

APPENDIX A

880 F.3d 399

United States Court of Appeals, Seventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Rick E. BROWN & Mary C.

Talaga, Defendants-Appellants.

Nos. 15-3117 & 15-3261

|

Argued May 23, 2017

|

Decided January 19, 2018

Synopsis

Background: Defendants were convicted in the United States District Court for the Northern District of Illinois, Gary Feinerman, J., of conspiracy to commit health-care fraud, health-care fraud, and falsifying a matter or providing false statements. Defendants appealed.

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

[1] district court err in relying on idea that white-collar criminals are prime candidates for general deterrence, and

[2] record supported sentencing court's conclusion that second defendant knew that her billing submissions were fraudulent when she began working for company.

Affirmed.

West Headnotes (6)

[1] Criminal Law**🔑 Review De Novo**

Whether a District Court followed proper sentencing procedure is a question of law that the Court of Appeals reviews de novo.

[1 Cases that cite this headnote](#)

[2] Criminal Law**🔑 Application of guidelines**

To ensure that a sentencing judge did not commit any significant procedural error, the Court of Appeals examines whether the District Court: (1) properly calculated the Sentencing Guidelines range; (2) recognized that the Guidelines range was not mandatory; (3) considered the statutory sentencing factors; (4) selected a sentence based on facts that were not clearly erroneous; and (5) adequately explained the chosen sentence including an explanation for any deviation from the Guidelines range. [18 U.S.C.A. § 3553\(a\)](#).

[Cases that cite this headnote](#)

[3] Sentencing and Punishment**🔑 Deterrence**

District court did not err in relying on idea that white-collar criminals were prime candidates for general deterrence as one statutory sentencing factor supporting imposition of 87-month sentence for defendant's role in health care fraud conspiracy, which was 34 months below the Sentencing Guidelines range; district court was entitled to conclude that, given that health-care fraud was widespread and that therefore there was a lower likelihood of getting caught, a serious penalty was necessary to ensure deterrence. [18 U.S.C.A. § 3553\(a\)](#).

[Cases that cite this headnote](#)

[4] Sentencing and Punishment**🔑 Evidence**

Sentencing judges cannot be expected to rely on evidence not before them.

[Cases that cite this headnote](#)

[5] Sentencing and Punishment**🔑 Sufficiency**

Record supported sentencing court's conclusion that defendant, who was responsible for medical billing for company

that provided home physician visits to patients, knew her billing submissions to Medicare were fraudulent when she began working for company, in calculating loss arising from her role in conspiracy to commit health care fraud; defendant was experienced Medicare biller when she began working at company, had training in Medicare billing, was intimately familiar with billing procedures of the medical practice, and had completed course on medical billing. 18 U.S.C.A. § 1349.

[Cases that cite this headnote](#)

[6] Criminal Law

🔑 Sentencing

The Court of Appeals reviews the District Court's determination of loss for clear error and will reverse the District Court only if it is left with the definite and firm conviction that a mistake was made.

[Cases that cite this headnote](#)

*400 Appeals from the United States District Court for the Northern District of Illinois, Eastern Division, Nos. 1:13-cr-00854-1, 1:13-cr-00854-3 — [Gary Feinerman](#), Judge.

Attorneys and Law Firms

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[Carol A. Brook](#), Attorney, Rosalie L. Guimaraes, Attorney, Office of the Federal Defender Program, for Defendant–Appellant.

Before [Bauer](#), [Easterbrook](#), and [Ripple](#), Circuit Judges.

Opinion

[Ripple](#), Circuit Judge.

A grand jury indicted Rick E. Brown and Mary C. Talaga with one count of conspiracy to commit health-care fraud, in violation of 18 U.S.C. § 1349, six counts of health-care fraud, in violation of 18 U.S.C. § 1347, and three counts of falsifying a matter or providing false statements, in violation of 18 U.S.C. § 1035(a). A jury convicted them on all counts. The district court sentenced Mr. Brown to eighty-seven months' imprisonment on the health-care fraud counts and terms of sixty *401 months' imprisonment on each of the falsification counts to run concurrently with each other and with the fraud counts. In doing so, the district court explained that a significant sentence was warranted for several reasons, including general deterrence. Ms. Talaga was sentenced to concurrent forty-five-month sentences on all of the ten counts.

Both defendants now maintain that the district court erred in imposing their respective sentences. Mr. Brown maintains that the district court's assumptions about the need for general deterrence were unfounded and constituted procedural error. Ms. Talaga argues that, when the district court calculated the amount of loss for which she was responsible, it impermissibly included losses that occurred before she joined the conspiracy. The inclusion of these amounts resulted in a higher loss amount, corresponding to a higher offense level and sentence.

Because the district court did not err in its reasoning or in its sentencing determination, we affirm its judgments.

I

BACKGROUND

A.

Medicall Physicians Group, Ltd. (“Medicall”), a company that provided home physician visits to patients, employed both Mr. Brown and Ms. Talaga. Mr. Brown served as Medicall's office manager, and Ms. Talaga had responsibility for medical billing. Dr. Roger Lucero, a third defendant, was the owner and medical director of the company. He pleaded guilty to the conspiracy count, cooperated with the Government, and testified against both Mr. Brown and Ms. Talaga.

Beginning at least as early as January 2007, Mr. Brown and Dr. Lucero began submitting false and fraudulent claims to Medicare. Ms. Talaga, who had been trained as a medical biller, joined Medcall in August 2007. She reported to Mr. Brown and was paid a percentage of Medcall's earnings.

According to the evidence, the fraud at Medcall took at least three forms. First, Mr. Brown and Ms. Talaga billed Medicare for "prolonged" visits, using the prolonged care code, as a way to pay for employees' travel time. Second, regardless whether the patient qualified for, or received, the billed-for care, every patient was billed for "Care Plan Oversight," a type of physician supervision for patients requiring complex or multi-disciplinary care. Finally, Mr. Brown and Ms. Talaga billed Medicare for services purportedly provided to deceased patients, as well as services by providers who no longer were associated with Medcall.

After hearing the evidence, the jury convicted both defendants on all counts of the indictment.

1. Mr. Brown

The probation office prepared a presentence report ("PSR") for Mr. Brown. The PSR calculated a base offense level of six under [U.S.S.G. § 2B1.1\(a\)\(2\)](#), and then applied an eighteen-level increase under [§ 2B1.1\(b\)\(1\)\(J\)](#) for an intended loss of approximately \$4.3 million. The PSR also applied (1) a two-level increase for a federal health-care offense involving a loss of more than \$1 million but less than \$7 million; (2) a two-level increase for use of sophisticated means; (3) a four-level increase for being a leader or organizer; and (4) a two-level increase for obstruction of justice because Mr. Brown had testified falsely at trial about his role in the offense. These increases yielded a total offense level of thirty-four that, when combined with Mr. Brown's criminal history category of I, [*402](#) yielded a sentencing range of 151 to 188 months.

Mr. Brown objected to various aspects of the PSR's calculation. The district court agreed with Mr. Brown that the fraud did not involve sophisticated means. It also gave Mr. Brown the benefit of the loss table in the new Guidelines, which yielded a sixteen-level increase, as opposed to an eighteen-level increase, for amount of loss. When combined with Mr. Brown's criminal history

category, the new calculation yielded a guidelines range of 121 to 151 months.

The district court then considered "the 3553(a) factors one by one."¹ It also observed that "[s]ubsection (a) (2) requires the Court to consider the need for the sentence imposed to accomplish the various purposes of criminal punishment. The first purpose is to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."² The court considered the crimes to be "serious" because they occurred "over an extended period of time" and involved "\$4.3 million in false claims."³ The second purpose articulated in [18 U.S.C. § 3553\(a\)](#) "is to afford adequate deterrence to criminal conduct."⁴ The court considered this purpose "a significant factor" because Medicare fraud unfortunately is widespread "in this country; and those who are in the medical field and who are tempted to engage in fraud must know, they have to know, that the penalties are severe, particularly given the low likelihood of getting caught."⁵ The court stated that it agreed with the Government

that people in the healthcare business and in the home healthcare business in particular will know about this sentence, and this sentence has to send a signal. It's not the only consideration, and it's not the most important consideration, but it is a consideration that 3553(a) (2)(B) directs me to consider, and I do have to consider that.^[6]

Finally, the court noted that, with respect to specific deterrence, it was "highly unlikely" that Mr. Brown would commit a crime in the future.⁷ The court then sentenced Mr. Brown to eighty-seven months' imprisonment.

The court reiterated many of these considerations in its oral statement of reasons:

I don't think that anything less than 87 months would be sufficient to fulfill the purposes of 3553(a), and here's why: The duration of the scheme. It went on for several years. This wasn't a momentary slip This was a sustained course of knowing criminal conduct.

The amount actually stolen, over \$1.3 million. That's a lot of money.

I'm going to come back to general deterrence. This is a white collar crime, so the sentence imposed here is far more likely to have a deterrent effect on Mr. Brown's cohorts, those also involved in the medical profession, than a sentence in a drug case or an illegal re-entry case.

I do agree ... that people in the healthcare field, people who are business—men and women who are business people, they engage in a cost/benefit analysis. And the benefit is the benefit if you don't get caught, and the cost is the *403 probability of getting caught multiplied by the sanction.

And there's a low probability of getting caught, so the sanction has to be serious. It has to be real, if there's any hope of ensuring that at least when people look at the cost and the benefits, when they're contemplating fraud, that they realize that cost will outweigh the benefits.

And finally, there's Mr. Brown's failure to accept responsibility, and in particular his repetition of the claim ... that he wasn't responsible for the fraud.^[8]

2. Ms. Talaga

The probation office also prepared a PSR for Ms. Talaga. It set her base offense level at six pursuant to § 2B1.1, and applied an eighteen-level increase for the amount of loss (greater than \$2.5 million, but less than \$7 million). It also included a two-level increase for use of sophisticated means and a two-level increase for a federal health-care offense. These de-terminations yielded an offense level of twenty-eight that, when combined with a criminal history category of I, yielded a guidelines range of seventy-eight to ninety-seven months.

Ms. Talaga objected to various aspects of the PSR. Her primary argument was that the intended loss amount should be reduced. She submitted that her “intended loss could not have been more than the amount that Medicare actually paid because Ms. Talaga knew that Medically ... would not have obtained the full \$4M+ that Medically ... fraudulently billed.”⁹ Specifically, she noted that an application note to the fraud guideline states “that the aggregate dollar amount of fraudulent bills ‘is evidence

sufficient to establish the amount of [the] intended loss, *if not rebutted* by the defendant.”¹⁰ She claimed that

[u]nlike co-defendants Rick Brown and Dr. Roger Lucero, [she] “was intimately familiar with the billing procedures of the medical practice” as well as with 42 U.S.C. § 1395w-4(a)(1), which provides that Medicare can never pay any more than “the amount determined under the Medicare fee schedule.” The Government's own investigation establishes that Ms. Talaga successfully completed “Medical Billing,” a course at Triton Junior College, and the “Medical Billing” course syllabus explains that the course is “all about Medicare and medical billing problems,” but that the course covers mostly Medicare issues. Further, Triton College staff and a Triton Medical Billing course professor confirmed that the course “cover[s] in depth” the Medicare regulation that Medicare can never pay any more than the Medicare fee schedule. Even aside from Ms. Talaga's schooling, Ms. Talaga would have had to have understood Medicare's payment practices because her income was based entirely on Medicare payment amounts with respect to her submitted bills to Medicare.^[11]

Consequently, she claimed, she had rebutted the Government's prima facie case.

Ms. Talaga also argued that the amount of loss should be decreased because she did not recognize that she was committing fraud when she first began at Medically.¹² Ms. Talaga pointed to the testimony of *404 another biller, Arian Shogren, who testified that Mr. Brown told her that all patients actually were receiving Care Plan Oversight. At first, Shogren stated that she believed Mr. Brown; however, “she recognized the fraud ‘at the end’ of her time working at Medically.”¹³ Ms. Talaga submitted that she, similarly, did not recognize the fraud at the outset.

