No.-

In the Supreme Court of the United States

BARRY J. CADDEN,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR WRIT OF CERTIORARI OF BARRY J. CADDEN TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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January 11, 2023

QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court clearly err in applying a four-point "vulnerable victim" enhancement under U.S.S.G. § 3A1.1(b) to defendant's sentence, absent a showing that the victims were "unusually vulnerable"? More generally, does this criminal sentencing enhancement require a showing that the victims were "unusually vulnerable" in order to apply?

2. Did the District Court clearly err in applying a two-point enhancement for "conscious or reckless risk of death or serious bodily injury" under U.S.S.G. § 2B1.16(b)(16), by applying the objective test for "reckless" established in the Second Circuit in *United States v. Lucien*? More generally, does this criminal sentencing enhancement require the courts to use an objective or subjective concept of "reckless"?

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- United States v. Barry J. Cadden, No. 14-cr-10363-2-RGS. U.S. District Court for the District of Massachusetts. Judgment entered June 26, 2017.

- United States v. Barry J. Cadden, Nos. 17-1694, 17-1712, 17-2062. U.S. Court of Appeals for the First Circuit. Judgment remanding case entered July 9, 2020.

- United States v. Barry J. Cadden, No. 14-cr-10363-2-RGS. U.S. District Court for the District of Massachusetts. Amended Judgment after remand entered November 30, 2021.

- United States v. Barry J. Cadden, Nos. 21-1602, 21-2003. U.S. Court of Appeals for the First Circuit. Judgment affirming sentence entered October 13, 2022.

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United States v. Barry Cadden, 51 F.4th 32 (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 October 13, 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.

GUIDELINES PROVISIONS INVOLVED

U.S.S.G. § 3A1.1(b)

> (b) (1) If the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by 2 levels.
> (2) If (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.

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 Barry J. Cadden ["Cadden"] was charged in an indictment with thirteen others for a variety of offenses in an indictment returned in the United States District Court for the District of Massachusetts on December 16, 2014. The charges stemmed from the national outbreak of fungal meningitis in 2012 that was eventually traced to an injectable steroid, methylprednisolone acetate ["MPA"], compounded at the New England Compounding Center ["NECC"] in Framingham, Massachusetts. Numerous recipients of the MPA compounded at NECC were seriously injured, with some tragically losing their lives. Cadden was the founder, part-owner, and president of NECC at the time that the company manufactured and distributed the MPA.

Cadden was tried on ninety-seven separate counts and, following a ten-week trial, was convicted on fifty-seven counts under RICO, RICO conspiracy, and multiple counts of mail fraud. Cadden was acquitted of the most serious charges, including all twenty-five second-degree murder racketeering charges, conspiracy to defraud the United States charges, and all but three of the forty-one counts under the Food Drug and Cosmetic Act. The district court sentenced Cadden to 108 months on June 26, 2017. App. B-001.

II. FIRST APPEAL

The government appealed Cadden's sentence, while Cadden cross-appealed his convictions. On July 9, 2020, the First Circuit upheld Cadden's convictions, but

overturned and remanded Cadden's sentence, holding that the district court had not properly analyzed enhancements under § 2B1.1(b)(16) and § 3A1.1(b) of the United States Sentencing Guidelines ["Guidelines"]. *United States v. Cadden*, 965 F.3d 1 (1st Cir. 2020). App. A-001, C-001, C-003.

III. RESENTENCING

The district court resentenced Cadden on July 7, 2021. Cadden argued that the district court correctly declined to apply the two enhancements under U.S.S.G. § 2B1.1(b)(16) and § 3A1.1(b). During resentencing, the district court first turned to the enhancement under U.S.S.G. § 2B1.1(b)(16), specifically, the "conscious and reckless disregard of death or serious bodily injury" enhancement. The district court noted that the "conscious" portion of the enhancement clearly did not apply and, instead, focused on the "reckless" portion of the enhancement. The district court elected to follow the Second Circuit's interpretation of the enhancement as articulated in *United States v. Lucien*, 347 F.3d 45 (2nd Cir. 2003), which established an objective standard for "reckless" under the enhancement.

Turning next to U.S.S.G. § 3A1.1(b), or the "vulnerable victim" enhancement, the district court offered briefly that the enhancement applied because the recipients of the medical injections were "vulnerable" based on the location of their injections. Ultimately, the district court applied the two sentencing enhancements, raising Cadden's sentence from 108 months to 174 months. App. B-007.

IV. SECOND APPEAL

Cadden appealed the amended sentence on the grounds that the district court incorrectly applied the two enhancements to his sentence under U.S.S.G. § 2B1.1(b)(16) and § 3A1.1(b). Specifically, the appeal focused on two primary issues for the sentencing enhancements. First, the district court used the incorrect for "reckless" under § 2B1.1(b)(16) and second, the district court failed to apply the "unusually" vulnerable standard for § 3A1.1(b). The First Circuit issued the decision on Cadden's second appeal on October 13, 2022, affirming Cadden's sentence. *United States v. Barry Cadden*, 51 F.4th 32 (1st Cir. 2022). App. A-035. The Court reviewed the sentence for plain error, and held that the district court's reasoning for applying the two enhancements was not in plain error. *Id*. at 39.

REASONINGS FOR GRANTING THE PETITION

I. THERE IS A SPLIT IN THE CIRCUITS OVER THE CORRECT INTERPRETATION OF "RECKLESS" UNDER U.S.S.G. § 2B1.1(B)(16)(A), THAT THE COURT SHOULD RESOLVE.

Section 2B1 of the Guidelines provide for an upwards enhancement for crimes involving fraud where the offense involved "the conscious or reckless risk of death or serious bodily injury." The Guidelines fail to establish a clear definition and application for the term "reckless" in this context. The Circuit Courts are divided as to the term's meaning in this context.

Generally, federal courts have defined "recklessness" in the criminal context by a subjective standard. In *Farmer v. Brennan*, 517 U.S. 825, 836-837 (1994), this Court held that in the criminal context, courts "generally permits a finding of

recklessness only when a person disregards a risk of harm of which he is *aware*." (emphasis added). At least one other section in the Guidelines likewise applies a subjective standard to the term "reckless." *See* U.S.S.G. § 3C1.2.

The Seventh and Eight Circuits have adopted the definition of "reckless" as taken from Application Note 1 to U.S.S.G. § 2A1.4, relating to involuntary manslaughter. *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 Application Note defines reckless as "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." This definition effectively establishes a subjective standard for determining whether a defendant acted recklessly. *See* U.S.S.G. § 3C1.2.

In contrast, the Second, Ninth and Tenth Circuits have adopted a purely objective standard, focusing instead on whether the defendant's conduct created a "conscious or reckless risk of death or serious bodily injury." *United States v. Lucien*, 347 F.3d 45, 55 (2nd Cir. 2003); *United States v. Johansson*, 249 F.3d 848, 858 (9th Cir. 2001); *United States v. Maestas*, 642 F. 3d 1315, 1322 (10th Cir. 2011). The objective standard for recklessness in the criminal context allows defendants to receive additional criminal responsibility, including incarceration, in situations where they were not actually aware of the risk of harm. *Id.*

The principles of fairness and justice in the criminal context, where a defendant's liberty is at risk, mandate that "reckless" under U.S.S.G. §2Bl.l(b)(16)(A) take into account the defendant's actual state of mind, rather than a standard more akin to a civil standard where only what a defendant "should have known" is analyzed. There was no evidence presented at trial that Cadden had any actual knowledge of the contamination of the MPA.

As such, the district court erred in applying the objective standard for "reckless" under U.S.S.G. §2Bl.l(b)(16)(A) and applying the sentence enhancement, rather than the subjective standard more properly applied to the criminal context. The First Circuit also erred in upholding the enhancement. 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.

II. THE VULNERABLE VICTIM ENHANCEMENT UNDER U.S.S.G. § 3A1.1(b) REQUIRES A SHOWING OF "UNUSUAL" VULNERABILITY OF THE VICTIMS, CONSISTENT WITH THE SENTENCING GUIDELINES COMMENTARY.

The Guidelines provide for a two-level enhancement under U.S.S.G. § 3A1.1(b) where "the defendant knew or should have known that a victim of the offense was a vulnerable victim." App. C-001. The Application Notes to the Guidelines specifically note that this enhancement only applies to "offenses involving an unusually vulnerable victim in which the defendant knows or should have known of the victim's unusual vulnerability." U.S.S.G. § 3A1.1, Note 2.

The First Circuit has established a two-pronged test for this enhancement. First, the victim must have been vulnerable, which requires that the victim had an

"impaired capacity … to detect or prevent crime." *United States v. Donnelly*, 370 F.3d 87, 92 (1st Cir. 2004)(citations omitted). Second, the court must find that, "the defendant knew or should have known of the victim's unusual vulnerability." *Id.* Despite this clear guidance within the First Circuit, both the district court, and the First Circuit on appeal, failed to apply this analysis. Neither the district court, nor the First Circuit, analyzed properly whether the victims in this case were "unusually" vulnerable nor whether Cadden knew or should have known of the patients' vulnerability. Rather, the district court held, without any substantive analysis, that the mere fact the patients were receiving medical injections made them vulnerable, and therefore the enhancement applied.

This conclusion is not supported by the facts or the law. The Guidelines make clear that the purpose of the enhancement is to further punish defendants who harm "unusually" vulnerable individuals. "'Unusual' is plainly meant to identify a select group different than the constituency who will be the 'usual' victims of the specific offense." *United States v. Footman*, 66 F. Supp. 2d 83, 94–95 (D. Mass. 1999), aff'd, 215 F.3d 145 (1st Cir. 2000). There must be a "special weakness that the defendant exploited." *United States v. Feldman*, 83 F.3d 9, 15 (1st Cir. 1996). The analysis for the purposes of the enhancement also requires an individualized assessment of each of the victim's circumstances, not a generalized enhancement based on assumptions about a group of victims. *See United States v. Fosher*, 124 F.3d 52, 56 (1st Cir. 1997) (reversing application of enhancement for elderly victim

of home invasion and remanding sentence to district court because court failed to address individual characteristics that made victim unusually vulnerable).

The district court failed to conduct any type of individualized assessment of the victims, which would be undoubtedly be required to properly assess whether the enhancement applied. The evidence at trial clearly established that the victims were from across the country, had different doctors, different medical conditions, and had different treatment regiments. The examples of "unusually" vulnerable victims from the Application Note in the guidelines references cancer patients and handicapped individuals as examples of "unusually" vulnerable victims. The district court conducted no individualized, or even generalized, analysis that demonstrates the victims in the present matter came close to that level of vulnerability. Absent that analysis, the enhancement could not be properly applied.

The second prong of the analysis—whether Cadden knew or had reason to know that the patients were unusually vulnerable—was also not completed. A major factor in determining whether Cadden knew or had reason to know about the patients' vulnerability is the fact that there were intermediaries, in the form of the various clinics dispensing the injections, that removed Cadden from contact with or knowledge of the specific identities or conditions of the patients. The First Circuit suggested that the district court undertake this analysis, but the district court failed to do so. *See Cadden*, 965 F.3d at 36.

Not even a doctor-patient relationship is sufficient, standing alone, to warrant the "vulnerable victim" enhancement. *See e.g., United States v. Volkman*,

797 F.3d 377, 399 (6th Cir. 2015)("The fact that a defendant is a doctor—and his victim a patient—is insufficient for applying the vulnerable victim enhancement); *United States v. Stokes*, 392 F. App'x 362, 371 (6th Cir. 2010) (unpublished) ("the district court must find that the victim-patient was more vulnerable to the crime than the average patient upon whom the doctor could prey"). "'All patients are vulnerable to their physician to a certain extent, yet § 3A1.1 intends to punish a criminal who [preys upon] victims that are especially susceptible to the perpetrator's criminal design'...." *Stokes*, 392 F. App'x at 370–71 (*quoting United States v. Singh*, 54 F.3d 1182, 1193 n. 7 (4th Cir. 1995) (notations in original)).

Here, where Cadden did not even have a doctor-patient relationship with the victims, it is wholly unreasonable to determine that he knew or should have known that the patients were vulnerable. The district court failed to analyze whether the victims had the requisite "unusual vulnerability", and therefore erred in assessing the enhancement; and, the First Circuit erred in affirming that adjustment to Cadden's sentence. This Court should grant the petition for certiorari, make a determination as to the proper construction and application of this enhancement, and remand this case for resentencing based on such construction.

CONCLUSION

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

Respectfully submitted,

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By his attorney,

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APPENDICES

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APPENDIX A

965 F.3d 1
United States Court of Appeals, First Circuit.

UNITED STATES of America,
Appellee, Cross-Appellant,
v.
Barry J. CADDEN, Defendant,
Appellant, Cross-Appellee.

Nos. 17-1694, 17-1712, 17-2062
|
July 9, 2020

Synopsis

Background: After jury convicted defendant of racketeering, racketeering conspiracy, mail fraud, and violations of federal Food, Drug, and Cosmetic Act (FDCA), the United States District Court for the District of Massachusetts, Richard G. Stearns, J., 2017 WL 2695289, denied defendant's motion for judgment of acquittal or for new trial. Defendant appealed, and government cross-appealed.

Holdings: The Court of Appeals, Barron, Circuit Judge, held that:

[1] there was sufficient evidence to support defendant's mail fraud convictions;

[2] there was sufficient evidence that acts of mail fraud committed by defendant were related to establish "pattern of racketeering activity";

[3] there was sufficient evidence of open-ended continuity to support defendant's racketeering and racketeering conspiracy convictions;

[4] district court did not abuse its discretion in permitting jury to hear evidence related to persons who died, or fell ill, from using contaminated medication from defendant's compounding pharmacy;

[5] district court did not abuse its discretion in denying defendant's motion for new trial based on prosecutor's refusal to withdraw medical clinic director's apparently incorrect testimony;

[6] district court did not abuse its discretion in denying defendant's motion for new trial based on prosecution's conduct in furnishing jury with binder of admitted evidence without notifying court or defense;

[7] district court did not commit clear error in relying on value of shipments that it could pin down with reasonable certainty as fraudulent to determine loss amount;

[8] reach of vulnerable victim enhancement was not necessarily limited to those hospitals that purchased contaminated medications; and

[9] forfeiture amount included funds that defendant's wife deposited into joint account that were tainted by racketeering activity.

Affirmed in part, vacated in part, and remanded.

Procedural Posture(s): Appellate Review; Trial or Guilt Phase Motion or Objection; Post-Trial Hearing Motion; Sentencing or Penalty Phase Motion or Objection; Forfeiture Proceeding.

West Headnotes (31)

[1] Postal Service Nature and elements of offense in general

To convict defendant of mail fraud, government must prove beyond reasonable doubt: (1) scheme to defraud based on false pretenses; (2) defendant's knowing and willing participation in scheme with intent to defraud; and (3) use of interstate mail communications in furtherance of that scheme. 18 U.S.C.A. § 1341.

[2] Criminal Law Review De Novo

Court of Appeals' review of preserved sufficiency-of-evidence challenge is de novo.

[3] Criminal Law Construction in favor of government, state, or prosecution

Criminal Law Reasonable doubt

In undertaking sufficiency-of-evidence review, Court of Appeals must assess record evidence in light most favorable to prosecution, and affirm so long as body of proof, as a whole, has sufficient bite to ground reasoned conclusion that government proved each element of charged crime beyond reasonable doubt.

[4] **Postal Service** Use of mails to defraud

There was sufficient evidence of materiality of compounding pharmacy owner's misrepresentations to support his mail fraud conviction, in light of evidence that pharmacy touted to its prospective customers its "commitment to quality" and its use of "Certified Technicians" to better ensure that products that it produced would not be contaminated, that pharmacy's communications to medical center led center's pharmacy director to think that technicians would be licensed while working there, that use of unlicensed pharmacy technician would have been "red flag," and that unlicensed pharmacy technician helped in compounding cardioplegic solution that pharmacy sent to center. 18 U.S.C.A. § 1341.

[5] **Postal Service** Nature of scheme or device in general

To secure mail fraud conviction, government need not prove that decisionmaker actually relied on falsehood, so long as falsehood that was made is material. 18 U.S.C.A. § 1341.

2 Cases that cite this headnote

[6] **Postal Service** Nature of scheme or device in general

To prove materiality of defendant's misrepresentation in mail fraud prosecution, government need only show that false statement had natural tendency to influence, or was capable of influencing its target's decision. 18 U.S.C.A. § 1341.

2 Cases that cite this headnote

[7] **Postal Service** Use of mails to defraud

There was sufficient evidence that compounding pharmacy owner misrepresented pharmacy's compliance with state's United States Pharmacopeia (USP) regulations governing compounding of high-risk sterile medications to support owner's mail fraud convictions, in light of evidence that company's salespersons and marketing materials touted its adherence to regulations in their communications with customers, that customers relied on pharmacy's representations that it was producing quality products that were USP-compliant, and that pharmacy failed to comply with USP standards when it used uncertified pharmacy technician. 18 U.S.C.A. § 1341; 247 Mass. Code Regs. 901(3).

[8] **Racketeer Influenced and Corrupt Organizations** Pattern of Activity

For there to be "pattern of racketeering activity" under Racketeer Influenced and Corrupt Organizations Act (RICO), there must be at least two acts of racketeering activity, and those predicate acts, each of which must have occurred within ten years of one another, (1) must be related to each other, and (2) must amount to or pose threat of continued criminal activity. 18 U.S.C.A. §§ 1961(5), 1962(c).

[9] **Racketeer Influenced and Corrupt Organizations** Continuity or relatedness; ongoing activity

To satisfy relatedness requirement for establishing "pattern of racketeering activity" in prosecution under Racketeer Influenced and Corrupt Organizations Act (RICO), government must show that predicate acts have same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and

are not isolated events. 18 U.S.C.A. § 1961(5).

[10] **Conspiracy** Mail and wire fraud

Racketeer Influenced and Corrupt Organizations Continuity or relatedness; ongoing activity

There was sufficient evidence that acts of mail fraud committed by compounding pharmacy owner were related to establish "pattern of racketeering activity" required to support his convictions for racketeering and racketeering conspiracy, even though predicate acts of mail fraud included both some that were based on fraudulent representations about technician licensure and some were based on fraudulent representations that involved pharmacy's failure to comply with state regulations, where misrepresentations all reflected same crime, same category of victims, same purpose, similar fraudulent misrepresentations, similar methods of communicating those representations through marketing materials, similar participants, and same method of commission, and they all occurred within same time frame. 18 U.S.C.A. §§ 1341, 1961(5), 1962(c).

1 Case that cites this headnote

[11] **Conspiracy** Mail and wire fraud

Racketeer Influenced and Corrupt Organizations Continuity or relatedness; ongoing activity

There was sufficient evidence of open-ended continuity to support compounding pharmacy owner's racketeering and racketeering conspiracy convictions, in light of evidence that pharmacy routinely violated regulatory standards by sending out medications to customers prior to testing them, "botching lots" to mix old, testing medications with new, untested ones and labeling mixture with old label, shipping medications that used expired ingredients, and sterilizing its compounded medications for insufficient amount of time, that pharmacy routinely advertised to customers through its sales staff and standard marketing materials that it was in compliance with standards when it was not, and that it routinely represented to customers that it was using only certified technicians when it was not. 18 U.S.C.A. §§ 1341, 1961(5), 1962(c).

[12] **Racketeer Influenced and Corrupt Organizations** Continuity or relatedness; ongoing activity

Racketeer Influenced and Corrupt Organizations Time and duration

Government may satisfy continuity required to establish "pattern of racketeering activity" under Racketeer Influenced and Corrupt Organizations Act (RICO) by demonstrating either closed-ended continuity, which refers to closed period of repeated conduct, or open-ended continuity, which encompasses past conduct that by its nature projects into future with threat of repetition. 18 U.S.C.A. §§ 1961(5), 1962(c).

[13] **Racketeer Influenced and Corrupt Organizations** Continuity or relatedness; ongoing activity

There are at least two types of racketeering enterprises that, by their nature, extend into future and therefore demonstrate open-ended continuity required to establish "pattern of racketeering activity" under Racketeer Influenced and Corrupt Organizations Act (RICO): those that involve distinct threat of long-term racketeering activity, either implicit or explicit, and those where predicate acts or offenses are part of ongoing entity's regular way of doing business. 18 U.S.C.A. §§ 1961(5), 1962(c).

[14] **Criminal Law** Evidence calculated to create prejudice against or sympathy for accused

District court did not abuse its discretion in compounding pharmacy owner's racketeering prosecution in permitting jury to hear evidence related to persons who died, or fell ill, from using contaminated methylprednisolone acetate (MPA) that pharmacy had shipped to its customers, notwithstanding danger of unfair prejudice; record showed that deficient means were used by pharmacy in compounding contaminated MPA that led to deaths at issue, that owner knew of alleged deficiencies with pharmacy's compounding practices and directed shipment of orders, that owner was aware of type of risk that he was running by operating pharmacy in unsafe manner, and evidence was highly probative of owner's extremely reckless behavior. Fed. R. Evid. 403.

1 Case that cites this headnote

[15] **Homicide** Intent or mens rea; malice

Under Michigan law, defendant must act with malice to be guilty of second-degree murder, which requires showing that defendant intended to do act in wanton and wilful disregard of likelihood that natural tendency of such behavior is to cause death or great bodily harm.

[16] **Racketeer Influenced and Corrupt Organizations** Admissibility

District court did not abuse its discretion in compounding pharmacy owner's racketeering prosecution in permitting jury to hear evidence regarding pharmacy's failure to comply with its standard operating procedures (SOP), even though owner was charged with misrepresenting pharmacy's compliance with regulatory standards, not SOPs, where government asserted as predicate acts second degree murder of persons who received injections of contaminated drug, and failure to comply with SOPs was relevant to owner's recklessness—mens rea standard it needed to show to prove second-degree murder predicate acts.

[17] **Criminal Law** New Trial

Court of Appeals' review of district court's denial of defendant's motion for new trial based on prosecutorial misconduct is for abuse of discretion.

[18] **Criminal Law** Use of False or Perjured Testimony

Prosecutor may not knowingly use false evidence, including false testimony, to obtain tainted conviction regardless of whether prosecutor solicits false evidence or allows false evidence to go uncorrected when it appears, and such conviction must be set aside if there is any reasonable likelihood that false testimony could have affected jury's judgment.

[19] **Criminal Law** Rulings on evidence

District court did not abuse its discretion in compounding pharmacy owner's racketeering prosecution in denying owner's motion for new trial based on prosecutor's refusal to withdraw medical clinic director's testimony that owner instructed her to pull contaminated medication five days before he notified other customers of problem to prove owner's state of mind for purpose of proving second-degree-murder-based predicate acts, even though it was likely that director confused date of call, where jury heard owner's competing evidence concerning director's testimony, and did not find those predicate acts proven, and it was unlikely that director's testimony interfered with jury's deliberations over other counts premised on mail fraud.

[20] **Criminal Law** Conduct of counsel in general

In general, government misconduct alone is insufficient to reverse conviction absent showing of prejudice.

[21] **Criminal Law** Misconduct of or Affecting Jurors

District court did not abuse its discretion in compounding pharmacy owner's prosecution arising from sale of contaminated medications in denying owner's motion for new trial based on prosecution's conduct in furnishing jury with binder of admitted evidence without notifying court or defense, absent showing of prejudice; binder contained only documents that had been admitted into evidence, prosecution flagged existence of government-produced binder for jury during closing argument and described it as presenting its evidence, defendant failed to object or to produce comparable binder of defense evidence, and there was no indication that jury relied on binder.

[22] **Criminal Law** Review De Novo

Criminal Law Sentencing

Court of Appeals reviews district court's interpretation and application of sentencing guidelines de novo, and factual findings, including district court's calculation of amount of loss, for clear error.

3 Cases that cite this headnote

[23] **Sentencing and Punishment** Value of loss or benefit

District court did not commit clear error in relying on value of shipments that it could pin down with reasonable certainty as fraudulent to determine loss amount in sentencing compounding pharmacy owner for racketeering, racketeering conspiracy, mail fraud, and violations of federal Food, Drug, and Cosmetic Act (FDCA) as result of his misrepresentations regarding pharmacy's sterile compounding practices, where pharmacy produced number of products in separate areas from area in which sterile compounding took place, there was no indication that products produced in those areas were fraudulently sold, and government did not identify or attempt to document narrower loss figure. U.S.S.G. § 2B1.1.

