

# APPENDIX A

- A. United States v. Joseph, No. 23-1192, ECF No. 116, order denying rehearing on Nov. 25, 2024**
- B. United States v. Joseph, 108 F.4th 1273 (10th Cir. 2024)**
- C. United States v. Joseph, No. 1:21-CR-00083, ECF No. 149, criminal judgment entered June 5, 2023**

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**FILED**  
**United States Court of Appeals**  
**Tenth Circuit**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

**November 25, 2024**

**Christopher M. Wolpert**  
**Clerk of Court**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

FRANCIS F. JOSEPH,

Defendant - Appellant.

No. 23-1192  
(D.C. No. 1:21-CR-00083-RM-1)  
(D. Colo.)

**ORDER**

Before **McHUGH, MURPHY, and CARSON**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court



CHRISTOPHER M. WOLPERT, Clerk

## United States v. Joseph

United States Court of Appeals for the Tenth Circuit

July 29, 2024, Filed

No. 23-1192

**Reporter**

2024 U.S. App. LEXIS 18606 \*; 108 F.4th 1273; 125 Fed. R. Evid. Serv. (Callaghan) 545; 2024 WL 3560168 UNITED STATES OF AMERICA, Plaintiff - Appellee, v. FRANCIS F. JOSEPH, Defendant - Appellant.

**Prior History:** [\*1] Appeal from the United States District Court for the District of Colorado. (D.C. No. 1:21-CR-00083-RM-1).

**Counsel:** Elizabeth A. Franklin-Best, Elizabeth Franklin-Best, P.C., Columbia, South Carolina, for Defendant — Appellant.

John J. Liolos, Trial Attorney (Nicole M. Argentieri, Acting Assistant Attorney General; Lisa H. Miller, Deputy Assistant Attorney General, with him on the brief), Fraud Section, Criminal Division, U.S. Department of Justice, Washington, D.C., for Plaintiff — Appellee.

**Judges:** Before McHUGH, MURPHY, and CARSON, Circuit Judges.

**Opinion by:** MURPHY

## Opinion

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**MURPHY**, Circuit Judge.

### **I. Introduction**

Dr. Francis Joseph was the founder of Springs Medical Associates ("Springs Medical"), a medical practice based in Colorado Springs, Colorado. Following an ill-fated corporate governance agreement which installed a new Chief Operating Officer ("COO"), Joseph concocted a scheme for the alleged purpose of regaining control of the practice. Between March and June 2020, he submitted several false and unauthorized applications to federal COVID-19 relief programs on Springs Medical's behalf. As a result, Joseph received over \$250,000 in federal aid, which he disguised from Springs Medical leadership and ultimately misspent [\*2] for personal gain.

In 2023, a jury convicted Joseph of two fraud-based counts. On appeal, he argues insufficient evidence existed to demonstrate he possessed the requisite intent to commit the offenses. He also presents several challenges to his trial and sentencing proceedings, including that the district court improperly (a) limited his cross-examination and introduction of evidence; (b) admitted expert testimony as lay testimony; (c) allowed the government to introduce Fed. R. Evid. 404(b)(1) propensity evidence; (d) declined to provide clarifying jury instructions; and (e) miscalculated the economic loss under the sentencing guidelines occasioned by his offenses. This court concludes the record is replete with direct and circumstantial evidence that Joseph intended to commit fraud through his relief program applications. Further, except for the district court's admission of expert testimony in the guise of lay testimony, which was harmless, the district court neither

erred in sentencing nor abused its discretion in conducting Joseph's trial. Thus, exercising jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), this court **affirms** the district court's judgment.

## **II. Background**

### **a. Federal Relief Programs**

Joseph completed unauthorized [\*3] applications for two federally funded relief programs: the Accelerated and Advance Payment Program ("AAP"); and the Paycheck Protection Program ("PPP"). In light of the strain caused by the COVID-19 pandemic on national healthcare, the Centers for Medicare and Medicaid Services ("CMS") expanded the existing AAP to cover a broader range of Medicare providers. The program supplied funds to providers who experienced disruptions in Medicare claim submissions and processing. As long as applicants met basic criteria, AAP allowed providers to request a loan of up to 100% of Medicare payments for a three-month period. The loans permitted providers to receive full payment for claims until the date of recoupment, which began one year following the issuance of the loan. During this collection period, Medicare automatically offset amounts owed for new claims to repay the advanced funds.

PPP was authorized by the Coronavirus Aid, Relief, and Economic Security ("CARES") Act in March 2020 to help businesses weather the unpredictable economic conditions caused by the pandemic. The loans were facilitated by the Small Business Administration ("SBA") and were forgivable if used for the limited purposes [\*4] of payroll retention and paying mortgage interest, rent, or utilities. To obtain a PPP loan, a qualifying business had to submit a signed application from an authorized representative of the company. Candidates were further required to certify their acknowledgment of the program rules and provide payroll details. Both PPP and AAP loans were processed by third-party lenders, which coordinated with government entities to ensure applicants were properly approved and received the correct amount of relief.

### **b. Factual & Procedural History**

Joseph was the founder and managing physician of Springs Medical. He managed and controlled the practice until January 29, 2020, when Springs Medical adopted a document entitled "Joint Action by Written Consent of the Directors and Shareholders of [Springs Medical]" (the "Joint Action Document"). The Joint Action Document appointed Eric Papalini as Springs Medical's COO and bestowed upon him the authority and discretion to "make all actions necessary or desirable related to the operation of [Springs Medical]." As particularly relevant here, Papalini's authority included, "without limitation, the authority to hire and fire employees, manage [Springs Medical's] [\*5] banking accounts, make all decisions regarding [Springs Medical's] finances, borrow money in the name of [Springs Medical], make any contracts, enter into any transactions and make and obtain any commitments on behalf of [Springs Medical] deemed necessary or appropriate in his sole direction." After the Joint Action Document was executed, Joseph retained his shareholder status, but his day-to-day role was reduced to serving as a physician-employee.

