a distinct threat of long-term racketeering activity," as when a criminal's extortionary demand is accompanied by a promise, implicit or explicit, to regularly make similar illegal requests in the future. Id. at 242, 109 S.Ct. 2893. In the second example, related predicate acts may be found to reflect open-ended continuity when they "are part of an ongoing entity's regular way of doing business." Id. The Court has made clear that the entity referenced in the second example may have been, at least in part, a "legitimate business." Id. at 243, 109 S.Ct. 2893.

C.

Chin contends that the evidence did not suffice to support a finding of either closed-ended or open-ended continuity. But, even assuming that Chin adequately preserved this challenge, despite the government's contention to the contrary, and thus that our review is de novo, see United States v. Tanco-Baez, 942 F.3d 7, 16 (1st Cir. 2019), we disagree. As we will explain, a juror could reasonably find on this record that, by the fall of 2012, it had become a regular business practice of NECC to ship medications that had not been prepared in line with the requirements of USP-797 despite representing to customers that they had been.

*49 Significantly, the twelve predicate acts of racketeering that the jury found involved NECC having shipped customers medications that it had falsely told them the company had produced in compliance with USP-797, and Chin does not dispute that the evidence sufficed to support the finding that such a fraud had been perpetrated in each instance via that particular false representation. Moreover, those twelve predicate acts concerned distinct shipments of medications that had been sent to distinct customers. And while they were all sent within a discrete time period, a juror reasonably could find on this record that the company's practice of fraudulently shipping medications as if they had been produced in compliance with USP-797 had no natural endpoint.

In accord with this conclusion, we note that a former lab technician at NECC, Joseph Connolly, testified that the company "routinely sent medications out prior to getting results back from testing" for sterility, notwithstanding that USP-797 called for NECC to wait for the results of such testing before shipment. In addition, another company employee, Nicholas Booth, testified that it was not necessarily "a common practice" when he started for the company to ship medications without testing them in the manner that USP-797 required, but that, as production ramped up, "corners were cut" and "it started happening more and more." Booth further testified that, by the fall of 2012, the company was sending shipments of untested medications to customers under old labels, for medications that had been tested, "quite a bit" and that Cadden endorsed the practice.[3]

Chin argues in response that NECC operated safely for more than a decade before cutting corners in response to a brief surge in demand in 2012. Based on the much longer period of safe conduct, he appears to argue, a juror could not reasonably find that mail fraud via false representations of USP-797 compliance was part and parcel of a regular NECC business practice, such that the practice would be an ongoing one.

The jury was tasked, however, with deciding whether the period of fraudulent activity at NECC was of a nature that there was "a realistic prospect of continuity over an open-ended period yet to come." Home Orthopedics Corp. v. Rodriguez, 781 F.3d 521, 531 (1st Cir. 2015) (quoting Feinstein v. Resolution Tr. Corp., 942 F.2d 34, 46 (1st Cir. 1991)). At the very least, the evidence sufficed to permit a juror to find that NECC's regular practice was to engage in similar acts in the face of high demand and that demand pressure would have continued to be high going forward.

Chin points to evidence that shows that NECC tried to address the problems in its clean rooms in arguing that NECC's fraudulent scheme was likely to come to an end after the production surge in 2012. But, as Chin himself concedes, some of these efforts were "inadequate," some were "short-lived," and they all "ultimately failed."

Chin also argues that it would have been illogical for NECC to continue to produce *50 medications in a substandard manner indefinitely, given that its business model depended on customers' trust in the safety of its products. But, Chin does not dispute that the twelve predicate acts of mail fraud occurred despite the obvious business risk that they -- like any

fraudulent activity, if discovered -- posed to NECC. Thus, a juror reasonably could find that, to whatever extent NECC was incentivized to comply with safety protocols, those incentives were insufficient to cause the company to refrain from fraudulent conduct in the face of high demand from customers.[4]

Finally, Chin invokes various precedents that have vacated findings of liability for racketeering based on insufficient evidence of open-ended continuity. But, those cases either involve a defendant's attempt to maintain a single contract, see Sys. Mgmt., Inc. v. Loiselle, 303 F.3d 100, 106 (1st Cir. 2002), or a circumstance in which the defendant's alleged fraudulent scheme was limited to a "handful of victims" and was "inherently terminable," Cofacredit, S.A., Inc. v. Windsor Plumbing Supply Co., 187 F.3d 229, 244 (2d Cir. 1999). They are thus readily distinguishable from Chin's case.

In sum, the record fails to support Chin's sufficiency challenge to his conviction for racketeering. Rather, the evidence sufficed to show that NECC's fraudulent scheme of shipping medications as if they had been produced in compliance with USP-797 was an ongoing business practice as of 2012 that showed no signs of abating.

D.

There remains Chin's sufficiency challenge to his conviction for racketeering conspiracy. But, the only arguments that he makes in support of that challenge are identical to the ones that we have just rejected. We thus must reject this challenge as well.

III.

We now turn to the government's challenges in its appeal. They concern, respectively, the prison sentence that the District Court imposed and the orders of forfeiture and restitution that it issued. We begin with the government's arguments that the District Court erred in calculating the appropriate range for Chin's sentence under the Guidelines. We then take up the government's challenge to the District Court's forfeiture order. We conclude by considering the government's challenge to the District Court's ruling on restitution.

A.

9 The government argues that the District Court miscalculated the amount of loss attributable to Chin's illegal conduct under the Guidelines and that the District Court erroneously failed to apply several enhancements under the Guidelines. In assessing these challenges, we review the District Court's "factfinding for clear error and afford de novo consideration to its interpretation and application of the sentencing guidelines." United States v. Benítez-Beltrán, 892 F.3d 462, 469 (1st Cir. 2018) (quoting United States v. Flores-Machicote, 706 F.3d 16, 20 (1st Cir. 2013)).

1.

Chin's total offense level was based, in part, on the amount of "loss" attributable *61 to the underlying fraudulent scheme in which he was found to have been engaged. See U.S.S.G. § 2B1.1(b)(1); see also id. § 2B1.1 cmt. n.3(A)(i) (explaining that "loss is the greater of actual loss or intended loss," where "'[a]ctual loss' means the reasonably foreseeable pecuniary harm that resulted from the offense"). The District Court fixed that loss amount at $1.4 million -- a figure that required the District Court to increase Chin's offense level under the Guidelines by fourteen levels. See id. § 2B1.1(b)(1)(H). The government contends, however, that the District Court erred because it substantially understated the loss amount.

The District Court arrived at the $1.4 million amount by adding up the revenue that NECC had generated in the relevant period from what the District Court described as "every potentially contaminated or degraded drug shipped by NECC from the period beginning in March 2011 to the demise of the company in 2012." The District Court's method for calculating the loss amount was apparently the same one that it used at Cadden's sentencing, and the parties make no argument to the contrary. We thus understand the District Court to have arrived at the loss amount of $1.4 million by, as it had done in Cadden's case, adding up the total NECC revenue generated from sales of medications that were identified as expired, contaminated, nonsterile, sub-potent, super-potent, or compounded by an unqualified technician.

The government takes issue with that approach, as it did in Cadden's case, and contends that the District Court erred by not calculating the loss amount in Chin's case based on the total amount of NECC's sales during the relevant time period. But, the government has failed to show that all of NECC's sales over that period were based on fraudulent

representations, just as the government failed to make that showing in Cadden. See 965 F.3d at 32. Nor, as we explained in Cadden, is the government right that revenue that NECC generated from non-fraudulent sales during the relevant time period may be included in the loss amount because customers would not have made the purchases from NECC had they known about NECC's fraudulent sales even if they had not been directly defrauded themselves. See id. at 32–33.

To be sure, shipments in addition to those that the District Court relied on to calculate the loss amount in Chin's case could, perhaps, have been supportably found to have been made fraudulently in their own right. Thus, such shipments could perhaps have been included in the loss amount calculation, thereby generating a figure greater than $1.4 million. The government did not present the District Court in Chin's case, however, with a figure for the loss amount that would have reflected its view of the actual amount that customers paid for the fraudulent shipments made by NECC that would have been less than the greatest loss amount that it sought but more than the $1.4 million amount. At Chin's sentencing, the government merely advanced its sweeping claim that any NECC sales during the relevant period necessarily constituted "loss." That was so, we note, even though the government was on notice that the District Court was aware of the argument that the government had failed to prove that all NECC products were sold pursuant to a fraudulent scheme from the arguments made at Cadden's sentencing, which preceded Chin's.

10 Accordingly, much as we concluded when facing the similar issue in Cadden's case, see Cadden, 965 F.3d at 33–34, we hold that the District Court acted well within its discretion in identifying specific "62 shipments that were shown to be fraudulent and using NECC's revenue from those shipments to ground its loss calculation. The District Court was not obliged to speculate on the extent to which NECC's revenues also reflected other fraudulent sales that were not specifically identified by the government. See U.S.S.G. § 2B1.1 cmt. n.3(C) ("The court need only make a reasonable estimate of the loss. ... [T]he court's loss determination is entitled to appropriate deference."); United States v. Flete-García, 925 F.3d 17, 28 (1st Cir. 2019) ("[A] loss calculation need not be precise; the sentencing court need only make a reasonable estimate of the range of loss."); United States v. Rivera-Rodríguez, 489 F.3d 48, 53 (1st Cir. 2007) ("In arriving at an appropriate sentence, a district court enjoys 'broad discretion in the information it may receive and consider regarding [a] defendant and his conduct.' " (alteration in original) (quoting United States v. Curran, 926 F.2d 59, 61 (1st Cir. 1991))). We thus decline the government's request to vacate and remand the sentence so that the District Court may undertake the kind of calculation that the government failed to request be made at sentencing.

2.

The government next takes issue with the District Court's refusal under the Guidelines to apply the two-level enhancement that kicks in when an "offense involved ... the conscious or reckless risk of death or serious bodily injury." U.S.S.G. § 2B1.1(b)(16).[6] The District Court found the enhancement inapplicable because Chin had not committed an offense that carried with it the requisite risk identified in the enhancement. The District Court's conclusion rested on an interpretation of the Guidelines, and so we review it de novo. See Benítez-Beltrán, 892 F.3d at 469. We agree with the government that the District Court erred.

The District Court appears to have concluded that, as a matter of law, the enhancement could only apply if Chin had committed a criminal offense that, by its nature, involved the conscious or reckless risk of death or serious bodily injury. The District Court then found that the nature of his offenses did not pose the requisite kind of risk. According to the District Court, this was so because, with respect to those offenses, the "victims that were identified were the clinics and the hospitals who purchased the drugs," not the patients who were actually put at risk, as those patients "were not recipients of NECC's [fraudulent] representations."

The District Court did go on to consider whether it could find, contrary to the jury, that Chin had committed second-degree murder. The District Court appears to have thought that offense might carry with it the conscious or reckless risk identified in the enhancement. But, the District Court concluded, "the evidence did not establish a reckless and knowing disregard of a reasonable certainty of causing death or great bodily harm." Thus, consistent with the jury verdict, it found that Chin had not committed second-degree murder.

11 The problem with the District Court's reasoning is the following. As we explained in Cadden, see 966 F.3d at 34, in considering the nature of the risk involved in Chin's "offense," U.S.S.G. § 2B1.1(b)(16), the District Court needed to evaluate the "relevant conduct" for which the Guidelines hold him accountable *53 in relation to the offenses for which he was convicted, Id. § 1B1.1 cmt. n.1(I) (defining "offense"). That "relevant conduct" includes, among other things, "all acts and omissions" that Chin "committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused ... that occurred during the commission of the offense of conviction." Id. § 1B1.3(a)(1)(A). Thus, Chin was subject to the enhancement so long as his conduct during the commission of the offenses for which he was convicted -- whether federal mail fraud, or racketeering and racketeering conspiracy based on predicate acts of racketeering involving mail fraud[6] -- carried with it the risk identified in the enhancement.

Thus, it is not necessarily determinative -- as the District Court appeared to conclude -- that the direct targets of the mail-fraud-based offenses that he was convicted of committing were hospitals and medical providers and not the patients who were at risk of being hurt downstream. Chin's participation in a scheme to distribute medications that are subject to USP-797 -- including high-risk sterile ones like MPA -- but that are not compounded in compliance with it despite representations to the contrary could potentially constitute "relevant conduct" that "involved ... the conscious or reckless risk of death or serious bodily injury." Id. § 2B1.1(b)(16). Thus, it was legal error for the District Court to conclude that such a finding could not trigger the enhancement simply because the patients who might inject those medications were not themselves defrauded and only NECC's direct customers were.

Chin argues that we can nonetheless affirm the District Court. Chin bases that contention on a finding that the District Court made in the course of addressing the jury's determination that Chin did not commit the predicate acts of racketeering activity involving second-degree murder. The finding was that Chin did not act with "a reckless and knowing disregard of a reasonable certainty of causing death or great bodily harm."