1 Case that cites this headnote

[24] **Sentencing and Punishment** Risk of death or bodily injury

In determining whether to impose two-level enhancement for offense involving conscious or reckless risk of death or serious bodily injury in sentencing defendant for mail fraud and racketeering premised on mail fraud, district court incorrectly focused on whether defendant had committed predicate offense of second-degree murder, which jury had rejected, instead of whether his relevant conduct in commission of his mail fraud offense carried with it requisite risk of death under Guidelines, even though mail fraud did not inherently involve such risk. U.S.S.G. § 2B1.1(b)(16).

2 Cases that cite this headnote

[25] **Sentencing and Punishment** Vulnerability of victim

In sentencing compounding pharmacy owner for racketeering, racketeering conspiracy, mail fraud, and violations of federal Food, Drug, and Cosmetic Act (FDCA) based on his misrepresentations regarding pharmacy's sterile compounding practices, reach of vulnerable victim enhancement was not necessarily limited to those hospitals that purchased contaminated medications in reliance on owner's misrepresentations, but could plausibly include patients at those hospitals who foreseeably would use those contaminated medications. U.S.S.G. § 3A1.1.

[26] **Forfeitures** Plenary or de novo review

Forfeitures Questions of fact and evidence

In evaluating district court's forfeiture order, Court of Appeals reviews pure questions of law de novo, but, to extent factual issues are intermingled, considers mixed questions of law

and fact under more deferential clear error standard. 18 U.S.C.A. § 1963(a)(3).

[27] **Forfeitures** Tainted or untainted determinations; commingled funds

When property interests are in racketeering enterprise, they are subject to forfeiture in their entirety, regardless of whether some portion of enterprise is not tainted by racketeering activity, but property interests outside enterprise are subject to rule of proportionality, and are only forfeitable to extent they are tainted by racketeering activity. 18 U.S.C.A. § 1963(a)(3).

1 Case that cites this headnote

[28] **Forfeitures** Tainted or untainted determinations; commingled funds

In determining amount of forfeiture order in compounding pharmacy owner's prosecution for racketeering, racketeering conspiracy, mail fraud, and violations of federal Food, Drug, and Cosmetic Act (FDCA), district court was required to determine specific amount of compounding pharmacy's proceeds over period in question that were tainted by owner's racketeering activity. 18 U.S.C.A. § 1963(a)(3).

1 Case that cites this headnote

[29] **Forfeitures** Money, funds, and accounts in general

In general, word "proceeds" in Racketeer Influenced and Corrupt Organizations Act's (RICO) forfeiture statute refers to gross proceeds, not net profits. 18 U.S.C.A. § 1963(a)(3).

2 Cases that cite this headnote

[30] **Forfeitures** Amount, particular cases

Gross amount of proceeds received by defendant pursuant to his racketeering activity was subject to forfeiture, even though amount he obtained was itself taxable. 18 U.S.C.A. § 1963(a)(3).

2 Cases that cite this headnote

[31] **Forfeitures** Tainted or untainted determinations; commingled funds

Defendant "obtained" funds deposited in bank account that wife jointly controlled with defendant, and thus forfeiture amount in defendant's racketeering prosecution was not limited to proceeds that were attributable to defendant, but included funds that wife deposited into account, so long as funds in question were tainted by racketeering activity. 18 U.S.C.A. § 1963(a)(3).

2 Cases that cite this headnote

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

Attorneys and Law Firms

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Before Barron, Stahl, and Lipez, Circuit Judges.

Opinion

BARRON, Circuit Judge.

For years, the New England Compounding Center ("NECC") was a growing pharmacy business engaged in the practice of "compounding," which involves combining drugs with other substances to produce specialized medications for use

by patients. In the fall of 2012, however, patients across the country became seriously ill -- and many eventually died -- after receiving injections of NECC-compounded medications that had been contaminated by fungi and bacteria. A federal criminal investigation into NECC's compounding practices soon followed, which then led to the convictions and punishments that are at issue in the two related appeals that are now before us.

The first of these appeals is brought by Barry Cadden, who was the founder and part-owner, as well as the president, of NECC at the time that the company manufactured and distributed the contaminated medications from its facilities in Framingham, Massachusetts. He challenges his 2017 federal convictions in the United States District Court for the District of Massachusetts for one count of racketeering, see 18 U.S.C. § 1962(c); one count of racketeering conspiracy, see id. § 1962(d); fifty-two counts of mail fraud, see id. § 1341; and three counts of violating the Federal Food, Drug, and Cosmetic Act, see 21 U.S.C. §§ 331(a), 333(a). He also challenges the $7.5 million forfeiture order that the District Court imposed on him. The other appeal that we address is brought by the government. It takes aim at both the District Court's forfeiture order against Cadden and the 108-month prison sentence that he received.

We affirm each of the convictions that Cadden challenges on appeal. We vacate and remand his prison sentence due to the errors that the government correctly points out that the District Court made in calculating Cadden's recommended sentencing range under the United States Sentencing Guidelines ("Guidelines"). We also vacate and remand the forfeiture order ***7** in consequence of separate errors that Cadden and the government, respectively, identify in the way that the District Court determined the amount of the forfeiture.

I.

For years, NECC produced large volumes of compounded medications and sold them without incident to hospitals and other medical facilities throughout the United States. In the early fall of 2012, however, patients across the country started to fall sick with fungal meningitis, spinal or paraspinal infections, and other seemingly related illnesses. Over time, additional cases of patients suffering from these illnesses arose throughout the United States that seemed to be tied to the earlier ones.

A federal investigation into this unusual outbreak of seemingly related illnesses ensued. It traced the outbreak's cause to patients having been injected with a heavily contaminated medication that NECC had compounded. That medication was methylprednisolone acetate ("MPA"), which is a steroid that is injected primarily into the backs or knees of patients to help them to alleviate their pain.

At that point, federal investigators began looking into NECC's compounding practices. The investigators discovered what they determined were significant deficiencies in the clean room where NECC had compounded the contaminated MPA as well as in other aspects of NECC's operations. Among the deficiencies were apparent violations of Chapter 797 of the "United States Pharmacopeia," or, as it is otherwise known, "USP-797," which the Massachusetts Pharmacy Board requires pharmacists to follow, see 247 Mass. Code Regs. 901(3), and which regulates the compounding of "high-risk" sterile medications like MPA. Such medications are so deemed due to the nature of the harm that can befall patients who use them if they have not been properly prepared. The investigation also revealed that NECC had employed a pharmacy technician, Scott Connolly, who did not have a license that the Massachusetts Pharmacy Board required in order for him to be permitted to engage in the compounding work that he performed for the company.

Based on the investigation, a federal grand jury indicted Cadden on December 16, 2014, in the District of Massachusetts for a broad range of criminal conduct. These charges included fifty-three counts of mail fraud in violation of 18 U.S.C. § 1341, one count of racketeering in violation of 18 U.S.C. § 1962(c), one count of racketeering conspiracy in violation of 18 U.S.C. § 1962(d), one count of conspiracy to defraud the United States in violation of 18 U.S.C. § 371, and forty-one counts of Federal Food, Drug, and Cosmetic Act ("FDCA") violations, see 21 U.S.C. §§ 331(a), 333(a).

Many of the charges centered on fraudulent representations that NECC representatives had allegedly made to customers about the safety standards that the company followed in compounding various medications -- including the contaminated MPA -- that were shipped to customers between

March 25, 2010, and September 27, 2012. In particular, each of the fifty-three mail fraud counts identified a specific shipment of compounded medications that NECC sent to one of its customers after having made inaccurate representations to that customer about the standards NECC would adhere to in preparing those medications.

The racketeering and racketeering conspiracy charges, too, were based on a "pattern of racketeering activity," 18 U.S.C. 1961(5), that centered on mail fraud, see id. § 1961(1)(B) (defining mail fraud as a "racketeering activity"). The racketeering ***8** offense itself alleged seventy-eight separate acts of racketeering as part of that pattern, of which the lion's share -- fifty-three acts -- were mail fraud acts that matched the alleged mail fraud acts set forth in the corresponding counts that charged Cadden with mail fraud as a stand-alone offense. The racketeering conspiracy charge, moreover, alleged that Cadden conspired with others to commit a racketeering violation involving a pattern of racketeering activity consisting of predicate acts of racketeering involving mail fraud, although it did not identify any of those acts of mail fraud specifically.

Even though many of the charges against Cadden centered on alleged misrepresentations about NECC's compounding practices to its customers, the one for racketeering was not based only on such allegations. And, as we will explain, a number of the issues that Cadden raises on appeal concern the fact that the racketeering charge alleged not only that Cadden's pattern of racketeering activity involved fifty-three predicate acts of mail fraud but also that it involved twenty-five predicate acts of second-degree murder, which is itself a racketeering activity. See id. § 1961(1)(A). Each of these alleged predicate acts of second-degree murder was associated with a death of a patient that allegedly had been caused by that individual having been injected with the contaminated MPA that NECC had compounded. (By the time of Cadden's trial, 753 patients had been identified as having been afflicted in the outbreak that had been traced to NECC's contaminated MPA, of whom sixty-four had died in consequence of having been injected with that medication.)

The indictment charged thirteen others along with Cadden for their roles in alleged criminal conduct connected to NECC's compounding operations. The District Court severed Cadden's trial, however, from those for the others. Moreover, near the end of Cadden's ten-week trial, the District Court dismissed one of the stand-alone mail fraud counts that Cadden faced, as well as the alleged predicate act of racketeering involving mail fraud that corresponded to that stand-alone mail fraud count.

The jury ultimately found Cadden guilty of the racketeering and racketeering conspiracy counts, all fifty-two of the remaining stand-alone mail fraud counts, and three of the FDCA violations, each of which related to the introduction of misbranded drugs into interstate commerce. Cadden was found not guilty both of conspiring to defraud the United States and of the other FDCA counts. In a special verdict form, moreover, the jury indicated that, with respect to the racketeering charge, it did not unanimously find beyond a reasonable doubt any of the alleged predicate acts of racketeering involving second-degree murder. The special verdict form further indicated that the jury found forty-seven of the fifty-two alleged predicate acts of racketeering involving mail fraud, and thus it was on the basis of those mail-fraud-based predicate acts of racketeering alone that the jury's finding that there was a "pattern of racketeering activity" depended.

The District Court entered judgments of conviction and sentenced Cadden to a prison term that was at the very high end of the range that it had calculated under the Guidelines: 108 months' imprisonment. Based on Cadden's racketeering and racketeering conspiracy convictions, the District Court also imposed a forfeiture order on him in the amount of $7,545,501. Cadden's appeal and the government's appeal followed.

II.

Cadden first takes aim at the sufficiency of the evidence to support the allegations ***9** of mail fraud that underlie thirty of his fifty-two stand-alone mail fraud convictions [1] as well as his two convictions for, respectively, racketeering [2] and racketeering conspiracy. [3] In challenging these convictions on this ground, Cadden zeroes in on whether the evidence sufficed to support, with respect to any of these convictions, a finding beyond a reasonable doubt that the alleged fraudulent representation by an NECC representative on which each conviction depended in fact had been made. In the alternative, he contends that the evidence did not suffice to show that the representation -- even if made -- was material, as it must have been for the government to prove the alleged mail fraud. Thus,

he contends on the basis of these arguments that each of these convictions must be reversed.

We begin our analysis with the challenges that Cadden brings to the stand-alone mail fraud convictions. We then turn to the essentially identical challenges that Cadden makes to his racketeering and racketeering conspiracy convictions. We find no merit to any of them.

A.

[1] For the thirty stand-alone mail fraud convictions at issue, the government needed to prove beyond a reasonable doubt: "(1) a scheme to defraud based on false pretenses; (2) [Cadden's] knowing and willing participation in the scheme with the intent to defraud; and (3) the use of interstate mail ... communications in furtherance of that scheme." United States v. Soto, 799 F.3d 68, 92 (1st Cir. 2015) (alteration in original) (quoting United States v. Hebshie, 549 F.3d 30, 35 (1st Cir. 2008)); see also 18 U.S.C. § 1341.[4] We start with the ten stand-alone mail fraud convictions that concern, respectively, ***10** ten separate shipments of cardioplegic solution that NECC had made between March 25, 2010, and August 8, 2012, and that had been produced with the assistance of the NECC pharmacy technician, Scott Connolly, who lacked a license from the Massachusetts Board of Pharmacy that Massachusetts law required him to have to engage in the work that he performed for the company. We then address the twenty other stand-alone mail fraud convictions that Cadden challenges. Each of these convictions is for a count that rests on alleged fraudulent representations concerning other shipments that NECC made to its customers between July 7, 2011, and September 27, 2012. These convictions were premised on allegedly fraudulent representations that NECC's representatives made to customers of the company that have nothing to do with either Connolly's involvement in the compounding process or technician licensure at the company more generally. Instead, these convictions were premised on alleged fraudulent representations about, among other things, the company's compliance with USP-797.

1.

Cadden's challenges to each of the ten Connolly-related convictions rest on the contention that the evidence in the record does not suffice to show that NECC had falsely represented to the customer that received any of the shipments associated with these convictions that only licensed pharmacy technicians were involved in compounding them. Cadden acknowledges that Connolly, who was not licensed, helped in compounding the medications contained in those shipments. But, he contends that there is no basis for finding that each of the shipments had been distributed pursuant to a scheme to defraud. That is so, he contends, because, by the government's own account, the fraudulent scheme alleged in these ten mail fraud counts involved as a necessary component the company falsely representing to its customers that only licensed technicians had been used in compounding its medications.

[2] **[3]** Our review of this preserved challenge is de novo. See United States v. Diaz, 300 F.3d 66, 77 (1st Cir. 2002). In undertaking this review, though, we must assess the record evidence "in the light most favorable to the prosecution" and affirm so long as the "body of proof, as a whole, has sufficient bite to ground a reasoned conclusion that the government proved each of the elements of the charged crime beyond a reasonable doubt." United States v. Lara, 181 F.3d 183, 200 (1st Cir. 1999).

[4] Cadden's sufficiency challenge plainly fails as to the three Connolly-related convictions that were based on the shipments of cardioplegic solution that NECC sent to Sunrise Medical Center. The record includes the testimony of Wilson Chu, the pharmacy director at Sunrise Medical Center. Chu testified that NECC's use of an unlicensed pharmacy technician would have been a "red flag" if he had known about it and his employer would not have done business with NECC in consequence. The record also includes Chu's testimony that communications from NECC led him to "[d]efinitely" think that such technicians would be licensed while working there. No more was needed to permit a juror reasonably to find the allegedly fraudulent representations about technician licensure on which these three convictions depend had been made.

Representatives of the customers who received the shipments at issue in the seven remaining Connolly-related convictions did not testify -- in the way that Chu had testified with respect to the shipments to Sunrise Medical Center -- about what ***11** NECC had represented to them about technician licensure. But, we conclude, the circumstantial evidence in the record was strong enough to make up for that evidentiary

gap. We thus reject Cadden's sufficiency challenges to these convictions, too.

Kenneth Boneau, a salesperson for NECC, testified that the company was keenly aware in making its pitches to prospective customers that they might be reluctant to purchase from a compounding pharmacy like NECC, due in part to concerns about price and in part to concerns about the need for every medication ordered from NECC to be matched to a patient who would be receiving a requested medication that the company would compound. Thus, Boneau testified, an important part of NECC's pitch to its prospective customers was that, as an outside pharmacy, it had a "commitment to quality" that better ensured that the products that it produced would not be contaminated than the hospitals or medical facilities could ensure if they were to make such products on their own. In fact, to that end, Boneau testified, NECC presented itself to prospective customers as "the Rolls-Royce of compounding."

In addition, the government put forth evidence that directly addressed the representations that the company made -- in making this pitch about quality control -- to prospective customers about pharmacy technician licensure. Here, the government's case consisted not only of the testimony from Chu described above but also of Boneau's testimony about a particular exhibit that the government introduced at trial and in which he described the exhibit as "our marketing material ... for hospitals."

The cover page of that exhibit was labeled with the NECC logo and the word "Hospital," and the material inside indicated that it included a "Company Overview" of NECC. Boneau also explained in his testimony that he personally "would bring" this material with him on visits to potential customers and that, over the course of his time working for NECC, he "[l]eft it behind ... probably hundreds of times." He further testified that while "oftentimes" he left it at "an ophthalmology department or a pain department within a hospital ... most of the time" he left it at a hospital's "inpatient pharmacy."

Significantly, this marketing material, as part of the "Company Overview," made representations about the qualifications of NECC's "Personnel." Those representations included the statement that NECC's personnel included "Highly Specialized and Extensively Trained Compounding Pharmacists and Certified Technicians." (emphasis added).

The reference to the use of "Certified Technicians" permitted the inference that those technicians, because they were certified, would have had a license that a state pharmacy board required them to have. Nor does Cadden dispute that the customers who received the shipments on which these seven convictions depended were "hospitals" within the meaning of Boneau's testimony.

Thus, we conclude that a juror reasonably could find that there was a sufficient circumstantial basis to draw the inference that the allegedly fraudulent representations concerning technician licensure had been made in each instance for these seven convictions, notwithstanding the absence of direct evidence to that effect. See United States v. Ridolfi, 768 F.3d 57, 61 (1st Cir. 2014) (noting that a jury may make "reasonable, common sense inferences drawn from the evidence"). Accordingly, Cadden's sufficiency challenge to these seven Connolly-related convictions for the stand-alone offense of mail fraud fails, just as it ***12** fails as to the other three Connolly-related stand-alone mail fraud convictions.

Cadden does separately contend that the evidence did not suffice to show that any of the customers who received shipments on which the ten Connolly-related convictions depend -- Sunrise Medical Center included -- received the supposedly fraudulent representation about technician licensure after NECC had hired Connolly. But, Cadden identifies no evidence to indicate that, once Connolly came on board, NECC, through any of its representatives (including Cadden himself), corrected any prior representation that licensed pharmacy technicians would be used even though Connolly was not licensed. A juror reasonably could find, therefore, that NECC's decision to produce and ship medications compounded by someone who was not a licensed pharmacy technician after the company had represented otherwise to its customers itself constituted a use of the mails in furtherance of a fraudulent scheme.

Finally, Cadden shifts his angle of attack and focuses on what he contends is the lack of record evidence sufficient to show that any of the misrepresentations concerning technician licensure induced any customer to make a purchase from NECC. But, there is no force to this contention, which takes aim at the evidentiary support for the materiality element of mail fraud. See United States v. Prieto, 812 F.3d 6, 13 (1st Cir. 2016) (noting the existence of a materiality requirement).

[5] **[6]** To secure a mail fraud conviction, the government "need not prove that the decisionmaker actually relied on

the falsehood," so long as the falsehood that was made is a "material" one. Id. (first quoting United States v. Appolon, 715 F.3d 362, 368 (1st Cir. 2013)). To prove materiality, the government need only show that the false statement "had 'a natural tendency to influence, or [was] capable of influencing' " its target's decision. Id. (quoting Appolon, 715 F.3d at 368); see also United States v. Berroa, 856 F.3d 141, 149-50 (1st Cir. 2017) (explaining that, under the mail fraud statute, the defendant's fraud must be "the mechanism naturally inducing" the victim to act (quoting Loughrin v. United States, 573 U.S. 351, 363, 134 S.Ct. 2384, 189 L.Ed.2d 411 (2014))).

Reviewing the sufficiency of the evidence of materiality de novo, see United States v. Sebaggala, 256 F.3d 59, 63 (1st Cir. 2001), we find that the evidence sufficed here. Chu's testimony about the importance of pharmacy technician licensure to his hospital's purchasing decisions clearly permitted a reasonable juror to find the materiality element satisfied as to the three Connolly-related convictions that involved shipments of NECC medications to Sunrise Medical Center. But, that same testimony -- in combination with the emphasis placed on "Certified Technicians" in the marketing materials that Boneau testified that NECC routinely used to pitch its products to hospitals -- also supported the reasonable inference that a representation about pharmacy technician licensure would have mattered to such NECC customers generally. Accordingly, we reject Cadden's materiality challenge to these ten convictions.

2.

Having rejected Cadden's challenges to the ten Connelly-related convictions, we now come to his challenges to the twenty other stand-alone mail fraud convictions that he asks us to reverse for insufficient evidence. Here, too, his contention is that the evidence did not suffice to show that the fraudulent representations on which they depended had been made. [5]

***13** The government contends that our review is only for plain error, but Cadden's reply below to the government's opposition to the motion for judgment of acquittal raised these same challenges. Thus, our review is de novo, although we still must review the evidence in a verdict-friendly light. See Diaz, 300 F.3d at 77; Lara, 181 F.3d at 200.

[7] The government identifies a range of allegedly fraudulent representations for each of these twenty convictions that it contends were adequately supported by the record evidence. But, we need not focus on what the evidence showed as to whether each of those allegedly fraudulent representations had been made. It is enough, as we will explain, that the evidence sufficed to support a juror finding that the allegedly fraudulent representations concerning NECC's compliance with USP-797 had been made. And that is because, as Cadden does not dispute, the mail fraud count for each of these twenty convictions alleged that such a representation had been made to the customer who received the shipments referenced in each of those counts. See United States v. Gaw, 817 F.3d 1, 5 (1st Cir. 2016) (holding that where "alternative, independently sufficient grounds" exist for upholding a conviction, "adequate proof of one obviates any need for proof of the other" and the conviction can be affirmed on one ground alone (quoting United States v. Cruz–Arroyo, 461 F.3d 69, 73 (1st Cir. 2006))).

Specifically, the record shows that numerous NECC salespersons testified that NECC touted the company's adherence to the USP-797 standards in their communications with customers, and that one salesperson, Boneau, even testified that USP-797 compliance was "a big selling point" for NECC that Cadden himself had emphasized. In addition, the evidence contained NECC marketing materials that highlighted the company's supposed compliance with USP-797, and several NECC customers testified that they received representations from marketing materials and company representatives that indicated that NECC was following the standards laid out in USP-797.

We thus reject Cadden's contention that the evidence failed to suffice to permit a juror reasonably to find that a fraudulent representation concerning USP-797 compliance had been made to each of the customers, for each of the referenced shipments, for these twenty stand-alone mail fraud convictions. Instead, we conclude that the evidence sufficed to permit a juror to draw such an inference in finding Cadden guilty of each of the twenty counts on which these twenty convictions were based. See Ridolfi, 768 F.3d at 61 (expressing approval of the jury's use of "reasonable, common sense inferences drawn from the evidence").

Cadden does also contend that these twenty convictions must be reversed because the evidence did not suffice to show that the false representation about USP-797 compliance -- even if

made -- was material as to any of the shipments involved. But, here, too, the record shows otherwise.

Many NECC customers testified that they relied on the company's representations that it was producing quality products ***14** that were USP-compliant, and the evidence made clear that such representations were a "big selling point." We thus have no trouble concluding that a juror reasonably could find that the representations regarding USP-797 compliance had a natural tendency to induce NECC's customers to purchase its products, especially given that this particular safety standard applied to those compounded medications that -- if prepared improperly -- posed such a risk of harm to patients.

B.

That leaves only Cadden's sufficiency challenges to his racketeering and racketeering conspiracy convictions, insofar as these challenges also take aim at whether there was adequate evidence that the fraudulent representations on which these convictions depended -- given that they were for a pattern of racketeering activity based on mail fraud -- had been made. Cadden does not contend, however, that the mail fraud alleged to support these racketeering-related convictions is any different from the mail fraud alleged to support the thirty stand-alone mail fraud convictions that we have just addressed. Thus, because the only arguments that Cadden makes to us as to why the evidence did not suffice to support those allegations of mail fraud are without merit, we must reject his sufficiency challenges to these two convictions as well.

III.

Cadden has one last set of sufficiency challenges to his convictions that we need to address. This set concerns only his convictions for racketeering and racketeering conspiracy. As to the racketeering conviction, Cadden contends that, even if the evidence sufficed to support the predicate acts of racketeering involving mail fraud that underlie it, it still must be reversed because the evidence did not supportably show that those mail-fraud-based predicate acts of racketeering, taken together, formed a "pattern of racketeering activity." 18 U.S.C. § 1962(c). He then further contends that this same weakness in the government's case also renders his racketeering conspiracy conviction insufficiently supported. But, we do not agree.