On the same day that Congress signed the CARES Act into law, March 27, 2020, Joseph opened an unauthorized bank account in Springs Medical's name (hereafter, the "Unauthorized Bank Account"), making himself the sole signatory. His actions violated the terms of the Joint Action Document, which vested control of practice finances in Papalini. Joseph, however, claimed he opened the Unauthorized Bank Account because of a dispute with Papalini over his leadership and business decisions. He took offense to Papalini's behavior and purportedly considered it wise to disguise his financial dealings in preparation to oust Papalini from practice operations.

On or about March 29, 2020, Joseph applied for AAP relief on behalf of Springs Medical without [\*6] authorization from Papalini. He requested the maximum available loan and certified the request was due to billing complications caused by COVID-19. Notably, evidence presented at trial suggests no such complications were present at the time Joseph submitted his request. Joseph's application was approved and on April 7 the assigned lender made a payment of \$86,747.11 to Springs Medical's authorized business bank account (hereafter, the "Official Business Account"). Within twenty-four hours, Joseph transferred \$92,000 from this account to his minor daughter's bank account, which he controlled.

On April 3, Joseph applied for an unauthorized PPP loan in Springs Medical's name. His application listed his personal residence as the business address, used Springs Medical's Employer Identification Number ("EIN"), and sought \$500,000 in assistance. He claimed \$200,000 in monthly payroll, covering thirty-eight employees. The selected lender, Fountainhead Commercial Capital ("Fountainhead"), denied Joseph's application. It explained that another PPP loan request using Springs Medical's EIN had already been submitted. In fact, Springs Medical had previously tendered an authorized PPP loan application [\*7] for \$253,500.

Shortly thereafter, Springs Medical's office manager, Nicole Dennis, learned Joseph had removed funds from the Official Business Account following his successful AAP loan application. Dennis called Joseph, requesting he return the money so the practice could pay its employees. Joseph curtly refused. On April 14, 2020, Papalini terminated Joseph for transferring funds from the Official Business Account without approval. A week later, on April 21, Joseph filed a state-court civil lawsuit formally seeking to regain control of the practice. On May 7, 2020, the state court issued an order declaring that the Joint Action Document governed and Papalini controlled Springs Medical. Despite the order, Joseph appeared at Springs Medical on May 28 and attempted to fire Papalini in a last-ditch effort to take over the practice. Police arrived to diffuse the situation and Joseph left the premises unsuccessful.

On June 24, 2020, well after he ceded his financial duties and was formally severed from the practice, Joseph submitted another PPP loan application on behalf of Springs Medical. He represented himself as owner of the practice and requested \$179,000 in relief. Instead of using [\*8] Springs Medical's EIN, Joseph's application listed his own social security number. Despite his ouster, he claimed monthly payroll needs of \$72,000, covering thirty-four employees. As to how the funds would be used, Joseph selected the "other" box on the application. He claims he believed this selection allowed him to utilize the funds outside the program's restricted spending categories. Although he knew otherwise, Joseph also certified that Springs Medical had not received a prior PPP loan. The loan processor, Kabbage, Inc. ("Kabbage"), approved the application and issued \$179,000 to the Unauthorized Bank Account Joseph set up in March. Joseph admitted to ultimately using the money from both successful loans for his own benefit. After channeling the funds to his personal accounts, he misspent the relief on a range of goods and services, including vacation, home improvement, car payments, rent, child support, personal legal expenses, and adult entertainment.

On March 17, 2021, a federal grand jury charged Joseph with four counts: embezzlement or theft of health care benefit program funds in violation of 18 U.S.C. § 669 (Count One); embezzlement or theft of government property in violation of 18 U.S.C. § 641 (Count [\*9] Two); wire fraud in violation of 18 U.S.C. § 1343 (Count Three); and false statements in bankruptcy in violation of 18 U.S.C. § 152(3) (Count Four). The prosecution voluntarily dismissed Count Four prior to trial. Following a five-day trial in January 2023, the jury convicted Joseph of Count One, which was specifically predicated on fraud related to his AAP loan application; and Count Three, which was based on his misuse of the PPP loan system. The jury acquitted Joseph of Count Two. Joseph was sentenced to thirty months' imprisonment, followed by three years of supervised release. The district court also ordered Joseph to pay restitution of \$86,717.11 to CMS and \$179,999 to SBA.

### III. Analysis

#### a. Sufficiency of Evidence

This court reviews the sufficiency of evidence supporting a conviction *de novo*. *United States v. Anaya*, 727 F.3d 1043, 1050 (10th Cir. 2013). "We take the evidence—both direct and circumstantial, and reasonable inferences drawn from that evidence—in the light most favorable to the government and ask only whether a reasonable jury could find the defendant guilty beyond a reasonable doubt." *Id.* (quotations and alteration omitted).

Count One of Joseph's indictment required for conviction that he "knowingly and willfully embezzle[d], st[ole], or otherwise without authority [\*10] convert[ed] . . . , or intentionally misapply[d] any of the moneys, . . . of a health care benefit program." 18 U.S.C. § 669; *United States v. Maynard*, 984 F.3d 948, 962 (10th Cir. 2020). Similarly, Count Three of the indictment for wire fraud required he intentionally "devise[d] any scheme or artifice to defraud, or . . . obtain[ed] money or property by means of false or fraudulent pretenses." 18 U.S.C. § 1343; *United States v. Hay*, 95 F.4th 1304, 1311 (10th Cir. 2024). Joseph asserts no direct evidence demonstrates he had intent to defraud or intentionally misapply funds from either federal relief program at the time he submitted his applications. Instead, Joseph claims his applications were intended innocently as a means of trying to regain control of Springs Medical from Papalini.