The court accepted that, as an experienced biller, she would be familiar with Medicare's reimbursement levels. Therefore, concluded the court, Ms. Talaga should not be responsible for the amount of all the false claims, but only those that fell within the reimbursement schedule set by Medicare. Thus Ms. Talaga's amount of loss was reduced to \$3.262 million.¹⁴ The court also reduced Ms. Talaga's loss amount by \$222,000 for the few months during the conspiracy that she did not work for Medically.

These reductions, however, did not result in a reduction in offense level.

The court rejected Ms. Talaga's argument that she should not be responsible for fraudulent billings from the beginning of her tenure.¹⁵ The court found by the preponderance of the evidence that a seasoned and trained medical biller would have realized, from the outset, that not every single patient was receiving Care Plan Oversight, that the number of hours being billed for Care Plan Oversight could not be reconciled with the number of actual services that Dr. Lucero was performing, and that she did not have the required documentation for the bills that she was submitting.¹⁶

Giving Ms. Talaga the benefit of the upcoming amended schedule, the court calculated a new guidelines range of fifty-one to sixty-three months. After considering the § 3553(a) factors, the court imposed a sentence of forty-five months' imprisonment.

Both Mr. Brown and Ms. Talaga timely appealed their sentences.

II

DISCUSSION

[1] [2] Both Mr. Brown and Ms. Talaga maintain that the district court committed procedural error when imposing their sentences. “Whether a district court followed proper sentencing procedure is a question of law that we review de novo.” *United States v. Olmeda-Garcia*, 613 F.3d 721, 723 (7th Cir. 2010).

To ensure that the sentencing judge did not commit any “significant procedural error,” we examine whether the district court: i) properly calculated the Guidelines range; ii) recognized that the Guidelines range was not mandatory; iii) considered the sentencing factors in 18 U.S.C. § 3553(a); iv) selected a sentence based on facts that were not clearly erroneous; and v) adequately

explained the chosen sentence including an explanation for any deviation from the Guidelines range.

United States v. Lockwood, 840 F.3d 896, 900 (7th Cir. 2016) (quoting *Gall v. United States*, 552 U.S. 38, 53, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007)). We consider first Mr. Brown's claim of error and then turn to Ms. Talaga's.

A.

[3] With respect to Mr. Brown, the district court properly calculated the *405 guidelines range, recognized its ability to depart from the Guidelines, considered all of the § 3553(a) factors, and imposed a sentence that was thirty-four months *below* the guidelines range—a sentence that the court characterized as “a significant downward variance.”¹⁷ The court noted that four factors prevented it from departing further: the duration of the scheme, the amount of the fraud, the need for general deterrence, and Mr. Brown's failure to accept responsibility.¹⁸ All of these factors are legitimate considerations for the court to take into account. *See* 18 U.S.C. § 3553(a).

Mr. Brown maintains, however, that the district court committed procedural error because it relied on “unfounded” assumptions in articulating a need for general deterrence.¹⁹ Specifically, Mr. Brown questions the district court's belief that would-be white-collar criminals engage in cost-benefit analyses in deciding whether to engage in illicit activities. He further questions the court's application of this principle to the health-care context, specifically that, given the “low probability of getting caught,”²⁰ a serious penalty was necessary to deter others from engaging in this kind of crime.²¹

We previously have endorsed the idea that white-collar criminals “act rationally, calculating and comparing the risks and the rewards before deciding whether to engage in criminal activity.” *United States v. Warner*, 792 F.3d 847, 860–61 (7th Cir. 2015). They are, therefore, “prime candidates for general deterrence.” *Id.* at 860 (quoting *United States v. Peppel*, 707 F.3d 627, 637 (6th Cir. 2013)). Our approach comports with that of our sister circuits. *See United States v. Musgrave*, 761 F.3d 602, 609 (6th Cir. 2014) (“Because economic and fraud-based crimes are more rational, cool, and calculated than sudden crimes of

passion or opportunity, these crimes are prime candidates for general deterrence.” (quoting *Peppel*, 707 F.3d at 637)); *United States v. Martin*, 455 F.3d 1227, 1240 (11th Cir. 2006) (using language identical to that in *Musgrave*); cf. *United States v. Goffer*, 721 F.3d 113, 132 (2d Cir. 2013) (noting that “high sentences” were necessary to alter the calculus “that insider trading ‘was a game worth playing’”). The district court, therefore, did not err in relying on such a widely accepted principle.

The district court was entitled to conclude that, given that health-care fraud is widespread and that therefore there is a lower likelihood of getting caught, a serious penalty was necessary to ensure deterrence. At sentencing, the Government specifically brought to the district court's attention that “the Medicare program has imposed a moratorium on additional companies joining the program to provide home healthcare services because it is—the fraud in the area is so prevalent.”²² Mr. Brown did not dispute this assertion, either by way of argument or contrary evidence. *406²³ Indeed, in his brief to this court he acknowledges that “white collar crimes such as health care fraud, public corruption, and the like, seem to continue unabated.”²⁴

[4] Mr. Brown also submits, however, that “[s]ome press re-leases and news articles leading up to Brown's September 2015 sentencing hearing include rather dramatic statistics about the success of intensified law enforcement efforts in the area of Medicare fraud.”²⁵ Given these increased efforts and the publicity they received, Mr. Brown suggests that “it is difficult to understand how the district court could have so heartily agreed with the proposition that white-collar offenders in Brown's field are less likely to get caught.”²⁶ Mr. Brown never invited the district court's attention to these press releases and articles. Therefore, we can hardly fault the court for not considering them. “[S]entencing judges cannot be expected to rely on evidence not before them.” *United States v. Reibel*, 688 F.3d 868, 872 (7th Cir. 2012).

Moreover, even if this material had been presented to the district court, it would not have required the court to alter its conclusion that those who engage in Medicare fraud have a “low likelihood of getting caught.”²⁷ In determining the importance of deterrence in crafting a sentence, the sentencing court must answer the situation from the perspective of the prospective

offender. From that perspective, the likelihood of getting caught depends not simply on the amount of resources that the Government expends on a particular type of crime, but the frequency with which the particular crime is committed and the ease with which it can be committed and go undetected. Indeed, Mr. Brown observed in his brief that “health care fraud ... seem[s] to continue unabated.”²⁸ The vast size and complexity of the Medicare program makes fraud detection especially difficult.²⁹ Indeed, the unique problems faced in detecting fraud in the home-health-care industry prompted the Centers for Medicare & Medicaid Services to extend its moratorium on new home-health-care agencies in Chicago—a fact specifically brought to the district court's attention.³⁰ In short, because of the magnitude of the Medicare program, an increase in resources would not necessarily result in a potential offender determining that there is a meaningful increase in the likelihood *407 of detection. The district court did not err, therefore, in resting its conclusion about the need for general deterrence on the basis that there was a low likelihood of getting caught for Medicare fraud.

Mr. Brown maintains, however, that his case is indistinguishable from *United States v. England*, 555 F.3d 616 (7th Cir. 2009), and other cases in which we have found error because the district court based the sentence on unfounded assumptions. In *England*, the defendant, while incarcerated, threatened witnesses over the telephone and later was convicted of threatening force against a witness, his brother-in-law. At sentencing, the court articulated the belief that, had the defendant been out on bond, he would have armed himself and used “what degree of force ... was necessary to get them to drop the charges against him.” *Id.* at 620–21 (internal quotation marks omitted). The district court, therefore, determined that the appropriate guideline was § 2A2.1, “Assault with Intent to Commit Murder; Attempted Murder,” and that the nature of the offense warranted a sentence within the attempted-murder guideline range. *Id.* at 618–19. On appeal, we evaluated whether the district court's findings “were sufficiently ‘based on reliable evidence’ to satisfy due process, or if they amount[ed] to speculation, albeit informed, that f[ell] short of satisfying due process requirements.” *Id.* at 622 (quoting *United States v. Santiago*, 495 F.3d 820, 824 (7th Cir. 2007)). We explained that

[t]he preponderance of the evidence standard satisfies due process in a case, such as this one, where the district court sentences a defendant based on the guideline for a crime the court believes the defendant would have committed if out of prison on bond. Simply put, the question here is whether a preponderance of the evidence supports the court's *belief* that the defendant *would have* committed the crime. Adhering to such a standard operates to preclude a sentencing court from sentencing defendants for crimes not sufficiently supported by reliable evidence.

Id. In *England*, we were “unable to conclude that a preponderance of the evidence buttressed the court's belief that England would have” committed the crime of attempted murder because all of the defendant's family, including the threatened witness, “testified that they did not feel threatened by England's statements” but “that England was merely ‘blowing off steam’ in issuing threats.” *Id.* at 623. “[B]ecause the evidence appear[ed] at least in equipoise,” the preponderance of the evidence standard was not met. *Id.*

Mr. Brown's situation stands in stark contrast to the defendant in *England*. In *England*, the district court drew conclusions about England's individual conduct, which were not supported by a preponderance of the evidence, to determine England's presumptive guideline range and then sentenced England within that range. Here, however, the factual foundations for the district court's guideline calculation are sound. Moreover, the district court's statements regarding white-collar crime and the prevalence of Medicare fraud are not unfounded assumptions but are grounded in case law, in the record, and in common sense.³¹

***408** Here, Mr. Brown faults the district court for not addressing and accepting his policy argument, based on penological studies, that “it is the certainty of conviction rather than the length of sentence that serves to deter.”³² In the district court, the only mention of these studies was at the sentencing hearing. Defense counsel stated:

I'll just note briefly that the statute only requires adequate deterrence, not maximal deterrence with the sentence the Court imposes. And I would also add that studies have shown that it's really the certainty of punishment that drives people more in terms of deterrence than the actual severity or even the swiftness of the imposition of punishment.^[33]

For these reasons, counsel urged, “even a modest prison term for Mr. Brown could send that adequate message to society that law enforcement can and will investigate you for Medicare fraud.”³⁴ The district court did not have before it any specific studies. Indeed, Mr. Brown did not bring specific studies to this court's attention until his reply brief.³⁵

There is no question that, from a procedural perspective, the district court addressed and rejected this argument. In its statement of reasons, the court stated that it “agree[d] with [Government counsel] that people in the healthcare field ... engage in a cost/benefit analysis. And the benefit is the benefit if you don't get caught, and the cost is the probability of getting caught multiplied by the sanction.”³⁶

The district court was under no obligation to accept or to comment further on Mr. Brown's deterrence argument. In *United States v. Schmitz*, 717 F.3d 536, 542 (7th Cir. 2013), the defendant pleaded guilty to mail fraud, and the resulting guidelines sentence was 87 to 108 months. Before the district court, the defendant argued that the recently increased “penalties for fraud offenses represented a departure from the philosophy animating the original version of the Guidelines, namely that a short but definite period of incarceration would suffice as a deterrent to most white collar offenders.” *Id.* at 539. The district court, without explicitly addressing ***409** this argument, sentenced Schmitz to a term of eighty-four months.

On appeal, we determined that Schmitz's argument was “not one addressed to his own characteristics and circumstances,” but “was a categorical challenge to the validity of the fraud guideline, on the ground that the severity of sentences called for by the current incarnation

of that guideline is unsupported by any empirical data demonstrating the need” for longer sentences. *Id.* at 542. Because it was a “blanket challenge to the guideline rather than one tailored to [the defendant’s] unique characteristics and circumstances, it [wa]s not one that the district judge [had to] explicitly address.” *Id.* Moreover, the district court “was perfectly entitled to accept the penal philosophy embodied in the current fraud guideline and was not obligated to explain why [it] chose to do so.” *Id.*; see also *United States v. Hancock*, 825 F.3d 340, 344 (7th Cir. 2016) (quoting *Schmitz* for the proposition that a district court need not address Hancock’s policy argument that “the Guidelines’ offense-level increases for receipt, transport, possession, or distribution of child-pornography, fit poorly with modern practical realities” and specifically reiterating that “the district judge was ‘perfectly entitled to accept the penal philosophy embodied in the current [child-pornography] guideline’ ” (alteration in original)).