Chin asserts that, by finding that he did not have that state of mind, the District Court necessarily found that he did not act, as the enhancement requires, with a "conscious or reckless risk of death or serious bodily injury." Thus, he argues, the District Court necessarily found that this Guidelines enhancement did not apply.

Here, too, the District Court's analysis turns on an interpretation of the Guidelines and thus presents a question of law that we review de novo. See Benítez-Beltrán, 892 F.3d at 469. And, here, again, we agree with the government.

The District Court found that Chin did not act with a "reckless and knowing" state of mind in disregarding a "reasonable certainty of ... death or great bodily harm." The sentencing enhancement, however, describes the requisite mental state using disjunctive language: the enhancement applies so long as the defendant acted in spite of either a "conscious or reckless risk." U.S.S.G. § 2B1.1(b)(16)(A) (emphasis added). Thus, the District Court's finding does not foreclose the possibility that Chin's offense involved the mental state necessary for the enhancement's application. We therefore vacate and remand the sentence for the District Court to assess whether any of Chin's relevant conduct, as defined under U.S.S.G. § 1B1.3(a), "involved ... the conscious or reckless risk of death or serious bodily injury." Id. § 2B1.1(b)(16).

*54 3.

12 We next consider the government's challenge to the District Court's refusal to apply a two-level enhancement that the government requested based on its contention that Chin "knew or should have known that a victim of the offense was a vulnerable victim." U.S.S.G. § 3A1.1(b)(1). We also consider the government's related challenge to the District Court's refusal to apply an additional two-level increase, insofar as that vulnerable victim enhancement applied, based on the government's contention that "the offense involved a large number of" those "vulnerable victims." Id. § 3A1.1(b)(2).

13 The District Court ruled that the harmed patients were not "victims" within the meaning of either enhancement. It did so because it determined -- seemingly as a matter of law -- that they could not constitute "victims" because they were not the direct targets of the false representations to company customers on which the mail fraud-based convictions depended. But, reviewing this question of Guidelines' interpretation de novo, see Benítez-

Beltrán, 892 F.3d at 469, we agree with the government that, just as we explained in Cadden, "'[t]o come within the guidelines' definition' of 'victim,' 'one need not be a victim of the charged offense so long as one is a victim of the defendant's other relevant conduct,' " 965 F.3d at 35 (alteration in original) (quoting United States v. Souza, 749 F.3d 74, 86 (1st Cir. 2014)).

The "relevant conduct" that the Guidelines hold Chin accountable for engaging in includes, as noted, any action he took during the commission of mail fraud. If, for instance, Chin failed to comply with appropriate safety procedures in compounding the fatal lots of MPA, the patients who died from being injected with those lots could potentially be "victims" of his offense. Thus, the District Court erred in concluding that only individuals who received fraudulent representations from NECC could be "vulnerable victims" for the purpose of the enhancements at issue.

Chin nonetheless urges us to affirm the District Court's decision not to apply these enhancements on an alternative ground. He argues that the patients, even if "victims," are not "vulnerable" ones. But, because the District Court ruled that the patients could not be victims at all, it has not yet addressed the question. Thus, as in Cadden, we leave it for the District Court to address the issue in the first instance on remand. See 965 F.3d at 36.

In doing so, we pass no judgment on whether Chin's relevant conduct actually justified the application of the enhancement. We thus leave it to the District Court in the first instance to address, among other things, whether his actions were analogous to those of a fraudster who "market[s] an ineffective cancer cure," who the Guidelines indicate would merit the enhancement, U.S.S.G. § 3A1.1 cmt. n.2, and whether the fact that medical providers, not the patients themselves, dealt with NECC directly affects the patients' status as "vulnerable."[7]

4.

The government's last challenge to Chin's prison sentence concerns the District Court's refusal to apply the enhancement set forth in U.S.S.G. § 3B1.1. That enhancement increases the offense level of the defendant based on the defendant's "role in the offense." Id.

*65 At sentencing, the government argued that Chin was "an organizer or leader of a criminal activity that involved five or more participants" and that his offense level thus should be increased by four levels. Id. § 3B1.1(a). The District Court found at sentencing, however, that Chin was only "a supervisor or manager" of such an activity, "but not an organizer or leader." See id. § 3B1.1(b). Accordingly, it increased his offense level by only three.

The District Court reasoned as follows:

> The organizer and leader of the enterprise was Barry Cadden. Consequently, he was given the full four-point upward adjustment. That description does not, however, apply to Mr. Chin. Rather, the evidence established at trial, as the government accurately states on page 12 of its sentencing memorandum, that Mr. Chin was "the supervisory pharmacist at NECC who managed both of NECC's cleanrooms."

The government contends that the District Court erred by concluding that Chin could not have been a "leader" or "organizer" because Cadden had already filled such a role and because of Chin's title as "supervisory pharmacist." Our review is de novo. See Benítez-Beltrán, 892 F.3d at 469.

The government is right that "[t]here can ... be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy." U.S.S.G. § 3B1.1 cmt. n.4. The government is also correct that, in conducting the leader-organizer analysis, "titles such as 'kingpin' or 'boss' are not controlling." Id. Thus, to the extent that the District Court relied only on Chin's title and Cadden's leadership role at NECC in determining that Chin was neither a "leader" nor an "organizer," we agree with the government that the District Court's approach was erroneous.

14 Chin urges us to conclude, however, that the District Court in the relevant passage at sentencing was referring to "evidence" other than Chin's title and Cadden's place at the top of the NECC hierarchy. But, while we may affirm the District Court's application of an enhancement where we can infer its reasoning based on "what was argued by the parties

or contained in the pre-sentence report," United States v. Sicher, 576 F.3d 64, 71 (1st Cir. 2009) (quoting United States v. Hoey, 508 F.3d 687, 694 (1st Cir. 2007)), we are unable to do so here.

The District Court did not indicate its agreement with the theory that Chin advances on appeal, which is that Chin "had no ultimate decision-making authority" because he took all of his actions "at Cadden's direction." The record also includes evidence supportably showing that Chin directed other NECC workers to prepare medications in ways that the government alleges were incompatible with representations made by NECC. See United States v. Carrero-Hernández, 643 F.3d 344, 350 (1st Cir. 2011) ("[T]he defendant must have exercised some degree of control over others involved in the commission of the offense or he must have been responsible for organizing others for the purpose of carrying out the crime," (quoting United States v. Fuller, 897 F.2d 1217, 1220 (1st Cir. 1990))). The District Court's description of Chin's conduct as "supervisory" in nature, moreover, is not itself preclusive of a finding that, in performing his supervisory duties, Chin took on the role of an "organizer" within the meaning of the enhancement. Nor does the pre-sentence report prepared by the United States Office of Probation and Pretrial Services shed any light on the District Court's thinking; that report concluded that Chin was either an organizer or a leader.

*56 Thus, "[g]iven the impact that a possible error would have had on the sentence and the need for further clarification before we can determine whether an error occurred," United States v. Lacouture, 835 F.3d 187, 191-92 (1st Cir. 2016), we decline to affirm the District Court's ruling on the ground Chin proposes. Instead, "we think the wisest course here is to follow our occasional practice" of vacating and "remanding the matter to the district court" in light of the lack of clarity about the basis for the District Court's ruling. Id.

5.

In light of the issues we have identified with the treatment of three enhancements, the District Court may find on remand that application of one or more of these enhancements is warranted and that recalculation of Chin's sentencing range is necessary. If it does, then the District Court may of course in imposing a final sentence consider the parties' arguments about how the traditional concerns of sentencing play out given the modified range. Even if the District Court must reconsider its analysis in these respects, though, we are not thereby inviting the District Court to revisit other conclusions it reached in calculating Chin's sentencing range under the Guidelines that are not affected by our decision today. Thus, aside from the three enhancements the District Court failed to give a legally adequate rationale for declining to apply, the District Court may not on remand reconsider its initial determinations about whether any adjustments to Chin's total offense level are or are not applicable.

B.

We next consider the government's challenge to the forfeiture order. The government does so on the ground that it rested on an unduly limited view of the amount of funds that could be subject to forfeiture.

Due to his racketeering and racketeering conspiracy convictions, Chin was required to forfeit "any property constituting, or derived from, any proceeds which [he] obtained, directly or indirectly, from racketeering activity." 18 U.S.C. § 1963(a)(3). At sentencing, the District Court agreed with the government's contention that Chin's salary from NECC provided an appropriate starting point for the forfeiture calculation and held that Chin's earnings from March of 2010 to October of 2012 were subject to forfeiture. That was the period during which NECC, according to the District Court, was operating as a "criminal enterprise."[8]

Chin earned $473,584.50 in salary over this period of time. The District Court did not require Chin to forfeit this full amount, however. Instead, the District Court limited the forfeiture order to $175,000. The government contends that neither of the two reasons that the District Court gave for limiting the forfeiture order in that way -- one of which was statutory, and one of which was constitutional -- is sustainable. We agree.

1.

15 The District Court first explained that Chin could not be required to forfeit his full salary because he never "obtained" proceeds that were paid as taxes to the United States Treasury within the meaning of 18 U.S.C. § 1963(a)(3). The District *57 Court indicated that, if this reason had been the sole one for reducing the size of Chin's forfeiture order,

then it would have reduced the forfeiture amount from $473,684.50 to $348,084.60 rather than to the amount of $176,000 to which it ultimately reduced it.

16 17 To the extent this question presents one of law, our review is de novo. See United States v. Ponzo, 853 F.3d 558, 589 (1st Cir. 2017). But, "to the extent factual issues are intermingled, [we] consider mixed questions of law and fact under the more deferential clear error standard." Id.

18 19 As we explained in Cadden, see 965 F.3d at 38, a defendant convicted of racketeering must forfeit property even when "it has merely been held in custody by that individual and has been passed along to its true owner," United States v. Hurley, 63 F.3d 1, 21 (1st Cir. 1995). Thus, the fact that the offender is required to pay a certain portion of his salary to the federal government as taxes does not affect the fact that he "obtained" that portion.

The District Court expressed concern that, because Chin was forced to forfeit money that he had already paid in federal taxes, he was "being asked, in effect, to pay his taxes twice." But, the purpose of criminal forfeiture -- unlike a federal tax -- is to punish a racketeering offender. See United States v. Bajakajian, 524 U.S. 321, 332, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998) (noting that "in personam, criminal forfeitures ... have historically been treated as punitive"); Hurley, 63 F.3d at 21 (viewing "criminal forfeiture [for racketeering] as a kind of shadow fine," where "the size of the amount transported is some measure of the potential harm from the transaction"). Under our established precedent, an in personam forfeiture order against a racketeering offender is based on the gross amount of proceeds he acquires, even temporarily, and it is thus entirely unremarkable that such a forfeiture order may exceed the net amount of the offender's ill-gotten gains. See Hurley, 63 F.3d at 21. Thus, the District Court's taxes-based reason for reducing the amount of Chin's "proceeds" is not sustainable.

2.

20 The District Court's other reason for reducing the size of Chin's forfeiture order was to avoid an "excessive fine" in violation of the Eighth Amendment of the federal Constitution. See U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). The District Court acknowledged that Chin and his wife had a net worth of about $423,000 and that the couple had spent almost $700,000 in the sixteen months prior to the entry of the forfeiture order. Nevertheless, the District Court noted the costs that Chin would face in raising his two young children and also concluded that Chin had little prospect of earning a professional-level salary again, given his lack of an education outside of the pharmaceutical industry. The District Court on that basis found that imposing the nearly half-a-million dollar forfeiture would unconstitutionally deprive Chin of the ability to earn a livelihood in violation of the Excessive Fines Clause. See Bajakajian, 524 U.S. at 335-36, 118 S.Ct. 2028 (1998).

21 22 "The factual findings made by the district courts in conducting the excessiveness inquiry ... must be accepted unless clearly erroneous," Id. at 336 n.10, 118 S.Ct. 2028. But, we review the question of whether those facts add up to a constitutional violation de novo. Id.

The government offers a variety of arguments for why the Eighth Amendment *58 does not require the cap imposed by the District Court. We need focus on only its final one, in which it contends that the District Court's findings do not suffice to show that the full forfeiture amount sought by the government would deprive Chin of the ability to earn a livelihood that the Eighth Amendment limitation on excessive fines protects.

In United States v. Levesque, 546 F.3d 78 (1st Cir. 2008), we considered a challenge to a forfeiture order of more than $3 million by a defendant who claimed to have "nothing of value left to forfeit." Id. at 80. Without suggesting that the defendant herself might have a meritorious Eighth Amendment challenge to the size of her forfeiture order, we stated that it was not "inconceivable that a forfeiture could be so onerous as to deprive a defendant of his or her future ability to earn a living, thus implicating the historical concerns underlying the Excessive Fines Clause," and remanded for further proceedings. Id. at 86.