Given the facts in this case, this court does not disagree with Joseph's argument that focus must be on his intent at the time he submitted the applications. Importantly, however, he provides absolutely no authority to support his apparent contention that evidence of his actions before and after submitting the applications are not capable of demonstrating unlawful intent. Rather, "[b]ecause it is difficult to prove intent to defraud from direct evidence, a jury may consider circumstantial evidence of fraudulent intent and draw reasonable inferences [\*11] therefrom." *United States v. Bailey*, 327 F.3d 1131, 1140 (10th Cir. 2003); see *United States v. Magleby*, 241 F.3d 1306, 1312 (10th Cir. 2001) (collecting cases for same rule in non-fraud-based intent crimes); see also *United States v. Christy*, 916 F.3d 814, 843 (10th Cir. 2019) (highlighting importance of circumstantial evidence for determining intent under a sufficiency analysis). "[I]ntent may be inferred from evidence that the defendant attempted to conceal activity" and "[i]ntent to defraud may be inferred from the defendant's misrepresentations, knowledge of a false statement as well as whether the defendant profited or converted money to his own use." *Bailey*, 327 F.3d at 1140 (quotation omitted). It is the totality of the evidence, and the reasonable inferences drawn therefrom, which supports our sufficiency analysis. See *Anaya*, 727 F.3d at 1050. "Thus, even when a defendant, as here, denies having the requisite intent, a jury may disbelieve the defendant if his words and acts in the light of all the circumstances make his explanation seem improbable." *Magleby*, 241 F.3d at 1312 (quotation and alterations omitted).

Robust direct and circumstantial evidence exists to support Joseph's convictions on both counts. Contrary to Joseph's arguments, much of this evidence is contemporaneous to when he filed his applications. For instance, Joseph made numerous false certifications on the face of his applications, including that Springs Medical [\*12] was suffering Medicare claims processing delays due to COVID-19; that he was authorized to apply for loans on Springs Medical's behalf; and that the business had not previously received a PPP loan. He also set up a fraudulent bank account in the practice's name and moved tens of thousands of dollars from Springs Medical's Official Business Account into his daughter's account for the purpose of concealing his financial activity. He further attempted to disguise his transactions by using his home address on relief applications and by applying for funds under his social security number after learning that using the business's EIN would prove fatal. Additionally, it is undisputed that Joseph primarily used the relief money for his own benefit. In violation of program rules that he certified he understood, he spent

handsomely on personal legal expenses, home improvement, and phone sex operators, among many other things. His actions were knowingly in violation of the Joint Action Document and further contravened an ensuing state court order enforcing that document. The extensive evidence of Joseph's misrepresentations, covert financial activity, and self-enrichment from the time of his applications [\*13] and thereafter certainly supports a reasonable jury's conviction on both fraud counts. Bailey, 327 F.3d at 1140.

#### **b. Cross-Examination & Exhibit Introduction**

We review challenges to district court evidentiary rulings for abuse of discretion. United States v. Silva, 889 F.3d 704, 709 (10th Cir. 2018). An abuse of discretion occurs when the district court "renders an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Id.* (quotation omitted). Under this standard, "we will not reverse the district court without a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." United States v. Griffin, 389 F.3d 1100, 1103 (10th Cir. 2004) (quotation omitted).

Joseph argues the district court made two meaningful and improper evidentiary rulings. First, he asserts the district court inappropriately denied him the opportunity to fully cross-examine SBA counsel, Mary Beth Cvengros, and Kabbage employee, Valerie Martin. Specifically, Joseph intended to emphasize on cross that Kabbage had a practice of inadequately vetting relief applications and, therefore, made it easier for Joseph to obtain funds without scienter. Joseph further hypothesized that federal investigation into Kabbage's due diligence practices impacted its motivation [\*14] to participate in the trial. The district court determined Kabbage's impropriety did not illustrate or affect Joseph's underlying mens rea and refused further cross-examination on the matter. Second, Joseph claims the district court erred in denying his request to submit an exhibit of Springs Medical's authorized PPP loan from May 2020. Joseph suggested the exhibit would clarify the extent to which he was aware of a prior PPP loan when he applied for his second unauthorized loan in June 2020. The district court denied the introduction of the exhibit because it was not relevant to determining Joseph's intent and it risked misleading the jury. Instead, the district court permitted Joseph to testify to his understanding of the situation without the loan document for support.

District courts are given "broad discretion to limit the cross-examination" of witnesses. United States v. Pearson, 798 F.2d 385, 388 (10th Cir. 1986). Here, there was no "nexus" between Kabbage's shortcomings as a lender and Joseph's intent to defraud federal relief programs. United States v. Jones, 213 F.3d 1253, 1261 (10th Cir. 2000); see also United States v. John, 849 F.3d 912, 918 (10th Cir. 2017) (holding limitation of cross-examination was proper when the proposed questioning was not "even marginally relevant" to the underlying issue at hand). Kabbage's history of imprecise application [\*15] review and the federal investigation thereof do not remotely relate to Joseph's offenses. As the district court noted, it appears the desired cross-examination would serve only to deflect blame onto the lender. The negligence of another party "in failing to discover a fraudulent scheme," however, "is not a defense to criminal conduct." United States v. Svete, 556 F.3d 1157, 1167 (11th Cir. 2009) (quotation omitted). Absent a viable connection between Kabbage's behavior and Joseph's fraud, we conclude the district court's decision to limit the cross-examination of Cvengros and Martin was not arbitrary.

Similarly, whether to exclude evidence is within the "sound discretion" of the district court. United States v. Perrault, 995 F.3d 748, 764 (10th Cir. 2021). Here, the district court reasonably concluded the introduction of the PPP loan exhibit did little to illuminate Joseph's state of mind and would serve to support his unrelated theory that other people were at fault for his actions. See generally United States v. Keck, 643 F.3d 789, 795 (10th Cir. 2011) (upholding exclusion of exhibits on the grounds of "relevancy, waste of time, and confusion of the jury"). Further, this court struggles to find any prejudice in the district court's determination given that Joseph was fully allowed to present his desired evidence through his own testimony. See *id.* In

turn, [\*16] we conclude the district court did not abuse its discretion by excluding the Springs Medical PPP loan exhibit.