Like the district courts in *Schmitz* and *Hancock*, here the district court was “perfectly entitled to accept the penal philosophy embodied” in the Guidelines that societal goals are served by increasing fraud sentences to reflect the amount of loss, as opposed to imposing only nominal sentences. We find no substantive or procedural error in the district court’s imposition of sentence on Mr. Brown.

B.

[5] [6] We turn now to Ms. Talaga’s sentence. She takes issue with one of the factual bases on which the court’s calculation of loss rests. Specifically, she claims that the district court’s calculation of loss should not include amounts for claims dating back to 2007 because the Government did not prove that she was aware at that time that the claims were fraudulent. We review the district court’s determination of loss for clear error, see *United States v. Diamond*, 378 F.3d 720, 726 (7th Cir. 2004), and will reverse the district court “only if we are left with the definite and firm conviction that a mistake was made,” *United States v. Bryant*, 557 F.3d 489, 497 (7th Cir. 2009) (internal quotation marks omitted).

The record supports the district court’s conclusion that, in 2007, Ms. Talaga would have known that her submissions were fraudulent. Before the district court, Ms. Talaga argued that she had training in Medicare billing and

“was intimately familiar with the billing procedures of the medical practice.”³⁷ She also submitted documentation of her successful completion of a course at Triton Junior College on Medical Billing that was “all about Medicare and medical billing problems.”³⁸ Consequently, she maintained that her intended loss should be based on what Medicare actually paid, not what was billed, because she “knew that Medicall ... would not have obtained the full \$4M+ that [it] fraudulently billed.”³⁹ The district court accepted *410 this argument to reduce Ms. Talaga’s amount of loss to \$3.262 million. This same evidence supports the district court’s conclusion that Ms. Talaga would have recognized from the outset that there was a problem with billing *every* patient for Care Plan Oversight, that the numbers of hours for Care Plan Oversight could not be reconciled with the number of hours that the physicians spent performing other services, and that there was a lack of documentation to support the claims she was submitting.⁴⁰

Having convinced the district court of her expertise, Ms. Talaga now tries to discount the training she received. As we already have noted, however, in addition to her formal education, Ms. Talaga was an experienced Medicare biller when she arrived at Medicall. There was testimony that she performed her work quickly, that she knew how to re-code rejected claims so that they would be paid, and that she trained other staff.⁴¹ The district court reasonably concluded that, based on Ms. Talaga’s training and experience, she would have recognized, based on the sheer volume of claims for Care Plan Oversight (totaling up to three weeks per month of Dr. Lucero’s time),⁴² that these claims were fraudulent.

Ms. Talaga also submits that other evidence in the record undermines the court’s conclusion that she would have recognized the fraud. Ms. Talaga points to the testimony of another Medicall biller, Arian Shogren, who stated that she initially believed that all patients actually were receiving Care Plan Oversight. However, Shogren did not have experience with Medicare billing before she began working at Medicall. Indeed, when she began working at Medicall, she was a technician who did scheduling, took vitals, and kept track of patients’ medications.⁴³ Later, she performed some billing after receiving training from Ms. Talaga.⁴⁴ Consequently, the fact that she did not

immediately recognize the fraud does not suggest that Ms. Talaga, an experienced biller, also failed to do so.

Second, Ms. Talaga observes that one Government witness, Kelly Hartung, gave conflicting definitions of Care Plan Oversight. In her view, because the Government's own witness could not articulate consistently a definition for Care Plan Oversight, it "is unrealistic" to expect that she would have been able to recognize that the bills for Care Plan Oversight were fraudulent.⁴⁵ However, the fact that Hartung had difficulty articulating the definition of Care Plan Oversight during cross-examination⁴⁶ does not negate the fact that Ms. Talaga, as a trained Medicare biller, knew when it was appropriate to bill for Care Plan Oversight and knew that Care Plan Oversight bills—in such a high volume that they represented the bulk of Dr. Lucero's time—were fraudulent.

Ms. Talaga has not established that the district court committed clear error in holding her responsible for fraudulent claims from the beginning of her tenure *411 with Medicaid. We therefore affirm her sentence.

Conclusion

For the foregoing reasons, we affirm the district court's judgments with respect to the sentences of Mr. Brown and Ms. Talaga.

AFFIRMED

All Citations

880 F.3d 399, Med & Med GD (CCH) P 306,212

Footnotes

¹ R.386 (1:13-cr-00854-1) at 95.

² *Id.* at 100.

³ *Id.* at 95.

⁴ *Id.* at 100.

⁵ *Id.*

⁶ *Id.* at 101.

⁷ *Id.*

⁸ *Id.* at 105–06.

⁹ R.242 (1:13-cr-00854-3) at 1.

¹⁰ *Id.* (quoting U.S.S.G. § 2B1.1 cmt. n.3(F)(viii)).

¹¹ *Id.* at 3–4 (footnotes omitted).

¹² See *id.* at 6.

¹³ *Id.* (footnote omitted).

¹⁴ See R.387 (1:13-cr-00854-3) at 34–35.

¹⁵ See *id.* at 29.

¹⁶ See *id.*

¹⁷ R.386 (1:13-cr-00854-1) at 103.

¹⁸ See *id.* at 105–06.

¹⁹ Appellant Brown's Br. 35.

²⁰ R.386 (1:13-cr-00854-1) at 100 (observing that Medicare fraud unfortunately is widespread "in this country" and that "those who are in the medical field and who are tempted to engage in fraud must know ... that the penalties are severe, particularly given the low likelihood of getting caught").

²¹ *Id.* at 105 ("[M]en and women who are businesspeople, they engage in a cost/benefit analysis. And the benefit is the benefit if you don't get caught, and the cost is the probability of getting caught multiplied by the sanction.").

²² *Id.* at 71.

²³ Indeed, any such argument by Mr. Brown would have been unfounded because the Centers for Medicare & Medicaid Services did extend its moratorium on new home health agencies in Chicago, among other metropolitan areas, based on the "significant potential for fraud, waste, or abuse." [Medicare, Medicaid, and Children's Health Insurance Programs:](#)

Announcement of the Extension of Temporary Moratoria on Enrollment of Part B Non-Emergency Ground Ambulance Suppliers and Home Health Agencies in Designated Geographic Locations, 82 Fed. Reg. 2363 (Jan. 9, 2017).

24 Appellant Brown's Br. 41.

25 *Id.* at 37–38.

26 *Id.* at 39.

27 R.386 (1:13-cr-00854-1) at 100.

28 Appellant Brown's Br. 41.

29 The Government Accountability Office continues to designate “Medicare as a high-risk program ... due to its size, complexity, and susceptibility to mismanagement and improper payments.” Gov’t Accountability Office, *High Risk Series* 520 (2017), <https://www.gao.gov/assets/690/682765.pdf>; see also *United States v. Kuhlman*, 711 F.3d 1321, 1328 (11th Cir. 2013) (observing that “deterrence is an important factor in the sentencing calculus because health care fraud is so rampant that the government lacks the resources to reach it all”).

30 See R.386 (1:13-cr-00854-1) at 71.

31 The other cases on which Mr. Brown relies are equally unhelpful. In *United States v. Halliday*, 672 F.3d 462 (7th Cir. 2012), the district court, in reviewing § 3553(a) factors, stated that “Halliday believed [child pornography] was ‘victimless’ and that he did not ‘believe any of this is criminal.’ ” *Id.* at 474. However, there was no evidence in the record for the court’s conclusions; the “statements about Halliday’s belief that the crimes at issue were ‘victimless’ were pure speculation.” *Id.* at 475. Here, the court’s statement about the low likelihood of being caught for health-care fraud is grounded in the fact that Medicare fraud, and specifically home-health-care fraud, is prevalent, a fact that explicitly was raised during sentencing. Similarly in *United States v. Bradley*, 628 F.3d 394, 395 (7th Cir. 2010), the district court imposed a sentence that was 169 months *above* the guidelines range. The district court believed a severe penalty was necessary because, according to the court, the defendant had a long, undiscovered history of engaging in sexual activity with minors. However, there was no evidence in the record that the defendant had engaged in sexual activity with any minor except for the victim. In reviewing the sentence, we observed that the district court had made “a questionable ... prediction about future conduct based on rank speculation about other, multiple in-stances of deviant behavior.” *Id.* at 401. Here, the court did not engage in any speculation about the defendant’s past or future conduct, and speculation was not used to justify an above-guidelines sentence. *Cf.* *United States v. Martin*, 718 F.3d 684, 688 (7th Cir. 2013) (noting that, “although we have held that a district court’s unfounded speculation that sex offenders are not deterrable may necessitate remand, we have done so only where the court imposed an above-guidelines sentence for purposes of deterrence” (citation omitted)).

32 Brown’s Reply Br. 3.

33 R.386 (1:13-cr-00854-1) at 61.

34 *Id.*

35 See Brown’s Reply Br. 3–4.

36 R.386 (1:13-cr-00854-1) at 105.

37 R.242 (1:13-cr-00854-3) at 3 (internal quotation marks omitted).

38 *Id.* at 3–4 (internal quotation marks omitted).

39 *Id.* at 1.

40 See R.387 (1:13-cr-00854-3) at 29.

41 See R.374 (1:13-cr-00854-3) at 100 (Trial Tr. 346).

42 See R.265 (1:13-cr-00854-3) at 9 (citing Gov’t Trial Ex. 7-S).

43 See R.375 (1:13-cr-00854-3) at 6–7 (Trial Tr. 402–03).

44 *Id.* at 9–10 (Trial Tr. 405–06).

45 Appellant Talaga’s Br. 10–11.

46 See R.373 (1:13-cr-00854-3) at 40–49 (Trial Tr. 127–36).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

RICK E. BROWN,
Defendant.

Case No. 13 CR 854-1

Chicago, Illinois
September 4, 2015
10:00 a.m.

TRANSCRIPT OF PROCEEDINGS - Sentencing
BEFORE THE HONORABLE GARY FEINERMAN

APPEARANCES:

For the Government: HON. ZACHARY T. FARDON
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For the Defendant: FEDERAL DEFENDER PROGRAM
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Also Present: MS. SANDRA DeNICHOLAS, U.S. PROBATION.
MR. GREGORY SMITH, U.S. PROBATION.

Court Reporter:

CHARLES R. ZANDI, CSR, RPR, FCRR
Official Court Reporter
United States District Court
219 South Dearborn Street, Suite 2128
Chicago, Illinois 60604
Telephone: (312) 435-5387
email: Charles_zandi@ilnd.uscourts.gov

1 (Proceedings heard in open court:)

2 THE CLERK: 13 CR 854, USA versus Brown.

3 MS. HARPER: Good morning, your Honor. Brooke Harper
4 on behalf of the United States.

5 MS. LINDSAY-GUIMARAES: Good morning. Rose Lindsay
6 on behalf of Mr. Rick Brown.

7 MS. DeNICHOLAS: And good morning, your Honor, Sandra
8 DeNicholas from the Department of Probation.

9 THE COURT: Good morning. Are both sides and
10 Probation ready to proceed with the sentencing hearing?

11 MS. HARPER: Yes, your Honor.

12 MS. LINDSAY-GUIMARAES: Yes, Judge.

13 THE COURT: All right. Mr. Brown, have you had a
14 chance to see the Presentence Investigation Report and review
15 it with your attorney?

16 THE DEFENDANT: I did.

17 THE COURT: Okay. And, Miss Lindsay, do you have
18 any -- other than the objections and corrections that you've
19 set forth in your sentencing brief, do you have any others
20 that you're going to be raising this morning?

21 MS. LINDSAY-GUIMARAES: No, Judge.

22 THE COURT: Okay. And let me ask the government, do
23 you have any objections or corrections to the Presentence
24 Investigation Report?