23 As the District Court itself noted, however, Levesque made clear that "a defendant's inability to satisfy a forfeiture at the time of conviction, in and of itself, is not at all sufficient to render a forfeiture unconstitutional." 546 F.3d at 86. Levesque also stressed that, "even if

there is no sign that the defendant could satisfy the forfeiture in the future, there is always a possibility that she might be fortunate enough to legitimately come into money." Id. (quotations omitted).

24 As Levesque recognizes, the bar for a forfeiture order to be unconstitutionally excessive on livelihood-deprivation grounds is a high one. The District Court's findings about Chin's net worth, familial obligations, and inability to earn a professional-level salary simply are not sufficient to ground a determination that the full forfeiture order sought by the government would constitute the type of "ruinous monetary punishment[ ]" that might conceivably be "so onerous as to deprive a defendant of his or her future ability to earn a living" and thus violate the Eighth Amendment's Excessive Fine Clause. Id. at 84-86. Nor has Chin identified any authority to suggest otherwise. Cf. United States v. Sepúlveda-Hernández, 752 F.3d 22, 37 (1st Cir. 2014) (rejecting a challenge to a $1 million forfeiture order on plain error review); United States v. Aguasvivas-Castillo, 668 F.3d 7, 16-17 (1st Cir. 2012) (rejecting a challenge to a $20 million order on plain error review); United States v. Fogg, 666 F.3d 13, 17-20 (1st Cir. 2011) (reversing a District Court's determination that issuing a $264,000 forfeiture order to a defendant who was deeply in debt would be unconstitutional). Accordingly, we vacate the forfeiture order and direct the District Court to enter a forfeiture order in the full amount sought by the government.

C.

We come, then, to the last of the government's challenges. Here, the government takes aim at a conclusion reached by the District Court in calculating Chin's restitution obligation.

Chin was convicted of an offense "committed by fraud or deceit," 18 U.S.C. § 3663A(c)(1)(A)(i). The Mandatory Victims Restitution Act ("MVRA") thus required the District Court to order Chin to "make restitution to the victim[s] of the offense or ... [their] estate[s]." Id. § 3663A(a)(1).

In a preliminary order, the District Court found that the only "victims" entitled to restitution were the "medical facilities who purchased drugs from NECC," but that "the patients who were adversely affected by NECC's drugs" were "not 'victims' *59 ... under the MVRA's statutory definition." The District Court noted that the "sine qua non of mail fraud" is a scheme to "obtain[ ] money or property by means of false or fraudulent pretenses, representations, or promises" transmitted to some recipient, see 18 U.S.C. § 1341, and reasoned that NECC's "misrepresentations" were made "to the hospitals and clinics that purchased the drugs," not to "end-users and patients." Thus, the District Court declined to require Chin to pay restitution to patients or insurance companies. It instead deferred calculation of the final restitution amount and thus the imposition of a final order containing that amount until the completion of the trials of Chin's co-defendants. The District Court did indicate, however, as part of Chin's criminal judgment, that restitution to hospitals and clinics would be mandatory.

25 The government challenges the District Court's narrow construction of who counts as a "victim."[9] We review factual findings underlying a restitution order for clear error and legal conclusions de novo. See Soto, 799 F.3d at 97. The final order is reviewed for abuse of discretion. Id.

The MVRA defines "victim" as "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered." 18 U.S.C. § 3663A(a)(2). When an offense "involves as an element a scheme, conspiracy, or pattern of criminal activity," like Chin's mail fraud and racketeering-related convictions, see id. §§ 1341, 1963(c), 1963(d), "any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern" is a victim. Id. § 3663A(a)(2).

26 We disagree with the District Court's conclusion that patients and insurers were, as a matter of law, not "victims" within the scope of the MVRA. The restitution analysis focuses on the causal relationship "between the conduct and the loss," not between the nature of the statutory offense and the loss. United States v. Cutter, 313 F.3d 1, 7 (1st Cir. 2002) (emphasis added) (quoting United States v. Vaknin, 112 F.3d 579, 590 (1st Cir. 1997)); see also Robers v. United States, 572 U.S. 639, 645, 134 S.Ct. 1854, 188 L.Ed.2d 865 (2014) (focusing on the relationship between "the harm alleged" and the defendant's "conduct" (quoting Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 133, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014))). This approach to the "victim" analysis tracks the language of the statute, as it focuses on whether the victim was "harmed as a result of the

commission of an offense" or "by the defendant's criminal conduct in the course of [a] scheme, conspiracy, or pattern [of criminal *60 activity]." 18 U.S.C. § 3663A(a)(2) (emphasis added).

27 28 Chin nonetheless argues that we must affirm the District Court's ruling for the following reason. The "directly and proximately" language of the MVRA incorporates "a proximate cause requirement." Robers, 572 U.S. at 645, 134 S.Ct. 1854 (discussing 18 U.S.C. § 3663A(a)(2)). In assessing whether that requirement has been satisfied, we ask "'whether the harm alleged has a sufficiently close connection to the conduct' at issue." Id. (quoting Lexmark Int'l, Inc., 572 U.S. at 133, 134 S.Ct. 1377); see also Cutter, 313 F.3d at 7 ("[R]estitution is inappropriate if the conduct underlying the conviction is too far removed, either factually or temporally, from the loss."). Put otherwise, the statute asks, "was the harm foreseeable?" Soto, 799 F.3d at 98.

Chin contends that the District Court made a factual finding about the lack of proximate causation, which he would have us review under the deferential "clear error" standard and sustain. We see no indication, however, that the District Court made such a proximate cause finding. It rooted its conclusion that the patients were not "victims" on its reading of the mail fraud statute, and its determination that the "sine qua non" of mail fraud identified the direct recipients of fraudulent representations as the sole "victims" of such fraud. It thus did not attempt to evaluate the "factual[ ] or temporal[ ]" link between "the conduct underlying the conviction" and "the loss." Cutter, 313 F.3d at 7.

The District Court did at one point state:

> To the extent that patients may have implicitly relied on NECC's representations by relying on their doctors as learned intermediaries, this additional layer of insulation between NECC and the patient further renders any such reliance "too attenuated" to satisfy the "direct causation" standard of the MVRA. See Cutter, 313 F.3d at 7.

But, the District Court invoked this attenuation concern only to respond to the government's contention that the patients indirectly relied on NECC's representations such that they themselves were defrauded. We thus do not take the District Court to have engaged in a proximate cause analysis of whether the harm that would flow to the patients from Chin's conduct was foreseeable. Accordingly, we vacate and remand the restitution order.

IV.

We affirm Chin's convictions and vacate and remand his sentence, forfeiture order, and restitution order.

All Citations

965 F.3d 41, RICO Bus.Disp.Guide 13,364

Footnotes

1 The racketeering conviction at issue was based on 18 U.S.C. § 1962(c), which states that

> [i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

The racketeering conspiracy conviction was based on 18 U.S.C. § 1962(d), which states that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." The government alleged that Chin conspired to violate § 1962(c).

2 The mail fraud provision under which Chin was convicted and on which his predicate acts were based reads, in relevant part, as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises ... for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1341.

3 Because our analysis is based only on evidence that relates to the twelve predicate acts found by the jury, Chin's argument, to the extent he makes it, that we may not rely on evidence that relates to other predicate acts not found by the jury is beside the point. In any event, our precedent does not support the proposition on which he relies. See United States v. Connolly, 341 F.3d 16, 26 (1st Cir. 2003) (finding continuity of a racketeering enterprise based in part on "evidence of the existence of the enterprise apart from the specified racketeering acts"); cf. United States v. Clancl, 378 F.3d 71, 93 (1st Cir. 2004) ("The evidence relating to those acts that were found 'unproven' by the jury was still available to the jury in its evaluation of the overall [racketeering] charge.").

4 We note that the jury necessarily concluded in finding that Chin committed twelve predicate acts of racketeering involving mail fraud that he was a "knowing and willing particlpa[nt] in [NECC's mail fraud] scheme with the intent to defraud," United States v. Soto, 799 F.3d 68, 92 (1st Cir. 2015), and Chin does not dispute that a juror could infer he would have continued to be a knowing and willing participant in that fraudulent scheme if there were a supportable basis for finding that NECC would continue to perpetrate it.

6 At the time the District Court handed down Chin's sentence in 2018, the enhancement was codified at U.S.S.G. § 2B1.1(b)(16).

6 The government does not argue that actions associated with any of the FDCA convictions could serve to make the enhancement applicable.

7 The government does not argue that any conduct associated only with his convictions on the FDCA counts could require the application of the vulnerable victims enhancement.

8 The government had requested that Chin be required to forfeit his salary over a longer period of time, stretching back to 2006. On appeal, the government does not challenge the District Court's finding that the relevant period was from March of 2010 to October of 2012.

9 Under our established precedent, we treat a restitution order as an appealable final judgment even when it does not indicate the amount of restitution. See United States v. Cheal, 389 F.3d 35, 51 (1st Cir. 2004) (citing 18 U.S.C. § 3664(o)). Two Supreme Court precedents have subsequently addressed the appealability of a restitution calculation in a deferred restitution scenario such as this one, see Manrique v. United States, —— U.S. ——, 137 S. Ct. 1266, 1270-72, 197 L.Ed.2d 599 (2017); Dolan v. United States, 560 U.S. 605, 616-18, 130 S.Ct. 2533, 177 L.Ed.2d 108 (2010), but neither of them purports to make a holding about the jurisdiction of appellate courts to hear appeals of preliminary restitution orders, see Manrique, 137 S. Ct. at 1271; Dolan, 560 U.S. at 617-18, 130 S.Ct. 2533. No party, however, asks us to conclude from the subsequent Supreme Court precedent that this is the rare case in which we may depart from prior Circuit precedent based on new developments. We thus stick to the law of the circuit as articulated by Cheal,

under which we have jurisdiction to consider the government's appeal, notwithstanding that the amount of restitution has not been specified.

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41 F.4th 16
United States Court of Appeals, First Circuit.

UNITED STATES of America, Appellee

United States v. Chin
United States Court of Appeals, First Circuit. | July 15, 2022 | 41 F.4th 16 *(Approx. 16 pages)*

v.

Glenn A. CHIN, Defendant, Appellant.

No. 21-1574
July 15, 2022

Synopsis

Background: Defendant, a former pharmacist, was convicted in the United States District Court for the District of Massachusetts, Richard G. Stearns, J., of racketeering, racketeering conspiracy, mail fraud, and violation of the Federal Food, Drug, and Cosmetic Act (FDCA), in connection with compounding pharmacy's shipments of contaminated drugs, was sentenced to a 96-month prison term, and, 2018 WL 1399297, was ordered by pay restitution. Defendant appealed, and government cross-appealed. The United States Court of Appeals for the First Circuit, 965 F.3d 41, affirmed in part, vacated in part, and remanded for resentencing. On remand, the United States District Court for the District of Massachusetts, Richard G. Stearns, J., defendant was resentenced to a 126-month prison term. Defendant appealed.

Holdings: The Court of Appeals, Barron, Chief Judge, held that:
1 as a matter of apparent first impression, sentencing guideline for reckless and knowing disregard of a reasonable certainty of causing death or great bodily harm could apply if defendant should have been aware that conduct involved risk of death or serious injury; and
2 imposition of sentencing increase for reckless and knowing disregard of reasonable certainty of causing death or great bodily harm was warranted; and
3 sentencing increase for vulnerable victims was warranted.

Affirmed.

West Headnotes (12)

Change View

1 **Criminal Law** Review De Novo
Criminal Law Sentencing
The Court of Appeals reviews the District Court's factfinding at sentencing for clear error and affords de novo consideration to its interpretation and application of the Sentencing Guidelines.' U.S.S.G. § 1B1.1 et seq.

2 **Criminal Law** Review De Novo
Criminal Law Sentencing
Sentencing guideline providing for two-level sentencing increase based on defendant's reckless and knowing disregard of a reasonable certainty of causing death or great bodily harm could apply if preponderance of the evidence showed that defendant should have been aware that his offense, including his relevant conduct, involved risk of death or serious bodily injury, and did not require showing that defendant had actual, subjective awareness of the risk. U.S.S.G. § 2B1.1(b)(16)(A).

3 **Criminal Law** Criminal Intent and Malice
Willful blindness serves as an alternate theory on which the government may prove knowledge.

4 **Criminal Law** Elements of offenses in general
The mens rea element of a criminal offense must be proved beyond a reasonable doubt.

5 **Sentencing and Punishment** Factors enhancing sentence
A sentencing enhancement is subject only to the preponderance of the evidence standard that applies in the civil context.