### c. Expert & Lay Testimony

This court reviews a district court's decision to admit or exclude expert testimony for abuse of discretion. United States v. Starks, 34 F.4th 1142, 1170 (10th Cir. 2022); see also Fed. R. Evid. 702 (describing rules governing expert testimony). Generally, Fed. R. Evid. 701(c) ensures that lay testimony is "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Lay witnesses are typically allowed to provide "observations that are common enough and require a limited amount of expertise, if any." James River Ins. Co. v. Rapid Funding, LLC, 658 F.3d 1207, 1214 (10th Cir. 2011) (quotation and alteration omitted). "The prototypical example" of such evidence "relates to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences." *Id.*

At trial, the government offered "certified fraud examiner," Michael Petron, as a witness to explain Joseph's banking transactions. Absent an expert designation, the district court allowed the prosecution to use Petron as a lay witness, provided he limited his explanations to relatively [\*17] rudimentary arithmetic. Although Petron's testimony largely relied on addition and subtraction, the scope of his testimony was broad and its content was detailed. After selecting a "conservative" methodology for tracking funds, Petron provided an in-depth portrait of "eight or nine" different bank accounts based on analysis of "thousands of transactions." His testimony provided a thorough summary of how Joseph's various transactions related to one another and illustrated how the relief funds went from issuance to being spent on personal expenses.

When considering math, a lay witness is free to provide testimony that utilizes "basic arithmetic." Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1057 (10th Cir. 2020) (holding that taking the median of several numbers qualified as basic); Bryant v. Farmers Ins. Exch., 432 F.3d 1114, 1124 (10th Cir. 2005) ("Taking a simple average of 103 numbers, though technically a statistical determination, is not so complex a task that litigants need to hire experts in order to deem the evidence trustworthy."). Testimony is no longer lay testimony, however, if it moves beyond basic mathematics by considering advanced topics or by requiring the selection of a mathematic methodology. See James River Ins., 658 F.3d at 1214 ("Unlike taking an average, calculating depreciation requires more than applying basic mathematics. [\*18] Technical judgment is required in choosing among different types of depreciation."); LifeWise Master Funding v. Telebank, 374 F.3d 917, 929 (10th Cir. 2004) (classifying "moving averages, compounded growth rates, and S-curves" to be too technical for lay witness testimony). Still, merely possessing expert knowledge does not alone require a person to testify as an expert. ORP Surgical, LLC v. Howmedica Osteonics Corp., 92 F.4th 896, 915 (10th Cir. 2024).

Petron's testimony went beyond the mathematic analysis permissible for lay witnesses in both scope and kind. Importantly, to conduct his testimony he had to choose between multiple possible methodologies for tracing bank funds. Further, his testimony was based on a large-scale analysis of thousands of transactions across several different bank accounts. In Petron's own words, his testimony became "increasingly complex" as he described additional funds flowing across various accounts. This appears to be exactly the type of "technical, or other specialized knowledge" that is reserved for expert witnesses. Fed. R. Evid. 702(a). Indeed, this court is doubtful that Petron's testimony could be deemed within "the realm of common experience" as is required of lay testimony. United States v. Draine, 26 F.4th 1178, 1188 (10th Cir. 2022) (quotations omitted).

Nonetheless, "[a]n erroneous admission of evidence is harmless unless it had a substantial influence on the outcome or [\*19] leaves one in grave doubt as to whether it had such effect." *United States v. Yeley-Davis*, 632 F.3d 673, 685 (10th Cir. 2011) (quotation omitted). Prejudice is unlikely to arise when the record already contains evidence encapsulating the erroneous admission. See *United States v. Pehrson*, 65 F.4th 526, 543-44 (10th Cir. 2023); see also *United States v. Charley*, 189 F.3d 1251, 1272 (10th Cir. 1999) ("In light of the strength of the properly admitted testimony, . . . we cannot say that the erroneously admitted portions of the testimony substantially affected the trial's outcome."). Here, bank records displaying Joseph's transactions were admitted as exhibits. More substantially, a separate government witness, Special Agent Cory Rumble, testified at length to the contents of the bank account records and described in detail the movement of funds through Joseph's bank accounts. Agent Rumble's testimony also covered Joseph's many expenditures of relief funds on personal goods and services. Given that the jury received an alternative report of Joseph's financial activity which captured Petron's testimony, we conclude the district court's error of allowing Petron to testify as a lay witness was harmless.

#### **d. Rule 404(b) Evidence**

"We review the district court's decision to admit evidence under [Fed. R. Evid.] 404(b) for abuse of discretion." *United States v. Commanche*, 577 F.3d 1261, 1266 (10th Cir. 2009). Rule 404(b) forbids evidence of other bad acts to prove a person's character, but [\*20] it allows for such evidence to be admitted for the limited purposes of "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Generally, this court considers a four-factor test when determining the admissibility of evidence under Rule 404(b):

(1) the evidence must be offered for a proper purpose; (2) the evidence must be relevant; (3) the trial court must make a [Fed. R. Evid.] 403 determination of whether the probative value of the similar acts is substantially outweighed by its potential for unfair prejudice; and (4) . . . the trial court shall, upon request, instruct the jury that evidence of similar acts is to be considered only for the proper purpose for which it was admitted.

*United States v. Davis*, 636 F.3d 1281, 1297 (10th Cir. 2011) (quotation omitted). We consider the admissibility of evidence under Rule 404(b) to be a "case-specific inquiry" and rely heavily on the district court's "broad discretion." *United States v. Henthorn*, 864 F.3d 1241, 1248 (10th Cir. 2017).

At trial, the government sought to introduce evidence that, after the events underlying the charges set out in the indictment, Joseph withdrew \$241,000 in Medicare funds from Springs Medical's Official Business Account without authorization in November 2020. Given Joseph's argument that he intended to repay the [\*21] federal relief funds he previously took, the prosecution aimed to use his withdrawal and subsequent failure to repay as evidence that his applications were intentionally fraudulent. The district court accepted this explanation, determining the evidence was offered for the relevant purposes of showing Joseph's intent and lack of mistake. In its prejudice analysis, however, the district court recognized the withdrawal's potential to mislead the jury and, thus, restricted the use of evidence related to the event.<sup>1</sup> The district court further offered a limiting instruction when the evidence was presented.

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<sup>1</sup> The district court excluded "the introduction of whatever evidence or transcript or recording there is, that establishes that his explanation for [the Medicare funds withdrawal] is a lie . . . in the case in chief." The court made this determination in part due to the Medicare funds withdrawal being "tied up" with the corresponding bankruptcy proceeding, which was only questionably relevant to Joseph's criminal proceeding. The court further concluded that allowing additional evidence on the matter could "drift into what is, essentially, propensity evidence."