25 MS. HARPER: No, your Honor, I do not.

1 THE COURT: Why don't we deal with the defendant's
2 objections first, and I think there are three. And if I'm
3 missing one that should be there or if I've added one that
4 shouldn't be there, you'll let me know.

5 I think the first request is that all references to
6 the firearm should be stricken from the report. Second is
7 the amount of loss. And third is the Probation Office's
8 recommendation of a sophisticated means enhancement.

9 MS. LINDSAY-GUIMARAES: That's correct, Judge.

10 THE COURT: So, why don't we take those one by one.
11 And if -- we're going to be here for a while, so if anybody
12 who's not addressing the Court would like to be seated, please
13 feel free to do so. Mr. Brown, you as well. If you want to
14 stand, you may. If you want to be seated, whatever you're
15 more comfortable doing.

16 So, why don't we first deal with the firearms issue.
17 There are a number of references in the PSR to Mr. Brown's
18 possession of and reference to firearms; and in the brief, the
19 sentencing brief, defendant has asked that those references
20 are stricken. So, I actually -- I think the defendant had the
21 last word on that. I know what your point is. Why don't I
22 turn it over to the government; and then after the
23 government's done addressing it, I'll ask Probation for its
24 view, and then I'll turn it back to the defendant.

25 MS. HARPER: Would the Court like me to stand or --

1 THE COURT: Whatever you're more comfortable doing.

2 MS. HARPER: I will stay here, and I may stand at
3 another point. But for the purpose of this, your Honor, I
4 don't have a view on whether the conduct in the past with guns
5 needs to be in the Presentence Investigation Report. I think
6 it is relevant conduct for the Court to consider for the
7 purpose of the 3553(a) factors in relation to the nature of
8 the offense in this case; but in terms of Ms. Lindsay's
9 argument that those things could affect Mr. Brown's treatment
10 in prison, I don't think -- I don't see a need for the
11 reference to those things to affect his treatment in prison,
12 given the timing of when the conduct occurred.

13 THE COURT: I'm not sure I follow that last point.

14 MS. HARPER: Okay.

15 THE COURT: You don't think -- you agree with
16 Ms. Lindsay's argument that it ought to be deleted because of
17 the possible impact it could have on Mr. Brown's placement, or
18 you think it ought to stay in?

19 MS. HARPER: Well, I think -- I think that the
20 information is relevant to the Court's consideration of the
21 3553(a) factors. Does it need to be in the Presentence
22 Investigation Report for the Court to consider those things?
23 I don't think it does.

24 The Court is well aware through the submission of
25 reports of witness interviews of that conduct, and the Court

1 can consider those things regardless of whether they're
2 referenced in the Presentence Investigation Report. And for
3 those reasons, because I think the Court can appropriately
4 consider those things regardless of whether they're referenced
5 in the Presentence Investigation Report, to the extent that
6 there's some risk that that would adversely affect Mr. Brown's
7 time in prison, I don't think it's necessary for them to
8 appear there.

9 THE COURT: Okay. Probation?

10 MS. DeNICHOLAS: Your Honor, I do think that any
11 reference to firearms, regardless of the time frame, would
12 impact the Bureau of Prisons designation, so if there -- if it
13 doesn't need to be in the presentence report for your Honor to
14 consider it, then I think it probably should be taken out.

15 THE COURT: Okay. Anything to add, Ms. Lindsay?

16 MS. LINDSAY-GUIMARAES: No, not anything beyond what
17 I put in my brief. My concern is the possibility that it
18 would negatively impact him in custody.

19 THE COURT: Okay.

20 MS. LINDSAY-GUIMARAES: And --

21 THE COURT: Well, I haven't heard any objections from
22 the government and Probation to taking it out as long as it's
23 something that I can consider, which I will. So, I'm going
24 to -- I'm going to ask Probation to remove the references to
25 the firearms that are listed in the defendant's sentencing

1 memorandum.

2 In terms of impacting the sentence on 3553(a), I
3 don't believe that information is going to move the needle
4 in a material way. I'm not applauding -- I do believe that
5 the witnesses are telling the truth, and I'm not applauding
6 Mr. Brown's references to or display of firearms when dealing
7 with those individuals.

8 I do think, however, that there was no chance that
9 Mr. Brown was actually going to do anything with those
10 firearms against those people; and because of that, I don't
11 think that this is anything that the Bureau of Prisons needs
12 to know in order to effect an appropriate placement for
13 Mr. Brown.

14 And because I don't think it's anything that the
15 Bureau of Prisons needs to know, I want to eliminate the risk
16 that having it in the PSR could prompt the Bureau of Prisons
17 to conclude that Mr. Brown's placement needs to be more
18 serious given the references to those firearms.

19 So, for those reasons, I'm going to ask Probation to
20 strike those references.

21 The second issue is the amount of the loss. And
22 because we're working with the November 2014 Guidelines and
23 because the 18-level enhancement applies to intended loss
24 between 2.5 and \$7 million, and because even under the
25 defendant's proposed intended loss we would still be in that

1 range, because I think the defendant is saying that when you
2 deduct this and that and the other thing, you end up at just
3 under \$3.5 million, this isn't going to affect the technical
4 calculation of the Advisory Guidelines range.

5 However, I do think we ought to discuss the issue
6 because there is this impending amendment or proposed
7 amendment, which in all likelihood is going to go into effect
8 in December -- either November or December, and I do want to
9 give Mr. Brown the benefit of the amended Guidelines just
10 because I think it's fair to do so. Why should his sentence
11 be one thing if he's sentenced in September and another -- and
12 lower if he's sentenced in December? That doesn't make any
13 sense.

14 And I took the same approach for Amendment 782, which
15 was the two-level reduction in the drug quantity tables. And
16 even if the Sentencing Commission does not make the economic
17 loss Guidelines retroactive, I still, under 3553(a), would
18 want to give Mr. Brown the benefit of those amendments.

19 And because the loss amount could affect what his
20 Guidelines -- what the offense level would be under the
21 amended Guidelines because if he's under -- if the intended
22 loss is under \$3.5 million, there would be only a 16-level
23 enhancement rather than an 18-level enhancement, I think this
24 is something we ought to discuss.

25 So, again, the defendant raised this in his brief

1 yesterday. I know what the defendant's position is. Let me
2 turn it over to the government for its view, then Probation
3 for its view, and then we'll get a reply from the defendant.

4 MS. HARPER: Thank you, your Honor. I would like
5 to start by talking about the -- the perceived possible
6 unfairness of the sentence being different if it were on
7 November 14th and something else if it were on November 15th.
8 While I understand that perception, your Honor, I think it
9 makes sense to consider the purpose of the Guidelines
10 amendment in that issue.

11 And the Sentencing Commission has explained that the
12 reason for the amendment is to account for inflation, which is
13 to say that crimes committed now, when you steal a million and
14 a half to \$4 million from the Medicare program, it's a less
15 serious crime than it might have been in the past to steal a
16 million and a half to \$4 million from Medicare.

17 Well, the fact is Mr. Brown stole the money from
18 Medicare in the past. He stole the money from Medicare
19 starting in 2007 going through 2011 at a time when the value
20 of the dollar was greater. And because of that, Mr. Brown
21 should be punished according to the Guidelines that were in
22 effect during the time when he was taking that money from the
23 program, when the money that he was taking would have been
24 used -- could have been used to pay for a greater number of
25 legitimate services for people that were enrolled properly in

1 the Medicare program.

2 THE COURT: I understand your point. It's not an
3 unfair point; but if this were December 4th rather than
4 September 4th, you couldn't make that argument.

5 MS. HARPER: That is true, but it's not December 4th.

6 THE COURT: Yes. But then we still -- you're right.
7 It's not December 4th, but we still have --

8 MS. HARPER: And so I suppose --

9 THE COURT: We still have the situation where if it
10 were -- why should it matter to Mr. Brown's -- given that his
11 conduct was what his conduct was and it occurred when it
12 occurred, why should his sentence depend on whether my
13 schedule allowed for a sentencing hearing in September rather
14 than December? That seems kind of random.

15 MS. HARPER: Well, I suppose the way I would look at
16 it, your Honor, is that rather than Mr. Brown receiving an
17 unfair punishment because he may be sentenced earlier, that
18 people who -- similarly situated to Mr. Brown who stole from
19 the Medicare program at the same time that he did, 2007, 2008,
20 back when the value of a dollar was greater, to the extent
21 that those people would be sentenced after the change in the
22 Guidelines, they may reap a benefit because they are sentenced
23 later, but it is not unfair for Mr. Brown to be sentenced
24 under the old Guidelines now because he did take the money
25 back in 2007 through 2011.

1 So, there may be some defendants who would benefit,
2 in my view undeservedly, because they happen to be sentenced
3 after the new imposition date of the Guidelines; but it is not
4 unfair for Mr. Brown to be sentenced under the current
5 Guidelines, especially because his conduct took place a number
6 of years ago.

7 THE COURT: Your point is -- you make a reasonable
8 point. I just disagree with it, and here's why. And I'm
9 going to -- I want to give him the benefit of the new
10 Guidelines.

11 The current -- I think the numbers in the current
12 table are from, what, 1987?

13 MS. HARPER: That's correct, your Honor.

14 THE COURT: So, even if you look, as we should, at
15 2007 to 2011, it's still at the back end of that period. So,
16 there was a lot of inflation between '87 and '07 and '08 and
17 '9 and '10 and '11, so we're at the back end of that.

18 And it's not like the last seven or eight years were
19 like the '70s, where inflation was 15 percent, 18 percent.
20 We've been in a recession. Inflation has been very, very
21 low. So, while the difference between 1971 and 1978 value of
22 the dollar probably was pretty significant, the difference
23 between 2015 and 2007 to 2011 is not terribly significant.

24 And given that, and given subsection (a)(6) of 3553,
25 I'm going to -- I want to give him the benefit of the new

1 Guidelines.

2 So, what do you think of his calculations?

3 MS. HARPER: In that case, let's move on to talk
4 about that, your Honor, and I'll move through the different
5 points that Ms. Guimaraes makes in turn, starting with the
6 notion that there's some unclarity as to when Mr. Brown's
7 participation in the fraud began. And I'll address two
8 different aspects of the fraud, your Honor, that date back
9 to the beginning of 2007. One is the prolonged care code,
10 use of the prolonged care code, and the other is care plan
11 oversight.

12 Now, I think Ms. Guimaraes points out that Dr. Lucero
13 testified that at one time he and Mr. Brown believed that the
14 prolonged care code could legitimately be used, and that it
15 was only after a short time that they realized that it could
16 only be done -- that they were billing the code unlawfully,
17 and so they scaled their use of the code back to two times a
18 day to try to evade detection by Medicare.

19 Well, the testimony of Ms. Wardzala dates the use of
20 the code in the unlawful way back to 2007, because that is a
21 time when she was working at MediCall. And she testified that
22 she understood, she perceived that the code was only being
23 used selectively, as Dr. Lucero described. And you only use
24 the code selectively, Ms. Wardzala perceived, if you intend to
25 do it unlawfully. If you think everybody gets the value -- if

1 you think everybody can legitimately be billed for it, you
2 bill everybody for it, not a few selective people.

3 And so when you combine Dr. Lucero's testimony and
4 Ms. Wardzala's testimony, it's clear that the unlawful use of
5 the prolonged care code dates back into 2007, so we should not
6 do a reduction in the loss amount for the prolonged care code
7 use.

8 Now, a similar observation, I think, needs to be made
9 as to the care plan oversight billings. Ms. Guimaraes
10 similarly argues that Dr. Lucero testified that the use of --
11 well, the fraud as a whole and the use of the care plan
12 oversight fraud also evolved over time and that they came
13 to -- you know, they started at the beginning talking about
14 ways that they could bill things legitimately, and that
15 morphed into discussions of ways that they should do things
16 unlawfully.