6 **Sentencing and Punishment** Drugs and narcotics
Imposition of two-level sentencing increase for reckless and knowing disregard of a reasonable certainty of causing death or great bodily harm was warranted for defendant, a former pharmacist, convicted of racketeering, racketeering conspiracy, mail fraud, and violation of the Federal Food, Drug, and Cosmetic Act (FDCA), in connection with compound pharmacy's shipments of contaminated drugs, which caused deadly fungal meningitis outbreak; evidence showed that defendant presided over high-risk enterprise at pharmacy, and that despite incomplete testing and falsification of drug lab cleaning reports, the appearance of mold and other contaminants in the clean room, defendant permitted drugs to ship. Federal Food, Drug, and Cosmetic Act §§ 301, 303, 21 U.S.C.A. §§ 331(a), 333(a); U.S.S.G. § 2B1.1(b)(16)(A).

7 **Criminal Law** Sentencing
The Court of Appeals may look to the record of the sentencing hearing to ascertain the District Court's reasoning in imposing a particular sentence.

8 **Sentencing and Punishment** Vulnerability of victim
Imposition of vulnerable-victims sentencing increase was warranted for defendant, a former pharmacist, convicted of racketeering, racketeering conspiracy, mail fraud, and violation of the Federal Food, Drug, and Cosmetic Act (FDCA), in connection with compound pharmacy's shipments of contaminated drugs, which caused deadly fungal meningitis outbreak; patients who were harmed by the contaminated drugs were unusually vulnerable because their medical conditions led them to entrust medical personnel to inject drugs into their spines. Federal Food, Drug, and Cosmetic Act §§ 301, 303, 21 U.S.C.A. §§ 331(a), 333(a); U.S.S.G. § 3A1.1(b)(1).

9 **Sentencing and Punishment** Vulnerability of victim
To apply the vulnerable victim sentencing increase, the sentencing court must determine that (1) the victim of the crime was vulnerable, that is, the victim had an impaired capacity to detect or prevent crime; and (2) the defendant knew or should have known of the victim's unusual vulnerability. U.S.S.G. § 3A1.1(b)(1).

10 **Sentencing and Punishment** Vulnerability of victim
Sentencing increase for offense involving vulnerable victims could apply to defendant convicted of racketeering and racketeering conspiracy, in connection with his employment for compound pharmacy that shipped contaminated drugs to medical facilities, notwithstanding that direct recipients of contaminated drugs were hospitals and medical providers, rather than patients who were actually harmed by the contaminated drugs. U.S.S.G. § 3A1.1(b).

11 **Sentencing and Punishment** Vulnerability of victim

Application of vulnerable victim sentencing guideline, requiring that defendant knew or should have known of victims' vulnerability, did not necessitate proof that defendant intended to defraud his victims. U.S.S.G. § 3A1.1(b).

12 **Sentencing and Punishment** Vulnerability of victim
Application of vulnerable victim sentencing guideline, requiring that defendant knew or should have known of victims' vulnerability, did not necessitate proof that defendant a former pharmacist, convicted of racketeering, racketeering conspiracy, mail fraud, and violation of the Federal Food, Drug, and Cosmetic Act (FDCA), in connection with compound pharmacy's shipments of contaminated drugs, which caused deadly fungal meningitis outbreak had individualized, actual knowledge of victims' unusual vulnerability. U.S.S.G. § 3A1.1(b).

*18 APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS [Hon. Richard G. Stearns, U.S. District Judge]

Attorneys and Law Firms

James L. Sultan, with whom Rankin & Sultan was on brief, for appellant.

Christopher R. Looney, Assistant United States Attorney, with whom Rachael S. Rollins, United States Attorney, was on brief, for appellee.

Before Barron, Chief Judge, Lipez and Howard, Circuit Judges.

Opinion

BARRON, Chief Judge.

This appeal requires us to revisit the sentence that Glenn Chin, a former supervising pharmacist at the New England Compounding Center ("NECC"), received for his convictions in connection with the criminal investigation into the deadly nationwide outbreak of fungal meningitis in 2012 that was traced to the company's shipments of contaminated drugs. When we last considered Chin's sentence, we vacated and remanded it. See United States v. Chin, 965 F.3d 41, 60 (1st Cir. 2020) ("Chin I"). The United States District Court for the District of Massachusetts resentenced Chin while applying two sentencing enhancements under the United States Sentencing Guidelines ("Guidelines"). U.S. Sent'g Guidelines Manual §§ 2B1.1(b)(16)(A), 3A1.1(b)(1) [hereinafter U.S.S.G]. Chin contends that neither enhancement applies and thus that his sentence must be vacated once again. We affirm.

I.

The events at NECC have already been the subject of several reported decisions by this Court. We thus will rehearse only the facts relevant to Chin's current challenge to certain aspects of his resentencing. We refer the reader to Chin's first appeal, Chin I, 965 F.3d at 45-46, and to the appeal of Barry Cadden, Chin's boss at NECC, United States v. Cadden, 965 F.3d 1, 7-8 (1st Cir. 2020), for a more detailed discussion of the underlying facts.

NECC was a pharmacy based in Framingham, Massachusetts, that specialized in high-risk drug compounding, which refers to a process in which non-sterile ingredients are combined to create sterile drugs that are prepared at the request of hospitals and other healthcare providers. Chin worked as a licensed pharmacist at NECC from April 2004 to October 2012.

*19 In January 2010, Chin was promoted to the role of supervising pharmacist at NECC, in which he oversaw all drug production in NECC's two "clean rooms." In the fall of 2012, a number of patients who had received epidural injections of methylprednisolone acetate ("MPA") -- a steroid for pain relief -- contracted rare fungal infections that were ultimately traced back to contaminated drugs produced at NECC under Chin's supervision. A number of those patients died.

A federal criminal investigation into NECC's practices ensued, and in connection with it Chin was charged in December of 2014 with "racketeering in violation of 18 U.S.C. § 1962(c); racketeering conspiracy in violation of 18 U.S.C. § 1962(d); forty-three counts of

federal mail fraud in violation of 18 U.S.C. § 1341; and thirty-two counts of violating the Federal Food, Drug, and Cosmetic Act ('FDCA'), see 21 U.S.C. §§ 331(a), 333(a)." Chin I, 965 F.3d at 45. After a jury trial, Chin was found guilty on all counts. Id. at 46.

Evidence was introduced at trial that showed that Chin was familiar with Chapter 797 of the United States Pharmacopeia ("USP-797"), which sets forth standards governing sterile compounding that pharmacists licensed in Massachusetts must follow. Evidence introduced at trial also supportably showed that, despite NECC claiming to be USP-797 compliant, Chin knew that NECC was selling MPA that had not been properly sterilized or tested for sterility in accordance with USP-797. And, evidence was introduced at trial that showed that NECC's clean room became grossly contaminated with mold and bacteria after Chin instructed clean room staff to ignore cleaning protocols, and that Chin knew of this contamination.

At Chin's sentencing in January 2018, the government, among other things, requested that the District Court apply the two Guidelines that set forth the enhancements that are the subject of Chin's present appeal. The first enhancement is U.S.S.G. § 2B1.1(b)(16)(A), which imposes a two-level increase in the base offense level of those convicted of certain crimes "[i]f the offense involved ... the conscious or reckless risk of death or serious bodily injury." The second enhancement is U.S.S.G. § 3A1.1(b), which imposes a two-level increase in the base offense level "[i]f the defendant knew or should have known that a victim of the offense was a vulnerable victim" and an additional two-level increase if that enhancement applies and "the offense involved a large number of vulnerable victims."

The District Court declined to apply either enhancement in sentencing Chin to a term of imprisonment of 96 months, to be followed by two years of supervised release. The District Court determined at Chin's first sentencing that the "conscious or reckless risk" enhancement did not apply because "the evidence did not establish a reckless and knowing disregard of a reasonable certainty of causing death or great bodily harm." The District Court determined that the "vulnerable victim" enhancement did not apply because "here the victims that were identified were the clinics and the hospitals who purchased the drugs," and "because we construe 'victim' differently for purposes of sentencing, the enhancements do not apply on a proximate cause theory to persons who were not recipients of NECC's representations" -- that is, the individuals who were ultimately harmed by injections of tainted pharmaceuticals from NECC.

The government appealed the sentence that the District Court had imposed. It did so, in part, on the ground that the District Court erred in not applying either enhancement.

*20 On appeal, this Court rejected the District Court's basis for determining that the "conscious or reckless risk" enhancement did not apply. Chin I, 965 F.3d at 53. We first explained that the District Court failed to consider whether Chin's "relevant conduct," rather than the nature of his "offense" alone, carried with it the risk of death or serious bodily injury. Id. at 52–53. We further explained that the District Court erred because it

> found that Chin did not act with a "reckless and knowing" state of mind in disregarding a "reasonable certainty of ... death or great bodily harm." The sentencing enhancement, however, describes the requisite mental state using disjunctive language: the enhancement applies so long as the defendant acted in spite of either a "conscious or reckless risk." U.S.S.G. § 2B1.1(b)(16)(A) (emphasis added). Thus, the District Court's finding does not foreclose the possibility that Chin's offense involved the mental state necessary for the enhancement's application. We therefore vacate and remand the sentence for the District Court to assess whether any of Chin's relevant conduct, as defined under U.S.S.G. § 1B1.3(a), "involved ... the conscious or reckless risk of death or serious bodily injury." Id. § 2B1.1(b)(16).

Id. at 53 (omissions in original).

Chin I was published on the same day as Cadden, and it referenced the Cadden opinion in its analysis of the "conscious or reckless risk" issue. See Chin I, 965 F.3d at 52. Cadden similarly vacated the District Court's refusal to apply this enhancement to Cadden and remanded for the court to consider the proper mens rea for the § 2B1.1(b)(16)(A) enhancement. We explained that

> the District Court ... at no point directly addressed in sentencing whether a preponderance of the evidence ... established that Cadden's relevant conduct associated

> with the mail fraud involved a "conscious or reckless risk of death or serious bodily injury." U.S.S.G. § 2B1.1(b)(16); Cf. United States v. Lucien, 347 F.3d 45, 56-57 (2d Cir. 2003) (concluding that a conscious risk is one "known to the defendant" while a reckless risk is "the type of risk that is obvious to a reasonable person and for which disregard of said risk represents a gross deviation from what a reasonable person would do").

965 F.3d 1, 34–35.

In Chin I, this Court also rejected the District Court's basis for determining that the "vulnerable victim" enhancement did not apply. We explained in doing so that, " '[t]o come within the guidelines' definition' of 'victim,' 'one need not be a victim of the charged offense so long as one is a victim of the defendant's other relevant conduct.' " 965 F.3d at 54 (alteration in original) (quoting Cadden, 965 F.3d at 35). Moreover, in Chin I, with respect to whether Chin's particular conduct warranted the enhancement, we framed the question on remand with reference to commentary in the Guidelines. Specifically, we stated, "[w]e ... leave it to the District Court in the first instance to address, among other things, whether [Chin's] actions were analogous to those of a fraudster who 'market[s] an ineffective cancer cure,' who the Guidelines indicate would merit the enhancement, U.S.S.G. § 3A1.1 cmt. n.2." Chin I, 965 F.3d at 54.

Following this Court's decisions in Cadden and Chin I, Cadden was resentenced on July 7, 2021. Chin was resentenced the next day by the same judge who had resentenced Cadden and who had previously sentenced both men.

At Cadden's resentencing, the District Court observed that, at the first sentencing, it had treated the applicable mens rea *21 standard as "not recklessness in the tort law sense but in the appreciably stricter criminal law sense, requiring actual knowledge of an impending harm easily preventable." But, the District Court noted in resentencing Cadden, "[i]t's clear rather from the decision in Mr. Cadden's case that the First Circuit has adopted the Second Circuit's definition [in Lucien, 347 F.3d at 56-57], which is a quite different definition of recklessness." The District Court then quoted the definition of recklessness from Lucien: "the type of risk that is obvious to a reasonable person and for which disregard of said risk represents a gross deviation from what a reasonable person would do," Lucien, 347 F.3d at 56-57.

In assessing whether the enhancement applied to Cadden, the District Court found that Cadden "preside[d] over" a "high-risk enterprise" at NECC and did so

> despite warnings, signals, ... incomplete testing, falsification of drug lab cleaning reports, ... the appearance of mold and other contaminants in the clean room, and his superior knowledge of the risk involved[,] I have to conclude that [Cadden's] conduct did and does fit within the definition of "recklessness."

The District Court then applied the enhancement to Cadden.

Chin was resentenced by the District Court the day after Cadden was. The District Court declared in resentencing Chin, "I do not want to retread ground that I covered yesterday. .... I assume [the First Circuit's quotation of Lucien in Cadden] meant they were adopting or at least embracing the Second Circuit's view of how 'recklessness' would be defined in this case." The District Court then held the "conscious or reckless risk" enhancement applicable to Chin.