This court cannot identify error at any step of the four-factor test used to analyze 404(b) rulings. The district court reasonably determined the government's proffered purpose was legitimate and relevant to the underlying fraud claims. See *United States v. Mares*, 441 F.3d 1152, 1157 (10th Cir. 2006) ("Subsequent acts evidence is particularly relevant when a defendant's intent is at issue."). The Medicare withdrawal was responsive to Joseph's defense and helped illustrate his earlier relief applications were not merely innocent requests he meant to refund when the opportunity arose. The evidence was further relevant because it occurred in proximity to [\*22] the crimes of conviction and was similar in nature to Joseph's prior financial misdeeds. See *Davis*, 636 F.3d at 1298 (noting the probative value of other acts under Rule 404(b) that are similar in time, place, and nature to the underlying offenses). The district court also engaged in a prejudice analysis under Rule 403, which resulted in a restriction of related evidence to prevent jury confusion. Finally, the district court offered an appropriate and complete limiting instruction when the evidence was presented at trial. See, e.g., *United States v. Cardinas Garcia*, 596 F.3d 788, 798 (10th Cir. 2010) ("We presume jurors will conscientiously follow the trial court's instructions" (quotation omitted)). Accordingly, we are satisfied that the district court properly considered all necessary steps in its Rule 404(b) ruling and did not abuse its discretion in admitting the evidence.

#### e. Jury Instructions

This court reviews the refusal to give a requested jury instruction for abuse of discretion and will reverse only if prejudice results from such a refusal. *United States v. Faust*, 795 F.3d 1243, 1251 (10th Cir. 2015). "In order to assess whether the court properly exercised its discretion, we review the jury instructions de novo to determine whether, as a whole, they accurately state the governing law and provide the jury with an accurate understanding of the relevant [\*23] legal standards and factual issues in the case." *Id.* (quotation omitted).

Joseph argues the district court erred by not specifically instructing the jury that failing to repay a debt is not a crime. He claimed that creating the distinction between fraud and debt delinquency was fundamental to his defense. The district court declined the instruction, concluding that the government did not raise a failure-to-repay argument and the record did not otherwise support it. The district court further assured Joseph that it would exclude any argument which indicated nonpayment constitutes theft.

"[A] defendant is entitled to an instruction if the evidence viewed in his favor could support the defense." *United States v. Toledo*, 739 F.3d 562, 568 (10th Cir. 2014). Here, however, no evidence or argument supported the inclusion of the instruction. This court is not persuaded the instruction was necessary to Joseph's defense when it was unresponsive to any proposed argument, not relevant to the record, and the district court gave guarantees that any such argument would not be tolerated. See *United States v. Bader*, 678 F.3d 858, 873 (10th Cir. 2012) (similarly rejecting a jury instruction request that related to a "right . . . no way implicated" in the case). Given the proposed instruction's complete lack of relevance, [\*24] Joseph did not endure any prejudice as a result of its exclusion. The jury was provided "an accurate understanding" of the case and, therefore, we conclude the district court did not abuse its discretion in declining Joseph's request. *United States v. Crockett*, 435 F.3d 1305, 1314 (10th Cir. 2006).<sup>2</sup>

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<sup>2</sup> Joseph analogizes his case to *United States v. Britt*, 79 F.4th 1280, 1293 (10th Cir. 2023), which concluded the trial court "abused its discretion in refusing to instruct the jury on imperfect self-defense." There, this court emphasized the importance of "[g]iving full credence" to the defendant's testimony when deciding if an instruction is warranted. *Id.* at 1291. Unlike this case, however, *Britt*'s jury instruction request was responsive to arguments made at trial and was supported by sufficient evidence. *Id.* at 1291-92. In contrast, Joseph's request was not implicated by any argument made by the government, nor was it responsive to the evidence presented at trial.

#### f. Loss Calculation

"When reviewing a district court's application of the Sentencing Guidelines, we review legal questions de novo and we review any factual findings for clear error, giving due deference to the district court's application of the guidelines." United States v. Craig, 808 F.3d 1249, 1255 (10th Cir. 2015) (quotation omitted). Here, Joseph challenges whether his first failed PPP loan application from April 2020 was relevant conduct as defined by U.S.S.G. § 1B1.3(a)<sup>3</sup> and, therefore, whether it should be included as "intended loss" under U.S.S.G. § 2B1.1(b)(1). The district court determined the similar nature, close proximity, and shared purpose of Joseph's first PPP loan request qualified it as relevant conduct to his later, successful application. It included Joseph's \$500,000 loan request as intended loss, thereby increasing his assessment from § 2B1.1(b)(1)(G), covering offenses with losses exceeding \$250,000, to § 2B1.1(b)(1)(H), covering offenses with losses exceeding \$550,000. In turn, Joseph's offense level increased by two points.

Section 2B1.1(b)(1) contemplates both actual loss and [\*25] intended loss. U.S.S.G. § 2B1.1 cmt. n.3(A). Intended loss includes "the pecuniary harm that the defendant purposely sought to inflict." *Id.* at cmt. n.3(A)(ii). "In calculating loss under the Guidelines, the district court does not limit itself to conduct underlying the offense of conviction, but rather may consider all of the defendant's 'relevant conduct.'" United States v. Griffith, 584 F.3d 1004, 1011 (10th Cir. 2009). Relevant conduct for purposes of § 2B1.1(b)(1) includes "all acts and omissions committed . . . by the defendant" that "were part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(1)-(2).<sup>4</sup> A "common scheme" is generally considered as two or more offenses that are "substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar *modus operandi*." U.S.S.G. § 1B1.3 cmt. n.5(B)(i); see also United States v. Damato, 672 F.3d 832, 845 (10th Cir. 2012). The "same course of conduct" refers to a more flexible set of acts that are "sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses." U.S.S.G. § 1B1.3 at cmt. n.5(B)(ii); see also United States v. Garcia, 946 F.3d 1191, 1203 (10th Cir. 2020) ("We have opined that this same-course-of-conduct standard looks to whether the defendant repeats the same type of criminal activity over time, but does not require that acts be connected [\*26] together by common participants or by an overall scheme." (quotations omitted)).