17 Well, the evidence at trial showed that the nature of
18 the fraud with care plan oversight was they took everybody who
19 was on home healthcare, and they billed them for care plan
20 oversight. And when you look at the testimony and evidence
21 that were introduced at trial -- and I will hand some of these
22 things around right now -- you can see that that fraud was
23 taking place as far back as 2007, if not earlier.

24

25 With the Court's permission, given the timing that

1 we're working on here, I prepared a packet of some exhibits
2 and cases that I may intend to reference today. So, I'll turn
3 now to the first two items that are in this packet.
4 Government's Exhibit 7-S and 7-D, which were introduced at
5 trial.

6 Now, Dr. Lucero testified that the greatest number of
7 care plan oversight services he might have provided to any
8 patient in any month was 30. Well, Government Exhibit 7-S
9 shows the number of care plan oversight services billed just
10 to unique Medicare beneficiaries going -- per month, going
11 back all the way to January 2007. Well, these numbers show
12 that in the month of January 2007, there were more than 100
13 services billed under Dr. Lucero's number, in the month of
14 February, more than 138, far exceeding the number of services
15 that Dr. Lucero said he would ever have actually provided to
16 patients.

17 Similarly, when you look at Government's Trial
18 Exhibit 7-D, which relates to the proportion, the comparative
19 proportions of billings for home health certifications and
20 care plan oversight, you can see that for the entire period of
21 the conspiracy for which Rick Brown was convicted, the same
22 practice was being used; that is, for every patient who was on
23 home healthcare, the practice was billing Medicare for care
24 plan oversight.

25 And I just want to explain this briefly, which the

1 Court may recall the testimony from Kelly Hartung, which is
2 you can -- when you bill Medicare for a home health
3 certification, it's for 60 days at a time; and when you bill
4 care plan oversight it's for a maximum of 30 days at a time.
5 So, if you were billing Medicare for care plan oversight in
6 every month when somebody was on home healthcare, you'd expect
7 to see a ratio of approximately two care plan oversight
8 billings to every home healthcare certification billing.

9 And when you look at the data, the claims that
10 MediCall submitted to Medicare for the total conspiracy
11 period, 2007 through '11, you see that that's exactly what
12 was being done. More than two care plan oversight claims
13 were submitted for every home health certification claim.

14 And so what this data shows is that it wasn't just
15 in 2010 or 2011 that this practice of billing Medicare for
16 every home health patient for care plan oversight, it didn't
17 just start in 2010-11. It goes all the way back to 2007.

18 And Rick Brown directed the -- he's the one who
19 directed the employees to do this. That's what Arian Shogren
20 testified. All the employees who testified at trial, your
21 Honor, said that Rick Brown was the one that was in charge of
22 the company for the totality of the time that it was
23 operating.

24 So, I don't think -- I think it's clear that based on
25 the jury's conviction and the evidence that was introduced at

1 trial, that Rick Brown was a participant in this fraud, in the
2 care plan oversight fraud, and that it was going on from
3 January 2007 clear through to the end of the practice's
4 operation in December of 2011. And so I don't see any reason
5 to make any kind of reduction in the loss that the government
6 has calculated for care plan oversight.

7 Ms. Lindsay also argues that Mr. Brown should not be
8 charged with the billings for dead patients because it's clear
9 that Mr. Brown was only instructing people to submit
10 fraudulent claims for live patients; but the nature of the
11 fraud that was committed at MediCall was, "We're billing
12 automatically. We're taking everybody who's on home
13 healthcare. We're billing them for care plan oversight
14 services they didn't get." The natural result of that is you
15 will wind up with some dead people billed, and that is what
16 happened in this case.

17 Now, Ms. Lindsay devotes a number -- a fair bit of
18 space to arguing that the loss amount for Mr. Brown --

19 THE COURT: If you could move the microphone just a
20 little bit to your left. Great. Just so when you're facing
21 me, the microphone catches you.

22 MS. HARPER: Okay.

23 THE COURT: Thank you.

24 MS. HARPER: Now, Ms. Lindsay also devotes a fair
25 amount of space to arguing that there should be some reduction

1 because Mr. Brown necessarily must have understood that
2 Medicare would deny some claims. And this is the argument
3 that although -- this is the argument that he must have
4 expected -- he couldn't have intended that Medicare would
5 actually pay all of the claims that were billed. He must have
6 expected some of those would be denied, and so he should only
7 be charged for what was paid or he should be given some
8 reduction based on the denials. And I want to walk through
9 some of the what I think is relevant case law and the
10 Guidelines provisions on this issue.

11 I think Ms. Lindsay acknowledges, and I want to point
12 the Court to the Guidelines provision. Section 2B1.1 provides
13 that the loss is the greater of the actual and intended loss.
14 And the intended loss in a healthcare fraud case is
15 specifically addressed in the comments. And so this is -- in
16 the comments to 2B1.1, it's comment (3)(F)(viii). It is on
17 page 91 of the manual.

18 Okay? And it provides -- that comment provides, in
19 relation to federal healthcare offenses involving government
20 healthcare programs, in a case in which the defendant is
21 convicted of a federal healthcare offense involving a
22 government healthcare program, the aggregate dollar amount of
23 fraudulent bills submitted to the government healthcare
24 program shall constitute *prima facie* evidence of the amount
25 of the intended loss; i.e., is evidence sufficient to

1 establish the amount of the intended loss if not rebutted.

2 Now, that same standard has been endorsed repeatedly
3 by the Seventh Circuit. And I want to *United States against*
4 *Mikos* and *United States against Sutton*. And just for the
5 record, I'll read out that the citation for *Mikos* is 539 F.3d
6 706. I'm going to read now from page 714 of the decision,
7 which is on page 9 of the printout, beginning at about halfway
8 through the paragraph with the label (viii), which reads:

9 "Whether Medicare paid is irrelevant to the loss
10 calculation under 2B1.1, however, because that section deals
11 with intended loss. Mikos," the defendant in the case,
12 "billed the Medicare program for 1.8 million. That's the
13 intended loss whether Medicare paid or not, unless some of
14 the claims were legitimate."

15 Similarly, your Honor, in *United States against*
16 *Sutton*, I'm going to turn now -- well, actually, for the
17 record, the citation to that case is 582 F.3d 781. I'm going
18 to read now from pages 784 to 785.

19 "Where the defendant also argues in passing that
20 even assuming all of the claims were fraudulent, the loss
21 calculation should be 25 percent lower. Sutton points out
22 that although he billed Medicaid \$2,135 per 20 counseling
23 sessions, Medicare never paid more than \$1600 for the claims,
24 a 25 percent reduction from the amount he billed.

25 "This argument goes nowhere. This is nothing in the

1 record to suggest that Sutton did not hope to recover the full
2 amount that he billed. The fact that Medicaid denied some
3 claims or that he overbilled for the services provided sheds
4 no light on his intention to bilk Medicaid for the full
5 amounts billed."

6 Now, I'm sure Ms. Guimaraes will point out that the
7 comment to Section 2B1.1 contemplates that the defendant can
8 come forward and rebut the government's showing. That is, the
9 government has made a *prima facie* showing that the intended
10 loss was over \$4 million in this case by showing that that's
11 the amount of the fraudulent claims that were submitted. So,
12 then there's the question of: Well, what can the defendant do
13 to rebut that?

14 And the answer is he must provide some evidence.
15 Counsel's submissions in a sentencing brief are not sufficient
16 to rebut the -- rebut the *prima facie* showing that the
17 government has made. And I'd like to refer the Court on that
18 point to *United States against Miller*, which is the next case
19 in this packet. And it is a Fourth Circuit case with the
20 citation 316 F.3d 495, and I'm going to read now an expert
21 from pages 504 to 505.

22 "Miller's counsel did argue at sentencing that Miller
23 intended to bill Medicare and Medicaid only the amount set
24 forth on the government-established fee schedule as the price
25 of a given medical service. If Miller had offered evidence on

1 this point and similar evidence as to the other insureds he
2 defrauded, he might well have overcome the usual presumption
3 that a bill is a bill, but Miller offered no such evidence.
4 He did not testify that he was aware of the Medicare or
5 Medicaid fee schedules, nor did he proffer any evidence to
6 suggest that he knew the amount Medicare and Medicaid would
7 pay."

8 And I'm going to skip forward, your Honor, now, to
9 the next major paragraph, and starting in about the middle of
10 that paragraph, "In essence, Miller asks us to assume that he
11 knew the limits on Medicare and Medicaid payments, although he
12 never testified to that fact, and that he chose to bill well
13 above that amount with no intention of receiving the amount
14 billed, although he never testified to this fact, much less
15 suggested any alternative reason for the billing amount."

16 I would also note, your Honor, that 2B1.1 relates to
17 what loss the defendant intended to cause. Rick Brown is the
18 one who directed this fraud at MediCall. He's the one who
19 instructed employees on how to bill Medicare for services for
20 every single home healthcare patient.

21 And instead of the type of nuanced testimony that
22 might allow the Court to determine that maybe Rick Brown did
23 know something about fee schedules, maybe he did have some
24 reason to expect or intend that he would only receive some
25 percentage of the amount that was being billed, Rick Brown

1 testified at trial and professed total ignorance to the way
2 that the billing at MediCall worked.

3 And he continues to profess ignorance as to the way
4 billing works, as to the way Medicare works, even in the
5 letter that he submitted to the Court. And so I am going to
6 just read briefly one sentence on the second page of his
7 letter, where Mr. Brown says, "Professional billers, of which
8 Talaga was one, have a level of expertise which I did not
9 possess. I'm an excellent medic, not a billing professional."

10 And so, your Honor, not only has the government made
11 its *prima facie* showing as to what the total intended loss
12 was based on showing the total fraudulent -- the number of
13 fraudulent claims that were submitted to Medicare, Rick Brown
14 has come forward with no evidence to suggest he intended to
15 recover less than the amount that was billed, and he has
16 indeed professed total ignorance to how billing works and to
17 having nothing to do with the way that billing was conducted
18 at MediCall.

19 For those reasons, Rick Brown has done nothing to
20 rebut the *prima facie* case as to the intended loss amount
21 that the government has made.

22 THE COURT: Probation?

23 MS. HARPER: Excuse me, your Honor?

24 THE COURT: Probation.

25 MS. HARPER: Oh, Probation.

1 MS. DeNICHOLAS: Thank you. Your Honor, this is not
2 my case. I'm covering for Sarah Kieckhafer, so I hadn't
3 looked into the issue as much as I -- or become familiar
4 enough. I didn't interview the agent. And I think that I
5 would leave it up to the attorneys to argue their points.

6 THE COURT: Okay. Thank you.

7 MS. DeNICHOLAS: Thanks.

8 THE COURT: Ms. Guimaraes?

9 MS. LINDSAY-GUIMARAES: Yes, your Honor. I had
10 several comments I wanted to address. First of all, with
11 respect to the issue of the jointly undertaken criminal
12 activity and it allegedly going back to 2007 for both
13 prolonged care and care plan oversight, the problem I'm seeing
14 here is that Wardzala seems to be saying one thing, and Lucero
15 seems to be saying something very different with respect to
16 the timing.

17 And my concern here is that in all of the myriad
18 comments I pulled from the transcript of Lucero suggesting
19 that at first he wasn't quite sure or didn't think it was
20 wrong or just wasn't aware, the way he testified, he didn't
21 make it sound as though he had a couple of days in the
22 beginning of 2007 of uncertainty and then things dramatically
23 progressed from there. He made it sound in his testimony like
24 there was a period of time where the progression occurred,
25 where things evolved.

1 And with respect to care plan oversight, I pointed
2 out in the transcript that he specifically suggested that they
3 began -- that at first they didn't do all home health, but
4 then they did all patients on home health, and then it
5 progressed to do all patients on home health every month. And
6 he suggested a very clear progression step by step.

7 So, the question for me is -- and for the Court,
8 obviously, is: If there was some kind of a progression -- and
9 all of the offenses for which Mr. Brown has been found guilty,
10 they all have a state of mind requirement, an element that
11 goes to his state of mind.