A.

[8] For there to be a "pattern of racketeering activity" there must be "at least two acts of racketeering activity." Id. § 1961(5). In addition, those predicate acts, each of which must have occurred within ten years of one another, see id., (1) must be "related" to each other, and (2) must "amount to or pose a threat of continued criminal activity." H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 239, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989).

Cadden argues that the evidence did not suffice to show that the predicate acts of racketeering that the jury found satisfied, when considered together, either the "relatedness" or the "continuity" requirements. He thus contends his racketeering conviction must be reversed because the evidence did not suffice to satisfy the "pattern" element of that racketeering offense.

We first address the proper standard of review. We then consider, in turn, his contentions regarding what the record shows about relatedness and continuity. We conclude, as we will explain, that there is no merit to any of them.

1.

The government contends that our review is only for plain error because Cadden failed to raise his "pattern of racketeering activity"-based challenge that he now presents to us on appeal in the motion for acquittal that he made below pursuant ***15** to Federal Rule of Criminal Procedure 29. But, Cadden's post-verdict motion for judgment of acquittal incorporated by reference his challenge to "the lack of relatedness or continuity of the remaining isolated mailings," which he had previously aired to the District Court in his motion to dismiss each of these racketeering-related counts. Our review of this challenge, therefore, is de novo, though, of course, we still must consider the evidence in the light most favorable to the verdict. See Diaz, 300 F.3d at 77; Lara, 181 F.3d at 200.

2.

[9] **[10]** We begin with Cadden's arguments about the insufficiency of the evidence as to the relatedness requirement. The test for showing relatedness, however, "is not a cumbersome one." Feinstein v. Resolution Tr. Corp., 942 F.2d 34, 44 (1st Cir. 1991). It merely requires "[a] showing that predicate acts 'have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.' " Id. (quoting H.J., 492 U.S. at 240, 109 S.Ct. 2893). We conclude that the evidence sufficed to show that test was met here.

Cadden argues otherwise, first, by pointing to what he contends is an inconsistency in the state of mind of the defendant that the government was required to prove for second-degree murder compared to mail fraud. But, while it is true that the indictment alleged both types of predicate acts of racketeering activity in the racketeering charge, the special verdict form makes clear that the jury did not rely on the alleged predicate acts of racketeering activity based on second-degree murder to find the requisite "pattern of racketeering activity." See United States v. Torres Lopez, 851 F.2d 520, 523 (1st Cir. 1988) (using a special jury form to determine which predicate acts the jury found for the purposes of a federal racketeering conviction).

Thus, we do not see how the mere fact that predicate acts of racketeering involving second-degree murder were alleged bears on whether the evidence sufficed to satisfy the relatedness test based on the predicate acts of racketeering involving mail fraud that the jury actually found. Nor does Cadden develop any argument as to how they might. As a result, the key question for us concerns only whether the evidence sufficed to permit a juror reasonably to find that the predicate acts of mail fraud that the jury found were themselves related to one another.

Cadden contends that the evidence did not so suffice because those predicate acts of mail fraud included both some that were based on fraudulent representations about technician licensure -- mirroring the mail fraud allegations set forth in the ten Connolly-related, stand-alone mail fraud counts that we earlier addressed -- and some based on fraudulent representations that involved NECC's failure to produce these drugs in compliance with USP-797. But, even if we assume that it would not be enough for two or more of the predicate acts within one of these distinct sets of predicate acts of mail fraud to be related to one another, the argument that Cadden advances still lacks merit.

These predicate acts -- even though involving fraudulent representations concerning technician licensure and compliance with the USP -- all reflect the same crime (mail fraud), the same category of victims (medical providers), the same purpose (profit), similar fraudulent misrepresentations (claims of compliance with regulatory schemes), similar methods of communicating those representations (NECC marketing materials), similar participants (employees of NECC), and the same method of commission ***16** (medication sales through NECC). They also all occurred within the same time frame. Thus, a juror reasonably could find that they were related, despite their differences. See Feinstein, 942 F.2d at 44 (recognizing that predicate acts with the "same or similar purposes, results, participants, victims, or methods of commission" or that are "otherwise ... interrelated by distinguishing characteristics and ... not isolated events" are related (quoting H.J., 492 U.S. at 240, 109 S.Ct. 2893)).

3.

[11] We proceed, then, to consider Cadden's contention that the evidence did not suffice to permit a juror reasonably to find the continuity requirement met. Once again, though, we are not persuaded.

[12] The government may satisfy the continuity requirement by demonstrating either closed-ended continuity, which refers to "a closed period of repeated conduct," or open-ended continuity, which encompasses "past conduct that by its nature projects into the future with a threat of repetition." H.J., 492 U.S. at 241, 109 S.Ct. 2893. Cadden contends that the evidence did not suffice on either score. But, even assuming that it did not suffice to show closed-ended continuity, we find that it did suffice to show open-ended continuity.

[13] There are at least two types of racketeering enterprises that, by their nature, extend into the future and therefore demonstrate open-ended continuity: those that "involve a

distinct threat of long-term racketeering activity, either implicit or explicit" and those where "the predicate acts or offenses are part of an ongoing entity's regular way of doing business." Id. at 242, 109 S.Ct. 2893. The latter type not only includes enterprises that are wholly criminal but also those in which the predicate acts of racketeering "are a regular way of conducting defendant's ongoing legitimate business." Id. at 243, 109 S.Ct. 2893.

The record suffices to permit a juror reasonably to find that, at least as of 2012, it was "business as usual" at NECC to distribute medications to customers by representing to them that the medications had been compounded in compliance with standards that the company was not meeting. Thus, the record suffices to establish open-ended continuity.

Specifically, the record shows that NECC employees testified that the company "[r]outinely" sent out medications subject to USP-797 to customers prior to testing them, even though USP-797 forbade that practice; that the practice of "botching lots" to mix old, tested medications with new, untested ones and labeling the resulting USP-797-covered mixture with the old label was "prevalent" as of 2012 and occurred prior to that time, even though USP-797 required otherwise; and that "[i]t was kind of protocol" for NECC to ship even USP-797-covered medications that used expired ingredients, despite USP-797's contrary command. Evidence also showed that NECC had sterilized its compounded medications subject to USP-797 for an insufficient amount of time under that standard since at least 2009, and that it had a practice of failing to use biological indicators for those compounded medications, when USP-797 dictated otherwise.

Moreover, these facts and others led the government's expert witness to testify that he had concluded that NECC's method for sterilizing large lots of MPA was "completely inconsistent with the requirements of" USP-797. In addition, the evidence sufficed to permit a reasonable juror to find, for the reasons set forth above, see supra at 12–14, that, despite this evidence of a pattern of NECC failing to adhere to USP-797, NECC routinely advertised to ***17** customers through its sales staff and standard marketing materials that it was in compliance with that standard when it was not.

As we also have explained, the record supportably shows that, during this same time period, NECC had permitted some of its products to be compounded by an unlicensed pharmacy technician in violation of state law. Yet, the record also supportably showed, as we have explained, that NECC routinely represented to customers during this time that it was permitting only certified technicians to engage in such work, given the marketing materials that Boneau, the sales representative for NECC, had described in his testimony.

A juror thus could reasonably find from such evidence that, as of 2012, the mail fraud alleged in each of the predicate acts of racketeering that the jury found was "part of an ongoing entity's regular way of doing business." H.J., 492 U.S. at 242, 109 S.Ct. 2893. Accordingly, a juror reasonably could find that the evidence demonstrated open-ended continuity.

Cadden does stress that, at least on his account of the record, the company had regularly produced safe products prior to 2012. But, because the evidence that it was a routine business practice of NECC to market its medications through fraudulent misrepresentations about the standards that its operations met was strong, a juror reasonably could find that the company's pattern of conduct as of 2012 would continue into the future.

Cadden does also contend that his acquittal on most of the FDCA counts and the conspiracy to defraud the United States count indicates that the jury found him not guilty of participating in an open-ended racketeering operation. To make that case, he urges us to infer from those acquittals that the jury necessarily found that Cadden lacked the mens rea necessary to commit fraud. But, the jury necessarily found that Cadden intended to defraud when it found that he committed the mail fraud alleged in the mail-fraud-based predicate acts of racketeering. And, Cadden does not dispute that the evidence sufficed to permit a reasonable juror to so find. Nor is there any inherent inconsistency in the jury having made such findings while acquitting him of the FDCA counts and the conspiracy to defraud the United States count, given that the elements of those distinct crimes differ from the elements of mail fraud. See 18 U.S.C. § 371; 21 U.S.C. §§ 331(a), 333(a)(2), 351(a)(2)(A).

B.

For these reasons, we reject Cadden's sufficiency-of-the-evidence challenges to his racketeering conviction insofar as he challenges the sufficiency of the evidence to support the "pattern of racketeering" element of that offense. And, because his sufficiency-of-the-evidence challenges to

his racketeering conspiracy conviction rely on the same unpersuasive arguments, we reject them, too.

IV.

We next consider a set of challenges in which Cadden takes aim at each of his convictions, rather than only a subset of them. Moreover, in these challenges, he seeks merely to vacate -- rather than to reverse -- each of these convictions, as he contends that each was tainted by a trial error that so prejudiced the jury's finding of guilt in each instance that the resulting conviction cannot stand.

Cadden's focus here is on what he contends was the unduly prejudicial effect of certain evidence that the government introduced at trial that related to the persons who died, or fell ill, from using the contaminated MPA that NECC had ***18** shipped to its customers. That evidence includes photographs of patients who died after having been injected with the contaminated MPA, which the government displayed during opening and closing arguments, testimony given by three family members of such patients, and graphic testimony and photographs illustrating the harm that the MPA did to the patients.

Cadden does not clearly spell out the legal authority that grounds these challenges in his briefing to us. But, he does appear to be challenging the admission of this evidence under Federal Rule of Evidence 403. See Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of ... unfair prejudice ...."). Insofar as the government disputes whether Cadden has in fact advanced this argument on appeal, we may proceed on the assumption that he did. For, even if this Rule 403 challenge is properly before us and was preserved below, such that our review is for abuse of discretion, see United States v. Merritt, 945 F.3d 578, 586 (1st Cir. 2019), we find no merit to it.

A.

[14] Cadden argues that the patient-related evidence, which he contends bore at most on the alleged predicate racketeering acts involving second-degree murder, lacked enough probative value to outweigh its obvious prejudicial effect. In pressing this contention, Cadden at various points actually goes so far as to assert that there was not enough evidence of either the causation or mens rea elements of second-degree murder to support a finding of that offense at all and that the patient-related evidence could not itself make up for those fatal evidentiary gaps in the government's case on that score. Notably, that contention would suggest that there was no probative value to the patient-related evidence, such that there would be no need to engage in the traditional weighing of the probative value of evidence against its prejudicial impact. See Fed. R. Evid. 104(b) ("When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist."). But, as we will explain, that contention is not supported by the record. In fact, it is evident that the patient-related evidence was quite probative of at least the mens rea element of second-degree murder. We then go on to explain why, in light of the probative value of this evidence, the District Court did not err under Rule 403 in permitting the jury to hear it, notwithstanding the danger of unfair prejudice.

1.

Although Cadden asserts that sufficient evidence to permit a finding as to the causation element of second-degree murder was lacking, we fail to see why. He concedes that the MPA that NECC compounded caused the deaths associated with the alleged predicate acts of racketeering involving second-degree murder. In fact, he offered to stipulate as much and then conceded that aspect of causation at trial. Cadden also does not dispute that the record shows that deficient means were used by NECC in compounding the contaminated MPA that led to the deaths at issue in those alleged predicate acts. Nor does he dispute that the evidence presented at trial sufficed to permit a reasonable juror to find that the risks of contamination associated with the poor practices that NECC engaged in were high even compared to other non-USP-797-compliant compounding pharmacies. [6]

***19** Against that evidentiary backdrop, a juror could reasonably infer that the deficient compounding practices by NECC must have been the cause of such a singular mass casualty outbreak as the one that occurred here. After all, an official with the United States Centers for Disease Control testified at trial that the outbreak caused by the contaminated MPA compounded by NECC was a "public health tragedy" that in his fifteen years of work investigating outbreaks had only been matched by the Ebola epidemic -- and was unmatched (at least at that time) in terms of consequences within the United States. See United States v.

O'Brien, 14 F.3d 703, 708 (1st Cir. 1994) ("[I]n ... choosing from among competing inferences, jurors are entitled to take full advantage of their collective experience and common sense. There are limits to coincidence." (internal citations omitted)).

Cadden does contend that the evidence still failed to suffice to show that he personally took any action that resulted in the contamination of the MPA with which those patients were injected. But, he does not dispute that he knew of the alleged deficiencies with NECC's compounding practices. In addition, the record supportably shows that Cadden claimed to have "direct[ed] sales" for NECC and to have made "every important decision [for the company] on a daily basis." The record further suffices to illustrate specific instances of his directing the shipment of orders. Thus, a reasonable juror could conclude that Cadden caused the deaths of patients by directing the shipment of the deficiently prepared medications that caused the deaths, even though a juror reasonably could also find otherwise.

2.

The evidence as to the mens rea element also sufficed, contrary to Cadden's contention. Regarding this element, the District Court provided the jury with seven different sets of instructions on the state of mind necessary for second-degree murder -- one for every state where a patient identified in a murder allegation was located -- and asked the jury to apply to each murder allegation the mens rea standard of the state in which the patient had resided. Nevertheless, despite the distinct language used in the seven separate instructions, the District Court concluded that the mens rea standard was functionally identical between the states, and neither party on appeal identifies any material differences between the standards.

[15] In fact, in its briefing to us, the government presents the Michigan second-degree murder standard, applicable to eight of the murder charges, as representative of the appropriate mens rea standard for all twenty-five instances of second-degree murder, and Cadden does not contend otherwise. Under Michigan law, a defendant must act with "malice" to be guilty of second-degree murder, which requires, for our purposes, a showing that ***20** the defendant "inten[ded] to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." People v. Goecke, 457 Mich. 442, 579 N.W.2d 868, 878 (1998). We thus apply the Michigan standard in reviewing Cadden's challenge to the sufficiency of the evidence of mens rea, and we find that the evidence sufficed to meet it.

In addition to the expert testimony described above concerning the risks associated with not complying with USP-797, other testimony indicated that in 2002, Cadden was informed by an investigator for the United States Food and Drug Administration of the risk that, if NECC's compounded medications were contaminated, "people can get really sick or die." This testimony provided support for a finding that Cadden was well aware of the type of risk that he was running by operating NECC in an unsafe manner and then permitting a high-risk sterile compounded medication like MPA to be distributed under the false representation that it had been compounded in accord with USP-797. So, too, did the extensive number of people potentially endangered by Cadden's conduct over a lengthy period of time, Cf. 2 Wayne R. LaFave et al., Substantive Criminal Law § 14.4(a) (3d ed. 2019) ("[T]he situation may be such that the risk of death is too slight for murder where only one person is endangered by defendant's conduct, whereas the risk is sufficient where several are thus hazarded ...."), and the vivid accounts of the suffering endured by those who received injections of the contaminated MPA, as those accounts permitted a juror to assess Cadden to have been indifferent to the harm that such fraudulent shipping of such a deficiently compounded, high-risk sterile compounded medication could have caused.

Cadden does point to evidence that showed that NECC had produced MPA and other similar steroids in large quantities since 2006 without problems. But, as Cadden concedes, the evidence supportably showed that problems at NECC had gotten significantly worse by 2012, as NECC increased its production. For instance, an NECC employee testified that the practice of mislabeling lots to cover up the use of untested medications became much more prevalent in 2012, and cleaning became much less frequent. The evidence also showed that, in 2012, NECC sent eye-block to a hospital that contained insufficient anesthetic, leading to pain and headaches. A juror thus would have been justified in concluding from this evidence that NECC's record prior to 2012 was of limited relevance to Cadden's mens rea during that year.

3.

In finding that the evidence sufficed to permit a reasonable juror to find the predicate acts of racketeering involving second-degree murder, we in no way mean to second-guess the jury's determination, made apparent on the special verdict form, that the government did not prove them. Such a determination by the jury was based on a consideration of a wealth of evidence during an extensive trial that lasted more than two months. It is also the final word as to whether the government proved the serious allegations contained in the racketeering count that sets forth the alleged predicate acts involving second-degree murder. But, while there is no question the jury's actual finding on that score was that the government had not proved its case against Cadden, that finding is not determinative of whether he is right in pressing his Rule 403 challenge. For, in the aspect of that challenge at issue, he contends that a juror would not have had a sufficiently supportable evidentiary basis ***21** for finding second-degree murder on this record given the lack of evidence of causation and mens rea and thus that the patient-related evidence offered in support of it was simply not probative at all because it could not itself fill in those evidentiary gaps. The jury's finding does not speak to that issue.

Similarly, we are aware that, at sentencing, the District Court commented on the weakness of the government's case for finding that Cadden's conduct constituted second-degree murder. But, the District Court was not addressing whether the evidence of the second-degree murder predicate acts was so inadequate that it precluded a juror from finding them as a matter of law. Thus, the District Court was not addressing the contention that Cadden now makes in pressing his Rule 403 challenge about the probative value of the patient-related evidence. [7]

B.

That the murder predicates were sufficiently supported, and that the patient-related-evidence offered to prove those predicates had probative value because of its capacity to show his mens rea, does not, of course, determine in and of itself whether the District Court violated Rule 403 by admitting that evidence. There remains the question whether the prejudicial impact of that evidence so outweighed its probative value that it should have been excluded nonetheless. But, we conclude that the District Court did not abuse its discretion in answering that question as it did.

Cadden is right that he conceded at trial -- after offering to make a stipulation -- that each of the twenty-five patients tied to each of the alleged second-degree murder predicate acts of racketeering was injected with MPA from one of the contaminated lots compounded by NECC, that each of those patients received at least one contaminated injection, and that each of those patients died from receiving a contaminated injection of MPA. We thus agree with Cadden that, in consequence, the patient-related evidence could have at the most only marginal probative value to the causation showing that the government had to make to prove the second-degree-murder-based predicate acts of racketeering. Moreover, while the government is right that the United States Supreme Court has recognized that "the availability of alternative proofs of [an] element ..., such as an admission" by the defendant that the element exists, does not make direct evidence of that element wholly irrelevant, Old Chief v. U.S., 519 U.S. 172, 179, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), Cadden is also right to point out that "a lack of dispute or concession of a central allegation may significantly reduce the probative value of particular evidence," United States v. Kilmartin, 944 F.3d 315, 335 (1st Cir. 2019); see also Old Chief, 519 U.S. at 184, 117 S.Ct. 644 (concluding that "what counts as the Rule 403 'probative value' of an item of ***22** evidence ... may be calculated by comparing evidentiary alternatives"). Indeed, given the "delicate balance between" the "probative value" of evidence and "the risk that the evidence will inflame the jurors' passions," Kilmartin, 944 F.3d at 336, we have recognized that agreement between the parties on a key fact might sometimes tip the balance against admissibility of evidence of that fact, at least where the risk of unfair prejudice is especially high, see United States v. Ford, 839 F.3d 94, 109-10 (1st Cir. 2016).

Nonetheless, largely for the reasons we have already explained, we agree with the argument that the government made in its opposition to Cadden's motion in limine below, though, oddly, not in its brief to us on appeal: the patient-related evidence was "highly probative" of Cadden's "extremely reckless behavior." See United States v. Brown, 669 F.3d 10, 21 (1st Cir. 2012) ("[W]e may affirm a district court's evidentiary ruling on any ground apparent in the record ...."). Testimony from the patients' family members, for example, explained why the patients were reliant on the drugs compounded by NECC and the pain and suffering caused by the contaminated drugs that were injected into their bodies. In contrast, the concession mirroring the bare-bones stipulation was not a complete substitute for one

of the government's primary instruments for explaining the danger that an experienced pharmacist like Cadden was disregarding by operating his pharmacy in an unsafe manner. See United States v. Balsam, 203 F.3d 72, 84 (1st Cir. 2000) (explaining that the government is usually entitled to present "evidence creating a coherent narrative of [the defendant's] thoughts and actions in perpetrating the offense for which he is being tried" (quoting Old Chief, 519 U.S. at 192, 117 S.Ct. 644)); see also United States v. Morales-Aldahondo, 524 F.3d 115, 120 (1st Cir. 2008) ("The court is not required to scrub the trial clean of all evidence that may have an emotional impact, where the evidence is 'part of the Government's narrative.' " (quoting United States v. Dean, 135 F. Supp. 2d 207, 209-10 (D. Me. 2001))).

To be sure, the District Court was obliged to take account of the potential prejudicial impact of the patient-related testimony, which was sure to pack an emotional punch. But, the District Court was not insensitive to this concern. In fact, it limited the government to presenting only three family members of patients as witnesses and precluded the government from introducing graphic autopsy photographs of the patients to mitigate the risk of prejudice.

Thus, keeping in mind that "the district court must be ceded considerable latitude in steadying the balance which Rule 403 demands," United States v. Rodriguez-Estrada, 877 F.2d 153, 156 (1st Cir. 1989), we identify no abuse of discretion in the District Court's balancing under Rule 403 of the probative value of the evidence against its potential for prejudice. We thus reject this ground for overturning Cadden's convictions.

V.

Cadden next seeks to vacate his convictions based on another claimed trial error -- the District Court's partial denial of his pre-trial motion to "preclude [the] government from relying on environmental monitoring requirements other than those in USP 797." [8] But, here, too, we find no error.

A.

The motion at issue related to environmental monitoring data that NECC collected ***23** from its clean rooms during the period that the contaminated lots of MPA were produced. NECC gathered this data by measuring the level of microbial growth in different parts of its clean rooms.

At trial, the government repeatedly compared the results of this measuring to particular "alert" and "action" levels for microbial activity laid out in NECC's Standard Operating Procedures ("SOPs"). The government asserted that those levels signaled the possibility of a "drift from normal operating conditions" concerning the cleanliness of the clean rooms.

For example, during closing argument, the government presented a PowerPoint slideshow that highlighted each week in 2012 in which either air or surface monitoring results exceeded the action or alert levels in the SOPs. The evidence supportably showed that NECC did not take responsive action.

Cadden's motion below asked the District Court to preclude the government from making arguments that relied on this comparison between the environmental monitoring results in one of NECC's clean rooms and the alert and action levels of the SOPs. In support of that motion, Cadden contended to the District Court -- as he contends to us -- that he was charged with making fraudulent representations related to compliance with USP-797, not the SOPs. Cadden thus argued below -- as he does to us -- that he was not charged with falsely claiming to comply with the SOPs in connection with any of the mail fraud allegations underlying any of the counts he faced. He also argues that, under the terms of the SOPs themselves, the levels set out in the SOPs were not operative in 2012, given that NECC had recently transferred many of its operations to a new clean room and that it needed time before establishing new levels specific to that clean room. Rather, he asserts that, until NECC had gathered enough data to establish a baseline tailored to its new facilities, the SOPs designated the less stringent action levels outlined in the USP-797 as the operative levels.

As a result, according to Cadden, the government's repeated references to the triggering of the SOP "alert" and "action" levels were problematic in two respects. They were irrelevant to any material issue in the case and were unfairly prejudicial, and they also were likely to mislead the jury into thinking there was a failure to comply with the SOPs when, because they were not operative, there was not.

At oral argument, Cadden's attorney characterized his challenge to the denial of the motion as one that concerned

the relevance and unfairly prejudicial nature of certain of the evidence that had been admitted. But, Cadden's motion to the District Court was styled as a motion to "preclude the government from relying on" certain "environmental monitoring requirements," not one to exclude any evidence. As we read Cadden's brief to us, moreover, he does not appear to be challenging the admission of evidence regarding the SOPs or the environmental monitoring results. Rather, he challenges the government's repeated references to, and reliance on, the SOPs, particularly in opening and closing argument.

We need not resolve the precise nature of the challenge, though. The government does not dispute Cadden's contention that we should review the District Court's denial of the motion as if it had been properly preserved or that we should review its denial, as Cadden contends we must, for an abuse of discretion. We thus proceed on the basis of that shared view in reviewing Cadden's challenge as, even if we do, it fails. The reason is that, as we will explain, the challenge -- however it is best characterized -- rests on a fatally mistaken premise ***24** about what the government was trying to prove by referencing the deviations from the SOPs.

B.