This court agrees with the district court's determination that Joseph's first failed PPP loan attempt qualifies as relevant conduct under either the common scheme or same course of conduct standard. Joseph's first application was a near replica of his later submission; it was completed only three months prior to his second application; it seemingly had the same purpose to defraud relief programs for his own benefit; and it shared the same victim. See, e.g., United States v. Smith, 705 F.3d 1268, 1275 (10th Cir. 2013) (describing how a fraudulent housing sale based on fraudulent loan applications amounted to relevant conduct); see also Damato, 672 F.3d at 840-41 (looking favorably on temporal gaps substantially less than one year in analyzing same course of conduct qualifications). The two offenses are further correlated because Joseph's first failed application informed him how to successfully submit his second. After learning

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<sup>3</sup> Joseph arguably forfeited this challenge by exclusively arguing on appeal that his prior PPP loan application was not relevant conduct under § 1B1.3(a)(1). The district court, however, made clear it included the failed loan amount under the provisions of § 1B1.3(a)(2). Because we resolve this issue on de novo review, we need not determine if Joseph forfeited his claim.

<sup>4</sup> Section 1B1.3(a)(2) governs "offenses of a character for which § 3D1.2(d) would require grouping of multiple counts." Intended loss calculation under § 2B1.1(b)(1) is incorporated under § 3D1.2(d).

that using Springs Medical's EIN would result in a rejected application, Joseph used his own social security number in his second attempt.

Contrary to Joseph's arguments, there is no requirement that relevant conduct result in conviction when evidence fairly supports [\*27] the presence of a common scheme or shared course of conduct. See § 1B1.3 cmt. n.5(A) ("Application of this provision does not require the defendant, in fact, to have been convicted of multiple counts."); *United States v. Altamirano-Quintero*, 511 F.3d 1087, 1095 (10th Cir. 2007) ("Relevant conduct for sentencing purposes, therefore, comprises more, often much more, than the offense of conviction itself, and may include uncharged . . . conduct." (quotation omitted)). Joseph's applications were virtually identical in nature and were separated by only three months. Thus, we conclude Joseph's first PPP loan request was relevant conduct for purposes of the sentencing guidelines, and we perceive no clear error in the factual findings underlying the determination that he qualifies for an assessment under § 2B1.1(b)(1)(H).<sup>5</sup>

#### IV. Conclusion

The judgment of the United States District Court for the District of Colorado is hereby **AFFIRMED** [\*28].

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End of Document

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<sup>5</sup> On appeal, Joseph additionally argued that the cumulative error doctrine should apply. *United States v. Garcia*, 74 F.4th 1073, 1130 (10th Cir. 2023) ("Cumulative error is present when the cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error." (quotation omitted)). Because there was but a single error, there could be no cumulative error.

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AO 245B (CO Rev. 11/20) Judgment in a Criminal Case

## UNITED STATES DISTRICT COURT

## District of Colorado

UNITED STATES OF AMERICA	)	JUDGMENT IN A CRIMINAL CASE
v.	)	
FRANCIS F. JOSEPH	)	Case Number: 1:21-cr-00083-RM-1
	)	USM Number: 47245-509
	)	David Andrew Kraut, Kathleen Shen and Joshua M. Lilley
	)	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 and 3 of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

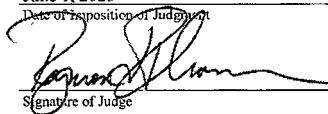
Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 669	Theft or Embezzlement in Connection with Health Care	04/08/2020	1
18 U.S.C. § 1343	Wire Fraud	07/31/2020	3

The defendant is sentenced as provided in pages 2 through 7 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) 2 of the Indictment

Count(s) 4 of the Indictment  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.

June 1, 2023  
 Date of imposition of Judgment  
  
 Signature of Judge

Raymond P. Moore, United States District Judge  
 Name and Title of Judge

June 5, 2023  
 Date

Case No. 1:21-cr-00083-RM Document 149 filed 06/05/23 USDC Colorado pg 2 of 7

AO 245B (CO Rev. 11/20) Judgment in Criminal Case

Judgment — Page 2 of 7DEFENDANT: FRANCIS F. JOSEPH  
CASE NUMBER: 1:21-cr-00083-RM-1**IMPRISONMENT**

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **thirty (30) months**; thirty (30) months as to Counts 1 and 3, to be served concurrently.

- The court makes the following recommendations to the Bureau of Prisons:  
The Court recommends that the defendant be designated to FCI Englewood.
  
- 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 MARSHALBy \_\_\_\_\_  
DEPUTY UNITED STATES MARSHAL

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AO 245B (CO Rev. 11/20) Judgment in Criminal Case

Judgment — Page 3 of 7DEFENDANT: FRANCIS F. JOSEPH  
CASE NUMBER: 1:21-cr-00083-RM-1**SUPERVISED RELEASE**

Upon release from imprisonment, you will be on supervised release for a term of: **three (3) years; three (3) years as to Counts 1 and 3, to be served concurrently.**

**MANDATORY CONDITIONS**

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and a maximum of 20 tests per year of supervision thereafter.
  - 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.

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AO 245B (CO Rev. 11/20) Judgment in Criminal Case

Judgment — Page 4 of 7DEFENDANT: FRANCIS F. JOSEPH  
CASE NUMBER: 1:21-cr-00083-RM-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, after obtaining Court approval, notify the person about the risk or 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](http://www.uscourts.gov).