12 So my question is then if Dr. Lucero seemed to be
13 evolving in going from -- crossing the line from genuine good
14 faith misunderstanding to an intentional fraud, when was that
15 critical shift in his state of mind? His testimony does not
16 seem to suggest that it was in early days of 2007, in spite of
17 the data.

18 Now, the data, conflicting with Dr. Lucero's
19 suggestion that it evolved over time, could be something that,
20 you know, could have been directed -- something that the
21 billers were responsible for, and that maybe Lucero didn't
22 have a part of. I don't know. But the fact of the matter is
23 that Lucero's testimony shows a clear lack of understanding of
24 the unlawfulness of some of the use of the codes early on.
25 And if Lucero wasn't clear at an early stage in the time

1 frame, it simply could not have been a joint endeavor.

2 He never said that Rick came to him and suggested the
3 use of home health in 2007. He just said it evolved over
4 time, that he gained an understanding later on that it was
5 wrong and yet at that point chose to continue to engage in the
6 behavior. So, if it was evolving, it simply could not have
7 been a joint endeavor as early as January 1st, 2007.

8 THE COURT: But at some point, Dr. Bayne indicated
9 to Dr. Lucero and Mr. Brown that you can't use prolonged care
10 codes to cover for travel time, and that was pretty -- it
11 wasn't -- it may not have been in '07, but it was pretty early
12 in the '07 to 2011 time frame.

13 MS. LINDSAY-GUIMARAES: I believe that e-mail was
14 either 2009 or 2010. So, that certainly did occur, and then
15 at that point, when there was more clarity provided by
16 Dr. Bayne, certainly things had to evolve from there. They
17 had a choice whether they would continue to use it anyway or
18 whether they would refrain from doing so.

19 But my concern is here if we just look at Lucero 's
20 testimony -- and the government has relied very heavily on his
21 testimony -- Dr. Lucero is suggesting all kinds of doubt as to
22 when things, in terms of state of mind, actually solidified
23 and crossed the line from good faith mistakes to intentional
24 fraud.

25 And if there's -- if there's any development there

1 of the fraud over time, I don't think it would be fair to
2 consider Mr. Brown a joint participant as early as January
3 2007 when things evolved in what he called, you know, a very
4 subtle, gradual way.

5 So, that's my concern with respect to the joint
6 endeavor. Should I go on, or did the --

7 THE COURT: Sure. Go on.

8 MS. LINDSAY-GUIMARAES: With respect to the deceased
9 patients not being within the scope of Mr. Brown's intended
10 action, yes, it appears that there was a directive to just
11 bill automatically; and as the government noted, a natural
12 result would be to bill dead patients. Yet nowhere in the
13 government's evidence that I've seen is there ever a directive
14 by Mr. Brown to say, "Oh, by the way, why don't you lump in
15 all of our prior and deceased patients into this whole thing."

16 If deceased patients were lumped in to that process,
17 it was more a matter of not keeping up with the information
18 coming from either the home health agencies or Social
19 Security, getting their records updated as to which patients
20 had passed away.

21 And, you know, there was -- Arian Shogren suggested
22 that there was a continual effort to try to update this list
23 of patients on home health, and it seems that it was a very
24 imperfect process.

25 And so -- but again, with respect to Mr. Brown, he

1 never directed anyone to say, "Hey, you know, it doesn't
2 matter if they're prior patients. Just bill it." It never --
3 anywhere in his e-mails did he even come close to suggesting
4 that that's what he wanted or intended.

5 He was pushing for, "Whatever patients we have now on
6 home health, let's bill them and bill them every month." But
7 it's clear from the context that he was -- he was intending
8 current patients. I think it's absurd to suggest that he
9 would have even contemplated the biller lumping in patients
10 who had already passed away and then saying that services
11 were provided for those patients, because if you want to
12 commit fraud, that is definitely one of the stupidest things
13 that he could have intended to do because it's so easily
14 detectable.

15 So, I'm just not at all convinced that it's
16 appropriate to include the deceased patients within the scope
17 of what he intended, based on the evidence.

18 With respect --

19 THE COURT: And do you agree with the PSR's
20 calculation and the government's calculation that the amount
21 attributable for the claims for the deceased individuals was
22 just under \$22,000?

23 MS. LINDSAY-GUIMARAES: Yeah, we do not dispute the
24 government's calculation.

25 THE COURT: And then for the prolonged care, the

1 amount involved there was \$284,000.

2 MS. LINDSAY-GUIMARAES: Yeah, we do not dispute the
3 actual calculations. Our arguments go more to Mr. Brown's
4 state of mind and when there would have been crossing the
5 line from good faith to intentional fraud, which would then
6 kick in this analysis of: Was this a joint criminal endeavor?
7 Was it within the scope? And was it reasonably foreseeable?

8 So, with respect to the issue on the intended loss,
9 we're not arguing that it should be actual loss. We
10 understand that the Commission has come down very clearly
11 in -- with respect to healthcare offenses that the intended
12 loss is, you know, *prima facie* evidence of -- you know, the
13 bills submitted is the *prima facie* evidence of the intended
14 loss, excuse me. But the intention here -- I understand the
15 Seventh Circuit's position and the cases that the government
16 has provided, but I'm troubled at this concept that just the
17 mere hitting send on all of the billing couldn't fairly
18 contemplate the actual realistic reality of what the billers
19 and Mr. Brown's, for that matter, what their real genuine
20 intentions could have been in doing that, because it's clear
21 from the government's evidence in terms of the remittance
22 advices, every single one of them in one of the government's
23 exhibits had a significant denial percentage.

24 And if that was the common trend in the billing
25 practices at MediCall, if it was -- if it was a standard and

1 an understood thing that not everything billed is reimbursed,
2 and, in fact, it looks like the vast majority, if not all of
3 the remittance advices that came back suggested that there
4 were some denials for whatever reason, if that was the case,
5 it would be, in my opinion, impossible for the parties to
6 genuinely believe that everything they submitted would have
7 the potential to be reimbursed.

8 We also submitted the AMA's statistics on the
9 national average denial rate of Medicare in general over the
10 actual time frame of the years 2008 to 2011, and that --
11 there's an average denial rate of Medicare that the AMA has
12 every year now been putting out a report card and showing
13 denial rates of health providers, including Medicare, and
14 those denial rates have on average over the course of this
15 conspiracy gone from close to 7 percent and then down close to
16 3 percent.

17 So, it's standard, and in the medical community, it's
18 understood -- I would imagine if we were to go out and talk to
19 100 different medical providers right now, whether home care
20 providers or some other kind of practice, I would imagine that
21 every medical provider would say that, yes, it's common, in
22 fact expected for Medicare to provide some denials.

23 So, I'm troubled at the thought of Mr. Brown being
24 held accountable for more than what he could have
25 realistically and reasonably expected in terms of loss,

1 knowing that those remittance advices were coming back to the
2 office on a regular basis and knowing that they were being
3 reviewed.

4 And if he had to push for more billing, it was
5 because he was aware of what wasn't going through and what
6 was, and was always trying to improve the bottom line. And so
7 the evidence is pretty clear that he would have had some idea
8 that there was essentially a built-in denial percentage in the
9 system.

10 And again, we brought up those remittance advices,
11 the government's own exhibits. They show significant denial
12 rates, sometimes as much as 30 percent, in addition to the
13 statistics from the AMA. And then going one step further, I
14 don't think Mr. Brown's letter to the Court contradicts any
15 of this, because he didn't say in his letter that he wasn't
16 aware of the denial rate. He professed ignorance as to the
17 specifics of the billing process. He didn't sit and use the
18 Medisoft software. He didn't sit and analyze the codes and
19 the diagnosis codes and the billing codes and things like
20 that.

21 So, when he says he's professing ignorance, he
22 certainly can do that, and that's a legitimate claim given the
23 fact that he wasn't actually doing the billing and entering
24 the data and hitting send in the Medisoft software.

25 So, I think what we've pointed to is sufficient to

1 rebut this idea that everything submitted just must absolutely
2 positively have been his intention.

3 And that's all I have on that point. Oh, well, I
4 just wanted to point out the First Circuit case, *United States*
5 *versus Alphas*, 785 F.3d 775, 2015, which I addressed in my
6 brief, where the First Circuit was considering this idea and
7 emphasized that this standard under the comment (3)(F)(viii)
8 is -- it says the relevant inquiry is what the defendant
9 reasonably expected to bilk out of the system -- out of the
10 victim, and that the standard focuses primarily on the
11 offender's objectively reasonable expectations.

12 To me, that statement and in the other case I
13 mentioned by the First Circuit, that comes down as the more
14 fair approach, and so we would ask the Court to consider those
15 cases in grappling with this issue.

16 THE COURT: Okay. Thank you. Anything in reply?

17 MS. HARPER: A few points, your Honor.

18 As to Ms. Guimaraes's point that because there was
19 some evolution, the fraud could not have been in place in
20 2007, this company was operating in 2006, your Honor, I
21 believe even 2005. If you look at the billing data, it is
22 clear that the fraud was in place in 2007. To the extent that
23 there was some evolution in a ramp-up to when Rick Brown and
24 Roger Lucero decided that they were going to bill every single
25 home healthcare patient for care plan oversight, that is not

1 inconsistent with the fraud being in place and operative in
2 the beginning of 2007. The government charged only a
3 conspiracy period of January 2007 through December 2011. That
4 is not the total time period when MediCall was in operation.

5 And I further would point out I don't believe there
6 is anything inconsistent with what Dr. Lucero testified to and
7 what Ms. Wardzala testified to. For Dr. Lucero to say that
8 there was a time when he thought that it was lawful to use the
9 prolonged care code and then he later realized it wasn't and
10 he and Rick Brown decided they would bill the code
11 deceptively, and for Ms. Wardzala to say that in 2007 when she
12 was working there she noted it was being billed deceptively,
13 that merely indicates that sort of a crossover point in the
14 timeline, Miss Wardzala helps to date the time period by which
15 Rick Brown and Roger Lucero had already determined the code
16 would be used in a deceptive way.

17 And I would also note that Ms. Wardzala said it was
18 Rick Brown who instructed her that the code should be used in
19 the way that it was used.

20 THE COURT: Okay.

21 MS. HARPER: As to the dead patients who were billed
22 and Ms. Guimaraes's point that Rick Brown would not have
23 intended for dead patients specifically to be billed, the
24 point is that Rick Brown instructed people to bill every
25 single home health patient for care plan oversight; and when

1 you've got people who are on home healthcare for months and
2 months and you're automatically billing them for care plan
3 oversight, some of those senior citizens pass away, and you
4 continue to bill them for care plan oversight even though
5 they're dead. And that is what happened in this case.

6 So, to say that he didn't intend specifically for
7 dead people to be billed, he intended that all of those claims
8 would be submitted and that MediCall would be paid for all of
9 them, regardless of whether the people were dead.

10 As to the remittance advices and moving on to
11 Ms. Guimaraes's point about what the defendant -- what
12 Mr. Rick Brown in particular may have reasonably expected, the
13 question here is: What did Rick Brown intend? And Rick Brown
14 and Roger Lucero and Mary Talaga intended that every single
15 patient on home health would be billed for care plan oversight
16 and that they would get paid for every single one of the
17 claims that they submitted.

18 The government has not done a loss calculation here
19 based on some fraudulent claims and some non-fraudulent
20 claims. The government's calculation is purely about the --
21 in the care plan oversight realm, the amount of services that
22 were fraudulently billed to Medicare. Were some of those
23 claims denied? Yes. Some of the patients were dead, and so,
24 therefore, Medicare denied those claims. In some cases,
25 had -- another service provider in another business already

1 submitted a claim for that same care plan oversight, and so
2 did Medicare deny the claims because somebody else already got
3 paid for it? Yes.