[16] In front of the District Court, the government argued that the comparison between NECC's environmental monitoring results and the standards outlined in the SOPs was probative not just of Cadden's commission of mail fraud, but also of his "extreme recklessness" -- the mens rea standard it needed to show to prove the second-degree murder predicate acts. And, notably, even on Cadden's own account, the action and alert levels set forth in the SOPs were the ones used in NECC's old clean room. Thus, even if we accept Cadden's contention that the SOPs were not formally in effect in 2012, the District Court did not err in permitting the government to make the case to the jury that those levels set a reasonable benchmark by which to assess the cleanliness of a compounding facility, that Cadden himself was well aware of them at the time NECC made the fatal shipments of contaminated MPA, and thus that deviations from them were probative of his reckless state of mind. For, even if NECC had not yet collected enough data to determine baseline measurements for the new facility, it was entirely reasonable for the government to turn to the action and alert levels that NECC had relied on for its old clean room to make the case to the jury that Cadden was aware its new one was unsanitary.

As the government put it to the District Court,

> Cadden's failure to properly monitor his clean room or come up with a plan for doing so effectively, as he was required to do by the USP, should hardly be the basis for an order excluding the [environmental monitoring] results showing contamination in his clean rooms from evidence; he simply should not be allowed to pretend that his consistent violations of his own policies, especially beginning in early 2012, did not happen.

Nor does Cadden develop any argument to the contrary, as he makes no contention that the content of the SOP-standards reference was so obviously misleading as a measure of the state of NECC's new clean room as to require the District Court to exclude all mention of those standards even if they could have been probative of the second-degree murder predicate acts. Thus, his challenge necessarily fails. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

VI.

[17] Cadden's final set of challenges to his convictions targets the District Court's denial of his motion for a new trial based on allegations of prosecutorial misconduct at trial. In seeking to vacate his convictions on this basis, Cadden first argues that, in several instances, the government presented false evidence to the jury that suggested that he had failed to take adequate action even after he learned about the existence of the contaminated MPA that caused the 2012 outbreak. He next takes issue with a binder of evidence that the government gave to the jury without either his or the District Court's knowledge. Our review of the District Court's denial of his motion for a new trial on these grounds is for abuse of

discretion, see United States v. Casas, 425 F.3d 23, 39 (1st Cir. 2005), and we see none.

A.

[18] We have held that "a prosecutor 'may not knowingly use false evidence, including ***25** false testimony, to obtain a tainted conviction regardless of whether the prosecutor solicits false evidence or ... allows false evidence to go uncorrected when it appears.' " United States v. Flores-Rivera, 787 F.3d 1, 31 (1st Cir. 2015) (alteration in original) (quoting United States v. Mangual–Garcia, 505 F.3d 1, 10 (1st Cir. 2007)). Such a conviction "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Bulger, 816 F.3d 137, 158 (1st Cir. 2016) (quoting United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)).

The most troubling allegations concern the testimony of Wendy Huffman, the director of an entity -- the South Bend Clinic -- that purchased medications from NECC. We thus begin with those allegations. We then consider two other alleged uses of false evidence by the government that Cadden identifies.

1.

Huffman testified at trial that, on September 21, 2012, she received a call from Cadden, in which he allegedly told her that she should pull the MPA that NECC had sold to the South Bend Clinic from its shelves. The government put forth Huffman's testimony to show that Cadden had known about the contamination on September 21 and thus well before September 26, when other evidence showed that he notified his other customers of the problem.

The Huffman testimony was potentially damning. It suggested that Cadden attempted to conceal evidence of the contamination from his other customers, which in turn supported the government's theory that he possessed the state of mind necessary for second-degree murder.

On February 5, 2017, shortly after Huffman testified, Cadden moved to strike Huffman's testimony on the ground that it was clearly false. Cadden based his motion, in part, on telephone records that indicated that Huffman had not received a call from Cadden on the date that she testified she had and on what he contended was the inconsistency between her testimony and other evidence about NECC's response to the outbreak.

The District Court denied that motion on the ground that it was the jury's responsibility to sort through the parties' factual dispute on the issue. On March 3, 2017, however, near the close of the government's case, the District Court held a conference with counsel. At the conference, the District Court asked counsel for the government whether it "shouldn't consider withdrawing [Huffman's] substantive testimony about a call on the 21st of September," as "[n]one of your other evidence is consistent with" Huffman's receipt of a recall notice on that date.

In response, on March 7, the government filed a brief that opposed Cadden's earlier motion to strike the Huffman testimony and requested that the District Court strike Cadden's evidence on this point. On March 8, the District Court again concluded that "whatever its private opinion may be, contested issues of fact are for the jury" and declined to strike any of the contested evidence.

At the close of the defense's case on March 13, though, Cadden once again moved to strike evidence relating to the Huffman call. Again, the District Court denied the motion, noting to Cadden that "[y]ou have an awfully strong argument, I think, on the point to the jury," but concluding that "it's a factual issue that I don't think I have the power to shape at this point."

***26** Finally, Cadden in his post-verdict motion for judgment of acquittal moved for a new trial based on the government's putting forth the Huffman testimony despite the evidence indicating that it was false. This time, the District Court rejected Cadden's argument on somewhat different grounds. It held that any misconduct that the government committed did not prejudice Cadden and so did not warrant a new trial.

Before reaching that conclusion, however, the District Court found that it was "clear that ... [Huffman] had confused a call from a patient advocate inquiring about an appointment ... with the warning call she did receive from Cadden the following week." And while the District Court did not make an express finding of misconduct by the government in relying on the evidence despite the indications that it was false, it stated that the government's "persistence in

defending the Huffman testimony," in spite of Cadden's repeated objections and its own explicit suggestion that the government retract the evidence, was "perplexing at best, and at worst, inconsistent with the obligation of the government to serve the higher interest of justice."

[19] We share the District Court's concern about the government's conduct. In fact, the government does not attempt on appeal to rebut the substance of Cadden's objections to the accuracy of Huffman's testimony. The government notes instead only that it "is not forbidden to call witnesses whose reliability in one or many particulars is imperfect or even suspect." United States v. McGovern, 499 F.2d 1140, 1143 (1st Cir. 1974). But, the leeway afforded the government to present flawed testimony does not sanction its "knowing reliance upon false evidence." Id. Nonetheless, like the District Court, we may resolve this challenge without deciding whether the government's conduct was proper, because Cadden has not shown the requisite prejudice.

Huffman's testimony was introduced to prove Cadden's state of mind for the purpose of proving only the second-degree-murder-based predicate acts of racketeering. The government made no argument that her testimony was otherwise probative. Yet, the jury, after having heard all the competing evidence that Cadden relies on concerning Huffman's testimony, did not find those predicate acts of racketeering proved.

At the very least, then, we find no indication in the jury verdict that the jury disagreed with what we read the overwhelming weight of the evidence to indicate about Huffman's testimony -- it was inaccurate. We thus have no reason to be concerned that, despite having been extensively rebutted, her testimony influenced the jury with respect to the only issue for which it was put forward by the government.

Nor is the Huffman testimony the sort of evidence that in its nature is likely to spill over and interfere with the jury's deliberations over the other counts (or predicate acts), such as those concerning mail fraud, that it was not put forward to prove. The straightforward testimony of Huffman, about a phone call that she allegedly received, was not likely -- at least after having been so thoroughly undermined -- to " 'evoke an improper emotional response' and distract[ ] 'from careful consideration of the relevant issues.' " Kilmartin, 944 F.3d at 335 (quoting United States v. Fulmer, 108 F.3d 1486, 1498 (1st Cir. 1997)). That being so, it would be too speculative to conclude, contrary to the District Court, that the Huffman testimony so tainted the trial that the verdicts for which the evidence was not presented must be overturned.

***27** Cadden contends that his ability to introduce evidence that Huffman's testimony was false does not wipe away the possibility of prejudice. He points out that much of the evidence supporting his rebuttal of Huffman's testimony only came out six weeks later during the presentation of his evidence. Cadden presents no support, however, for the notion that a delay between the government's case and the defense's case -- a standard feature of criminal trials -- prejudices defendants by making their case less persuasive in the eyes of the jury. We thus decline to base a prejudice finding on such an assertion.

2.

The two other incidents in which Cadden alleges that the government relied on false testimony are less concerning. We consider each in turn.

First, at trial, Annette Robinson, an NECC employee, testified that Cadden instructed her to do fungal testing, a request he had not made before, "a few weeks before the outbreak." Cadden contends that the testing records show that testing only began on September 27, 2012, however, which could suggest that Robinson was wrong that testing had begun earlier than the date of the outbreak.

But, it was not clear precisely when "the outbreak" occurred or how long "a few weeks" might be. There was also a lack of evidence about how long it took NECC to ship medications to the testing facility. We thus cannot conclude that Robinson's testimony was false, let alone that the government relied on it while knowing that it was.

Second, two witnesses from another clinic that had purchased medications that NECC compounded -- Michigan Pain Specialists -- testified at trial that Cadden had failed to notify their clinic on September 26, when he recalled the contaminated MPA from NECC's other customers. The testimony suggested that there was a gap between when Cadden was aware of the contamination -- even assuming that he first became aware of it on September 25 -- and when he took action to notify at least one of his customers.

Contrary to the witnesses' testimony, however, a document admitted at trial showed that NECC had faxed over a recall notice to Michigan Pain Specialists on September 26. Cadden contends on that basis that the testimony from the Michigan Pain Specialists witnesses was false and that the government committed misconduct by advancing it at trial.

But, Cadden concedes that, at trial, his attorney succeeded in "surpris[ing]" one of the clinic's witnesses with a copy of the fax. There is no indication that the government knew of this document when it presented the witness, thus making it hard to see how there is a basis for finding that the government engaged in misconduct.

In any event, the jury heard the same evidence that would allow us to conclude that the government's evidence was false. The special verdict form also shows that the jury did not accept the government's theory of second-degree murder. Yet the contested testimony was admissible to prove the alleged predicate acts of racketeering based on that racketeering activity. Thus, for substantially the same reasons that lead us to find that the admission of Huffman's testimony does not provide grounds for a new trial, we reject Cadden's challenge regarding the Michigan Pain Specialists testimony as well, given the minimal inherent risk of prejudice that it posed once undermined.

B.

Cadden also brings a misconduct-based challenge to his convictions because the ***28** prosecution gave the jury, without his knowledge or the knowledge of the District Court, a binder of admitted evidence that the government assembled. It is troubling that this binder, which was not itself admitted into evidence though the exhibits within it were, made its way to the jury for deliberations unbeknownst to Cadden or the District Court until after the jury had rendered its verdict. The District Court acknowledged as much. But, we conclude that the District Court did not err in determining that, due to a lack of prejudice, there was no ground for a new trial.

1.

The binder compiled evidence that had already been introduced throughout the trial, and it purported to prove deficiencies in the medications that corresponded to many of the stand-alone mail fraud counts and predicate acts of racketeering involving mail fraud. The binder was divided into three parts. Each part related to a different set of the stand-alone mail fraud counts that Cadden was charged with committing. Each part also contained admitted exhibits that related to test results that indicated that shipments that were at issue in each of those mail fraud counts were nonsterile or subpotent. The binder did not include evidence that Cadden had introduced at trial to prove that, contrary to the government's allegations, some of the shipments at issue contained medications that were in fact sterile.

The first mention of this binder at trial occurred during closing argument. That is when the government highlighted the existence of a government-created binder to the jury by describing it as "a binder that we put together for you where we've collected the test results that are in evidence for these [fraudulent] shipments."

Cadden apparently did not notice or object to the binder when the government referred to it, even though no such binder had been admitted into evidence or had otherwise been approved to go the jury. The government then provided the binder to the court clerk, who transmitted it to the jury room without giving any additional notice to Cadden or the District Court.

On the third day of jury deliberations, the jury requested exhibits that related to ten of the predicate acts of racketeering involving mail fraud, some of which the binder contained. At the District Court's request, the parties assembled responsive exhibits. The District Court organized these exhibits and submitted them to the jury.

On the same day, during a conversation between counsel and the District Court about a response to a different jury question, Cadden's counsel objected to the government's transmission of the binder and the jury's reliance on it. By then, he apparently had learned that the jury had obtained a binder filled with exhibits of government-friendly test results.

In response, counsel for the government claimed not to be aware of the location of the binder. The District Court relied on that representation in mistakenly concluding that the binder had not been sent to the jury and declining to take additional action at the time.

After the jury returned its verdict, however, it became clear that government attorneys had, in fact, provided the binder to the jury. The government later conceded the same.

Cadden now argues, as he did to the District Court in a motion for a new trial, that the government's provision of the binder to the jury and denial that it had done so constitutes misconduct that warrants a new trial. The District Court denied Cadden's motion.

***29** The District Court conceded that the binder's presence in the jury room without court approval was a "mistake." However, the District Court did not find that it was the product of intentional misconduct by the government. Rather, the District Court bypassed a definitive ruling on that issue and found that the binder, even though received by the jury without the knowledge of Cadden or the District Court, was not so prejudicial as to require a new trial. Among the District Court's reasons for so finding were that all of the documents contained in the binder had been admitted into evidence and that the District Court would have admitted the completed binder into evidence if the government had requested that it do so.

2.

[20] In general, government "misconduct alone is insufficient to reverse a conviction absent a showing of prejudice." United States v. Gentles, 619 F.3d 75, 81 (1st Cir. 2010); see also United States v. Best, 939 F.2d 425, 429 (7th Cir. 1991) (en banc) (asking, in a similar situation, whether "there was some prejudice or substantial right affected by the presence of the binders in the jury room during deliberations"). Nor does Cadden argue that the provision to the jury of a government binder that had not itself been admitted into evidence is presumptively prejudicial to the defendant, let alone that one that contains only documents that themselves have been admitted into evidence is.[9] See Best, 939 F.2d at 430. Instead, he contends that the binder presented the evidence that it contained in a manner favorable to the government's position and, for that reason, caused prejudice that necessitates a new trial.

To support this challenge, Cadden highlights the title of the binder, "Nonsterile and Sub/Super-Potent Results." He contends that title could be read to suggest that the binder included all the relevant test results, rather than only the government's preferred evidence concerning testing.

[21] As the District Court itself noted, however, the jury specifically requested "exhibits already allegedly included in the binder." The jury's request strongly suggests that it did not rely on the binder to the exclusion of other evidence, or assume, as Cadden's argument for prejudice would imply, that the government's binder contained the only exhibits about testing relevant to the mail fraud counts in question.

Moreover, the very title of the binder that Cadden complains of implies, not, as he suggests, that the binder includes all test results that relate to the shipments at issue in the mail-fraud-based counts, but rather, that it includes only all "Nonsterile and Sub/Super-Potent Results" that relate to those counts. Cadden's evidence of competing test results, however, was also introduced. Those results purported to show that the shipments contained medications that were sterile. It would be too speculative to conclude that the jury would have assumed a binder explicitly labeled as including "Nonsterile ... Results" would have been the sole place to look to find the non-trivial number of exhibits that showed that the medications were sterile, especially when Cadden repeatedly had highlighted those exhibits at trial and when the ***30** jury requested exhibits concerning test results that were in the binder.

We note, too, that the government flagged the existence of the government-produced binder for the jury during closing argument and described it as presenting its evidence. Thus, the jury was on notice that it would have access to a binder produced by the government that contained evidence of test results introduced to prove the instances of mail fraud alleged in the indictment. In fact, the binder had the United States Department of Justice seal on the front cover, and the District Court reasonably found the presence of the seal "would have made it clear to the jury that the exhibits had been assembled by the government."

Further supporting the District Court's no-prejudice finding is the fact that Cadden, when faced at closing argument with the government's assertion that it intended to present the jury with a binder full of government evidence regarding the fraudulent shipments of medications, neither objected nor took the opportunity to assemble a comparable binder of defense evidence. Cadden asserts that his counsel believed that the government was alluding to other binders that had been admitted into evidence during trial. But, he identifies no other binders that match the description offered by the government. The silence by Cadden's counsel at that moment thus accords with the District Court's assessment that the binder was not of a sort that would cause prejudice merely by having been given to the jury for its deliberations.

The District Court's determination as to prejudice also accords, as the government contends, with the most analogous precedent: Best. There, a sharply divided Seventh Circuit held en banc that, under somewhat similar circumstances, improper entry of a binder of admitted evidence into the jury room was not prejudicial. See 939 F.2d at 430-31. In fact, the record here reveals, if anything, less prejudice than was present there.

The dissenters in Best were understandably concerned that the binder at issue there was "a roadmap to a guilty verdict," id. at 433 (Posner, J., dissenting), and we see much force in their views. But, this binder was different. It merely grouped the admissible evidence that it contained by shipment and thus deployed a commonsense -- rather than a tendentious -- organizational scheme. In fact, the District Court itself expressed concern about "the confusion that the erratic numbering of government and defense exhibits caused during the trial," urged the parties to organize the evidence into binders, and indicated that, notwithstanding the structure of the binder, it would have allowed it into evidence anyway.

The dissenters in Best also emphasized that the record there strongly suggested that the jury relied heavily, although perhaps not exclusively, on the government's binder of evidence. Id. at 432-35. But, nothing in the record suggests comparable reliance on the binder by the jury in this case. In fact, the jury's request for exhibits that related to each of several counts addressed by the binder suggests the exact opposite.

To be sure, Cadden was deprived of knowing that the binder went to the jury and thus of choosing how to respond to that fact. But, he has not explained, and we do not see, what responsive action he could have taken that would show that he was so prejudiced by being denied the chance to take it that the District Court acted beyond its discretion in denying the motion for new trial. In fact, the record shows that the jury was aware that the binder was produced by the government and contained its evidence and that his ***31** counsel made no objection to the jury being provided the binder when the government first stated its intention to provide it. [10]

VII.

We have, to this point, addressed and rejected all the challenges that Cadden brings to his convictions. We thus now turn to the challenges that concern his punishment. We begin with the challenges to his prison sentence, which are brought solely by the government in its appeal. We then turn to the challenges that Cadden, in his appeal, and the government, in its, bring to the order of forfeiture.

A.

The District Court determined that Cadden's total offense level under the Guidelines was twenty-nine. Based on that determination and Cadden's lack of any prior criminal history, the District Court calculated a sentencing range under the Guidelines of 87-to-108 months' imprisonment and handed down a sentence at the top end of that range.

[22] The government contends that the District Court erred by understating the loss attributable to Cadden's offenses, see U.S.S.G. § 2B1.1(b)(1), and by failing to apply two enhancements that would have increased Cadden's total offense level, see id. §§ 2B1.1(b)(16), 3A1.1(b). We review the District Court's "interpretation and application of the sentencing guidelines" de novo, United States v. Flores-Machicote, 706 F.3d 16, 20 (1st Cir. 2013), and factual findings, including the District Court's "calculation of the amount of loss, for clear error," United States v. Ihenacho, 716 F.3d 266, 276 (1st Cir. 2013).

1.

The District Court calculated the loss attributable to Cadden's offenses as $1,427,000, which led to a fourteen-level increase in Cadden's total offense level. See U.S.S.G. § 2B1.1(b)(1)(H). The calculation was based on the "[a]ctual loss" suffered by victims, which refers to "the reasonably foreseeable pecuniary harm that resulted from the offense." See U.S.S.G. § 2B1.1 cmt. n.3(A)(i).

***32** The District Court limited the loss calculation to the total value of shipments of medications that had been

identified as deficient in some manner and that were listed in five trial exhibits. These shipments were deficient either because the medications were expired, contaminated, nonsterile, sub-potent, super-potent, or compounded by an unlicensed technician.

The government contends, however, that all NECC sales of medications during the period in question constituted pecuniary harm suffered by NECC's customers. For that reason, the government contends that the loss amount should have been at least $75.6 million. If the loss amount were that high, then the loss enhancement would have increased Cadden's total offense level an additional ten levels from twenty-nine to thirty-nine. See id. § 2B1.1(b)(1)(M). That increase would have shifted his Guidelines sentencing range upward dramatically. See id. ch. 5, pt. A. [11]

Insofar as NECC sold a product using a fraudulent representation, there is a strong argument that the entire value of the product constituted a "loss" for Guidelines purposes. See U.S.S.G. § 2B1.1 cmt. n.3(F)(v) ("In a case involving a scheme in which ... goods for which regulatory approval by a government agency was required but not obtained ... loss shall include the amount paid for the property ... with no credit provided for the value of those items ...."); United States v. Gonzalez-Alvarez, 277 F.3d 73, 80 (1st Cir. 2002) ("[C]onsumers here who reasonably believed they were purchasing milk compliant with all government health regulations, but in fact received a different product of unknown safety, were denied the benefit of their bargain and suffered an actual loss."). But, trial evidence showed that NECC produced a number of products in a separate area from the area in which NECC's sterile compounding took place. The government makes no developed attempt to explain how conditions were such in other areas in NECC's facilities that sales of all the products produced in those areas also were fraudulently sold. Thus, we do not see how the District Court erred in finding that not all products sold by NECC were sold fraudulently.

The government separately appears to argue that, even if some of NECC's sales were not made via fraudulent representations, those sales would still constitute a "loss." The government's theory is that if these customers had "known that NECC's production methods violated the USP and NECC's safety assurances, they would have never purchased the drugs." But, the cases that the government relies are ones in which the buyer did not receive the benefit of the anticipated bargain. See Gonzalez-Alvarez, 277 F.3d at 80 ("Where a product has a value of zero as a matter of law, but consumers pay for the product as if it had value, the buyers have been robbed of the benefit of their bargain."); United States v. Bhutani, 266 F.3d 661, 670 (7th Cir. 2001) ("[T]here was indeed loss to consumers because consumers bought drugs under the false belief that they were in full compliance with the law."); United States v. Marcus, 82 F.3d 606, 610 (4th Cir. 1996) ("Given the unchallenged finding that consumers would not purchase a drug of unknown safety and efficacy at any price, the district court correctly concluded that [the company's] gross sales were the appropriate measure of the actual loss suffered by consumers ***33** ...."). Those precedents provide no support for finding that a customer has experienced a pecuniary loss when, as here, he gets exactly what he was told he was paying for from the seller but he might have reconsidered the choice to become a customer at all if he had been aware of the seller's other fraudulent sales. See U.S.S.G. § 2B1.1 cmt. n.3(A)(iii) (" 'Pecuniary harm' means harm that is monetary or that otherwise is readily measurable in money.").

The government also contends that the District Court's loss amount fails to account for even all of the medications that NECC shipped that, at a minimum, were made with false representations concerning compliance with USP-797. The District Court perhaps could have swept up additional sales in its calculation of loss for this reason, just as the government contends. But, the record shows that the government only advanced at sentencing its flawed theory that all NECC sales in the relevant period should be included in the loss calculation, even including those that were not sold fraudulently. The government did not identify or attempt to document a narrower loss figure that would reflect the actual losses suffered by fraud victims but that would have been greater than the loss amount that the District Court calculated.

[23] Thus, given the information presented to the District Court, it did not commit clear error in relying on the value of the shipments that it could pin down with reasonable certainty as fraudulent to determine the "loss" amount. [12] 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-Garcia, 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."). We

note in this regard that, even on appeal, the government still has not identified that amount. Nor has it explained how it was denied a fair opportunity to provide that amount below. We thus reject the suggestion that the government made in its briefing to remand Cadden's sentence for the District Court to redo the loss calculation to account for potential additional fraudulent sales. See United States v. Mayendía-Blanco, 905 F.3d 26, 34 (1st Cir. 2018) (applying plain error review to a challenge to a loss calculation not made below); Zannino, 895 F.2d at 17 ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.").

2.

We next take up the government's challenge to the District Court's refusal, at sentencing, to apply a two-level enhancement because Cadden's "offense involved ... the conscious or reckless risk of death or serious bodily injury." U.S.S.G. § 2B1.1(b)(16).[13] The District Court reasoned that this enhancement was only based on "the offense of conviction" and ***34** not "on acquitted or even relevant conduct." Thus, to find the enhancement applicable, the District Court concluded that, given the nature of the offense of mail fraud, it would have to find that Cadden had committed second-degree murder, and although Cadden may have been "negligen[t]" or "even gross[ly] negligen[t]," the evidence did not "c[o]me close to establishing ... that he acted with [the] state of knowledge that a conviction for second-degree murder under relevant state law requires."