Defendant's Signature \_\_\_\_\_ Date \_\_\_\_\_

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AO 245B (CO Rev. 11/20) Judgment in Criminal Case

Judgment — Page 5 of 7

DEFENDANT: FRANCIS F. JOSEPH  
CASE NUMBER: 1:21-cr-00083-RM-1

**SPECIAL CONDITIONS OF SUPERVISION**

1. If not deported, you must participate in a program of mental health treatment approved by the probation officer and follow the rules and regulations of such program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program as to modality, duration, and intensity. You must pay for the cost of treatment based on your ability to pay.
2. If the judgment imposes a financial penalty/restitution, you must pay the financial penalty/restitution in accordance with the Schedule of Payments sheet of this judgment. You must also notify the court of any changes in economic circumstances that might affect your ability to pay the financial penalty/restitution.
3. You must not incur new credit charges or open additional lines of credit without the approval of the probation officer, unless you are in compliance with the periodic payment obligations imposed pursuant to the Court's judgment and sentence.
4. You must apply any monies received from income tax refunds, lottery winnings, inheritances, judgments, and any anticipated or unexpected financial gains to the outstanding court-ordered financial obligation in this case.
5. You must provide the probation officer access to any requested financial information and authorize the release of any financial information.
6. If you have an outstanding financial obligation, the probation office may share any financial or employment documentation relevant to you with the Asset Recovery Division of the United States Attorney's Office to assist in the collection of the obligation.
7. You must document all income and compensation generated or received from any source and must provide that information to the probation officer as requested.
8. Any business you operate during the term of supervision must be approved by the probation officer. You must operate under a formal, registered entity, and you must provide the probation officer with the name of the business entity and its registered agents. You must maintain business records and provide all business documentation and records as requested by the probation officer. Notwithstanding, the probation officer shall approve any business that meets these standards.
9. You must maintain separate personal and business finances and must not co-mingle personal and business funds or income in any financial accounts, including but not limited to bank accounts and lines of credit.
10. If you are deported, you must not thereafter re-enter the United States illegally. If you reenter the United States legally, you must report to the nearest U.S. Probation Office within 72 hours of your return.

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AO 245B (CO Rev. 11/20) Judgment in Criminal Case

Judgment — Page 6 of 7DEFENDANT: FRANCIS F. JOSEPH  
CASE NUMBER: 1:21-cr-00083-RM-1**CRIMINAL MONETARY PENALTIES**

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

<b>TOTALS</b>	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
	\$ 200.00	\$ 266,716.11	\$ 0.00	\$ 0.00	\$ 0.00

The determination of restitution is deferred until \_\_\_\_\_. 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.

<u>Name of Payee</u>	<u>Total Loss***</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
(Accelerated and Advance Payment Program)	\$86,717.11	\$86,717.11	
Centers for Medicare & Medicaid Services Division of Accounting Operation 7500 Security Boulevard Mail Stop C3-11-03 Baltimore, MD 21244			
(Paycheck Protection Program Loan) U.S. Small Business Administration Attn: Christine Phuangkeo, Post Servicing Team 801 R Street, Suite 101 Fresno, CA 93721	\$179,999.00	\$179,999.00	

<b>TOTALS</b>	\$ <u>266,716.11</u>	\$ <u>266,716.11</u>
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Restitution amount ordered pursuant to plea agreement \$ 266,716.11

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 the following page 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:

\* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Publ. L. No. 115-299.

\*\* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

\*\*\* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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AO 245B (CO Rev. 11/20) Judgment in Criminal Case

Judgment — Page 7 of 7DEFENDANT: FRANCIS F. JOSEPH  
CASE NUMBER: 1:21-cr-00083-RM-1**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 \$ \_\_\_\_\_ 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 special assessment and restitution obligation are due immediately. Any unpaid monetary obligations upon release from incarceration shall be paid in monthly installment payments during the term of supervised release. The monthly installment payment will be calculated as at least 10 percent of the defendant's gross monthly income

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

Case Number

Defendant and Co-Defendant Names  
(including defendant number)

Total Amount

Joint and Several Amount

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:  
Money judgment in the amount of \$266,746.11; and the defendant's interest in the 2016 Cadillac Escalade, VIN No. 1GYS4KKJ4GR471518

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

# APPENDIX B

## A. Colorado Revised Statute 12-240-138

## **C.R.S. 12-240-138**

Statutes current through all 2024 legislation

**Colorado Revised Statutes Annotated > Title 12. Professions and Occupations (§§ 12-1-101 — 12-315-310) > Health Care Professions and Occupations (Arts. 200 — 315) > Article 240. Medical Practice (§§ 12-240-101 — 12-240-146)**

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### **12-240-138. Professional service corporations, limited liability companies, and registered limited liability partnerships for the practice of medicine - definitions.**

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**(1)** Persons licensed to practice medicine by the board may form professional service corporations for such persons' practice of medicine under the "Colorado Business Corporation Act", articles 101 to 117 of title 7, if the corporations are organized and operated in accordance with the provisions of this section. The articles of incorporation of the corporations shall contain provisions complying with the following requirements:

- (a)** The name of the corporation shall contain the words "professional company" or "professional corporation" or abbreviations thereof.
- (b)** The corporation is organized solely for the purpose of permitting individuals to conduct the practice of medicine through a corporate entity, so long as all the individuals are actively licensed physicians or physician assistants in the state of Colorado.
- (c)** The corporation may exercise the powers and privileges conferred upon corporations by the laws of Colorado only in furtherance of and subject to its corporate purpose.
- (d)**
  - (I)** Except as specified in subsection (1)(d)(II) of this section, all shareholders of the corporation are persons licensed by the board to practice medicine in the state of Colorado who at all times own their shares in their own right; except that one or more persons licensed by the board as a physician assistant may be a shareholder of the corporation as long as the physician shareholders maintain majority ownership of the corporation. The shareholders shall be individuals who, except for illness, accident, time spent in the armed services, on vacations, and on leaves of absence not to exceed one year, are actively engaged in the practice of medicine or as a physician assistant in the offices of the corporation.

C.R.S. 12-240-138

**(II)** If a person licensed to practice medicine who was a shareholder of the corporation dies, an heir to the deceased shareholder may become a shareholder of the corporation for up to two years, regardless of whether the heir is licensed to practice medicine. Unless the deceased shareholder was the only shareholder of the corporation, the heir who becomes a shareholder shall be a nonvoting shareholder in all matters concerning the corporation. If the heir of the deceased shareholder ceases to be a shareholder, the shares shall be disposed of pursuant to subsection (1)(e) of this section.