In addition, at Cadden's resentencing, the District Court noted that, in light of the First Circuit's ruling in Cadden's first appeal, " 'victims' [are] defined ... by the larger picture of [an offender's] conduct as a whole," and that "any person who entrusts medical personnel to inject a foreign substance into their spine by definition fits what I would think, and ordinary people would think, is a definition of being in a vulnerable position." The District Court then applied the "vulnerable victim" enhancement to Cadden.

At Chin's resentencing, the District Court observed that the "First Circuit['s] ... expansive view of what constitutes a 'victim' under the Guidelines was pretty clear to me," and that "vulnerability can ... refer to one's ... inability to protect one's self under the circumstances." The District Court then held the "vulnerable victim" enhancement applicable to Chin as well.

1 After applying both the "conscious or reckless risk" and "vulnerable victim" enhancements to Chin, the District Court determined that Chin's total offense level was 34. Given that the District Court determined that Chin's Criminal History Category was I, the District Court calculated his Guidelines Sentencing Range to be a term of imprisonment of 151–188 months. The District Court thereafter imposed a 126-month term of imprisonment and two years of supervised release. Chin timely appeals. "[W]e review the District Court's 'factfinding for clear error and afford de novo consideration to its interpretation and application of the sentencing guidelines.' " Chin I, 965 F.3d at 50 (quoting United States v. Benítez-Beltrán, 892 F.3d 462, 469 (1st Cir. 2018)).

II.

We start with Chin's challenge to the District Court's application of the two-level enhancement set forth in *22 U.S.S.G. § 2B1.1(b)(16)(A). We are not persuaded by it.

A.

2 Chin first argues that the District Court erred in interpreting § 2B1.1(b)(16)(A). He contends that is so because the District Court held the enhancement to apply so long as there is proof that the offense, including the defendant's relevant conduct, involved a risk of death or serious bodily injury of which the defendant should have been aware and thus to apply even in the absence of proof by a preponderance of the evidence that the defendant in fact knew of that risk.

Chin contends in support of that argument that the District Court based its "should have known" interpretation of the enhancement solely on our invocation in the course of construing that same provision of the Guidelines in Cadden of the Second Circuit's decision in Lucien. He goes on to contend, however, that "It is not at all clear from this Court's 'Cf.' citation to Lucien that it was adopting that particular definition of 'reckless risk.' "

Chin further argues that, given that we did not hold in Cadden that Lucien controls, we must construe the enhancement afresh. And, he contends, by virtue of the use of the word "reckless" in § 2B1.1(b)(16)(A), the enhancement is properly construed to require proof that a defendant was aware that his relevant conduct in committing his offense created a risk of death or serious bodily injury and not merely that he should have known of that risk. He then contends that, in consequence, the enhancement cannot be applied to him, because the government did not prove by a preponderance of the evidence that Chin was aware of any such risk in engaging in the conduct relevant to his offense.

We agree with Chin that the "Cf." citation to Lucien in our Cadden decision, 965 F.3d at 34–35, does not resolve how this enhancement must be construed. We did not have occasion in Cadden to address the meaning of the word "reckless" in the enhancement. Our focus there was solely on the District Court's failure to address Cadden's "relevant conduct" in applying the enhancement as § 1B1.1 cmt. n.1(I) of the Guidelines requires, given that the District Court appeared to focus in assessing whether the enhancement applied on the nature of the offenses of which Cadden had been convicted. See Cadden, 965 F.3d at 34; U.S.S.G. § 1B1.1 cmt. n.1(I) (defining "offense"); Id. § 1B1.3(a)(1)(A) (setting forth "relevant conduct" for purposes of computing base offense level, offense characteristics, and adjustments). But, even though Cadden's invocation of Lucien is not controlling of the question presented here, we nonetheless conclude that the enhancement is best construed as Lucien construed it.

The Guideline refers to a "conscious or reckless risk." U.S.S.G. § 2B1.1(b)(16)(A) (emphasis added). If we were to read "reckless" in this Guideline itself to require a defendant to be aware of the risk of death or substantial bodily injury, as Chin contends we must, the use of the words "conscious or" in that same Guideline would be superfluous. See United States v. DeLuca, 17 F.3d 6, 10 (1st Cir. 1994) (" '[A]ll words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous.' We think that this principle is fully applicable to the sentencing guidelines ...." (internal citations omitted) (quoting Lamore v. Ives, 977 F.2d 713, 716–17 (1st Cir. 1992))).

3 *23 Nor can this redundancy be avoided, as Chin suggests, by "requiring the government to prove, at the very least, what amounts to willful blindness" to prove recklessness. "Willful blindness serves as an alternate theory on which the government may prove knowledge." United States v. Pérez-Meléndez, 599 F.3d 31, 41 (1st Cir. 2010).

In construing the Guideline to require proof only that the risk would have been obvious to a reasonable person in Chin's position, we align ourselves not only with the Second Circuit decision in Lucien, but with the Ninth and Tenth Circuits too. See United States v. Maestas, 642 F.3d 1315, 1321 (10th Cir. 2011) ("[A] defendant's conduct involves a conscious risk if the defendant was subjectively aware that his or her conduct created a risk of serious bodily injury, and a defendant's conduct involves a reckless risk if the risk of bodily injury would have been obvious to a reasonable person."); United States v. Johansson, 249 F.3d 848, 859 (9th Cir. 2001) ("We do not believe that a defendant can escape the application of the serious risk of injury enhancement by claiming that he was not aware that his conduct created a serious risk, that is, a defendant does not have to subjectively know that his conduct created the risk."). And while Chin is right that two courts of appeals have ruled to the contrary and interpreted § 2B1.1(b)(16)(A) to require actual, subjective awareness of a risk, see United States v. Mohsin, 904 F.3d 580, 586 (7th Cir. 2018); United States v. McCord, Inc., 143 F.3d 1095, 1098 (8th Cir. 1998), neither of those courts explains how that interpretation accords with the enhancement's use of the words "conscious or" before "reckless." See Johansson, 249 F.3d at 858 ("Our concern with the Eighth Circuit's interpretation of 'reckless' [in McCord] ... is that there is no meaningful distinction between an offense that involves the 'conscious' risk of injury, and an offense that involves the 'reckless' risk of injury, if under either prong the defendant must have been aware of the risk in the first place."); accord Maestas, 642 F.3d at 1320-21.[1]

Chin does point out that, although neither § 2B1.1(b)(16)(A) nor its application notes define the term "reckless," a definition of that word does appear elsewhere in the Guidelines. He then argues that we thus must apply that definition of "reckless" here.

Chin has in mind the definition of "reckless" that appears in the application notes to the Guideline that concerns involuntary manslaughter. See U.S.S.G. § 2A1.4. That Guideline sets different base offense levels for involuntary manslaughter depending on whether "the offense involved criminally negligent conduct; or ... the offense involved reckless conduct; or ... the offense involved the reckless operation of a means of transportation." Id. The application note to that Guideline, in turn, defines "reckless" as follows:

> "Reckless" means a situation in which the defendant was aware of the risk created by his conduct and the risk was of such a nature and degree that to *24 disregard that risk constituted a gross deviation from the standard of care that a reasonable person would exercise in such a situation.

Id. § 2A1.4 cmt. n.1. The application note also explains that " '[c]riminally negligent' means conduct that involves a gross deviation from the standard of care that a reasonable person would exercise under the circumstances, but which is not reckless." Id.

But, the application note that sets forth this definition of "reckless" in connection with the Guideline that concerns involuntary manslaughter does not purport to apply throughout the Guidelines. Nor does it even purport to apply to the Guideline at issue here in particular, which applies to fraud and certain related offenses. Thus, the application note does not, by its terms, require us to apply the definition of "reckless" that it sets forth here.

Moreover, it is problematic to apply that definition here as a textual matter. The definition of "reckless" in the involuntary manslaughter Guideline refers to a "risk." See U.S.S.G. § 2A1.4 cmt. n.1. It is thus hard to see how that definition could have been intended to apply to this Guideline, because this Guideline itself uses the word "reckless" to modify the word "risk." No such awkwardness arises under the involuntary manslaughter Guideline; it uses the adjective "reckless" to describe a defendant's conduct -- either "reckless conduct" or "reckless operation of a means of transportation," U.S.S.G. § 2A1.4. See Maestas, 642 F.3d at 1321 (observing the distinction between the two Guidelines' respective uses of "reckless conduct" and "reckless risk"); Johansson, 249 F.3d at 859 ("The Guideline describes a 'reckless risk,' not a reckless disregard of a known risk.").[2]

Chin separately argues that -- the definition of "reckless" elsewhere in the Guidelines aside -- the term as it appears in the enhancement at issue here is best construed to require the defendant to be aware of the risk of death or serious bodily injury. He relies for this contention in part on other instances in which recklessness has been defined to require a defendant's subjective awareness of a risk. See Volsine v. United States, 579 U.S. 686,

694, 699, 136 S.Ct. 2272, 195 L.Ed.2d 736 (2016) (describing reckless conduct as "acts undertaken with awareness of their substantial risk of causing injury" and "with conscious disregard of a substantial risk of harm"); Farmer v. Brennan, 511 U.S. 825, 836–37, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) ("The criminal law ... generally *25 permits a finding of recklessness only when a person disregards a risk of harm of which he is aware.").

4 6 But, in those instances, the term defines the mens rea element of a criminal offense, see Voisine, 579 U.S. at 691, 136 S.Ct. 2272; Farmer, 511 U.S. at 836–37, 114 S.Ct. 1970, which must be proved beyond a reasonable doubt.[3] Here, however, the term appears in a sentencing enhancement, which is subject only to the lower preponderance of the evidence standard that also applies in the civil context. See United States v. Hernández-Negrón, 21 F.4th 19, 25-26 (1st Cir. 2021). Thus, the examples of "reckless" being given the stricter meaning on which Chin relies fail to show that this Guideline is best construed to incorporate a meaning of "reckless" that is used to define an element of a crime, rather than a meaning of "reckless" that is traditionally used in the civil context, which is the one the Second Circuit attributes to it in Lucien, 347 F.3d at 56-57. See Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 68, 127 S.Ct. 2201, 167 L.Ed.2d 1045 (2007) ("While 'the term recklessness is not self-defining,' the common law has generally understood it in the sphere of civil liability as conduct violating an objective standard: action entailing 'an unjustifiably high risk of harm that is either known or so obvious that it should be known.' " (quoting Farmer, 511 U.S. at 836, 114 S.Ct. 1970)); see also id. at 68 n.13, 127 S.Ct. 2201 ("Unlike civil recklessness, criminal recklessness also requires subjective knowledge on the part of the offender.").

We do not mean to suggest that the word "reckless" in a Guideline necessarily incorporates the traditional common-law understanding of the term in the civil context. But, given the use of the words "conscious or reckless" to modify risk in § 2B1.1(b)(16)(A), the text requires us to construe "reckless" here to refer to that standard.

B.

6 Chin argues in the alternative that the record fails to show by a preponderance of the evidence that his relevant conduct satisfied the objective standard for recklessness, even if that standard is the applicable one under this Guideline. Specifically, he contends that "[w]hile [he] was aware that there were deficiencies in testing and the condition of the compounding lab ..., it would have required rank speculation to foresee that those shortcomings would cause the vials of MPA to become contaminated with fungus, leading to a scourge of serious illness and death." We are not persuaded.

7 The District Court did not expressly set forth findings about the nature of the risk of which Chin should have been aware from his relevant conduct in committing his offense. However, we may look to the record of the sentencing hearing to ascertain the District Court's reasoning. Cf. United States v. Montero-Montero, 817 F.3d 35, 37 (1st Cir. 2016) ("To be sure, a sentencing court's rationale sometimes may be inferred from the sentencing colloquy and the parties' arguments (oral or written) in connection with sentencing.").

*26 Notably, before applying the § 2B1.1(b)(16)(A) enhancement to Chin, the District Court explained that it "d[id] not want to retread ground that [it] covered yesterday." It is thus evident that the District Court was relying on the same rationale for applying this enhancement to Chin that it had relied on the day before in applying the enhancement to Cadden. And, at Cadden's resentencing, it had explained that the enhancement applied to Cadden because Cadden "preside[d] over" a "high-risk enterprise" at NECC

> despite warnings, signals, ... incomplete testing, falsification of drug lab cleaning reports, ... the appearance of mold and other contaminants in the clean room, and his superior knowledge of the risk involved.