[24] The government now challenges that determination on the ground that the District Court incorrectly focused on whether Cadden had committed second-degree murder, instead of whether his "relevant conduct" in the commission of his mail fraud offense carried with it the requisite risk of death under the Guidelines. See U.S.S.G. § 2B1.1(b)(16). We agree.

For the purpose of determining whether Cadden's "offense" involved the requisite risk under § 2B1.1(b)(16), the District Court should have looked at not only Cadden's "offense[s] of conviction" -- which included mail fraud and racketeering premised on mail fraud -- but also at all of his "relevant conduct" as defined by the Guidelines. Id. § 1B1.1 cmt. n.1(I) (defining "offense"). Under the Guidelines, the "relevant conduct" for which Cadden is held accountable includes "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant ... that occurred during the commission of the offense of conviction." Id. § 1B1.3(a)(1)(A). The Guidelines base a defendant's sentence on a range of actions that may extend beyond those the government must prove to secure a conviction because "[t]he focus [of the Sentencing Guidelines] is on the specific acts and omissions for which the defendant is to be held accountable ... rather than on whether the defendant is criminally liable for an offense ...." Id. § 1B1.3 cmt. n.1.

Thus, if Cadden's acts during the commission of mail fraud -- for instance, by directing the shipment of medications he knew to be substandard and highly dangerous in consequence -- "involved ... the conscious or reckless risk of death or serious bodily injury," id. § 2B1.1(b)(16), then the District Court should have found that the enhancement applied.[14] That is true even if, as the District Court apparently found, his "offense of conviction" did not itself inherently involve that risk.

We also cannot accept Cadden's contention that we may treat the District Court as having concluded that the relevant conduct associated with the mail fraud did not involve a "conscious" or "reckless" risk of death or serious bodily injury. The District Court did state that the evidence did not establish that Cadden had the requisite mens rea for second-degree murder. But, in so concluding, the District Court stated that Cadden did not act "with actual knowledge that his acts, or more accurately his failures to act, were almost certain to result in the death of another." (emphases added). As the government points out, the District Court in doing so at no point directly addressed in sentencing whether a preponderance of the evidence nonetheless 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 ***35** 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"). To be sure, the District Court found that the government was not "close" to showing the mens rea required for second-degree murder. But, here, too, the District

Court did so without directly referencing the Guidelines standard in connection with Cadden's relevant conduct in committing the mail fraud.

Thus, we remand for the District Court to do what it has not yet done: directly address the narrow issue of whether Cadden's actions warranted the application of the risk-of-death enhancement based on the appropriate mens rea standard and scope of relevant conduct. In doing so, we pass no judgment on whether Cadden did in fact possess the state of mind necessary for the enhancement to apply, or whether any other barriers to the application of the enhancement might exist. [15]

3.

We come, then, to the government's last challenge to the sentence imposed by the District Court. It concerns another enhancement that the District Court declined to apply: the "vulnerable victim" enhancement. This enhancement bumps up the offense level by two "[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), and raises it by another two if "the offense involved a large number of [such] vulnerable victims," id. § 3A1.1(b)(2).

The District Court declined to apply the enhancement. It ruled that, for the purposes of the Guidelines provision in question, "the victims at issue, given the nature of the jury's verdict, were the purchasers of the drugs," rather than the patients who received the drugs.

The Guidelines do not define the word "victim" as it is used in the vulnerable victim enhancement. But, they do make clear that a "victim" means "a person ... who is a victim of the offense of conviction and any conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct)." U.S.S.G. § 3A1.1 cmt. n.2.

[25] We have previously read this language to indicate 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." United States v. Souza, 749 F.3d 74, 86 (1st Cir. 2014). As we have previously explained, Cadden's "relevant conduct" included, among other things, any actions that he took to direct the shipment of contaminated medications to hospitals during the commission of mail fraud. [16] The "victims" of that conduct could plausibly include the patients who foreseeably would use those contaminated medications. Thus, we agree ***36** with the government that the District Court committed an error of law in holding that, due to the nature of Cadden's convictions, the reach of the vulnerable victim enhancement is necessarily limited to those "victims" who were defrauded -- namely, the customers of NECC itself. See United States v. Sidhu, 130 F.3d 644, 655 (5th Cir. 1997) ("[A] physician's patients can be victimized by a fraudulent billing scheme directed at insurers or other health care providers.").

Cadden argues that, in any event, we may affirm the District Court's determination on the alternative ground that the patients, even if "victims," were not "vulnerable." But the District Court determined that the patients were necessarily not "victims" at all. So, it has not yet passed on the question of their vulnerability. We thus decline to do so in the first instance. Instead, we leave it for the District Court to determine, on remand, whether, for example, Cadden is comparably situated to a defendant who "market[s] an ineffective cancer cure" and who would warrant the enhancement, U.S.S.G. § 3A1.1 cmt. n.2, and what effect, if any, the presence of the intermediary medical facilities who purchased the medications on behalf of their patients should have on the assessment of the patients' vulnerability.

4.

Because we find that the District Court's reasons for declining to apply two enhancements were legally erroneous, the District Court may on remand find that the enhancements should have been applied and that the Guidelines range it originally calculated requires modification. If it updates the Guidelines range to account for the application of one or both of these enhancements, it should of course consider the parties' updated arguments for what Cadden's sentence should be in light of the modified range. The District Court may not, however, reconsider on remand other enhancements or aspects of its initial sentencing calculation beyond those issues narrowly required by its reconsideration of the two enhancements that we have identified.

B.

We turn, finally, to the challenges that are before us that concern the forfeiture order of $7,545,501 that the District Court imposed pursuant to 18 U.S.C. § 1963(a)(3). That provision requires defendants convicted of racketeering offenses to forfeit "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity." The District Court determined the forfeiture amount based on "the total amount of NECC proceeds that were paid to Barry Cadden personally during the life of the racketeering enterprise, that is, from March 26, 2010 to October 31, 2012."

[26] We start with the government's challenges and then consider Cadden's. "[W]e review pure 'questions of law de novo, but, to the extent factual issues are intermingled, consider mixed questions of law and fact under the more deferential clear error standard.' " United States v. Ponzo, 853 F.3d 558, 589 (1st Cir. 2017) (quoting United States v. Ferrario-Pozzi, 368 F.3d 5, 8 (1st Cir. 2004)).

1.

[27] Cadden contends that the District Court erred in finding that all NECC proceeds obtained during the relevant period were "obtained" "from racketeering activity." When property interests are "in a" racketeering enterprise, they are subject to forfeiture "in their entirety, regardless of whether some portion of the enterprise ***37** is not tainted by the racketeering activity." United States v. Angiulo, 897 F.2d 1169, 1211 (1st Cir. 1990). Property interests "outside the enterprise," on the other hand, are "subject to a rule of proportionality," and are only forfeitable "to the extent they are tainted by the racketeering activity." Id. at 1211-12.

We have held that "proceeds or profits" of racketeering activity are "outside interests ... subject to a rule of proportionality."[17] Id. at 1212. Thus, their treatment "is in contrast to the treatment of interests in an enterprise, which are forfeitable regardless of percentage of taint." Id.

The government suggests, based on Angiulo, that Cadden's proceeds may constitute interests in the racketeering enterprise rather than interests outside of it. But, the government offers no support for this broad definition of interests in an enterprise, particularly given that the government's authority to seek and obtain "interests in" the enterprise arises from a distinct statutory provision that the government did not rely on in seeking a forfeiture order against Cadden. See 18 U.S.C. § 1963(a)(2)(A) (requiring the forfeiture of "any interest in ... any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962"). Nor does the government explain how we may ignore the clear command of Angiulo that "proceeds ... are only subject to forfeiture to the extent they are tainted by the racketeering activity." 897 F.2d at 1212.

In the alternative, the government contends as follows. Even if a proportionality rule should have been applied, as Cadden argues, it was harmless not to apply it. The government argues that all the medications that NECC manufactured during the relevant period were subject to forfeiture, as they were all tainted by racketeering activity.

[28] In making this argument, the government contends that all of NECC's medications were produced fraudulently and that, even if they were not, customers would not have purchased the legitimately produced medications had they known about NECC's history of fraud. As we have already explained, however, the District Court supportably found at sentencing that the government failed to prove that all of NECC's sales over the period in question were generated by fraud. The government likewise presents no authority for the proposition that profits from non-fraudulent sales of NECC could be considered "proceeds which [a] person obtained, directly or indirectly, from racketeering activity." 18 U.S.C. § 1963(a)(3). Given that these profits were not obtained from the racketeering activity of mail fraud that formed the basis of Cadden's convictions, ***38** but rather from legitimate, non-racketeering activity, we see no reason to adopt the government's expansive reading of the forfeiture statute. Nor did the government develop an argument below for why all the proceeds of Cadden's from NECC were tainted by racketeering activity, and thus the District Court made no findings on this precise point. Accordingly, while we do not make a finding about what specific amount of Cadden's proceeds were tainted by racketeering activity, we cannot agree with the government on the basis of this record that all of them were, and we are thus unable to affirm the District Court on this alternative basis. We therefore vacate and remand for the District Court to assess in the first instance

the arguments of Cadden and the government, based on this record, about the portion of Cadden's earnings from NECC over the relevant time period that were tainted by racketeering activity and therefore subject to forfeiture.

2.

Next, we consider Cadden's contention that the District Court erred in calculating the forfeiture amount without deducting the amount in taxes that he paid on those proceeds. We disagree.

[29] **[30]** In general, the word "proceeds" in the forfeiture statute refers to gross proceeds, not net profits. United States v. Hurley, 63 F.3d 1, 21 (1st Cir. 1995). In addition, per the statute, "property should be regarded as 'obtained' ... when it has merely been held in custody" before being "passed along to its true owner." Id. Cadden clearly "obtained" the amount of funds subject to forfeiture before they were subject to taxation. We thus do not see why that gross amount is not subject to forfeiture, even though the amount he obtained was itself taxable.

Cadden does argue that the ease of calculating Cadden's net proceeds, because of the clear evidence of his tax liability, renders this case one in which his forfeiture should be based on net proceeds instead of gross proceeds. But, Hurley did not merely establish a fallback procedure for estimating the value of proceeds in the face of a messy factual record. It purported to interpret the words "proceeds" and "obtain[ ]" in a statute, 18 U.S.C. § 1963. See 63 F.3d at 21. Thus, while Hurley noted the concern that net proceeds would be difficult to calculate, we read it to have based its reading of the statute on other rationales -- including the legislative history indicating Congress's desire to give the statute a broad reach, among others -- that are no less relevant when applied to the circumstances of Cadden's gains. See 63 F.3d at 21; see also Clark v. Martinez, 543 U.S. 371, 380, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005) ("It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern.").

Finally, Cadden points to Seventh Circuit cases that, he contends, "used a net proceeds approach when the relevant figures were readily ascertainable." See United States v. Genova, 333 F.3d 750, 761 (7th Cir. 2003) (defining "proceeds" as "profits net of the costs of the criminal business"); United States v. Masters, 924 F.2d 1362, 1369-70 (7th Cir. 1991) ("[T]he proceeds to which the statute refers are net, not gross, revenues ...."). We have previously recognized, however, that in this respect, the Seventh Circuit's precedent is in conflict with our own. See United States v. Iacaboni, 363 F.3d 1, 4 (1st Cir. 2004). Because these cases reach a different conclusion than what our own precedent requires, they are of no assistance to Cadden. [18]

***39 3.**

The government, for its part, takes issue with another aspect of the District Court's forfeiture calculation. Cadden's wife Lisa, like Cadden, was a part-owner of NECC, and, like Cadden, she received proceeds in consequence of her ownership stake in the company. These proceeds were deposited in a bank account that Lisa Cadden jointly controlled with Cadden. The District Court declined to require Cadden to forfeit the amounts attributable to his wife's earnings, however, reasoning that the sought-after forfeiture order would impermissibly claw back from Cadden gains that were properly attributable to someone else -- his wife.

[31] So long as the proceeds in question were tainted by racketeering activity, we agree with the government that the forfeiture amount should not have been limited to the NECC-derived proceeds that were attributable to Barry rather than Lisa Cadden. While Barry Cadden may not have personally earned any of the tainted proceeds stemming from his wife's involvement in NECC, he "obtained" them "from racketeering activity" within the meaning of 18 U.S.C. § 1963(a)(3).

The key preliminary question is whether Cadden "obtained" the NECC earnings that Lisa Cadden deposited in their joint account at all. And, on this point, we see little doubt. The Supreme Court has noted that, during the time period in which § 1963(a)(3) was enacted, "the verb 'obtain' was defined as 'to come into possession of' or to 'get or acquire,' " and "[t]hat definition persists today." Honeycutt v. United

States, —— U.S. ——, 137 S. Ct. 1626, 1632, 198 L.Ed.2d 73 (2017) (quoting Random House Dictionary of the English Language 994 (1966)). And, we have held that a person obtains property even when the property is merely "held in custody" before being "passed along to its true owner." Hurley, 63 F.3d at 21. Given Barry Cadden's status as a party to the joint account he shared with his wife, he had "the right to withdraw all the funds" from the account, "or any portion of them," and therefore could "effectively exercise control over the entire interest, or any part of it, and divest totally or partially, the interest of" his wife. United States v. U.S. Currency, $81,000.00, 189 F.3d 28, 34 (1st Cir. 1999) (quoting Heffernan v. Wollaston Credit Union, 30 Mass. App. Ct. 171, 567 N.E.2d 933, 937 (1991)). [19] This was more than sufficient for acquisition purposes.

It is true that a racketeering offender is not required to forfeit all of the "proceeds" he "obtained," but only those that he "obtained, directly or indirectly, from racketeering activity." 18 U.S.C. § 1963(a)(3). It is also true that the racketeering activity itself must have led to the acquisition of the proceeds. See Angiulo, 897 F.2d at 1213 (noting that "defendants' racketeering ***40** activities must be shown to be 'a cause in fact of the acquisition or maintenance of [forfeitable] interests,' " including proceeds (quoting United States v. Horak, 833 F.2d 1235, 1243 (7th Cir. 1987))). But, even accepting, favorably to Cadden, that the forfeiture statute imposes not merely a but-for causation requirement but a proximate causation requirement as well, we do not see how this additional limitation would support the District Court's holding.

The District Court has not yet determined what amount of the NECC proceeds Lisa Cadden obtained were tainted by racketeering activity -- an issue that, as noted, it will need to resolve on remand -- but we may assume that at least some of her earnings can be traced to fraudulent NECC sales. Insofar as that is the case, the record shows that Cadden would have been well aware that the mail fraud would generate profits that would accrue to him via his wife's ownership share in NECC. Lisa Cadden had been a co-owner of the company since its inception in 1998, and the record shows that over that time period, she deposited the shareholder distributions that she received into bank accounts she jointly owned with her husband. There is little doubt that, as her husband and the head of NECC, Barry Cadden would have been aware of this, and he does not contend otherwise. Thus, it was a direct and foreseeable consequence of Barry Cadden's mail fraud activity that some NECC earnings attributable to that fraud would pass on to Lisa Cadden and into the bank account she shared with him, such that any proximate cause limitation imposed by the forfeiture statute is satisfied here. See CSX Transp., Inc. v. McBride, 564 U.S. 685, 701, 131 S.Ct. 2630, 180 L.Ed.2d 637 (2011) (discussing different definitions of proximate cause).

Cadden's arguments to the contrary are not persuasive. He contends that a party to a joint account does not necessarily "own" the account. But, the test is whether he "obtained" the funds, and, as noted, a party does not need to have owned property to have obtained it for the purposes of § 1963(a)(3). See Hurley, 63 F.3d at 21. He also contends that, in line with Honeycutt, forfeiture under § 1963(a)(3) "is limited to property the defendant himself actually acquired as the result of the crime." 137 S. Ct. at 1635. Because Lisa Cadden was an "innocent" party, he argues that it would unfair to penalize him on the basis of her earnings. Even assuming that this holding of Honeycutt applies to § 1963(a) -- and is not limited to the statute at issue there, 21 U.S.C. § 853 -- it provides no support for Cadden's position, however, because as a party to the jointly controlled account, Cadden himself "actually acquired" the funds at issue. Because we hold that Cadden "obtained" the NECC "proceeds" that Lisa Cadden deposited in the couple's joint bank account, we remand for the District Court to consider what amount of Lisa Cadden's earnings should be included in Barry Cadden's forfeiture order because they were tainted by racketeering activity.

VIII.

This case was extremely complex. The District Court was faced with a number of novel issues and emotionally fraught evidence concerning the most serious type of allegations. We commend its handling of this difficult case, and, for the reasons stated above, **affirm** Cadden's convictions, though we **vacate** and **remand** Cadden's sentence, and **vacate** and **remand** the forfeiture order entered against him.

All Citations

965 F.3d 1, RICO Bus.Disp.Guide 13,365, 112 Fed. R. Evid. Serv. 1703

Footnotes

1 The federal criminal statute outlining the crime of mail fraud reads 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.

2 The provision of the racketeering statute that Cadden was alleged to have violated 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.

18 U.S.C. § 1962(c).

3 The racketeering conspiracy statute 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." 18 U.S.C. § 1962(d). Cadden was alleged to have conspired to violate 18 U.S.C. § 1962(c).

4 While the jury convicted Cadden on all fifty-two of the mail fraud counts and found that he committed forty-seven of the corresponding predicate acts, it did not find that he committed five charged predicate acts of mail fraud relating to shipments of expired drugs -- even though it found Cadden guilty of the five mail fraud counts relating to those same shipments.

5 Cadden does not contest that the record evidence supportably showed that each customer involved in the remaining twenty-two mail fraud counts received a fraudulent representation. He limits his challenge to the twenty counts he identifies because no representatives from customers of shipments identified in these counts testified at trial about the representations they received from NECC.

6 Consider in this regard that there was substantial expert witness testimony that NECC's operations were "completely inconsistent with the requirements" imposed by USP-797, the governing rules for sterile compounding facilities, and that the company "repeatedly, week after week after week ... had excursions and data that told them that their facility was out of a state of control" but nevertheless "ignored that for weeks and

weeks and weeks on end." Consider, too, that there was also expert testimony that asserted that the USP standards that the evidence supportably showed that Cadden was consciously flouting were of the utmost importance because "in the event there is a nonsterile event ... it can harm a lot of patients," possibly leading to "[m]ass casualty." In fact, still other expert testimony stated that the USP-797 cleaning requirements that NECC was not adhering to were necessary because "contamination" of the clean room environment "can make its way into the final preparation and harm or kill patients."

7 For these same reasons, we reject Cadden's challenge insofar as he means to make a claim of retroactive misjoinder -- as the government understands him to be making. For, even assuming there are no other obstacles to that argument, it is premised on the evidence of second-degree murder having been insufficient, which we conclude it was not. See United States v. Jones, 16 F.3d 487, 493 (2d Cir. 1994) (explaining that " '[r]etroactive misjoinder' arises where joinder of multiple counts was proper initially, but later developments -- such as a district court's dismissal of some counts for lack of evidence ... -- render the initial joinder improper"); Cf. United States v. Mubayyid, 658 F.3d 35, 72 n.39 (1st Cir. 2011) ("Retroactive misjoinder occurs where joinder was proper initially because of a conspiracy allegation, but where later developments ... appear to render the initial joinder improper." (quoting United States v. Deitz, 577 F.3d 672, 693 (6th Cir. 2009))).

8 The District Court granted the motion as to requirements predating January 2012.

9 Cadden also does not frame his claim as one rooted in the jury's "improper exposure to extrinsic material," United States v. Pagán-Romero, 894 F.3d 441, 446 (1st Cir. 2018), and the District Court did not treat it as one. We thus apply the standards that have been developed for reviewing claims of prosecutorial misconduct rather than the somewhat distinct standards for reviewing claims of exposure to extrinsic evidence. See id. at 446-47.

10 Aside from the false testimony and the binder incident, Cadden identifies a slew of other examples of what he deems to be government misconduct. However, as stated in Cadden's opening brief, he only "summarized" these events "briefly" in order to show that "the government's behavior" regarding the primary incidents "was not an aberration." In his reply brief, he reiterated that he "points to this litany [of alleged instances of misconduct] to demonstrate the pattern [of misconduct] and that the pattern was deliberate." Because we do not resolve the question of what state of mind the government attorneys possessed in taking the primary actions Cadden complains of, as Cadden has not demonstrated that any instances of potential misconduct resulted in prejudice, we do not need to address the other incidents that Cadden highlights that allegedly show their behavior was deliberate. Even to the extent that Cadden does mean for these other incidents to serve as distinct grounds for a new trial, he has not developed any of the arguments or their prejudicial effects in sufficient detail, either in front of the District Court or in front of us, and has thus waived them. See Zannino, 895 F.2d at 17 ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

We also reject Cadden's suggestion that, even if none of the alleged instances of misconduct prejudiced him in isolation, the sum total of the alleged misconduct amounts to cumulative prejudice warranting a new trial. For the reasons already discussed, none of the instances of possible misconduct Cadden identifies resulted in prejudice. Thus, even when combined with one another, they do not require vacatur of any of Cadden's convictions.

11 While the government initially took issue with the time period adopted by the District Court, in its reply brief, the government concedes that, at least for purposes of this appeal, it merely argues that "the racketeering

period started no later than 2010 -- as the district court's written orders contemplate." Thus, we do not address its arguments on this point.

12 Contrary to the government's suggestion that the District Court demanded proof that medications contained in the shipments were "defective or dangerous" before it included them in the loss calculation, the District Court included in the loss amount the value of shipments of medications that were compounded by an unlicensed technician, even though there was no evidence that all of the medications he compounded were in some way defective or dangerous. This conclusion aligns with the District Court's statement that it included all shipments that were "potentially contaminated or degraded," not merely those that were shown to be. (emphasis added).

13 At the time of sentencing, the enhancement was codified at U.S.S.G. § 2B1.1(b)(15).

14 The government has made no argument that any actions Cadden took in relation to his convictions for introducing misbranded drugs into commerce carried the requisite risk for the risk-of-death enhancement to apply.

15 The government additionally argues that the District Court mistakenly held that the only "victims" that could matter for the purpose of the risk-of-death enhancement were the direct victims of Cadden's mail fraud crimes, namely the hospitals who purchased drugs from NECC. We are not convinced that the District Court rested its holding on this alternative ground. However, insofar as it matters on remand, we agree with the government that nothing in the Guidelines restricts the scope of the relevant "risk of death or serious bodily injury" analysis to those individuals who were directly defrauded by a defendant's illegal scheme. See U.S.S.G. § 2B1.1(b)(16).

16 The government does not argue that any of Cadden's conduct during the commission of his FDCA offenses for introducing misbranded drugs into commerce harmed any vulnerable victims.

17 The racketeering statute has been modified from the one applied by the Angiulo court. At the time the forfeiture order at issue in Angiulo was issued, racketeering proceeds were treated as forfeitable because they were considered to be "interest[s]" that the defendant "has acquired or maintained in violation of section 1962," which laid out the substantive racketeering offenses. 18 U.S.C. § 1963(a)(1) (1982); see Angiulo, 897 F.2d at 1211-12. Today, however, "property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity ... in violation of section 1962" is explicitly identified as a ground for forfeiture under the statute. 18 U.S.C. § 1963(a)(3). Neither party argues that Congress's decision to explicitly identify "proceeds" as a type of forfeitable property has any practical effect on the analysis. But, to the extent it matters, the current statute presents a stronger case for imposing a proportionality rule on proceeds, as it limits forfeiture to "proceeds which the person obtained ... from racketeering activity," id. (emphasis added), not the broader racketeering enterprise.

18 Cadden does not argue that our conclusion in Hurley is affected by United States v. Santos, 553 U.S. 507, 128 S.Ct. 2020, 170 L.Ed.2d 912 (2008), superseded by statute, Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 2(f)(1), 123 Stat. 1617, 1618, in which five justices of the Supreme Court agreed that the word "proceeds" in a different forfeiture statute, 18 U.S.C. § 1956, did not mean "gross profits." Cf. United States v. Bucci, 582 F.3d 108, 122-24 (1st Cir. 2009) (considering whether Santos affects the "gross profits" issue in another forfeiture statute). We thus assume Hurley remains good law.

19 The government asserts that Massachusetts law governs, and Cadden does not dispute this assertion. In any case, however, we see no reason to think that Cadden would not have "obtained" the funds deposited in his jointly controlled account regardless of which state's law applied, given his ability to withdraw and spend the funds.