**(e)** Provisions shall be made requiring any shareholder who ceases to be or for any reason is ineligible to be a shareholder to dispose of all of his or her shares forthwith, either to the corporation or to any person having the qualifications described in subsection (1)(d) of this section.

**(f)** The president shall be a shareholder and a director and, to the extent possible, all other directors and officers shall be persons having the qualifications described in subsection (1)(d) of this section. Lay directors, officers, and heirs of deceased shareholders shall not exercise any authority whatsoever over the independent medical judgment of persons licensed by the board to practice medicine in this state. Notwithstanding sections 7-108-103 to 7-108-106 relating to the terms of office and classification of directors, a professional service corporation for the practice of medicine may provide in the articles of incorporation or the bylaws that the directors may have terms of office of up to six years and that the directors may be divided into classes, with the terms of each class staggered to provide for the periodic election of less than all the directors. Nothing in this article 240 shall be construed to cause a professional service corporation to be vicariously liable to a patient or third person for the professional negligence or other tortious conduct of a physician who is a shareholder or employee of a professional service corporation.

**(g)** An heir to a deceased shareholder who becomes a shareholder shall be liable only to the same extent as the deceased shareholder would have been in his or her capacity as a shareholder, had he or she lived and remained a shareholder, for all acts, errors, and omissions of the employees of the corporation.

**(h)** The articles of incorporation provide and all shareholders of the corporation agree that all shareholders of the corporation are jointly and severally liable for all acts, errors, and omissions of the employees of the corporation or that all shareholders of the corporation are jointly and severally liable

C.R.S. 12-240-138

for all acts, errors, and omissions of the employees of the corporation, except during periods of time when each licensee who is a shareholder or any employee of the corporation has a professional liability policy insuring himself or herself and all employees who are not licensed pursuant to this article 240 who act at his or her direction, in the amount of fifty thousand dollars for each claim and an aggregate top limit of liability per year for all claims of one hundred fifty thousand dollars, or the corporation maintains in good standing professional liability insurance that meets the following minimum standards:

- (I) The insurance insures the corporation against liability imposed upon the corporation by law for damages resulting from any claim made against the corporation arising out of the performance of professional services for others by those officers and employees of the corporation who are licensees.
- (II) The policies insure the corporation against liability imposed upon it by law for damages arising out of the acts, errors, and omissions of all nonprofessional employees.
- (III) The insurance is in an amount for each claim of at least fifty thousand dollars multiplied by the number of licensees employed by the corporation. The policy may provide for an aggregate top limit of liability per year for all claims of one hundred fifty thousand dollars also multiplied by the number of licensees employed by the corporation, but no firm shall be required to carry insurance in excess of three hundred thousand dollars for each claim with an aggregate top limit of liability for all claims during the year of nine hundred thousand dollars.
- (IV) The policy may provide that it does not apply to: Any dishonest, fraudulent, criminal, or malicious act or omission of the insured corporation or any stockholder or employee thereof; the conduct of any business enterprise, as distinguished from the practice of medicine, in which the insured corporation under this section is not permitted to engage but which nevertheless may be owned by the insured corporation or in which the insured corporation may be a partner or which may be controlled, operated, or managed by the insured corporation in its own or in a fiduciary capacity, including the ownership, maintenance, or use of any property in connection therewith; when not resulting from breach of professional duty, bodily injury to, or sickness, disease, or death of any person, or to injury to or destruction of any tangible property, including the loss of use thereof; and the policy may contain reasonable provisions with respect to policy periods, territory, claims, conditions, and other usual matters.

C.R.S. 12-240-138

**(2)** The corporation shall do nothing that, if done by a licensee employed by the corporation, would violate the standards of professional conduct as provided for in section 12-240-121. Any violation of this section by the corporation is grounds for the board to revoke or suspend the license of the person or persons responsible for the violation.

**(3)** Nothing in this section diminishes or changes the obligation of each licensee employed by the corporation to conduct his or her practice in accordance with the standards of professional conduct provided for in section 12-240-121. Any licensee who, by act or omission, causes the corporation to act or fail to act in a way that violates the standards of professional conduct, including any provision of this section, is personally responsible for such act or omission and is subject to discipline for the act or omission.

**(4)** Nothing in this section modifies the physician-patient privilege specified in section 13-90-107 (1)(d).

**(5)** A professional service corporation may adopt a pension, cash profit sharing, deferred profit sharing, health and accident, insurance, or welfare plan for all or part of its employees including lay employees if the plan does not require or result in the sharing of specific or identifiable fees with lay employees, and if any payments made to lay employees, or into any plan in behalf of lay employees, are based upon their compensation or length of service, or both, rather than the amount of fees or income received.

**(6)**

**(a)** Corporations shall not practice medicine. Nothing in this section shall be construed to abrogate a cause of action against a professional corporation for its independent acts of negligence.

**(b)** Employment of a physician in accordance with section 25-3-103.7 shall not be considered the corporate practice of medicine.

**(7)** As used in this section, unless the context otherwise requires:

**(a)** "Articles of incorporation" includes operating agreements of limited liability companies and partnership agreements of registered limited liability partnerships.

**(b)** "Corporation" includes a limited liability company organized under the "Colorado Limited Liability Company Act", article 80 of title 7, and a limited liability partnership registered under section 7-60-144 or 7-64-1002; except that the name of an entity other than a corporation shall contain the word "professional" or the abbreviation "prof." in addition to any other words required by the statute under which the entity is organized.

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- (c)** "Director" and "officer" of a corporation includes a member and a manager of a limited liability company and a partner in a registered limited liability partnership.
- (d)** "Employees" includes employees, members, and managers of a limited liability company and employees and partners of a registered limited liability partnership.
- (e)** "President" includes all managers, if any, of a limited liability company and all partners in a registered limited liability partnership.
- (f)** "Share" includes a member's rights in a limited liability company and a partner's rights in a registered limited liability partnership.
- (g)** "Shareholder" includes a member of a limited liability company and a partner in a registered limited liability partnership.

## **History**

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**Source:** L. 2019:Entire title R&RE with relocations,(HB 19-1172), ch. 136, p. 1212, § 1, effective October 1.

Colorado Revised Statutes Annotated

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