Of course, the record in Chin's case must provide support for the District Court's decision to apply the enhancement to him based on this same rationale. But, reviewing the District Court's factfinding for clear error, Chin I, 965 F.3d at 50, we conclude that the record here supportably shows that Chin knew in 2012 that NECC's clean room was grossly contaminated after his staff's failure to adhere to cleaning protocols, that he knew that NECC was selling MPA that was not properly sterilized or tested for sterility despite claiming that it was USP-797 compliant, and that he instructed NECC technicians to

mislabel untested drugs with the lot numbers of older lots that NECC had tested. And, as the government points out, the record also supportably shows that Chin was required to follow USP-797 standards, the purpose of which "is to describe conditions and practices to prevent harm, including death, to patients that could result from ... microbial contamination." Thus, the District Court did not clearly err in finding that Chin should have been aware of the risk of death or serious bodily injury that his conduct in committing his offense posed, given the evidence supportably showing that he breached USP-797 standards that exist in part to "prevent ... death ... to patients."

III.

8 9 We next address Chin's contention that the District Court erred in applying an enhancement to his sentence that provides for a two-level increase "[i]f the defendant knew or should have known that a victim of the offense was a vulnerable victim." U.S.S.G. § 3A1.1(b)(1).[4] The application note further explains that the enhancement "applies to offenses involving an unusually vulnerable victim." Id. § 3A1.1 cmt. n.2. To apply the "vulnerable victim" enhancement, "the sentencing court must determine that (1) 'the victim of the crime was vulnerable, that is, ... the victim had an "impaired capacity ... to detect or prevent crime;" ' and (2) 'the defendant knew or should have known of the victim's unusual vulnerability.' " United States v. Stella, 591 F.3d 23, 29 (1st Cir. 2009) (quoting United States v. Donnelly, 370 F.3d 87, 92 (1st Cir. 2004)).

Chin does not dispute that the patients who were administered NECC drugs are "victims" in the relevant sense. See United States v. Bradley, 644 F.3d 1213, 1288 (11th Cir. 2011) (concluding that "recipients of recycled blood-derivatives are 'vulnerable victims' " where owner of pharmaceutical "27 wholesaler's fraudulent billing scheme caused AIDS and hemophilia patients to be treated with recycled blood derivatives); United States v. Milstein, 401 F.3d 53, 74 (2d Cir. 2005) (affirming application of "vulnerable victims" enhancement where defendant "distribute[d] counterfeit and misbranded drugs to doctors, pharmacists, and pharmaceutical wholesalers, knowing that those customers would distribute the drugs to women with fertility problems and to Parkinson's disease patients"); see also United States v. Sidhu, 130 F.3d 844, 855 (5th Cir. 1997) ("[A] physician's patients can be victimized by a fraudulent billing scheme directed at insurers or other health care providers."). But, he still argues that neither prong of the enhancement is satisfied here. Reviewing the District Court's factfinding for clear error and its interpretation of the Guidelines de novo, Chin I, 965 F.3d at 50, we do not agree.

A.

Chin contends that the victims here -- i.e., the patients harmed by contaminated NECC drugs -- "were not 'unusually vulnerable' " merely because they were members of "a generic class of all medical patients." He further contends that such a finding would be inconsistent with the intent and purpose of the Guideline, which he says is meant to punish "defendants who exploit the particular weaknesses of society's most vulnerable members." To the extent Chin contends that the District Court erred in its interpretation and application of the Guideline, we disagree under de novo review. To the extent he challenges the District Court's factual finding that the victims at issue were in fact "unusually vulnerable," we discern no clear error.

The District Court did not find, as Chin suggests, that these victims were unusually vulnerable merely because they belonged to "a generic class of all medical patients." Rather, the District Court supportably found that they were unusually vulnerable because their pain led them to "entrust medical personnel to inject a foreign substance into their spine[s]," recognizing that "vulnerability can equally refer to one's ... inability to protect one's self under the circumstances." Applying the enhancement based on particularized class characteristics such as these is consistent with our precedent. Although we have said that the sentencing court should focus "on the victim's individual characteristics" in applying this enhancement, "above and beyond mere membership in a large class," see United States v. Feldman, 83 F.3d 9, 15 (1st Cir. 1996), we have also made clear that "this is in no way a fixed rule." United States v. Gill, 99 F.3d 484, 486-87 (1st Cir. 1996). Indeed, "[i]n some cases the inference to be drawn from the class characteristics may be so powerful that there can be little doubt about unusual vulnerability of class members within the meaning of section 3A1.1." Id. at 487 (citing United States v. Echevarria, 33 F.3d 175, 180-81 (2d Cir. 1994) (upholding enhancement as applied to unlicensed doctor based on group determination of vulnerability of medical patients), superseded by regulation on other grounds as stated in United States v. Hussey, 254 F.3d 428, 433 n.3 (2d Cir. 2001), and

United States v. Bachynsky, 949 F.2d 722, 735 (5th Cir. 1991) (same, as applied to physician making false diagnoses)). Thus, reviewing de novo, we conclude that the District Court did not err in interpreting the Guideline.

Nor do we find any clear error in the District Court's application of the Guideline to Chin. Indeed, we have upheld the application of the enhancement in similar circumstances: in Stella, we held that victims' "illnesses" can distinguish them from *28 members of the "general public" for purposes of the vulnerable-victim enhancement, insofar as their need for medication vitiates their ability to "help themselves" or "to detect or prevent against the [relevant harm]." 591 F.3d at 30 (quoting the sentencing court's findings). Cf. Bradley, 644 F.3d at 1289 (concluding that victims "were vulnerable due to their medical condition -- AIDS and hemophilia"); Milstein, 401 F.3d at 74 (concluding that "women with fertility problems and ... Parkinson's disease patients" constituted vulnerable victims). Here, the patients receiving MPA injections into their spine were in a similarly "unusually vulnerable" position, see U.S.S.G. § 3A1.1 cmt. n.2, by virtue of their physical condition and the circumstances of the procedure. Thus, we discern no error in the District Court's application of the enhancement.

B.

10 Chin also argues that the record fails to show that Chin knew or should have known of the victims' unusual vulnerability. In support of this contention, Chin appears to argue that the "knew or should have known" requirement in § 3A1.1(b) per se precludes the enhancement's application to him because he was merely a supplier of medical products to health care facilities and thus stood at a remove from the patients who were harmed by the contaminated drugs that NECC compounded. But, insofar as Chin is pressing this contention is making a legal argument about the proper construction of the Guideline, such that our review is de novo, see Chin I, 965 F.3d at 50, we must reject the contention.

Nothing in the text of the provision supports the per se exclusion of medical suppliers. Thus, nothing in the text bars the application of the enhancement to a medical supplier who knew or should have known that he was distributing unsafe drugs that would be used by vulnerable patients. See Bradley, 644 F.3d at 1289; Milstein, 401 F.3d at 74; see also United States v. Moran, 778 F.3d 942, 952–53, 978–79 (11th Cir. 2015) (applying "vulnerable victim" enhancement to defendant CEO of medical facility who was not directly involved in patient care). Rather, the text merely provides that the enhancement applies to an offender who "knew or should have known that a victim of the offense was a vulnerable victim." U.S.S.G. § 3A1.1(b).

11 Chin next argues that the enhancement may not be applied to him by referencing the application note to it. The application note explains that "[t]he adjustment would apply, for example, in a fraud case in which the defendant marketed an ineffective cancer cure." U.S.S.G. § 3A1.1 cmt. n.2. Chin contends that, in addition to the fact that he was not himself "a health care provider," he also is not analogous to a fraudster who marketed an ineffective cancer cure. And that is so, Chin contends, because NECC had previously sold lots of MPA without incident, and the record fails to show by a preponderance of the evidence that he "kn[e]w that any of the drugs he compounded were contaminated." He thus appears to be contending that, absent a showing by a preponderance of the evidence of his intent to defraud the victims, there can be no finding that Chin knew or should have known that the victims were vulnerable.

But, even if we understand this argument to be a contention about the proper way to construe the Guideline, such that our review is de novo rather than for clear error, Chin I, 965 F.3d at 50, we reject it. The text of the Guideline provides no basis for concluding that the "knew or should have known" standard may be satisfied only by a finding that the defendant intended to defraud his victims. Nor does *29 the application note, in giving an example of how the Guideline could be satisfied, purport to suggest that there is a requirement to prove an intent to defraud. Instead, the Guideline merely requires that it be shown by a preponderance of the evidence that, in engaging in the conduct relevant to his offense, Chin knew or should have known that vulnerable patients would be using the unsafe drugs he produced at NECC.

12 Finally, Chin appears to be arguing that, even if the Guideline may be applied to a medical supplier who was not defrauding patients, the District Court clearly erred in finding that he "knew or should have known" that the victims were vulnerable. Here, his assertion is that there is an absence of record evidence of his individualized knowledge of both who the

end users of NECC drugs would be and that the drugs that NECC shipped were contaminated. But, we cannot agree.

The District Court supportably found that "[e]vidence introduced at trial, including internal NECC emails, brought home the certainty that Chin and other of the coconspirators were fully aware of the risks involved in the distribution of defective drugs." Chin's resume advertised his "[k]nowledge of USP[-]797," and the first sentence of the introduction to USP-797 reads, "[t]he objective of this chapter is to describe conditions and practices to prevent harm, including death, to patients that could result from ... microbial contamination ...." And, Chin himself concedes in his brief to us that he "was aware that there were deficiencies in testing and the condition of the compounding lab and that all the USP-797 protocols were not being strictly adhered to." Indeed, evidence was presented at trial that tended to show that Chin was aware of the particularly grave risks associated with injecting contaminated medication into a patient's spinal fluid, as opposed to other routes of drug administration.[6] Thus, the District Court did not clearly err in concluding that Chin knew or should have known that downstream recipients of MPA from NECC were particularly vulnerable.

IV.

For the foregoing reasons, we affirm Chin's sentence.

All Citations

41 F.4th 16

Footnotes

1 Chin does also point to the Eleventh Circuit's decision in United States v. Mateos, 623 F.3d 1350 (11th Cir. 2010), which applied the enhancement on the ground that the sentencing court had "f[ound] that a trained nurse, such as [the defendant] ..., would be well aware" of the risks associated with her criminal activity, Id. at 1371. But, as the government observes, this standard more closely resembles a should-have-known standard than an actual awareness standard. Moreover, insofar as the Eleventh Circuit meant to embrace an actual-awareness-of-risk requirement in Mateos, see Id. ("the Guidelines provision focuses on the defendant's disregard of risk"), it, too, made no attempt to explain how such a requirement could be reconciled with the Guideline's text.

2 Chin draws our attention to a case in which this Court relied on the definition of "reckless" from the involuntary manslaughter Guideline when interpreting a third Guideline's use of that word. See United States v. Carrero-Hernández, 643 F.3d 344, 348–50 (1st Cir. 2011). There, this Court was tasked with interpreting a Guideline that provided for an increased offense level "if the defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer," U.S.S.G. § 3C1.2, whose application note expressly imported the definition of "reckless" from the Guideline on involuntary manslaughter, Id. cmt. n.2; see also Carrero-Hernández, 643 F.3d at 348. But, even setting aside the fact that in that case -- unlike this one -- the Guideline in question expressly incorporated the definition of "reckless" set out in the application note to § 2A1.4, Carrero-Hernández illustrates why the text of Chin's enhancement compels a different construction of the word "reckless." The provision at issue in Carrero-Hernández, like the involuntary manslaughter Guideline, used "reckless[]" to describe how an offender engaged in risky conduct. See U.S.S.G. § 3C1.2 ("If the defendant recklessly created a substantial risk ..."); Id. § 2A1.4 ("If the offense involved reckless conduct ..."). By contrast, as we have explained, "reckless" in § 2B1.1(b)(16)(A) describes expressly a "risk," not the way an offender conducted himself with respect to that risk. See Id. § 2B1.1(b)(16)(A).

3 Farmer was a civil Bivens action in which the Court held that "deliberate indifference," for the purposes of defining a violation of the Eighth Amendment, see Helling v. McKinney, 509 U.S. 25, 32, 113 S.Ct. 2475, 125

L.Ed.2d 22 (1993), required actual knowledge and disregard of a risk, rather than merely an objective risk. 511 U.S. at 837, 839–40, 114 S.Ct. 1970. The Court explained in so holding, however, that it was "adopt[ing]" what it called "subjective recklessness as used in the criminal law." Id. at 839–40, 114 S.Ct. 1970.

4 U.S.S.G. § 3A1.1(b)(2) provides, "[I]f (A) subdivision (1) applies; and (B) the offense involved a large number of vulnerable victims, increase the offense level determined under subdivision (1) by 2 additional levels." The District Court applied this enhancement at Chin's resentencing. Chin does not argue that the District Court erred in applying the additional enhancement in § 3A1.1(b)(2) if the District Court properly applied the enhancement in § 3A1.1(b)(1).

5 An NECC compounding technician testified that Chin, when training him in clean-room sanitation practices, "stressed that with the injectable drugs [there] was even more a need to be vigilant in terms of cleanliness because you're bypassing the immune system, basically injecting it right into the cerebral spinal fluid, whatever it is, and it's going to go straight up into their brain." Additionally, the second sentence of the introduction to USP-797 explains that "[c]ontaminated [compounded sterile preparations] are potentially most hazardous to patients when administered into body cavities, central nervous and vascular systems, eyes, and joints and when used as baths for live organs and tissues."