51 F.4th 32
United States Court of Appeals, First Circuit.

UNITED STATES, Appellee,
v.
Barry J. CADDEN, Defendant, Appellant.

Nos. 21-1602, 21-2003
|
October 13, 2022

Synopsis

Background: Defendant was convicted in the United States District Court for the District of Massachusetts, Richard G. Stearns, J., for violations of Racketeer Influenced and Corrupt Organizations Act (RICO) and Federal Food, Drug, and Cosmetic Act, and mail fraud. Defendant appealed. The Court of Appeals, 965 F.3d 1, vacated sentence and remanded for resentencing. On remand, the District Court imposed sentence of 174 months, and defendant appealed.

Holdings: The Court of Appeals, Barron, Chief Judge, held that:

[1] evidence warranted application of "vulnerable victims" enhancement to base offense level;

[2] sentence of 174 months was procedurally reasonable; and

[3] sentence was not impermissibly disparate from 126-month sentence imposed on codefendant for same crimes.

Affirmed.

See also, 41 F.4th 16.

Procedural Posture(s): Appellate Review.

West Headnotes (7)

[1] Sentencing and Punishment Vulnerability of victim

Evidence supported findings that defendant, founder and partial owner of company that produced medications, knowingly shipped contaminated medication that caused deadly outbreak of fungal meningitis, and that he had reason to know that patients were receiving medication, and therefore, that those patients were unusually vulnerable, as basis for "vulnerable victims" enhancement to sentence for violations of Racketeer Influenced and Corrupt Organizations Act (RICO) and Federal Food, Drug, and Cosmetic Act, and mail fraud; defendant designed and presided over high-risk enterprise, he ignored issues with specification tests, incomplete testing, falsification of drug lab cleaning reports, and appearance of mold and other contaminants in clean room, and nothing in record indicated that he was not aware that contaminated medication was being injected into patient's spinal fluid and of grave risks associated with doing so. 18 U.S.C.A. §§ 1341, 1961 et seq.; Federal Food, Drug, and Cosmetic Act § 1, 21 U.S.C.A. § 301 et seq.; U.S.S.G. § 3A1.1(b).

[2] Criminal Law Necessity of Objections in General

To establish plain error, defendant must show that error occurred which was clear or obvious and which not only affected defendant's substantial rights, but also seriously impaired fairness, integrity, or public reputation of judicial proceedings.

[3] Sentencing and Punishment Sufficiency

Sentence of 174 months for violations of Racketeer Influenced and Corrupt Organizations Act (RICO), Federal Food, Drug, and Cosmetic Act, and federal mail fraud statute arising out of production and delivery of contaminated medications was procedurally reasonable, despite defendant's assertion that district court's statements at resentencing following vacatur of 107-month sentence on appeal indicated that it erroneously believed it lacked discretion to impose sentence it believed was reasonable; at initial sentencing, district court had determined that "conscious or reckless risk" and "vulnerable victims" enhancements did not apply, Court of

Appeals concluded on Government's appeal that they did apply, and on remand for resentencing, district court's statements that it was bound by Court of Appeals' ruling was correct statement of law. 18 U.S.C.A. §§ 1341, 1961 et seq.; Federal Food, Drug, and Cosmetic Act § 1, 21 U.S.C.A. § 301 et seq.; U.S.S.G. §§ 2B1.1(b)(16)(A), 3A1.1(b).

[4] **Criminal Law** Mandate and proceedings in lower court

Sentencing and Punishment Sufficiency

Sentence of 174 months for violations of Racketeer Influenced and Corrupt Organizations Act (RICO), Federal Food, Drug, and Cosmetic Act, and federal mail fraud statute was not procedurally unreasonable, despite defendant's assertion that district court erroneously believed it lacked discretion to impose same 107-month sentence on remand following vacatur of sentence on appeal, based on statement that "Court of Appeals was of at least the implicit, if not explicit, view that my prior sentence was excessively lenient"; rather, comments reflected district court's understanding of Court of Appeals' ruling to require application of "conscious or reckless risk" and "vulnerable victims" enhancements that district court had erroneously believed at initial sentencing did not apply. 18 U.S.C.A. §§ 1341, 1961 et seq.; Federal Food, Drug, and Cosmetic Act § 1, 21 U.S.C.A. § 301 et seq.; U.S.S.G. §§ 2B1.1(b)(16)(A), 3A1.1(b).

[5] **Criminal Law** Sentencing and Punishment

Sentence of 174 months for violations of Racketeer Influenced and Corrupt Organizations Act (RICO), Federal Food, Drug, and Cosmetic Act, and federal mail fraud statute imposed on remand following vacatur of 107 months on Government's appeal was not plain error, based on defendant's assertion that statement made by district court at codefendant's resentencing that Court of Appeals had made clear its belief that original sentence imposed was too lenient indicated erroneous belief that it lacked discretion to impose same sentence on remand; rather, statement could be viewed as district court's understanding of Court of Appeals' ruling that district court erred in refusing to apply "conscious or reckless risk" and "vulnerable victims" enhancements in calculating base offense level, not as statement that district court lacked discretion to vary downward from guidelines range after application of enhancements. 18 U.S.C.A. §§ 1341, 1961 et seq.; Federal Food, Drug, and Cosmetic Act § 1, 21 U.S.C.A. § 301 et seq.; U.S.S.G. §§ 2B1.1(b)(16)(A), 3A1.1(b).

[6] **Sentencing and Punishment** Sentence or disposition of co-participant or codefendant

Sentencing and Punishment Total sentence deemed not excessive

Sentence of 174 months for violations of Racketeer Influenced and Corrupt Organizations Act (RICO), Federal Food, Drug, and Cosmetic Act, and federal mail fraud statute imposed on remand following vacatur of 107 months on Government's appeal was not impermissibly disparate from 126-month sentence imposed on codefendant for same crimes, where, at codefendant's resentencing, codefendant gave allocution that reflected his remorse and contrition for harm caused to victims, and his attempts to rehabilitate himself during prison, including through "counsel[ing] other inmates about drug addiction and recidivism," whereas defendant, at his resentencing, declined to allocute and chose instead to communicate, through counsel, that allocution he gave at initial sentencing was unchanged. 18 U.S.C.A. §§ 1341, 1961 et seq.; Federal Food, Drug, and Cosmetic Act § 1, 21 U.S.C.A. § 301 et seq.

[7] **Criminal Law** Review De Novo

Criminal Law Sentencing

Criminal Law Sentencing

When a challenge to a sentence is preserved, appellate review of the District Court's discretionary judgments is for abuse of discretion, its findings of fact are reviewed for clear error, and its conclusions of law are reviewed de novo.

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

Attorneys and Law Firms

Michelle R. Peirce, with whom Bruce A. Singal and Hinckley, Allen & Snyder LLP were on brief, for appellant.

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

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

Opinion

BARRON, Chief Judge.

***34** Barry J. Cadden was convicted on fifty-seven counts under the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq., the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 et seq., and the federal mail fraud statute, 18 U.S.C. § 1341. He was initially sentenced for these crimes to a 108-month prison term, but the government appealed, and we vacated and remanded that sentence. United States v. Cadden, 965 F.3d 1, 40 (1st Cir. 2020). He now appeals from the 174-month prison term that he received at his resentencing. We affirm.

I.

We have described the circumstances underlying Cadden's criminal conduct in prior cases. See United States v. Cadden, 965 F.3d 1 (1st Cir. 2020) (Cadden I), United States v. Chin, 965 F.3d 41 (1st Cir. 2020) (Chin I), United States v. Chin, 41 F.4th 16 (1st Cir. 2022), cert. denied, No. 22-5534, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2022 WL 6573283 (Oct. 11, 2022) (Chin II). Suffice it to say, Cadden was the founder and partial owner of the New England Compounding Center ("NECC"), a company that carried out pharmaceutical compounding operations to produce medications used nationwide. In 2012, a deadly outbreak of fungal meningitis was traced to methylprednisolone acetate ("MPA") that NECC produced. A federal criminal investigation ensued. It resulted in Cadden, Glenn Chin, and other NECC staff being indicted on federal charges, including charges arising under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), the Federal Food, Drug, and Cosmetic Act ("FDCA"), and the federal mail fraud statute. Cadden and Chin were found guilty of the RICO and mail fraud charges, as well as some of the FDCA charges. [1]

Cadden's first sentencing hearing was held in June 2017. There, the District Court calculated Cadden's range under the United States Sentencing Guidelines ("U.S.S.G.") to be 87 to 108 months of imprisonment and sentenced Cadden to a prison term of 108 months.

Chin's first sentencing, before the same judge as Cadden's, was held in January 2018. The District Court calculated Chin's Sentencing Guidelines range to be 78 to 97 months of imprisonment. The District Court then imposed a prison term of 96 months.

During both Cadden's and Chin's initial sentencings, the District Court determined that enhancements set forth in two Sentencing Guidelines did not apply to either Cadden or Chin. See Cadden I, 965 F.3d at 33-36; Chin I, 965 F.3d at 52-55. The two enhancements are set out, respectively, in 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 ***35** injury' " ("conscious or reckless risk enhancement"), and 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' " ("vulnerable victims enhancement"). Chin II, 41 F.4th at 19

(alterations in original) (quoting U.S.S.G. §§ 2B1.1(b)(16)(A), 3A1.1(b)).

The United States appealed from the sentences imposed on both Cadden and Chin. We vacated Cadden's sentence in Cadden I, while clarifying the circumstances in which the enhancements set out in the two Sentencing Guidelines quoted above would apply. Cadden I, 965 F.3d at 33-36. We specified that, if the District Court found on remand "that the enhancements should have been applied [to Cadden] and that the Guidelines range it originally calculated requires modification," it should "update[ ] the Guidelines range to account for the application of one or both of these enhancements," then "of course consider the parties' updated arguments for what Cadden's sentence should be in light of the modified range." Id. at 36. We also specified that the "District Court may not, however, reconsider on remand other enhancements or aspects of its initial sentencing calculation beyond those issues narrowly required by its reconsideration of the two enhancements" at issue in that appeal. Id. We similarly vacated Chin's sentence in Chin I, while issuing similar instructions to the District Court in that case about how to determine whether these two enhancements should be applied on remand. Chin I, 965 F.3d at 56 ("In light of the issues we have identified with the treatment of [the] 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.").

The District Court resentenced Cadden on July 7, 2021. The District Court determined that both the conscious or reckless risk enhancement and the vulnerable victims enhancement applied to Cadden. The same sentencing judge then resentenced Chin over two days of proceedings on July 8 and July 21, 2021, and determined that each of the enhancements applied to him as well.

The District Court determined that the application of the two enhancements to Cadden resulted in a six-level increase to his base offense level under the Sentencing Guidelines. The District Court reached the same conclusion as to Chin.

The District Court recalculated Cadden's Sentencing Guidelines range, based on his increased offense level, to be 168 to 210 months of imprisonment, and imposed on Cadden a prison sentence of 174 months. The District Court similarly recalculated Chin's Sentencing Guidelines range to be 151 to 188 months of imprisonment, but chose to vary below that range and sentenced Chin to 126 months.

Chin and Cadden each appealed the District Court's determination that the conscious or reckless risk enhancement and the vulnerable victims enhancement applied to them. On July 15, 2022, we affirmed Chin's sentence in Chin II. We now address Cadden's.

II.

Much of Cadden's appeal focuses on whether the District Court erred in applying ***36** the conscious or reckless risk and vulnerable victims enhancements when calculating his base offense level. But, as Cadden acknowledged at oral argument, the District Court did not err in construing the Guidelines setting forth those enhancements, at least given our decision in Chin II, which was decided prior to oral argument in this case but after briefing had been completed. Cadden also does not contend -- again, in consequence of our ruling in Chin II -- that the District Court erred in finding that the conscious or reckless risk enhancement applied to Cadden.

[1] Notwithstanding Chin II, Cadden does still appear to be challenging the District Court's determination that the vulnerable victims enhancement applied to him. Specifically, he appears to be contending that the government has failed to meet its burden to show that he had the required knowledge that the victims of the MPA contamination were vulnerable because the record does not suffice to show that he "knowingly ship[ped] contaminated drugs." The record's failure to show that he had such knowledge about his offense, according to Cadden, necessarily means that it fails to show that he had "reason to know that patients were receiving contaminated MPA at all, let alone reason to know that [those patients] were 'unusually vulnerable.' "

[2] Because this argument was not raised below, our review is only for plain error. As a result, Cadden must show "(1) that an error occurred (2) which was clear or obvious and which not only (3) affected the defendant's substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings." United States v. Duarte, 246 F.3d 56, 60 (1st Cir. 2001). But, he fails to

do so, given our ruling in Chin II. There, Chin contended that the "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" precluded the District Court from applying the vulnerable victims enhancement to him. Chin II, 41 F.4th at 29. But, we upheld the District Court's application of the enhancement because "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," and other evidence "brought home the certainty that Chin and other of the coconspirators were fully aware of the risks involved in the distribution of defective drugs." Id.

The District Court likewise found here that Cadden "did design and preside over what was, as he recognized[,] a high-risk enterprise" and that he ignored "warnings [and] signals," at least some of "which he had to have been aware," including issues with "specification tests, incomplete testing, falsification of drug lab cleaning reports, ... [and] the appearance of mold and other contaminants in the clean room." And, Cadden neither argues nor points to anything in the record that shows, let alone clearly shows, that he was any less aware than Chin either that MPA was being administered via "injecti[on] ... into a patient's spinal fluid" or of the "particularly grave risks" associated with doing so. Chin II, 41 F.4th at 29. Thus, we reject this aspect of his challenge to the sentence that he received as well.

III.

We turn, then, to Cadden's separate contention that, even if the District Court rightly applied the two enhancements in question when determining Cadden's base offense level, the resulting sentence still cannot stand. He contends that is so for ***37** two distinct reasons, neither of which we find persuasive.

A.

Cadden first contends that, in resentencing him, the District Court "improperly and inexplicably stated its belief that it had no discretion to impose the sentence it determined was reasonable." Again, we review for plain error, as Cadden did not raise this contention below.

Cadden does not specify whether this challenge that the District Court misapprehended its discretion is to the procedural or substantive reasonableness of the sentence to which he was subject. See United States v. Matos-de-Jesús, 856 F.3d 174, 177 (1st Cir. 2017) ("Appellate review of claims of sentencing error entails a two-step pavane. Under this framework, we first address any assignments of procedural error. If the sentence passes procedural muster, we then address any challenge to its substantive reasonableness." (internal citations omitted)). But, we do not see how the challenge could succeed as a challenge to the sentence's substantive reasonableness if it could not succeed as a challenge to the sentence's procedural reasonableness. And, as we will explain, it fails on plain error review as a procedural reasonableness challenge, given the nature of the four statements that the District Court made that Cadden relies on to support this ground for challenging his sentence.

[3] First, Cadden points to a statement that the District Court made when determining that the conscious or reckless risk enhancement applied to him: [2]

> I know counsel understand that I am constrained in a number of respects by the First Circuit's decision [in Cadden I]. I may disagree with the decision in some respects, but that does not matter, in that I owe deference to them and am required to follow their dictates as I understand them. ... To begin with the first of the rulings, the First Circuit appeared to take the view that I did not recognize that the [vulnerable victims] enhancement is phrased in the subjunctive rather than the conjunctive sense. I do not think that is a correct statement of my findings in that regard. ... But that is, as I understand it, the law as the First Circuit now has defined it. I do recognize that the First Circuit was correct, and, therefore, I was incorrect in my belief that the enhancement applied only if it was anchored in an actual count of conviction rather than through an assessment of a defendant's conduct as a whole. It is clear that the First Circuit takes the latter position

> and disagreed with me on the former. So with these two considerations in mind, I am constrained to agree that the enhancement does apply .... I have to conclude that [Cadden's] conduct did and does fit within the definition of "recklessness" as set out in the new First Circuit test.

Second, Cadden points to the statement that the District Court made in determining that the vulnerable victims enhancement also applied to him:

> With respect to the second enhancement involving victims, here I think the First Circuit has essentially decided the issue for me, so I will go directly to their decision. ... Given the First Circuit's explicit ruling in the Cadden decision, I have no choice but to say, yes, the enhancement applies.

***38** **[4]** Third, Cadden points to the statement that the District Court made after announcing his newly calculated Sentencing Guidelines range but prior to imposing his sentence:

> I do also recognize that the Court of Appeals was of at least the implicit, if not explicit, view that my prior sentence was excessively lenient. I do not personally agree, but so it is with many of the things that I am required to do as a judge.

[5] Finally, Cadden points to the statement that the District Court made in announcing Chin's sentence on July 21:

> The First Circuit, though, has clearly, very clearly, made clear its belief that whatever I may have thought about the justice of the original sentence, that, under their formula, the sentence I imposed was too lenient, and I do recognize that I have to abide by their judgment in that regard.

The first and second statements fail to support Cadden's contention that the District Court plainly erred in imposing the sentence that it did. Each statement is nothing more than a correct statement of the law that the District Court was required to apply. So, neither statement shows that the District Court mistakenly thought that, due to Cadden I, it lacked the discretion to impose a prison sentence as short as the one that it had previously imposed.

The District Court's reference in the third statement to Cadden I's "implicit, if not explicit" view about the leniency that the District Court showed during Cadden's first sentencing also fails to support Cadden's challenge, at least given that we are reviewing only for plain error. The statement need not be understood as a statement that the District Court believed itself to be barred by Cadden I from imposing the same length of prison sentence at Cadden's resentencing as it had imposed at his initial sentencing when it was relying on a different and -- as Chin II revealed, given the facts that the District Court found at Cadden's resentencing -- mistaken calculation of his Sentencing Guidelines range. Instead, this third statement can fairly be read merely as recognizing that Cadden I's legal reasoning (both express and implied), when applied to the facts that the District Court found at the resentencing, required the District Court to apply the enhancements to Cadden at resentencing that it had declined to apply to him at his original sentencing. Thus, we cannot say from this statement that it is clear or obvious that the District Court imposed the sentence that it did here because it concluded that it lacked the discretion to do otherwise once it applied the Guidelines in the manner Cadden I required.

The fourth statement was made at Chin's sentencing, not Cadden's. So, for that reason alone, it is hard to see how it plainly shows that the District Court thought that it lacked the relevant quantum of discretion when it sentenced Cadden. But, even setting that feature of the statement aside, it is not different in substance from the third statement. Considered in context, it, too, may be understood as a commentary about the effect of our earlier rulings on how the relevant Guidelines must be interpreted (and, given the facts found at the resentencing, that the enhancements set forth in those

Guidelines must have been applied at that proceeding) rather than as a bald statement that we had denied the District Court the discretion to vary downward from the Sentencing Guidelines range calculated after a proper analysis of the two Guidelines at issue. Thus, here as well it cannot be said that it is clear or obvious from this statement that the District Court was laboring under such a misimpression about what we ***39** had held in our earlier rulings. And, that being so, Cadden cannot find support for his claim of plain error in this statement any more than he can in any of the other three.

Simply put, none of the four statements, when read in context, support the claim of plain error. Nor do the statements do so when read as a whole, given that nothing about their interaction with one another yield a sum greater than zero. We therefore see no basis for overturning Cadden's sentence in these statements.

B.

[6] Cadden's remaining challenge to his 174-month prison sentence concerns the disparity between his newly imposed sentence and Chin's newly imposed sentence. Specifically, Cadden argues that the "[D]istrict [C]ourt inexplicably widened the gap between Cadden's and Chin's sentences, creating an unwarranted and unreasonable sentence disparity" when it increased the gap between Cadden's and Chin's sentences from 12 months (11 percent of Cadden's original 108-month sentence) at the first sentencing to 48 months (28 percent of Cadden's new 174-month sentence) at the second sentencing. [3] Cadden argues that this unexplained disparity is both a procedural and substantive error.

[7] But, even assuming this challenge is preserved, such that our review of the District Court's "discretionary judgments" is for "abuse of discretion, its findings of fact for clear error, and its conclusions of law de novo," United States v. Reyes-Santiago, 804 F.3d 453, 468 (1st Cir. 2015), the challenge still fails. And that is so for the simple reason that we do not confront here an "apples to apples" comparison. United States v. Candelario-Ramos, 45 F.4th 521, 526 (1st Cir. 2022) (quoting United States v. González-Barbosa, 920 F.3d 125, 131 (1st Cir. 2019)).

As the government points out, Chin gave an allocution at his second sentencing proceeding that explained his efforts to "better [him]self" in prison, including through "counsel[ing] other inmates about drug addiction and recidivism." Chin also stated that he "fe[lt] responsible for what happened because [he] made the drugs that made ... people terribly sick, including those who have died" and apologized to the victims and their families. And, the District Court explained in imposing Chin's sentence that it was "happy to have heard" Chin's allocution, because it was a "showing [of] genuine contrition and, more importantly, genuine self-reflection." The District Court also explained that, in its view, Chin was on the day of his resentencing "a different man than the portrait that was painted at trial" because he had engaged in "introspection and examination of his own responsibility for what occurred." By contrast, when the District Court asked if Cadden wished to make an allocution at his resentencing, Cadden declined and chose instead to communicate, through counsel, that "the sentiments he expressed" during his "extensive allocution at his initial sentencing" were unchanged. Thus, because Chin and Cadden were differently positioned from one another as of the time of their respective resentencings, relative to how they were positioned at the time of their respective initial sentencings, we see no basis for finding Cadden's sentence to be impermissibly disparate from Chin's, even though the gap between their sentences increased at their resentencings.

***40 IV.**

For these reasons, Cadden's sentence is **affirmed**.

All Citations

51 F.4th 32

Footnotes

1 Cadden was charged with other offenses but was acquitted on those counts.

2 Cadden's briefing contained shorter excerpts of the first and second statements by the District Court than we include here. We include longer excerpts to demonstrate the context in which the statements were made.

3 Cadden frames his argument in the same relative terms we use to present it here. He does not argue that the District Court should have maintained the same 12-month differential between his sentence and Chin's, only that the District Court should have left the percentage disparity between the sentences undisturbed.

APPENDIX B

AO 245B (Rev. 10/15) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

District of Massachusetts

UNITED STATES OF AMERICA
v.
BARRY CADDEN

JUDGMENT IN A CRIMINAL CASE

Case Number: 1: 14 CR 10363 - 1 - RGS

USM Number: 965-22-038

Bruce Singal
Defendant's Attorney

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, 4-39, 41-56, 95, 99, and 100 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC. 1962(c)	Racketeering	10/31/12	1
18 USC. 1962(d)	Racketeering Conspiracy	10/31/12	2
18 USC. 1341	Mail Fraud	09/27/12	4-39 and 41-56
21 USC. 353(b)(1), 331(a	Intoduction of Misbranded Drugs into Interstate Commerce	09/14/10	95
21 USC. 353(b)(1), 331(a	Intoduction of Misbranded Drugs into Interstate Commerce	09/14/10	99 and 100

The defendant is sentenced as provided in pages 2 through 6 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) 3 and 57-94

☐ 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.

6/26/2017
Date of Imposition of Judgment

Richard G. Stearns
Signature of Judge

The Honorable Richard G. Stearns
Judge, U.S. District Court
Name and Title of Judge

6/27/2017
Date

DEFENDANT: BARRY CADDEN
CASE NUMBER: **1: 14 CR 10363 - 1 - RGS**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 108 month(s)

This term consists of terms of 108 months on Counts 1, 2, 4-39, and 41-56, and terms of 24 months on Counts 95, 99, and 100, 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 8/7/2017 .

☐ 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 _____

a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: BARRY CADDEN
CASE NUMBER: **1: 14 CR 10363 - 1 - RGS**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : 3 year(s)

This term consists of terms of 3 years on Counts 1, 2, 4-39, and 41-56, and terms of 1 year on Counts 95, 99, and 100, such terms to run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall 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 the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☐ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

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

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: BARRY CADDEN
CASE NUMBER: **1: 14 CR 10363 - 1 - RGS**

SPECIAL CONDITIONS OF SUPERVISION

1. You are prohibited from consuming alcoholic beverages in excess.

2. You must participate in a program for substance abuse counseling as directed by the Probation Office, which program may include testing, not to exceed 104 drug tests per year to determine whether you have reverted to the use of alcohol or drugs.