4 But when Rick Brown instructed Mary Talaga and Arian
5 Shogren to bill for every single home health patient for care
6 plan oversight, he intended every one of those claims would be
7 paid. That was hit intent. And for Ms. Guimaraes to say that
8 Rick Brown -- his intent is informed by information of which
9 there is no record in this case. I think everything that
10 Ms. Guimaraes said about what people in the medical community
11 might reasonably expect may be true of what some people in the
12 medical community may reasonably expect, but there is no
13 evidence in this case that Rick Brown understood that or knew
14 any of that.

15 THE COURT: Okay. We're dealing with 3553(a) in
16 terms of the importance of what the intended loss amount is.
17 And I'm not going to -- I'm not going to give you a precise
18 calculation. I believe -- well, what the Probation Office and
19 what the government propose is that the intended loss amount
20 be \$4.317 million. The vast majority of that amount is for
21 care plan oversight, which was \$3.63 million. About 284,000
22 was for prolonged care. 22,000, a very small amount, was for
23 deceased people. And \$378,000 were the claims submitted on
24 behalf of services performed by doctors who at the time were
25 not employed by MediCall.

1 So, with respect to the prolonged care, let's say
2 that Dr. Bayne -- that for the first two or three years of
3 the fraud, there was legitimate confusion as to whether you
4 could use prolonged care claims to reimburse for travel.
5 We're talking maybe \$150,000.

6 Let's say I give Mr. Brown the benefit and don't
7 attribute any of the dead people to him. That's \$22,000. I'm
8 not sure that would be the right thing to do, but I think you
9 know where I'm going. It doesn't really matter.

10 And let's -- I don't -- I think that the appropriate
11 interpretation of comment (F)(viii) of Guideline 2B1.1 is that
12 there shouldn't be a reduction -- well, let me step back.

13 Whatever confusion there might have been as to the --
14 even viewing the -- even taking Mr. Brown's view of prolonged
15 care and saying, well, you know, maybe before Bayne's e-mail,
16 they didn't know, that's limited to the portion of the
17 intended loss dealing with prolonged care. I think with
18 respect to care plan oversight, billing every single home
19 healthcare patient every month for care plan oversight, there
20 was no evolution there. It wasn't like they thought it was
21 okay at the beginning and then realized later on in the middle
22 of the scheme that that, after all, was not okay. That was
23 fraudulent from the get-go.

24 So, we have the \$3.63 million there for care plan
25 oversight and the \$378,000 for the doctors who weren't there.

1 And I don't believe that the presumption under section
2 (F)(viii) of the comments has been rebutted with evidence for
3 the reasons that the government stated.

4 But even if I were to give Mr. Brown the benefit of
5 the background knowledge of anywhere between 3 percent and
6 7 percent of all claims are denied, that still would amount
7 to about \$250,000. And even adding that to the -- maybe half
8 of the prolonged care amount of \$284,000 and all of the dead
9 people, \$22,000, that still doesn't get Mr. Brown south of
10 \$3.5 million.

11 So, I'll just assume that the intended loss is
12 somewhere marginally south of \$4.317 million; and I know that
13 the intended loss, even giving Mr. Brown the benefit of all
14 the doubts, some of which are not even doubts, he would still
15 be north of \$3.5 million.

16 But in the end, it really doesn't matter, because
17 we're talking about 3553(a) here and giving Mr. Brown the
18 benefit of the amendment that has not yet been put in place.
19 And whether it's \$3.51 million or, as Mr. Brown says,
20 \$3.44 million, when I'm looking at the 3553(a) factors, that's
21 not going to move the needle at all. I'm going to sentence
22 him as if he were at the upper -- at the very, very top of a
23 16-level enhancement or towards the bottom of an 18-level
24 enhancement. So, that's how I'm going to resolve the amount
25 of the loss.

1 Let's talk about sophisticated means. We'll resolve
2 that, and then to make sure everybody has a chance for a
3 break, we'll take a break; and then we'll come back and
4 discuss the 3553(a) factors, other than the Guidelines, unless
5 anybody needs a break right now.

6 MS. HARPER: Fine for the government.

7 THE COURT: Okay. So, in terms of sophisticated
8 means, I do know what the defendant's position is. The
9 defendant was heard last in writing, so I'll let the
10 government go first.

11 MS. HARPER: Thank you, your Honor. I think when it
12 comes to sophisticated means, Ms. Guimaraes's general point
13 is -- well, there's a couple of general points. One is there
14 wasn't much sophistication here. They submitted a bunch of
15 fraudulent claims, and that's not very hard to do. You don't
16 have to be sophisticated to do that.

17 And then the second point is, they got caught, so
18 clearly they didn't do a very good job of sophisticatedly
19 engineering their offense.

20 And as to the first point, I think -- which is it
21 just wasn't very sophisticated, they didn't do much that was
22 sophisticated here, I think it makes sense to take a step back
23 and think about all of the moving pieces that came together to
24 conduct and attempt to conceal the fraud in this case.

25 So, the first aspect of the crime, your Honor, is

1 that patients need to get put on home health services. And we
2 heard testimony at trial that Rick Brown would himself put
3 patients on home healthcare, Rick Brown, regardless of what a
4 doctor may order, and then he would tell Mary Talaga and Arian
5 Shogren to bill as though a doctor had prescribed it.

6 And then numerous employees testified about the fact
7 that Rick Brown over the years persistently forged the
8 signatures on those 485 forms that are required to put someone
9 on home health care.

10 So first, just as to the aspect of getting the
11 patients on home healthcare, we have fraudulent prescriptions,
12 and we have Rick Brown forging signatures, falsifying
13 documents on the 485 forms.

14 And then there's the second aspect of the fraud,
15 which is we take all of those people who are on home
16 healthcare, some of whom have been put there by Rick Brown,
17 and we bill them all for care plan oversight. There are
18 within that second component numerous steps to try to engineer
19 fraudulent concealing documents.

20 The first step is we get everybody who's got an
21 actual prescription for home healthcare, a 485, real or not,
22 on the spreadsheet that Ms. Shogren was instructed to maintain
23 at Mr. Brown's direction. And then Ms. Shogren had to go into
24 the electronic medical records system to do a cross check of
25 people who may actually have received home healthcare --

1 excuse me, care plan oversight services and there was
2 documentation for it, and all of the other patients, the
3 hundreds of patients per month for whom there was no
4 documentation.

5 Once she prepared that cross check, she'd send a
6 list out to all the doctors by e-mail on a weekly basis at
7 Rick Brown's instruction telling the doctors that they were
8 required to create documents for those hundreds of patients
9 that had no care plan oversight documentation and return it
10 within a period of 72 hours.

11 Mary Talaga had to take that spreadsheet and enter
12 all the false information into the billing system, that is
13 true. But around that was the infrastructure of we've got
14 the spreadsheet. We've got Arian Shogren cross checking
15 information from the spreadsheet and the electronic medical
16 system. We've got e-mails periodically being sent to the
17 doctors in an attempt to fabricate records to fill in the
18 gaps where there was no actual documentation.

19 And then when some of those doctors, particularly
20 Dr. Patel, refused to fabricate the documents that Arian
21 Shogren was e-mailing about regularly, then Rick Brown went to
22 Roger Lucero and had him falsify documents in the electronic
23 medical records system; and then those additionally had to be
24 backdated consistent with the claims that Mary Talaga had
25 already submitted.

1 So, this is not just a case where there's a biller
2 who's, you know, making up dates and times that go into a
3 billing system. Yes, that did, in fact, happen here, and that
4 may be the run-of-the-mill healthcare offense, where you've
5 just got somebody making up information that goes into a claim
6 submission form. But that wasn't the extent of what happened
7 here. You had multiple individuals, Rick Brown compelling
8 Arian Shogren, with the participation of Mary Talaga, trying
9 to compel the doctors, ultimately compelling Roger Lucero, to
10 put into place this entire infrastructure that supported the
11 fraudulent claims that they were submitting and to create
12 documents in an attempt to conceal from Medicare, from the
13 contractors of Medicare who may ultimately come to check for
14 the documents to make sure that if they got audited again,
15 they'd have documents that they could show and say, "Oh, yeah,
16 we did all the care plan oversight services."

17 So, this is not just, you know, a one-step-and-done,
18 unsophisticated attempt to commit fraud. There were many
19 systems in place involving multiple people to attempt to
20 attempt to conceal what was happening.

21 Now, as to the point that they did a really bad job
22 ultimately of concealing the fraud, I want to direct the Court
23 to -- well, ultimately, they did get caught, clearly, and I
24 think Ms. Guimaraes concedes that. I want to direct the Court
25 to *United States against Wayland*, which is the next case in

1 the packet. That's a Seventh Circuit case, 549 F.3d 526. I'm
2 going to read from page 529.

3 "Mr. Wayland," the defendant in the case, "also
4 submits that because he erred in the design and execution of
5 his fraud, it could not have been sophisticated. He suggests
6 that his admission that he shared an account with Stern was
7 foolish and that his forgeries must have been amateurish
8 because investigators quickly were able to uncover the fraud.
9 However, a sophisticated scheme need not exhibit intelligence
10 or expertise.

11 "It does not matter that Mr. Wayland might have done
12 a better job perpetrating and concealing the fraud, nor does
13 it matter that Mr. Wayland's own sloppiness or errors of
14 judgment may have contributed to the unraveling of his scheme.
15 Mr. Wayland's scheme displayed a greater level of planning and
16 concealment than the typical healthcare fraud, and its
17 failings do not suggest that the district court clearly
18 erred."

19 And I would submit to the Court that that is exactly
20 what happened in this case, that although clearly there were
21 errors in the attempts to conceal the crime here, including
22 that they just billed at levels that were completely
23 ridiculous all the way back in 2007, there was an
24 infrastructure in place, a complex infrastructure in place
25 that was intended to conceal the conduct of the crime, and

1 that it was a sophisticated offense, so the enhancement
2 applies.

3 THE COURT: Does Probation have anything to add?

4 MS. DeNICHOLAS: No, your Honor. Thank you.

5 THE COURT: Okay. Ms. Guimaraes?

6 MS. LINDSAY-GUIMARAES: With respect to this
7 spreadsheet, I'm having a hard time seeing how that was
8 particularly sophisticated, as it was simply a means to just
9 keep track. They were just keeping track of a list. It was
10 around the same bill everyone on home health. That meant they
11 needed to create a list and pull that from the Janus
12 electronic medical system and put it on a spreadsheet and
13 track it. So, that was just a way to manage a list, and in no
14 way should that be viewed as sophisticated by any stretch of
15 the imagination.

16 Furthermore, it was -- it was very openly discussed
17 in the office that was sent around to the doctors, as
18 Ms. Harper mentioned, no efforts whatsoever, as, you know, we
19 looked at the e-mails in court, no efforts to say, "Hey, you
20 know, this spreadsheet needs to be delivered to the doctors
21 only and nobody else can know about it." There was no
22 discussion like that. It was very open. Mr. Brown's intent
23 there was very clear in what he was asking people to do.

24 And the fact that multiple people needed to be
25 involved in, you know, maintaining that list, again, shouldn't

1 go to the fact that it was sophisticated.

2 With respect to the other parts that came into play
3 in terms of retroactively documenting, that's certainly an
4 additional step that needed to be taken to perpetuate the
5 fraud, but that -- all of that appears to have been in
6 response to the audit. And so if we look at the time before
7 the audit where there was just billing based on, you know,
8 "Let's do this list of everyone on home health and bill
9 everyone for care plan oversight," that particular part of
10 things doesn't seem particularly complex in either the
11 execution or efforts to conceal it. It was very
12 straightforward. "Let's see who these people are, and then
13 let's have Mary bill them."

14 The second part of this, though, when the audit began
15 and Dr. Lucero testified that he then had to go back and
16 retroactively document things, that was certainly an
17 additional step, but my question for the Court is: Was that
18 an additional step that would go above and beyond a typical
19 scenario of this nature where there was inappropriate billing,
20 an audit came around, and the parties then realized, wow, we
21 don't have all the documentation that we needed for this for
22 purposes of the audit," so, the logical thing to do then would
23 be, well, Dr. Lucero goes in and adds some notations?