End of Document

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL ACTION NO. 14-10363-RGS

UNITED STATES OF AMERICA

v.

GLENN CHIN

MEMORANDUM AND ORDER
ON FORFEITURE OF PROPERTY

February 23, 2018

STEARNS, D.J.

Following Glenn Chin's conviction for mail-fraud racketeering, conspiracy, mail fraud, and violations of the federal Food, Drug, and Cosmetic Act (FDCA), the government sought the forfeiture of the entire $611,774 that Chin was paid in salary as a pharmacist at New England Compounding Center (NECC) between 2006 and October 2012, when NECC ceased doing business. *See* Dkt #1391 (Motion for Order of Forfeiture). Chin filed an opposition, *see* Dkt #1423, and the court heard oral argument on February 15, 2018.[1] For the reasons to be stated, the government's motion will be allowed in part.

[1] In that same hearing, the court heard argument on the government's Motion for an Order of Restitution. *See* Dkt # 1400. The question of restitution will be the subject of a separate Order.

APPENDIX B

The government is correct that a forfeiture in this case is virtually mandated by 18 U.S.C. § 1963. *See Alexander v. United States*, 509 U.S. 544, 562 (1993) (noting that "a RICO conviction subjects the violator not only to traditional, though stringent, criminal fines and prison terms, but also mandatory forfeiture under § 1963."). The court also agrees that Chin's salary, paid for his work as NECC's Supervisory Pharmacist during the period of time in which NECC was operating as a criminal enterprise, is forfeitable. *See United States v. DeFries*, 129 F.3d 1293, 1313 (D.C. Cir. 1997) (holding that salaries received by former union officials after their tampering with union elections were subject to forfeiture because "but for the elections, which the district court found to be tainted by appellants' racketeering activity, they would not have received their salaries."). Here, but for Chin's participation in conduct "tainted by . . . racketeering activity," he would not have earned the salary that he did from NECC. *See United States v. Angiulo*, 897 F.2d 1169, 1213 (1st Cir. 1990) (endorsing the "but for" test).

Where the court parts company with the government is over the proposition that NECC operated as a criminal enterprise from its inception, thus exposing the entirety of Chin's earnings from 2006 through 2012 (the statute of limitations period) to forfeiture. As I observed at Chin's sentencing (and at the sentencing of codefendant Barry Cadden), the weight of the

evidence, as corroborated by an analysis of the jury's verdict, is that NECC originated as a legitimate business, but under mounting pressure to maximize profits, degenerated into a criminal enterprise in March of 2010, and operated as such until its collapse in October of 2012.[2] Consequently, only the salary that Chin received during that period of time falls within the precincts of forfeitable gains.

According to the government's calculations, as corroborated by Chin's tax returns, the total of Chin's potential salary exposure can be calculated as follows. Chin earned $171,837 at NECC in 2011, and $163,805 during the ten months in 2012 during which NECC remained viable. Chin was paid $165,531 by NECC in 2010 (at a monthly salary of $13,794.25). Prorating 2010 over ten months from March to December yields $137,942.50. Combining the three figures ($137,942.50 + $171,837 + $163,805) yields a total of $ 473,584.50.

Chin advances three arguments in support of a lesser amount. The first, and most radical, is the contention that he should only forfeit the

[2] As I noted in a separate order, *see* Dkt # 1433, correcting a dating miscue on my part at Chin's sentencing hearing, "[a] RICO enterprise is defined by a minimum of two related predicate acts occurring within ten years of one another. Here, in Chin's case, as in the Cadden trial, the earliest predicate act found by the jury is the fraudulent mailing of March 25, 2010 (Predicate Act 69). All parties agree that the enterprise [thereafter] endured until the shuttering of NECC in October of 2012."

portion of his salary associated with the specific shipments of drugs the jury found to have been part of the mail fraud scheme. *See* Chin Opp'n, Dkt #1423 at 5 (arguing that "a reasonable method" of calculating forfeiture would be "to determine what percentage of NECC's gross revenues" during the racketeering period "was comprised of products that were tainted by the fraud proved at trial, and find the forfeiture amount to be the corresponding percentage of Mr. Chin's compensation for that period.").

There are legal, as well as conceptual difficulties, with this argument. As the government points out, 18 U.S.C. § 1963(a)(3) provides for the forfeiture of "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity." In Chin's case, the entire salary he earned at NECC during the relevant time period constitutes "proceeds . . . obtained, directly or *indirectly*" from his participation in the racketeering enterprise. Moreover, as a practical matter, there is no realistic means of calculating the actual value added by Chin to any specific batch of drugs shipped by NECC.

Chin's second argument is that his gross salary is an improper starting point for any calculation of a forfeitable amount because it includes payments for federal and state taxes, as well as other benefits, that were deducted from his paycheck. The government counters (accurately) that

First Circuit precedent generally holds that forfeitable proceeds in a RICO context are to be measured in gross, rather than net, terms. *See, e.g., United States v. Hurley*, 63 F.3d 1, 21 (1st Cir. 1995) (rejecting defendant's argument that "proceeds" means "net proceeds" or "net profits" under § 1963 (a)(3)). This precedent is consistent with Congress's intention that RICO's forfeiture provisions be "broadly interpreted." *Id.*

The "gross proceeds" approach is further supported by the obvious difficulty involved in calculating "business expenses" in the mine run of RICO cases, in which the enterprise is constituted from the outset as an illegal entity for which, deliberately, no accurate records are kept in order to conceal the underlying activity from law enforcement. NECC, however, is an exception. The company was not initially constituted as an illegal enterprise, and it kept detailed and accurate records during its corporate existence. Consequently, it is no difficult matter to segregate the portion of Chin's salary that was deducted for federal and state taxes, health benefits and retirement accounts. Not surprisingly, there is support in circuit case law for using a net approach where the relevant figures are readily ascertainable. *See United States v. Genova*, 333 F.3d 750, 761 (7th Cir. 2003).

A recent Supreme Court recent ruling, *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), offers important guidance. *Honeycutt* stands for the

proposition that a RICO forfeiture is to be "limited to property the defendant himself actually acquired as the result of the crime." *Id.* at 1635. As the government points out, *Honeycutt* makes clear that property "received" can include benefits obtained "indirectly" from a RICO enterprise. *See* Gov't's Reply, Dkt # 1432 at 5 ("For example, if a criminal participated in a fraud scheme and the victim paid the criminal's mortgage or car loan for him, the value of that payment would be ill-gotten gains that the criminal obtained indirectly."). Consistent with this reasoning, the portions of Chin's salary that were deducted to cover health care benefit payments and retirement account contributions constitute property "obtained" indirectly by Chin because he was their ultimate beneficiary.

The money deducted from Chin's salary as federal income tax payments do not, however, fit within this analysis. The counter-argument, made by government counsel at the forfeiture hearing, that the federal tax deductions were paid for Chin's "benefit" (presumably because in a larger sense he and his family were recipients of government services), is not one that most taxpayers, however zealous in their filings, would find compelling. While there may be a flush of civic pride in paying taxes, it is difficult to see how money paid into the U.S. Treasury can be characterized as proceeds "obtained" by a defendant. There is also a double counting issue arising from

the fact that forfeited proceeds escheat to the Treasury, meaning that Chin is being asked, in effect, to pay his taxes twice.[3] These two considerations lead me to conclude that Chin's federal income tax payments should be deducted from the forfeiture figure.[4]

According to Chin's tax returns, his tax bracket varied between 25% and 28% during the tax years in question. The court will use the mean of 26.5% as an appropriate estimate for Chin's effective tax rate during this period. This results in an adjusted, post-federal tax figure of $473,584.50 minus $125,499.90[5], or $348,084.60.

Chin's third argument is constitutional. He contends that the forfeiture of his entire earnings during the relevant period would violate the

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[3] I take the government at its word that the Department of Justice, to the extent that it has the authority to do so, intends to pay over any forfeiture proceeds to patients and families who suffered from the contaminated drugs (essentially converting the forfeiture into a restitution payment). While commendable, this does not address the double counting issue as all Treasury monies are fungible.

[4] This is not, however, the case with respect to state and local taxes, as the governmental entities involved are not asserting an interest in this case, and will not receive any of the forfeited funds.

[5] The specific calculations are as follows:

$137,942.50 (2010 salary, March-Dec) x .265 = $36,554.76
$171,837 (2011 salary) x .265 = $45,536.81
$163,805 (2012 salary, until Oct. 31) x .265 = $43,408.33
Total: $125,499.90

Excessive Fines Clause of the Eighth Amendment.[6] "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). In evaluating whether a financial penalty is so oppressive as to violate the Eighth Amendment, courts begin by applying a three-factor test: "(1) whether the defendant falls into the class of persons at whom the criminal statute was principally directed; (2) other penalties authorized by the legislature (or the Sentencing Commission); and (3) the harm caused by the defendant." *United States v. Heldeman*, 402 F.3d 220, 223 (1st Cir. 2005).

The three-factor test weighs heavily in favor of the government. With respect to the first factor, Chin argues that he is "far from fitting the archetypal profile of an organized crime figure or a calculating predator who chooses to enter into a conspiracy for the very purpose of perpetuating fraud, who are the classes of persons at whom the [RICO and RICO forfeiture] statutes were principally directed." Chin Opp'n, Dkt #1423 at 10. While in the popular imagination, RICO conjures up images of mobsters engaged in

[6] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

loansharking, extortion, and illegal gambling, Congress intended "that RICO (although a criminal statute) be broadly interpreted." *Hurley*, 63 F.3d at 21. The best evidence of this is the inclusion of mail fraud, which is hardly one of the usual tools of the gangster trade, as one of the predicate acts on which a RICO enterprise can be based.

As for the second factor, Chin cites the Probation Office's Presentence Report (PSR) and its recommendation of a "fine range" of $20,000 to $200,000. *See* PSR ¶ 167. Because that recommended range is significantly lower than the forfeiture amount that the government seeks, Chin argues that the proposed forfeiture is "out of line" with the financial penalty endorsed by the U.S. Sentencing Commission. While this argument has some value in considering whether a hardship reduction in the forfeiture amount is appropriate, for purposes of the second *Heldeman* factor, it is not persuasive. The statutorily authorized maximum fine is $250,000 on each of the 41 mail fraud counts alone for which Chin was convicted. In other words, Congress has authorized a total fine far in excess of what the government is seeking through forfeiture.[7]

[7] The government reads Chin's argument as suggesting that the forfeiture should be keyed to the loss amount calculated by the court at sentencing pursuant to USSG § 2B1.1. The government points out that the court rejected a similar argument in the Cadden proceedings, because the argument "confuses loss for purposes of the sentencing guidelines, which

Finally, Chin argues that, because the court has found that the "victims" of NECC for loss calculation purposes under the Sentencing Guidelines were the clinics and hospitals that relied on fraudulent representations in purchasing NECC's drugs, the "harm" caused by Chin's conduct should be evaluated by the same measure. I am not persuaded. While the hospitals and clinics were the immediate victims of the mail fraud, the harm caused by the fraudulent scheme impacted the thousands of patients who were injected with the contaminated drugs (or feared as much), as well as their families and loved ones. Evidence introduced at trial, including internal NECC emails, brought home the certainty that Chin and other of the co-conspirators were fully aware of the risks involved in the distribution of defective drugs. In sum, the *Heldeman* factors militate in favor of the government.

Nonetheless, as the First Circuit has made clear, "the three-part test for gross disproportionality described in *Heldeman* . . . is not the end of the inquiry under the Excessive Fines Clause." *United States v. Levesque*, 546 F.3d 78, 83 (1st Cir. 2008). In addition to the proportionality test, "a court

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focuses on loss to victims, with criminal forfeiture, which is aimed at a defendant's ill-begotten gains from criminal activity." *See United States v. Barry Cadden*, 14-cr-10363-1-RGS, Mem. and Order on Forfeiture of Property, Dkt #1216 at 5 n.8 (Sept. 27, 2017). That is true here as well.

should also consider whether forfeiture would deprive the defendant of his or her livelihood." *Id.* The source of this concern derives from the singular and ancient history of the Eighth Amendment. *Id.; see also United States v. Jose*, 499 F.3d 105, 113 (1st Cir. 2007).

The text of the Excessive Fines Clause was taken, almost verbatim, from the Virginia Declaration of Rights of 1776.[8] That text, in turn, had been copied from the English Bill of Rights promulgated in 1689 during the Glorious Revolution. Many of the drafters of the English Bill of Rights had themselves been victims of arbitrary and excessive punishment during the reign of the dethroned James II, with some having had "to remain in prison because they could not pay the huge monetary penalties that had been assessed." *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 267 (1989).