3. You must pay the balance of any fine or restitution imposed according to a court-ordered repayment schedule.

4. You are prohibited from incurring new credit charges or opening additional lines of credit without the approval of the Probation Office while any financial obligations remain outstanding.

5. You must provide the Probation Office access to any requested financial information, which may be shared with the Financial Litigation Unit of the U.S. Attorney's Office.

6. You shall be required to contribute to the costs of evaluation, treatment, programming, and/or monitoring (see Special Condition #2), based on the ability to pay or availability of third-party payment.

DEFENDANT: BARRY CADDEN
CASE NUMBER: **1: 14 CR 10363 - 1 - RGS**

CRIMINAL MONETARY PENALTIES

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

	Assessment	Fine	Restitution
TOTALS	$ 5,700.00	$ 0.00	$ TBD

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

☐ The defendant must 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
TOTALS	$ 0.00	$ 0.00	

☐ 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 the ☐ fine ☐ restitution.

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

* 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.

DEFENDANT: BARRY CADDEN
CASE NUMBER: **1: 14 CR 10363 - 1 - RGS**

SCHEDULE OF PAYMENTS

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

A ☑ Lump sum payment of $ 5,700.00 due immediately, balance due

☐ not later than _____ , or
☐ in accordance ☐ 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:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during 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.

☐ 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:

Order of forfeiture to issue for an amount yet to be determined

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) penalties, and (8) costs, including cost of prosecution and court costs.

AO 245C (Rev. 02/18) Amended Judgment in a Criminal Case Sheet 1 (NOTE: Identify Changes with Asterisks (*))

UNITED STATES DISTRICT COURT

District of Massachusetts

UNITED STATES OF AMERICA

v.

Barry J. Cadden

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: 14-cr-10363-RGS-1
USM Number: 96522-038
Bruce A. Singal
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, 4-39, 41-56, 95, 99, and 100 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) 3, 57-90, 91-94

☐ 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: Barry J. Cadden
CASE NUMBER: 14-cr-10363-RGS-1

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1341	Mail Fraud;	9/27/2012	4-39 & 41-56
21 U.S.C. § 353(b)(1),	Introduction of Misbranded Drugs into Interstate	9/14/2010	95, 99, 100
21 U.S.C. § 331(a) &	Commerce with Intent to Defraud and Mislead - No		
21 U.S.C. § 333(a)(2)	Prescriptions		

DEFENDANT: Barry J. Cadden
CASE NUMBER: 14-cr-10363-RGS-1

IMPRISONMENT

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

174 months. This tern consists if terns of 174 months on counts 1, 2, 4-39, and 41-56, and terms of 24 months on counts 95, 99, and 100 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: Barry J. Cadden
CASE NUMBER: 14-cr-10363-RGS-1

SUPERVISED RELEASE

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

3 years. This term consists of terms of 3 years on counts 1, 2, 4-39, and 41-56, and terms of 1 year on counts 95, 99, and 100.

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: Barry J. Cadden
CASE NUMBER: 14-cr-10363-RGS-1

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 _____

DEFENDANT: Barry J. Cadden
CASE NUMBER: 14-cr-10363-RGS-1

SPECIAL CONDITIONS OF SUPERVISION

1. You are prohibited from consuming any alcoholic beverages.

2. You must participate in a program for substance abuse counseling as directed by the Probation Office, which program may include testing, not to exceed 104 drug tests per year to determine whether you have reverted to the use of alcohol or drugs.

3. You must pay the balance of any fine or restitution imposed according to a court-ordered repayment schedule.

4. You are prohibited from incurring new credit charges or opening additional lines of credit without the approval of the Probation Office while any financial obligations remain outstanding.

5. You must provide the Probation Office access to any requested financial information, which may be shared with the Financial Litigation Unit of the U.S. Attorney's Office.

6. You shall be required to contribute to the costs of evaluation, treatment, programming, and/or monitoring (see Special Condition #2), based on the ability to pay or availability of third-party payment.

DEFENDANT: Barry J. Cadden
CASE NUMBER: 14-cr-10363-RGS-1

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	$ 5,700.00	$	$	$ 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.

DEFENDANT: Barry J. Cadden
CASE NUMBER: 14-cr-10363-RGS-1

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 $ 5,700.00 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.

Glenn Chin, 14-10363-2, $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:

$1,427,000

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.

APPENDIX C

USSG, § 3A1.1, 18 U.S.C.A.

§ 3A1.1. Hate Crime Motivation or Vulnerable Victim

Currentness

(a) If the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense of conviction because of the actual or perceived race, color, religion, national origin, ethnicity, gender, gender identity, disability, or sexual orientation of any person, increase by 3 levels.

(b)(1) If the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by 2 levels.

(2) If (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.

(c) Special Instruction

(1) Subsection (a) shall not apply if an adjustment from § 2H1.1(b)(1) applies.

CREDIT(S)

(Effective November 1, 1987; amended effective November 1, 1989; November 1, 1990; November 1, 1992; November 1, 1995; November 1, 1997; November 1, 1998; November 1, 2000; November 1, 2010.)

COMMENTARY

<***Application Notes:***>

<**1.** Subsection (a) applies to offenses that are hate crimes. Note that special evidentiary requirements govern the application of this subsection.>

<Do not apply subsection (a) on the basis of gender in the case of a sexual offense. In such cases, this factor is taken into account by the offense level of the Chapter Two offense guideline. Moreover, do not apply subsection (a) if an adjustment from § 2H1.1(b)(1) applies.>

<**2.** For purposes of subsection (b), "vulnerable victim" means a person (A) who is a victim of the offense of conviction and any conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct); and (B) who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.>

<Subsection (b) applies to offenses involving an unusually vulnerable victim in which the defendant knows or should have known of the victim's unusual vulnerability. The adjustment would apply, for example, in a fraud case in which the defendant marketed an ineffective cancer cure or in a robbery in which the defendant selected a handicapped victim. But it would not apply in a case in which the defendant sold fraudulent securities by mail to the general public and one of the victims happened to be senile. Similarly, for example, a bank teller is not an unusually vulnerable victim solely by virtue of the teller's position in a bank.>

<Do not apply subsection (b) if the factor that makes the person a vulnerable victim is incorporated in the offense guideline. For example, if the offense guideline provides an enhancement for the age of the victim, this subsection would not be applied unless the victim was unusually vulnerable for reasons unrelated to age.>

<**3.** The adjustments from subsections (a) and (b) are to be applied cumulatively. Do not, however, apply subsection (b) in a case in which subsection (a) applies unless a victim of the offense was unusually vulnerable for reasons unrelated to race, color, religion, national origin, ethnicity, gender, gender identity, disability, or sexual orientation.>

<**4.** If an enhancement from subsection (b) applies and the defendant's criminal history includes a prior sentence for an offense that involved the selection of a vulnerable victim, an upward departure may be warranted.>

<**5.** For purposes of this guideline, "gender identity" means actual or perceived gender-related characteristics. **See** 18 U.S.C. § 249(c)(4).>

<***Background:*** *Subsection (a) reflects the directive to the Commission, contained in Section 280003 of the Violent Crime Control and Law Enforcement Act of 1994, to provide an enhancement of not less than three levels for an offense when the finder of fact at trial determines beyond a reasonable doubt that the defendant had a hate crime motivation. To avoid unwarranted sentencing disparity based on the method of conviction, the Commission has broadened the application of this enhancement to include offenses that, in the case of a plea of guilty or nolo contendere, the court at sentencing determines are hate crimes. In section 4703(a) of Public Law 111-84, Congress broadened the scope of that directive to include gender identity; to reflect that congressional action, the Commission has broadened the scope of this enhancement to include gender identity.>*

<Subsection (b)(2) implements, in a broader form, the instruction to the Commission in section 6(c)(3) of Public Law 105-184.>

Notes of Decisions (235)

Federal Sentencing Guidelines, § 3A1.1, 18 U.S.C.A., FSG § 3A1.1
As amended to 3-15-22.

End of Document

United States Code Annotated
Federal Sentencing Guidelines (Refs & Annos)
Chapter Two. Offense Conduct (Refs & Annos)
Part B. Basic Economic Offenses
1. Theft, Embezzlement, Receipt of Stolen Property, Property Destruction, and Offenses Involving Fraud or Deceit (Refs & Annos)

USSG, § 2B1.1, 18 U.S.C.A.

§ 2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

Currentness

(a) Base Offense Level:

(1) 7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or

(2) 6, otherwise.

(b) Specific Offense Characteristics

(1) If the loss exceeded $6,500, increase the offense level as follows:

Loss (apply the greatest)	Increase in Level
(A) $6,500 or less	no increase
(B) More than $6,500	add 2
(C) More than $15,000	add 4
(D) More than $40,000	add 6
(E) More than $95,000	add 8
(F) More than $150,000	add 10
(G) More than $250,000	add 12
(H) More than $550,000	add 14

(I) More than $1,500,000 ..... add 16

(J) More than $3,500,000 ..... add 18

(K) More than $9,500,000 ..... add 20

(L) More than $25,000,000 ..... add 22

(M) More than $65,000,000 ..... add 24

(N) More than $150,000,000 ..... add 26

(O) More than $250,000,000 ..... add 28

(P) More than $550,000,000 ..... add 30.

(2) (Apply the greatest) If the offense--

(A) (i) involved 10 or more victims; (ii) was committed through mass-marketing; or (iii) resulted in substantial financial hardship to one or more victims, increase by 2 levels;

(B) resulted in substantial financial hardship to five or more victims, increase by 4 levels; or

(C) resulted in substantial financial hardship to 25 or more victims, increase by 6 levels.

(3) If the offense involved a theft from the person of another, increase by 2 levels.

(4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by 2 levels.

(5) If the offense involved theft of, damage to, destruction of, or trafficking in, property from a national cemetery or veterans' memorial, increase by 2 levels.

(6) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1037; and (B) the offense involved obtaining electronic mail addresses through improper means, increase by 2 levels.

(7) If (A) the defendant was convicted of a Federal health care offense involving a Government health care program; and (B) the loss under subsection (b)(1) to the Government health care program was (i) more than $1,000,000, increase by 2 levels; (ii) more than $7,000,000, increase by 3 levels; or (iii) more than $20,000,000, increase by 4 levels.

(8) (Apply the greater) If--

(A) the offense involved conduct described in 18 U.S.C. § 670, increase by 2 levels; or

(B) the offense involved conduct described in 18 U.S.C. § 670, and the defendant was employed by, or was an agent of, an organization in the supply chain for the pre-retail medical product, increase by 4 levels.

(9) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

(10) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(11) If the offense involved (A) the possession or use of any (i) device-making equipment, or (ii) authentication feature; (B) the production or trafficking of any (i) unauthorized access device or counterfeit access device, or (ii) authentication feature; or (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification, or (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(12) If the offense involved conduct described in 18 U.S.C. § 1040, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(13) If the defendant was convicted under 42 U.S.C. 408(a), 1011(a), or 1383a(a) and the statutory maximum term of ten years' imprisonment applies, increase by 4 levels. If the resulting offense level is less than 12, increase to level 12.

(14) (Apply the greater) If the offense involved misappropriation of a trade secret and the defendant knew or intended--

(A) that the trade secret would be transported or transmitted out of the United States, increase by 2 levels; or

(B) that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by 4 levels.

If subparagraph (B) applies and the resulting offense level is less than level 14, increase to level 14.

(15) If the offense involved an organized scheme to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

(16) 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. If the resulting offense level is less than level 14, increase to level 14.

(17) (Apply the greater) If--

(A) the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by 2 levels; or

(B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; or (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had 1,000 or more employees, increase by 4 levels.

(C) The cumulative adjustments from application of both subsections (b)(2) and (b)(17)(B) shall not exceed 8 levels, except as provided in subdivision (D).

(D) If the resulting offense level determined under subdivision (A) or (B) is less than level 24, increase to level 24.

(18) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1030, and the offense involved an intent to obtain personal information, or (B) the offense involved the unauthorized public dissemination of personal information, increase by 2 levels.

(19)(A) (Apply the greatest) If the defendant was convicted of an offense under:

(i)18 U.S.C. § 1030, and the offense involved a computer system used to maintain or operate a critical infrastructure, or used by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by 2 levels.

(ii)18 U.S.C. § 1030(a)(5)(A), increase by 4 levels.

(iii)18 U.S.C. § 1030, and the offense caused a substantial disruption of a critical infrastructure, increase by 6 levels.

(B) If subdivision (A)(iii) applies, and the offense level is less than level 24, increase to level 24.

(20) If the offense involved--

(A) a violation of securities law and, at the time of the offense, the defendant was (i) an officer or a director of a publicly traded company; (ii) a registered broker or dealer, or a person associated with a broker or dealer; or (iii) an investment adviser, or a person associated with an investment adviser; or

(B) a violation of commodities law and, at the time of the offense, the defendant was (i) an officer or a director of a futures commission merchant or an introducing broker; (ii) a commodities trading advisor; or (iii) a commodity pool operator,

increase by 4 levels.

(c) Cross References

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of any such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), § 2D2.1 (Unlawful Possession; Attempt or Conspiracy), § 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate.

(2) If the offense involved arson, or property damage by use of explosives, apply § 2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.

(3) If (A) neither subdivision (1) nor (2) of this subsection applies; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (e.g., 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and (C) the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.

(4) If the offense involved a cultural heritage resource or a paleontological resource, apply § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources), if the resulting offense level is greater than that determined above.

CREDIT(S)

(Effective November 1, 1987; amended effective June 15, 1988; November 1, 1989; November 1, 1990; November 1, 1991; November 1, 1993; November 1, 1995; November 1, 1997; November 1, 1998; November 1, 2000; November 1, 2001; November 1, 2002; January 25, 2003; November 1, 2003; November 1, 2004; November 1, 2005; November 1, 2006; November 1, 2007; February 6, 2008; November 1, 2008; November 1, 2009; November 1, 2010; November 1, 2011; November 1, 2012; November 1, 2013; November 1, 2015; November 1, 2018.)

COMMENTARY

<**Statutory Provisions:**7 U.S.C. §§ 6, 6b, 6c, 6h, 6***o***, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644, 6821; 18 U.S.C. §§ 38, 225, 285-289, 471-473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 664, 1001-1008, 1010-1014, 1016-1022, 1025, 1026, 1028, 1029, 1030(a)(4)-(5), 1031, 1037, 1040, 1341-1344, 1348, 1350, 1361, 1363, 1369, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail, is involved), 1708, 1831,

1832, 1992(a)(1), (a)(5), 2113(b), 2282A, 2282B, 2291, 2312-2317, 2332b(a)(1), 2701; 19 U.S.C. § 2401f; 29 U.S.C. § 501(c); 42 U.S.C. § 1011; 49 U.S.C. §§ 14915, 30170, 46317(a), 60123(b). For additional statutory provision(s) see Appendix A (Statutory Index).>

<**Application Notes**>

<**1. Definitions.--**For purposes of this guideline:>

<"Cultural heritage resource" has the meaning given that term in Application Note 1 of the Commentary to § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources).>

<"Equity securities" has the meaning given that term in section 3(a)(11) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(11)).>

<"Federal health care offense" has the meaning given that term in 18 U.S.C. § 24.>

<"Financial institution" includes any institution described in 18 U.S.C. § 20, § 656, § 657, § 1005, § 1006, § 1007, or § 1014; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical, or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. "Union or employee pension fund" and "any health, medical, or hospital insurance association," primarily include large pension funds that serve many persons (e.g., pension funds or large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.>

<"Firearm" and "destructive device" have the meaning given those terms in the Commentary to § 1B1.1 (Application Instructions).>

<"Foreign instrumentality" and "foreign agent" have the meaning given those terms in 18 U.S.C. § 1839(1) and (2), respectively.>

<"Government health care program" means any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by federal or state government. Examples of such programs are the Medicare program, the Medicaid program, and the CHIP program.>

<"Means of identification" has the meaning given that term in 18 U.S.C. § 1028(d)(7), except that such means of identification shall be of an actual (i.e., not fictitious) individual, other than the defendant or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct).>

<"National cemetery" means a cemetery (A) established under section 2400 of title 38, United States Code; or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.>

<"Paleontological resource" has the meaning given that term in Application Note 1 of the Commentary to § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources).>

<"Personal information" means sensitive or private information involving an identifiable individual (including such information in the possession of a third party), including (A) medical records; (B) wills; (C) diaries; (D) private correspondence, including e-mail; (E) financial records; (F) photographs of a sensitive or private nature; or (G) similar information.>

<"Pre-retail medical product" has the meaning given that term in 18 U.S.C. § 670(e).>

<"Publicly traded company" means an issuer (A) with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78***l***); or (B) that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78***o***(d)). "Issuer" has the meaning given that term in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. § 78c).>

<"Supply chain" has the meaning given that term in 18 U.S.C. § 670(e).>

<"Theft from the person of another" means theft, without the use of force, of property that was being held by another person or was within arms' reach. Examples include pick-pocketing and non-forcible purse-snatching, such as the theft of a purse from a shopping cart.>

<"Trade secret" has the meaning given that term in 18 U.S.C. § 1839(3).>

<"Veterans' memorial" means any structure, plaque, statue, or other monument described in 18 U.S.C. § 1369(a).>

<"Victim" means (A) any person who sustained any part of the actual loss determined under subsection (b)(1); or (B) any individual who sustained bodily injury as a result of the offense. "Person" includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.>

<**2. Application of Subsection (a)(1).--**>

<**(A)** "Referenced to this Guideline".--For purposes of subsection (a)(1), an offense is "referenced to this guideline" if (i) this guideline is the applicable Chapter Two guideline specifically referenced in Appendix A (Statutory Index) for the offense of conviction, as determined under the provisions of § 1B1.2 (Applicable Guidelines); or (ii) in the case of a conviction for conspiracy, solicitation, or attempt to which § 2X1.1 (Attempt, Solicitation, or Conspiracy) applies, this guideline is the appropriate guideline for the offense the defendant was convicted of conspiring, soliciting, or attempting to commit.>

<**(B) Definition of "Statutory Maximum Term of Imprisonment."**--For purposes of this guideline, "statutory maximum term of imprisonment" means the maximum term of imprisonment authorized for the offense of conviction, including any increase in that maximum term under a statutory enhancement provision.>

<**(C) Base Offense Level Determination for Cases Involving Multiple Counts.**--In a case involving multiple counts sentenced under this guideline, the applicable base offense level is determined by the count of conviction that provides the highest statutory maximum term of imprisonment.>

<**3. Loss Under Subsection (b)(1).--**This application note applies to the determination of loss under subsection (b)(1).>

<**(A) General Rule.--**Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.>

<**(i) Actual Loss.--**"Actual loss" means the reasonably foreseeable pecuniary harm that resulted from the offense.>

<**(ii) Intended Loss.--**"Intended loss" (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).>

<**(iii) Pecuniary Harm.--**"Pecuniary harm" means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.>

<**(iv) Reasonably Foreseeable Pecuniary Harm.--**For purposes of this guideline, "reasonably foreseeable pecuniary harm" means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.>

<**(v) Rules of Construction in Certain Cases.--**In the cases described in subdivisions (I) through (III), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:>

<**(I) Product Substitution Cases.--**In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim's business operations caused by the product substitution.>

<**(II) Procurement Fraud Cases.--**In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correct the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.>

<**(III) Offenses Under 18 U.S.C. § 1030.--**In the case of an offense under 18 U.S.C. § 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: Any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.>

<**(B) Gain.--**The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.>

<**(C) Estimation of Loss.--**The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).>

<The estimate of the loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances, factors such as the following:>

<**(i)** The fair market value of the property unlawfully taken, copied, or destroyed; or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property.>

<**(ii)** In the case of proprietary information (e.g., trade secrets), the cost of developing that information or the reduction in the value of that information that resulted from the offense.>

<**(iii)** The cost of repairs to damaged property.>

<**(iv)** The approximate number of victims multiplied by the average loss to each victim.>

<**(v)** The reduction that resulted from the offense in the value of equity securities or other corporate assets.>

<**(vi)** More general factors, such as the scope and duration of the offense and revenues generated by similar operations.>

<**(D) Exclusions from Loss.--**Loss shall not include the following:>

<**(i)** Interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs.>

<**(ii)** Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense.>

<**(E) Credits Against Loss.--**Loss shall be reduced by the following:>

<**(i)** The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency.>

<**(ii)** In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.>

<**(iii)** Notwithstanding clause (ii), in the case of a fraud involving a mortgage loan, if the collateral has not been disposed of by the time of sentencing, use the fair market value of the collateral as of the date on which the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.>

<In such a case, there shall be a rebuttable presumption that the most recent tax assessment value of the collateral is a reasonable estimate of the fair market value. In determining whether the most recent tax assessment value is a reasonable estimate of the fair market value, the court may consider, among other factors, the recency of the tax assessment and the extent to which the jurisdiction's tax assessment practices reflect factors not relevant to fair market value.>

<**(F) Special Rules.--**Notwithstanding subdivision (A), the following special rules shall be used to assist in determining loss in the cases indicated:>

<**(i) Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes.--**In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device and shall be not less than $500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the

commission of the offense, loss shall be not less than $100 per unused means. For purposes of this subdivision, "counterfeit access device" and "unauthorized access device" have the meaning given those terms in Application Note 10(A).>

<**(ii) Government Benefits.--**In a case involving government benefits (e.g., grants, loans, entitlement program payments), loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be. For example, if the defendant was the intended recipient of food stamps having a value of $100 but fraudulently received food stamps having a value of $150, loss is $50.>

<**(iii) Davis-Bacon Act Violations.--**In a case involving a Davis-Bacon Act violation (i.e., a violation of 40 U.S.C. § 3142, criminally prosecuted under 18 U.S.C. § 1001), the value of the benefits shall be considered to be not less than the difference between the legally required wages and actual wages paid.>

<**(iv) Ponzi and Other Fraudulent Investment Schemes.--**In a case involving a fraudulent investment scheme, such as a Ponzi scheme, loss shall not be reduced by the money or the value of the property transferred to any individual investor in the scheme in access of that investor's principal investment (i.e., the gain to an individual investor in the scheme shall not be used to offset the loss to another individual investor in the scheme).>

<**(v) Certain Other Unlawful Misrepresentation Schemes.--**In a case involving a scheme in which (I) services were fraudulently rendered to the victim by persons falsely posing as licensed professionals; (II) goods were falsely represented as approved by a governmental regulatory agency; or (III) goods for which regulatory approval by a government agency was required but not obtained, or was obtained by fraud, loss shall include the amount paid for the property, services or goods transferred, rendered, or misrepresented, with no credit provided for the value of those items or services.>

<**(vi) Value of Controlled Substances.--**In a case involving controlled substances, loss is the estimated street value of the controlled substances.>

<**(vii) Value of Cultural Heritage Resources or Paleontological Resources.--**In a case involving a cultural heritage resource or paleontological resource, loss attributable to that resource shall be determined in accordance with the rules for determining the "value of the resource" set forth in Application Note 2 of the Commentary to § 2B1.5.>

<**(viii) Federal Health Care Offenses Involving Government Health Care Programs.--**In a case in which the defendant is convicted of a Federal health care offense involving a Government health care program, the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss, *i.e.*, is evidence sufficient to establish the amount of the intended loss, if not rebutted.>

<**(ix) Fraudulent Inflation or Deflation in Value of Securities or Commodities.--**In a case involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity, the court in determining loss may use any method that is appropriate and practicable under the circumstances. One such method the court may consider is a method under which the actual loss attributable to the change in value of the security or commodity is the amount determined by-->

<**(I)** calculating the difference between the average price of the security or commodity during the period that the fraud occurred and the average price of the security or commodity during the 90-day period after the fraud was disclosed to the market, and>

<**(II)** multiplying the difference in average price by the number of shares outstanding.>

<In determining whether the amount so determined is a reasonable estimate of the actual loss attributable to the change in value of the security or commodity, the court may consider, among other factors, the extent to which the amount so determined includes significant changes in value not resulting from the offense (e.g., changes caused by external market forces, such as changed economic circumstances, changed investor expectations, and new industry-specific or firm-specific facts, conditions, or events).>

<**4. Application of Subsection (b)(2).--**>

<**(A) Definition.--**For purposes of subsection (b)(2), "mass-marketing" means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (i) purchase goods or services; (ii) participate in a contest or sweepstakes; or (iii) invest for financial profit. "Mass-marketing" includes, for example, a telemarketing campaign that solicits a large number of individuals to purchase fraudulent life insurance policies.>