Among the complaints leveled by the Revolutionaries against the King's Bench was that it had "subvert[ed] the requirement, under Magna

[8] Earlier efforts in the colonies to codify individual rights and liberties and to establish roadmaps for governance had also included a prohibition on excessive fines. For instance, the 1682 Frame of Government of Pennsylvania provided "[t]hat all fines shall be moderate, and saving men's contenements, merchandise, or wainage." *See* Frame of Government of Pennsylvania, May 5, 1682, *available* from The Avalon Project, Yale Law School, http://avalon.law.yale.edu/17th_century/pa04.asp

[Carta], that 'amercements (the medieval predecessors of fines) should be proportioned to the offense and that they should not deprive a wrongdoer of his livelihood.'" *Levesque*, 546 F.3d at 84 (quoting *Bajakajian*, 524 U.S. at 335).[9] Chapter 14 of Magna Carta had provided that:

> A Freeman shall not be amerced for a small Fault, but after the Manner of the Fault. And for a great Fault, after the Greatness thereof, saving to him his Contenement. (2.) And a Merchant likewise, saving to him his Merchandize. (3.) And any others Villain than ours shall be likewise amerced, saving his *Wainage*, if he fall into our Mercy.

A man's contenement was "Freehold land held by a feudal tenant," in particular "land used to support the tenant." Black's Law Dictionary (10th ed.); *see also* Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233, 1260 n.154 (1987) (citing historical sources defining Contenement as "that which is necessary for his support, according to his Condition or State of Life; so that tho' he might be amerced, yet something must be left for his Support."). The wainage, or wainagium, generally referred to the "instruments of

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[9] During the time that followed the Norman Conquest, a new system emerged whereby "individuals who had engaged in conduct offensive to the Crown placed themselves 'in the king's mercy' so as not to have to satisfy all the monetary claims against them," and "[i]n order to receive clemency, these individuals were required to pay an 'amercement' to the crown, its representative, or a feudal lord." *Browning-Ferris*, 492 U.S. at 287-88 (O'Connor, J., concurring in part and dissenting in part).

husbandry," or "the plow, team, and other implements used by a person to cultivate the soil," Black's Law Dictionary (10th ed.), the feudal analog to what we might refer to today as a person's livelihood.[10] These safeguards were a significant improvement on more ancient notions of punishment that provided for directly proportional retaliation against the accused depending on the severity of the crime. *See* Leviticus 24:19-20 (King James Version) ("And if a man cause a blemish in his neighbour; as he hath done, so shall it be done to him; Breach for breach, eye for eye, tooth for tooth: as he hath caused a blemish in a man, so shall it be done to him again.")

As the Supreme Court has noted, "[a]lthough the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection — including the right to be free from excessive punishments." *Solem v. Helm*, 463 U.S. 277, 286 (1983). The Eighth Amendment thus incorporated

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[10] Lord Coke described the origins of the wainagium as deriving from the Saxon word "wagna," which was a cart or wagon used by an indentured servant to carry manure from the lord's manor to his fields. *See* 2 E. Coke, The Institutes of the Laws of England *28 (noting that in rendering his service to the lord, the villain used a cart (or wain) to carry the dung "out of the seite of the manor unto the great lord's land, and casting it upon the same, and the like; and it was great reason to save his wainage, for otherwise the miserable creature was to carry it on his back.").

into American domestic law the English common-law principle that amercements or fines are not to be livelihood-shattering.[11]

Against this background, Chin argues that a forfeiture order "of any substantial sum" will deprive him of his future ability to earn a living, "especially if 'earning a living' is interpreted to mean contributing in a meaningful way to the support of his two children who will still be minors wholly dependent on their parents for financial support when Mr. Chin is released from prison." Chin Opp'n, Dkt #1423 at 13. Having surrendered his pharmacy license in the fall of 2012, and with no prospect of it ever being reinstated, Chin argues that he has "no reasonable expectation that he will ever again earn a professional-level income." *Id.* In addition to his young children, Chin notes that his wife, Kathy Chin, who is scheduled to go on trial for her alleged role in the NECC conspiracy later this year, has no realistic

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[11] Magna Carta also established a mechanism for challenging an amercement as excessive, in the form of a writ of *de moderata misericordia capienda* ("for taking a moderate amercement"), which "order[ed] a bailiff to take a moderate penalty from a party had been excessively penalized in a court not of record." Black's Law Dictionary (10th ed.) Early English practice under the writ confirms that proportionality of the monetary penalty to the crime committed and the question of whether the amerced party's livelihood would be destroyed were analytically distinct questions (as the First Circuit recognized in *Levesque*). *See* Massey at 1259-60 ("If the amercement was not tainted by such disproportionality, but was still so large so as to infringe upon a person's means of earning a living or maintaining himself and his family, *misericordia* would still lie.").

means of making up his contribution to his family's finances. Chin also points to the fact that the government is seeking $82 million in restitution, suggesting that the court take that into account in determining the appropriate forfeiture amount.[12] Finally, Chin contends that "he has no substantial assets with which to satisfy any forfeiture order, and no reasonable prospect of accumulating any such assets." *Id.*

As the First Circuit observed in *Levesque*, a present inability to pay is not dispositive on the question of whether a forfeiture is unconstitutional:

> Although we do not define the contours of this inquiry, we note that a defendant's inability to satisfy a forfeiture at the time of conviction, in and of itself, is not at all sufficient to render a forfeiture unconstitutional, nor is it even the correct inquiry. Indeed, the purpose of imposing a forfeiture as a money judgment is to "permit[] the government to collect on the forfeiture order in the same way that a successful plaintiff collects a money judgment from a civil defendant. Thus, even if the defendant does not have sufficient funds to cover the forfeiture at the time of the conviction, the government may seize future assets to satisfy the order.

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[12] *But see United States v. Mei Juan Zhang*, 789 F.3d 214, 218 (1st Cir. 2015) (joining a unanimous holding among the federal circuit courts that restitution and forfeiture are not impermissible double penalties and that a district court is "without authority to offset the restitution . . . owed by the amount seized [in forfeiture]."). As in the Cadden case, I read the relevant precedents and the respective histories of both the RICO forfeiture statute and the Mandatory Victim Restitution Act (MVRA), 18 U.S.C. § 3663A(a)(1), as requiring that a court evaluate forfeiture and restitution separately.

546 F.3d at 85 (internal citation omitted). At oral argument, the government doubled down on this dicta, noting that Chin could come into funds later, or could possibly "win the lottery." However, while accepting the principle that current inability to pay *vel non* (leaving aside the random chances of a win in a mega-lottery[13]) should not dictate the constitutionality of a forfeiture order under the Eighth Amendment, it does not lose all relevance in Chin's case. The court is sensitive to the fact that Chin has no educational or vocational training outside of the pharmacy trade (which is now foreclosed to him) and that his two young children will bear a substantial part of the burden imposed by his imprisonment and impoverishment.[14]

The government makes a salient point in rebuttal, noting that the Chins (the defendant and his wife) have spent a significant sum of money (nearly $700,000) over the past sixteen months, including the purchase of a new motor vehicle, paying off their mortgage, investing in businesses that

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[13] *Cf. People v. St. Martin*, 1 Cal.3d 524, 533 (1970) ("Our courts are not gambling halls but forums for the discovery of truth.").

[14] This observation is not meant in any sense to detract from the far more weighty burden imposed on the victims of NECC's malfeasances. The court also fully understands that it is unlikely that many, if any, of these victims will have any sympathy for Mr. Chin's circumstances. The court, however, is bound to treat Mr. Chin according to the law and with the recognition that, however careless his acts, he would never have deliberately set out to inflict the harms to which they so tragically contributed.

Kathy Chin has launched to generate a source of income for the family, and on gym memberships, piano classes for the children, travel, groceries, clothing, Florida time shares, and support for extended family members in China. While the inference is that the Chins were engaged in a deliberate effort to spend down their assets (over and above payments for family necessities) to avoid paying a fine or forfeiture, the court notes that they there were under no legal obligation to preserve their assets to satisfy a future judgment. More troubling is the suggestion, now being examined by the Magistrate Judge, that Mr. Chin may have misrepresented his net worth to avoid contributing to the payment for the services of the lawyers appointed by the court to represent him.

Balancing this latter concern against the Eighth Amendment command that that any forfeiture not destroy the future ability of a defendant to earn a living in support of his family, the constitutional imperative necessarily takes precedence.[15] On balance, taking into account Chin's current financial situation[16], his bleak prospects of ever earning a

[15] It is worth noting that a forfeiture judgment is not, as a rule, dischargeable in bankruptcy, but will follow Chin after he is released from prison.

[16] As best I can determine from the verified statement filed by Chin with the court, he and his wife have a current net worth of approximately $423,000 with monthly expenses of roughly $12,000.

professional-level income again, and his family support obligations, the court believes that a forfeiture of $175,000, a sum towards the upper end of the Sentencing Guidelines fine range, is sufficiently punitive, while stopping short of depriving Chin and his family of "that which is necessary for his support, according to his Condition or State of Life."[17]

ORDER

For the foregoing reasons, the court ORDERS Glenn Chin to forfeit assets in the amount $175,000. The government is directed to file, within 10 days of this order, a revised proposed order of forfeiture consistent with this decision.

SO ORDERED.

/s/ Richard G. Stearns

UNITED STATES DISTRICT JUDGE

[17] The court would have been inclined to impose a lesser sum, but for the efforts made by Mr. Chin to rearrange his assets as he faced trial. In this regard, the court notes that some of the acquisitions (the car, home equity, and the time shares, as examples), continue to form part of the family's net worth.

UNITED STATES DISTRICT COURT

UNITED STATES OF AMERICA
v.
Glenn A. Chin

Date of Original Judgment: 7/27/2021
(Or Date of Last Amended Judgment)

Reason for Amendment:

- ☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- ☑ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
- ☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: 1:14CR10363-2
USM Number: 96354-038
James L. Sultan
Defendant's Attorney

- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Direct Motion to District Court Pursuant ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
- ☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

- ☐ pleaded guilty to count(s) _____
- ☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.
- ☑ was found guilty on count(s) 1, 2, 4-31, 36, 38, 44-56, 57-84, 89, 90, 93, 94 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1962(c)	Racketeering	10/31/2012	1
18 U.S.C. § 1962(d)	Racketeering Conspiracy	10/31/2012	2
	(continued)		

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) _____
- ☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

11/30/2021
Date of Imposition of Judgment

/s/ Richard G. Stearns
Signature of Judge
Honorable Richard G. Stearns
Name and Title of Judge

11/30/2021
Date

DEFENDANT: Glenn A. Chin
CASE NUMBER: 1:14CR10363-2

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1341	Mail Fraud	9/27/2012	4-31, 36, 38, 44-56
21 U.S.C. § 351(a)(2)(A)	Introduction of Misbranded Drugs into Interstate Commerce with Intent to Defraud and Mislead - Insanitary Conditions	9/27/2012	57-84, 89, 90
21 U.S.C. § 331(a), & 21 U.S.C. § 333(a)(1)			
21 U.S.C. § 352(a), 21 U.S.C. § 331(a), & 21 U.S.C. § 333(a)(2)	Introduction of Misbranded Drugs into Interstate Commerce with Intent to Defraud and Mislead - False and Misleading Labeling	6/8/2012	93 & 94

DEFENDANT: Glenn A. Chin
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IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

126 months
This terms consists of terms of 126 months on counts 1, 2, 4-31, 36, 38, and 44-56, terms of 12 months on counts 56-84, 89, and 90, and terms of 36 months on counts 93 and 94, to be served concurrently

☐ The court makes the following recommendations to the Bureau of Prisons:

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Glenn A. Chin
CASE NUMBER: 1:14CR10363-2

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

2 Years

This term consists of 2 years on counts 1, 2, 4-31, 36, 38, and 44-56 and terms of 1 year of counts 57-84, 89, 90, 93, and 94 such terms to run concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Glenn A. Chin
CASE NUMBER: 1:14CR10363-2

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

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CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 5,450.00	$	$	$ 82,025,647.68

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
Patient-Victims listed in the TAB Report		$80,138,911.00	
Elkhart General Hospital		$565,074.42	
South Bend Clinic		$218,384.82	
First Recovery Group, LLC		$1,103,277.44	
TOTALS	$ 0.00	$ 82,025,647.68	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☑ Lump sum payment of $ 6,450.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

The individual patient-victims are to be paid in full before any restitution is paid to the clinics and insurers.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☑ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

Barry Cadden, 14-10363-1, $82,025,647.68 (Total & Joint and Several Amount)

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:

$ 473,584

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

18 U.S.C. §1963 (a) (3)

Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law— (3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

U.S.S.G. §2B1.1 (b) (16) (A)

(b) Specific Offense Characteristics. (16) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury. . . increase by 2 levels.

APPENDIX C