<**(B) Applicability to Transmission of Multiple Commercial Electronic Mail Messages.--**For purposes of subsection (b)(2), an offense under 18 U.S.C. § 1037, or any other offense involving conduct described in 18 U.S.C. § 1037, shall be considered to have been committed through mass-marketing. Accordingly, the defendant shall receive at least a two-level enhancement under subsection (b)(2) and may, depending on the facts of the case, receive a greater enhancement under such subsection, if the defendant was convicted under, or the offense involved conduct described in, 18 U.S.C. § 1037.>

<**(C) Undelivered United States Mail.--**>

<**(i) In General.--**In a case in which undelivered United States mail was taken, or the taking of such item was an object of the offense, or in a case in which the stolen property received, transported, transferred, transmitted, or possessed was undelivered United States mail, "victim" means (I) any victim as defined in Application Note 1; or (II) any person who was the intended recipient, or addressee, of the undelivered United States mail.>

<**(ii) Special Rule.--**A case described in subdivision (C)(i) of this note that involved-->

<**(I)** a United States Postal Service relay box, collection box, delivery vehicle, satchel, or cart, shall be considered to have involved at least 10 victims.>

<**(II)** a housing unit cluster box or any similar receptacle that contains multiple mailboxes, whether such receptacle is owned by the United States Postal Service or otherwise owned, shall, unless proven otherwise, be presumed to have involved the number of victims corresponding to the number of mailboxes in each cluster box or similar receptacle.>

<**(iii) Definition.--**"Undelivered United States mail" means mail that has not actually been received by the addressee or the addressee's agent (e.g., mail taken from the addressee's mail box).>

<**(D) Vulnerable Victims.--**If subsection (b)(2)(B) or (C) applies, an enhancement under § 3A1.1(b)(2) shall not apply.>

<**(E) Cases Involving Means of Identification.--**For purposes of subsection (b)(2), in a case involving means of identification "victim" means (i) any victim as defined in Application Note 1; or (ii) any individual whose means of identification was used unlawfully or without authority.>

<**(F) Substantial Financial Hardship.--**In determining whether the offense resulted in substantial financial hardship to a victim, the court shall consider, among other factors, whether the offense resulted in the victim-->

<**(i)** becoming insolvent;>

<**(ii)** filing for bankruptcy under the Bankruptcy Code (title 11, United States Code);>

<**(iii)** suffering substantial loss of a retirement, education, or other savings or investment fund;>

<**(iv)** making substantial changes to his or her employment, such as postponing his or her retirement plans;>

<**(v)** making substantial changes to his or her living arrangements, such as relocating to a less expensive home; and>

<**(vi)** suffering substantial harm to his or her ability to obtain credit.>

<**5. Enhancement for Business of Receiving and Selling Stolen Property under Subsection (b)(4).--**For purposes of subsection (b)(4), the court shall consider the following non-exhaustive list of factors in determining whether the defendant was in the business of receiving and selling stolen property:>

<**(A)** The regularity and sophistication of the defendant's activities.>

<**(B)** The value and size of the inventory of stolen property maintained by the defendant.>

<**(C)** The extent to which the defendant's activities encouraged or facilitated other crimes.>

<**(D)** The defendant's past activities involving stolen property.>

<**6. Application of Subsection (b)(6).--**For purposes of subsection (b)(6), "improper means" includes the unauthorized harvesting of electronic mail addresses of users of a website, proprietary service, or other online public forum.>

<**7. Application of Subsection (b)(8)(B).--**If subsection (b)(8)(B) applies, do not apply an adjustment under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).>

<**8. Application of Subsection (b)(9).--**>

<**(A) In General.--**The adjustments in subsection (b)(9) are alternative rather than cumulative. If, in a particular case, however, more than one of the enumerated factors applied, an upward departure may be warranted.>

<**(B) Misrepresentations Regarding Charitable and Other Institutions.--**Subsection (b)(9)(A) applies in any case in which the defendant represented that the defendant was acting to obtain a benefit on behalf of a charitable educational, religious, or political organization, or a government agency (regardless of whether the defendant actually was associated with the organization or government agency) when, in fact, the defendant intended to divert

all or part of that benefit (e.g., for the defendant's personal gain). Subsection (b)(9)(A) applies, for example, to the following:>

<**(i)** A defendant who solicited contributions for a non-existent famine relief organization.>

<**(ii)** A defendant who solicited donations from church members by falsely claiming to be a fundraiser for a religiously affiliated school.>

<**(iii)** A defendant, chief of a local fire department, who conducted a public fundraiser representing that the purpose of the fundraiser was to procure sufficient funds for a new fire engine when, in fact, the defendant intended to divert some of the funds for the defendant's personal benefit.>

<**(C) Fraud in Contravention of Prior Judicial Order.--**Subsection (b)(9)(C) provides an enhancement if the defendant commits a fraud in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. A defendant who does not comply with such a prior, official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment. If it is established that an entity the defendant controlled was a party to the prior proceeding that resulted in the official judicial or administrative action, and the defendant had knowledge of that prior decree or order, this enhancement applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business previously was enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, is subject to this enhancement. This enhancement does not apply if the same conduct resulted in an enhancement pursuant to a provision found elsewhere in the guidelines (e.g., a violation of a condition of release addressed in § 3C1.3 (Commission of Offense While on Release) or a violation of probation addressed in § 4A1.1 (Criminal History Category)).>

<**(D) College Scholarship Fraud.--**For purposes of subsection (b)(9)(D):>

<"Financial assistance" means any scholarship, grant, loan, tuition, discount, award, or other financial assistance for the purpose of financing an education.>

<"Institution of higher education" has the meaning given that term in section 101 of the Higher Education Act of 1954 (20 U.S.C. § 1001).>

<**(E) Non-Applicability of Chapter Three Adjustments.--**>

<**(i) Subsection (b)(9)(A).--**If the conduct that forms the basis for an enhancement under subsection (b)(9)(A) is the only conduct that forms the basis for an adjustment under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill), do not apply that adjustment under § 3B1.3.>

<**(ii) Subsection (b)(9)(B) and (C).--**If the conduct that forms the basis for an enhancement under subsection (b)(9)(B) or (C) is the only conduct that forms the basis for an adjustment under § 3C1.1 (Obstructing or Impeding the Administration of Justice), do not apply that adjustment under § 3C1.1.>

<**9. Application of Subsection (b)(10).--**>

<**(A) Definition of United States.--**For purposes of subsection (b)(10)(B), "United States" means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.>

<**(B) Sophisticated Means Enhancement under Subsection (b)(10)(C).--**For purposes of subsection (b)(10)(C), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means.>

<**(C) Non-Applicability of Chapter Three Adjustment.--**If the conduct that forms the basis for an enhancement under subsection (b)(10) is the only conduct that forms the basis for an adjustment under § 3C1.1, do not apply that adjustment under § 3C1.1.>

<**10. Application of Subsection (b)(11).--**>

<**(A) Definitions.--**For purposes of subsection (b)(11):>

<"Authentication feature" has the meaning given that term in 18 U.S.C. § 1028(d)(1).>

<"Counterfeit access device" (i) has the meaning given that term in 18 U.S.C. § 1029(e)(2); and (ii) includes a telecommunications instrument that has been modified or altered to obtain unauthorized use of telecommunications service.>

<"Device-making equipment" (i) has the meaning given that term in 18 U.S.C. § 1029(e)(6); and (ii) includes (I) any hardware or software that has been configured as described in 18 U.S.C. § 1029(a)(9); and (II) a scanning receiver referred to in 18 U.S.C. § 1029(a)(8). "Scanning receiver" has the meaning given that term in 18 U.S.C. § 1029(e)(8).>

<"Produce" includes manufacture, design, alter, authenticate, duplicate, or assemble. "Production" includes manufacture, design, alteration, authentication, duplication, or assembly.>

<"Telecommunications service" has the meaning given that term in 18 U.S.C. § 1029(e)(9).>

<"Unauthorized access device" has the meaning given that term in 18 U.S.C. § 1029(e)(3).>

<**(B) Authentication Features and Identification Documents.--**Offenses involving authentication features, identification documents, false identification documents, and means of identification, in violation of 18 U.S.C. § 1028, also are covered by this guideline. If the primary purpose of the offense, under 18 U.S.C. § 1028, was to violate, or assist another to violate, the law pertaining to naturalization, citizenship, or legal resident status, apply § 2L2.1 (Trafficking in a Document Relating to Naturalization) or § 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization), as appropriate, rather than this guideline.>

<**(C) Application of Subsection (b)(11)(C)(i).--**>

<**(i) In General.--**Subsection (b)(11)(C)(i) applies in a case in which a means of identification of an individual other than the defendant (or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct)) is used without that individual's authorization unlawfully to produce or obtain another means of identification.>

<**(ii) Examples.--**Examples of conduct to which subsection (b)(11)(C)(i) applies are as follows:>

<**(I)** A defendant obtains an individual's name and social security number from a source (e.g., from a piece of mail taken from the individual's mailbox) and obtains a bank loan in that individual's name. In this example, the account number of the bank loan is the other means of identification that has been obtained unlawfully.>

<**(II)** A defendant obtains an individual's name and address from a source (e.g., from a driver's license in a stolen wallet) and applies for, obtains, and subsequently uses a credit card in that individual's name. In this example, the credit card is the other means of identification that has been obtained unlawfully.>

<**(iii) Non-applicability of Subsection (b)(11)(C)(i).--**Examples of conduct to which subsection (b)(11)(C)(i) does not apply are as follows:>

<**(I)** A defendant uses a credit card from a stolen wallet only to make a purchase. In such a case, the defendant has not used the stolen credit card to obtain another means of identification.>

<**(II)** A defendant forges another individual's signature to cash a stolen check. Forging another individual's signature is not producing another means of identification.>

<**(D) Application of Subsection (b)(11)(C)(ii).--**Subsection (b)(11)(C)(ii) applies in any case in which the offense involved the possession of 5 or more means of identification that unlawfully were produced or obtained, regardless of the number of individuals in whose name (or other identifying information) the means of identification were so produced or so obtained.>

<**11. Interaction of Subsection (b)(13) and § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).--**If subsection (b)(13) applies, do not apply § 3B1.3.>

<**12. Application of Subsection (b)(15).--**Subsection (b)(15) provides a minimum offense level in the case of an ongoing, sophisticated operation (e.g., an auto theft ring or "chop shop") to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment. For purposes of this subsection, "vehicle" means motor vehicle, vessel, or aircraft. A "cargo shipment" includes cargo transported on a railroad car, bus, steamboat, vessel, or airplane.>

<**13. Gross Receipts Enhancement under Subsection (b)(17)(A).--**>

<**(A) In General.--**For purposes of subsection (b)(17)(A), the defendant shall be considered to have derived more than $1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded $1,000,000.>

<**(B) Definition.--**"Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).>

<**14. Application of Subsection (b)(17)(B).--**>

<**(A) Application of Subsection (b)(17)(B)(i).--**The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the safety and soundness of a financial institution was substantially jeopardized:>

<**(i)** The financial institution became insolvent.>

<**(ii)** The financial institution substantially reduced benefits to pensioners or insureds.>

<**(iii)** The financial institution was unable on demand to refund fully any deposit, payment, or investment.>

<**(iv)** The financial institution was so depleted of its assets as to be forced to merge with another institution in order to continue active operations.>

<**(v)** One or more of the criteria in clauses (i) through (iv) was likely to result from the offense but did not result from the offense because of federal government intervention, such as a "bailout".>

<**(B) Application of Subsection (b)(17)(B)(ii).--**>

<**(i) Definition.--**For purposes of this subsection, "organization" has the meaning given that term in Application Note 1 of § 8A1.1 (Applicability of Chapter Eight).>

<**(ii) In General.--**The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the solvency or financial security of an organization that was a publicly traded company or that had more than 1,000 employees was substantially endangered:>

<**(I)** The organization became insolvent or suffered a substantial reduction in the value of its assets.>

<**(II)** The organization filed for bankruptcy under Chapters 7, 11, or 13 of the Bankruptcy Code (title 11, United States Code).>

<**(III)** The organization suffered a substantial reduction in the value of its equity securities or the value of its employee retirement accounts.>

<**(IV)** The organization substantially reduced its workforce.>

<**(V)** The organization substantially reduced its employee pension benefits.>

<**(VI)** The liquidity of the equity securities of a publicly traded company was substantially endangered. For example, the company was delisted from its primary listing exchange, or trading of the company's securities was halted for more than one full trading day.>

<**(VII)** One or more of the criteria in subclauses (I) through (VI) was likely to result from the offense but did not result from the offense because of federal government intervention, such as a "bailout".>

<**15. Application of Subsection (b)(19).--**>

<**(A) Definitions.**--For purposes of subsection (b)(19):>

<"Critical infrastructure" means systems and assets vital to national defense, national security, economic security, public health or safety, or any combination of those matters. A critical infrastructure may be publicly or privately owned. Examples of critical infrastructures include gas and oil production, storage, and delivery systems, water supply systems, telecommunications networks, electrical power delivery systems, financing and banking systems, emergency services (including medical, police, fire, and rescue services), transportation systems and services

(including highways, mass transit, airlines, and airports), and government operations that provide essential services to the public.>

<"Government entity" has the meaning given that term in 18 U.S.C. § 1030(e)(9).>

<**(B) Subsection (b)(19)(A)(iii).**--If the same conduct that forms the basis for an enhancement under subsection (b)(19)(A)(iii) is the only conduct that forms the basis for an enhancement under subsection (b)(17)(B), do not apply the enhancement under subsection (b)(17)(B).>

<**16. Application of Subsection (b)(20).**-->

<**(A) Definitions.**--For purposes of subsection (b)(20):>

<"Commodities law" means (i) the Commodity Exchange Act (7 U.S.C. § 1 et seq.) and 18 U.S.C. § 1348; and (ii) includes the rules, regulations, and orders issued by the Commodity Futures Trading Commission.>

<"Commodity pool operator" has the meaning given that term in section 1a(11) of the Commodity Exchange Act (7 U.S.C. § 1a(11)).>

<"Commodity trading advisor" has the meaning given that term in section 1a(12) of the Commodity Exchange Act (7 U.S.C. § 1a(12)).>

<"Futures commission merchant" has the meaning given that term in section 1a(28) of the Commodity Exchange Act (7 U.S.C. § 1a(28)).>

<"Introducing broker" has the meaning given that term in section 1a(31) of the Commodity Exchange Act (7 U.S.C. § 1a(31)).>

<"Investment adviser" has the meaning given that term in section 202(a)(11) of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-2(a)(11)).>

<"Person associated with a broker or dealer" has the meaning given that term in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(18)).>

<"Person associated with an investment adviser" has the meaning given that term in section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-2(a)(17)).>

<"Registered broker or dealer" has the meaning given that term in section 3(a)(48) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(48)).>

<"Securities law" (i) means 18 U.S.C. §§ 1348, 1350, and the provisions of law referred to in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(47)); and (ii) includes the rules, regulations, and orders issued by the Securities and Exchange Commission pursuant to the provisions of law referred to in such section.>

<**(B) In General.**--A conviction under a securities law or commodities law is not required in order for subsection (b)(20) to apply. This subsection would apply in the case of a defendant convicted under a general fraud statute if the defendant's conduct violated a securities law or commodities law. For example, this subsection would apply if an officer of a publicly traded company violated regulations issued by the Securities and Exchange Commission by

fraudulently influencing an independent audit of the company's financial statements for the purposes of rendering such financial statements materially misleading, even if the officer is convicted only of wire fraud.>

<**(C) Nonapplicability of § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).--**If subsection (b)(20) applies, do not apply § 3B1.3.>

<**17. Cross Reference in Subsection (c)(3).--**Subsection (c)(3) provides a cross reference to another guideline in Chapter Two (Offense Conduct) in cases in which the defendant is convicted of a general fraud statute, and the count of conviction establishes an offense involving fraudulent conduct that is more aptly covered by another guideline. Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. § 1001, or similarly general statute, although the offense involves fraudulent conduct that is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which § 2S1.3 (Structuring Transactions to Evade Reporting Requirements) likely would be more apt, and false statements to a customs officer, for which § 2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property) likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state employee who improperly influenced the award of a contract and used the mails to commit the offense may be prosecuted under 18 U.S.C. § 1341 for fraud involving the deprivation of the intangible right of honest services. Such a case would be more aptly sentenced pursuant to § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions).>

<**18. Continuing Financial Crimes Enterprise.--**If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the "continuing financial crimes enterprise".>

<**19. Partially Completed Offenses.--**In the case of a partially completed offense (e.g., an offense involving a completed theft or fraud that is part of a larger, attempted theft or fraud), the offense level is to be determined in accordance with the provisions of § 2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. See Application Note 4 of the Commentary to § 2X1.1.>

<**20. Multiple-Count Indictments.--**Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction. See Chapter Three, Part D (Multiple Counts).>

<**21. Departure Considerations.--**>

<**(A) Upward Departure Considerations.--**There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:>

<**(i)** A primary objective of the offense was an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm.>

<**(ii)** The offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest (through, for example, the theft of personal information such as medical, educational, or financial records).>

<An upward departure would be warranted, for example, in an 18 U.S.C. § 1030 offense involving damage to a protected computer, if, as a result of that offense, death resulted.>

<An upward departure also would be warranted, for example, in a case involving animal enterprise terrorism under 18 U.S.C. § 43, if, in the course of the offense, serious bodily injury or death resulted, or substantial scientific research or information were destroyed.>

<Similarly, an upward departure would be warranted in a case involving conduct described in 18 U.S.C. § 670 if the offense resulted in serious bodily injury or death, including serious bodily injury or death resulting from the use of the pre-retail medical product.>

<**(iii)** The offense involved a substantial amount of interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs, not included in the determination of loss for purposes of subsection (b)(1).>

<**(iv)** The offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1), such as a risk of a significant disruption of a national financial market.>

<**(v)** In a case involving stolen information from a "protected computer", as defined in 18 U.S.C. § 1030(e)(2), the defendant sought the stolen information to further a broader criminal purpose.>

<**(vi)** In a case involving access devices or unlawfully produced or unlawfully obtained means of identification:>

<**(I)** The offense caused substantial harm to the victim's reputation, or the victim suffered a substantial inconvenience related to repairing the victim's reputation.>

<**(II)** An individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in that individual's name.>

<**(III)** The defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual's identity.>

<**(B) Upward Departure for Debilitating Impact on a Critical Infrastructure.**--An upward departure would be warranted in a case in which subsection (b)(19)(A)(iii) applies and the disruption to the critical infrastructure(s) is so substantial as to have a debilitating impact on national security, national economic security, national public health or safety, or any combination of those matters.>

<**(C) Downward Departure Consideration.**--There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.>

<For example, a securities fraud involving a fraudulent statement made publicly to the market may produce an aggregate loss amount that is substantial but diffuse, with relatively small loss amounts suffered by a relatively large number of victims. In such a case, the loss table in subsection (b)(1) and the victims table in subsection (b)(2) may combine to produce an offense level that substantially overstates the seriousness of the offense. If so, a downward departure may be warranted.>

<**(D) Downward Departure for Major Disaster or Emergency Victims.--**If (i) the minimum offense level of level 12 in subsection (b)(12) applies; (ii) the defendant sustained damage, loss, hardship, or suffering caused by a major disaster or an emergency as those terms are defined in 42 U.S.C. § 5122; and (iii) the benefits received illegally were only an extension or overpayment of benefits received legitimately, a downward departure may be warranted.>

<**Background:** This guideline covers offenses involving theft, stolen property, property damage or destruction, fraud, forgery, and counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United States).>

<Because federal fraud statutes often are broadly written, a single pattern of offense conduct usually can be prosecuted under several code sections, as a result of which the offense of conviction may be somewhat arbitrary. Furthermore, most fraud statutes cover a broad range of conduct with extreme variation in severity. The specific offense characteristics and cross references contained in this guideline are designed with these considerations in mind.>

<The Commission has determined that, ordinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the loss caused or intended by their crimes. Accordingly, along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under this guideline.>

<Theft from the person of another, such as pickpocketing or non-forcible purse-snatching, receives an enhanced sentence because of the increased risk of physical injury. This guideline does not include an enhancement for thefts from the person by means of force or fear; such crimes are robberies and are covered under § 2B3.1 (Robbery).>

<A minimum offense level of level 14 is provided for offenses involving an organized scheme to steal vehicles or vehicle parts. Typically, the scope of such activity is substantial, but the value of the property may be particularly difficult to ascertain in individual cases because the stolen property is rapidly resold or otherwise disposed of in the course of the offense. Therefore, the specific offense characteristic of “organized scheme” is used as an alternative to “loss” in setting a minimum offense level.>

<Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or the generosity and charitable motives of victims. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct; rather, defendants who exploit victims' charitable impulses or trust in government create particular social harm. In a similar vein, a defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.>

<Offenses that involve the use of financial transactions or financial accounts outside the United States in an effort to conceal illicit profits and criminal conduct involve a particularly high level of sophistication and complexity. These offenses are difficult to detect and require costly investigations and prosecutions. Diplomatic processes often must be used to secure testimony and evidence beyond the jurisdiction of United States courts. Consequently, a minimum offense level of level 12 is provided for these offenses.>

<Subsection (b)(5) implements the instruction to the Commission in section 2 of Public Law 105-101 and the directive to the Commission in section 3 of Public Law 110-384.>

<Subsection (b)(7) implements the directive to the Commission in section 10606 of Public Law 111-148.>

<Subsection (b)(8) implements the directive to the Commission in section 7 of Public Law 112-186.>

<Subsection (b)(9)(D) implements, in a broader form, the directive in section 3 of the College Scholarship Fraud Prevention Act of 2000, Public Law 106-420.>

<Subsection (b)(10) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105-184.>

<Subsections (b)(11)(A)(i) and (B)(i) implement the instruction to the Commission in section 4 of the Wireless Telephone Protection Act, Public Law 105-172.>

<Subsection (b)(11)(C) implements the directive to the Commission in section 4 of the Identity Theft and Assumption Deterrence Act of 1998, Public Law 105-318. This subsection focuses principally on an aggravated form of identity theft known as "affirmative identity theft" or "breeding", in which a defendant uses another individual's name, social security number, or some other form of identification (the "means of identification") to "breed" (i.e., produce or obtain) new or additional forms of identification. Because 18 U.S.C. § 1028(d) broadly defines "means of identification", the new or additional forms of identification can include items such as a driver's license, a credit card, or a bank loan. This subsection provides a minimum offense level of level 12, in part because of the seriousness of the offense. The minimum offense level accounts for the fact that the means of identification that were "bred" (i.e., produced or obtained) often are within the defendant's exclusive control, making it difficult for the individual victim to detect that the victim's identity has been "stolen." Generally, the victim does not become aware of the offense until certain harms have already occurred (e.g., a damaged credit rating or an inability to obtain a loan). The minimum offense level also accounts for the non-monetary harm associated with these types of offenses, much of which may be difficult or impossible to quantify (e.g., harm to the individual's reputation or credit rating, inconvenience, and other difficulties resulting from the offense). The legislative history of the Identity Theft and Assumption Deterrence Act of 1998 indicates that Congress was especially concerned with providing increased punishment for this type of harm.>

<Subsection (b)(12) implements the directive in section 5 of Public Law 110-179.>

<Subsection (b)(14) implements the directive in section 3 of Public Law 112-269.>

<Subsection (b)(16)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103-322.>

<Subsection (b)(17)(A) implements, in a broader form, the instruction to the Commission in section 2507 of Public Law 101-647.>

<Subsection (b)(17)(B)(i) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101-73.>

<Subsection (b)(18) implements the directive in section 209 of Public Law 110-326.>

<Subsection (b)(19) implements the directive in section 225(b) of Public Law 107-296. The minimum offense level of level 24 provided in subsection (b)(19)(B) for an offense that resulted in a substantial disruption of a critical infrastructure reflects the serious impact such an offense could have on national security, national economic security, national public health or safety, or a combination of any of these matters.>

Notes of Decisions (1253)

Federal Sentencing Guidelines, § 2B1.1, 18 U.S.C.A., FSG § 2B1.1
As amended to 3-15-22.

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