24 So, all of these things, I understand that there are
25 multiple people and, as the government suggested, you know,

1 multiple moving parts; but it's hard for me to see how that
2 comes outside of the realm of a typical fraud, of managing
3 what needs to be managed on the end of MediCall in order to
4 submit fraudulent billing. It was just, "We're going to bill
5 all of these people, and this is how we're going to do it."
6 And it was done very much in the open, and then the
7 documentation came after -- after the audit.

8 So, we're not at all trying to say that because it
9 wasn't maybe as intelligent as it could have been, that that
10 makes it not sophisticated. What we're saying is that it
11 just -- in the entire execution and level of concealment and
12 everything, it just can't be more than what would typically
13 be done to get reimbursements for claims that -- for services
14 that weren't provided.

15 THE COURT: Any reply?

16 MS. HARPER: Two minor points, your Honor. One, as
17 to the fact that the fraud was openly conducted within the
18 office, I agree with that. The question is not was the
19 fraud -- did the participants attempt to conceal the fraud
20 from themselves. The question is: Did they attempt to
21 conceal the fraud from the Medicare program, the victim in
22 this case? And the answer is yes. The entire infrastructure
23 that was built to fabricate documents was intended to conceal
24 the crime from the Medicare program, not from each other.

25 And Miss -- I think Ms. Lindsay just -- she conflates

1 various pieces of the evidence in relation to what documents
2 were fabricated in an attempt to conceal in this case.
3 Dr. Lucero did testify that he fabricated documents to respond
4 to the audit, which happened in 2010. But from that point
5 forward, the infrastructure I described was used and in place
6 so that in the event of another audit, the fraud would not be
7 discovered.

8 THE COURT: I think both sides -- both sides'
9 position is reasonable. I think the defendant has the better
10 of the argument on sophisticated means. I'm looking in
11 particular to application note 9(b), which defines
12 sophisticated means as, "Especially complex or especially
13 intricate," not just complex and intricate, but, "especially
14 complex and especially intricate offense conduct pertaining to
15 the execution or concealment of an offense."

16 And what we have here -- and I agree with
17 Miss Harper's description of the offense conduct. What we
18 have here is just garden-variety fraud and garden-variety
19 concealment. I don't think it was complex or intricate. I
20 very strongly believe that it wasn't especially complex or
21 especially intricate.

22 There were fraudulent prescriptions. There were
23 forged signatures, backdating medical records. That's all
24 mine run activity in a healthcare fraud case. That's what
25 happened. Mr. Brown will be held accountable for it. But

1 it's not especially complex or especially intricate.

2 Particularly given that the claims were submitted for
3 care plan oversight every month for every home health care
4 patient, that's kind of the opposite of complex and intricate.
5 Billing the first and the last patient every day for prolonged
6 care, that's not complex or intricate at all. It's pretty --
7 pretty basic.

8 So, I'm going to find that the two-level enhancement
9 for sophisticated means does not apply.

10 And there are no other objections from the defendants
11 to the Guidelines calculation, is that correct?

12 MS. LINDSAY-GUIMARAES: Your Honor, I did just want
13 to point out that I had also briefly addressed the idea with
14 respect to loss as to whether a reasonable margin of error
15 should be incorporated in terms of giving the final
16 calculation, just understanding that human error most
17 certainly in this case could have come into play given the
18 circumstances under which Ms. Talaga was actually submitting
19 the billing.

20 THE COURT: Okay.

21 MS. LINDSAY-GUIMARAES: So, other than that, that was
22 the only other issue.

23 THE COURT: Okay. And I understand the argument.
24 For technical Guidelines purposes, that doesn't get Mr. Brown
25 anywhere near \$2.5 million, as even your calculation

1 acknowledges. And I did not mention unintentional errors;
2 and even assuming that some of the \$4.317 million was the
3 result of unintentional errors, it was a small amount, and
4 I -- it doesn't get us south of \$2.5 million by any stretch.
5 And given what I believe would be a reasonable unintentional
6 error rate, it doesn't get us even south of \$3.5 million.

7 Again, intended loss is probably a little bit under
8 \$4.317 million, but I think it's closer to \$4.317 million than
9 it is to \$3.5 million.

10 So, there -- are there any other Guidelines issues
11 that we need to address?

12 MS. LINDSAY-GUIMARAES: No, Judge.

13 THE COURT: Okay. Putting aside the sophisticated
14 means, I agree with the Probation Office's Guideline
15 calculation. So, I believe with taking away those two levels,
16 instead of a -- an offense level of 34, we have an offense
17 level of 32, with a criminal history category of I, and that
18 leaves us with a technically calculated Advisory Guidelines
19 range of 121 to 151 months.

20 I think we now have to address the 3553(a) factors.
21 I want to give everybody a seven- or eight-minute break. Why
22 don't we -- well first, let me ask, does the government have
23 anybody else who will be addressing the Court this morning
24 other than you, Miss Harper?

25 MS. HARPER: No.

1 THE COURT: Okay. Ms. Guimaraes?

2 MS. LINDSAY-GUIMARAES: I'm sorry. What was the
3 Court's question?

4 THE COURT: Who other than yourself and Mr. Brown, if
5 he would like to address the Court, although he is under no
6 obligation to do so, other than you and Mr. Brown, do you have
7 anybody else who will be addressing the Court this morning?

8 MS. LINDSAY-GUIMARAES: I believe I do. Could I just
9 get a count real quick?

10 THE COURT: You don't have to tell me now.

11 MS. LINDSAY-GUIMARAES: Okay. There would be a few.

12 THE COURT: Okay. And I'd like to give -- and then
13 the question is when in the course of discussing the 3553(a)
14 factors would you like them to address the Court? The way I
15 ordinarily do things is I hear from defense counsel, then the
16 government, then Probation, and then I turn it back to defense
17 counsel to reply to anything the government and Probation
18 said. Where in that order would you like the others to
19 address the Court?

20 MS. LINDSAY-GUIMARAES: What about after I get a
21 chance to respond, but right before Mr. Brown has an
22 opportunity to speak to the Court?

23 THE COURT: Is that okay with the government?

24 MS. HARPER: I have no objection to that.

25 THE COURT: Okay. And if there's anything that you

1 need to address after the others have spoken to the Court,
2 I'll give you an opportunity. So, that's what we'll do.
3 We'll come back at 11:30 on that clock.

4 (Recess had.)

5 THE CLERK: 13 CR 854, USA versus Brown.

6 MS. HARPER: Brooke Harper on behalf of the United
7 States.

8 THE COURT: Okay. Ms. Guimaraes?

9 MS. LINDSAY-GUIMARAES: So, yes, moving on to 3553,
10 right?

11 THE COURT: Right.

12 MS. LINDSAY-GUIMARAES: Okay. I just wanted to say a
13 handful of things about some of the various 3553 factors in
14 hopes that the Court will take these things into consideration
15 in figuring out what a fair sentence would be for Mr. Brown in
16 light of all the evidence.

17 With respect to his history and characteristics, I
18 think this is a big one for Mr. Brown. If we go back to his
19 childhood days, it's clear from the presentence report that
20 his father died at the age of 6. From that point on, it's my
21 understanding in talking to some of the family members that
22 things became pretty chaotic.

23 His mother appeared to have struggled with bipolar
24 disorder or something to that effect and was -- engaged in
25 difficult behavior that put the children in fear in the home.

1 And in addition to that, with a very volatile mother and the
2 loss of their father, when the stepfather came in to the
3 picture, he was very abusive when he abused alcohol, and he
4 abused alcohol quite a bit. So things, as the Brown family
5 has mentioned to me, were very chaotic and very difficult and
6 distressing.

7 In spite of all of that, Mr. Brown, at a young age,
8 had the fortitude and the strength of character to be very
9 well-behaved. He was described by his siblings as a good kid,
10 a studious kid, did well in school, was just self-motivated.
11 And he took his own initiative to become very involved in his
12 church.

13 He even -- in junior high and high school, when other
14 kids tend to get in trouble and experiment with all kinds of
15 inappropriate behaviors, he went the complete opposite route.
16 He actually did Bible study and went to church two or three
17 times a week, and basically hung out with the kids who had
18 good values, because that's where he wanted to be and that's
19 how he wanted to be.

20 In addition, on his own initiative, as soon as he was
21 able, he was always going out and getting work and worked all
22 kinds of jobs. He had an excellent work ethic, according to
23 his sister and his other siblings. And from a very young age,
24 he was able to go out and earn his own way and buy a car, a
25 Mustang that he really enjoyed.

1 So, from very early on, he showed tremendous promise
2 in terms of his character and his work ethic, which is very
3 commendable.

4 From there, he was motivated to get away from his
5 family because of the chaos and the fact that he often took
6 very physical and violent beatings from his -- both his mother
7 and his stepfather, including a Coke bottle hit over his head.
8 So, he was motivated to get out of the family home and make a
9 life for himself, so he -- he was drawn to military service.

10 And he -- he first -- he started with the U.S. Air
11 Force, and then he also had some experience with the Army.
12 And it's very clear -- if you ask anyone who knows Mr. Brown,
13 it's very clear that his military service to his country
14 literally means the world to him. He served very honorably in
15 his various tours, and as I submitted to the Court, he had
16 very positive response in commendations and awards and honors
17 and things like that as he served our country.

18 He also became a medic; and the downside to that was
19 he was exposed to very, very gruesome, agonizing scenes of the
20 whole injured and dying, and that was horrific and a difficult
21 challenge for him to see this on a daily basis. But at the
22 same time, in the midst of those horrifying scenes that he was
23 exposed to, as he learned how to be a medic, he learned that
24 he was darned good at it, and that he was very good at
25 nurturing and caring for the wounded and the dying.

1 And he received a lot of praise from different people
2 that he assisted as he served as a medic. And there were
3 various letters that I submitted to the Court in that regard.

4 So, that was the perfect foundation for him to then
5 be drawn to the whole world of home health. When he had an
6 opportunity to join 1-800-CALL-DOC, he described it as really
7 finding his calling in life, because he was really good at
8 caring for the homebound. He was really good at engaging with
9 the patients, giving them the listening ear that they needed,
10 showing compassion.

11 And I love the one example of a patient he treated
12 way back in the '90s, where Dr. Cornwell, who submitted a
13 letter to the Court, he provided an attachment, an article
14 that discussed the importance of treating patients in their
15 homes; and there is a photograph of a patient that Dr. Brown
16 helped Dr. Cornwell treat, and he was there to -- Mr. Brown
17 was there to provide the x-ray, the portable x-ray and do some
18 other things for this woman, who, you know, miraculously
19 improved just the very next day. And it's really neat to see
20 the difference in the photograph of her before when she was in
21 her bed very ill and refusing to go to a hospital, and then
22 the very next day, after being cared for in her home, to see
23 that she was very comfortably and happily sitting at her
24 kitchen table and looked like she had almost completely
25 recovered.

1 And Mr. Brown saw that on a very routine basis, and
2 he saw the value of treating people in their homes and the
3 value of -- in terms of monetarily, that it would save the
4 government tons of money by just sending the doctors directly
5 to their door, taking care of their needs, keeping them
6 comfortable, keeping them near their family.

7 So, as Mr. Brown was able to do this with
8 Dr. Cornwell, he was more than happy to then take the
9 opportunity to start his own franchise out here in the
10 Midwest. So, he uprooted his entire family, came out here,
11 and continued to pursue that mission because he genuinely
12 believed in what they were doing, and he genuinely believed
13 in the fact that he was really good at helping with these
14 house calls and really connecting with these patients.

15 And so he saw that as his mission, and it was a
16 vision for him. And so that was the kind of person he was.
17 He pursued a meaningful vision. He didn't just say, "Well, I
18 want to become a dentist because I won't have to work very
19 much, and I'll make a lot of money." He pursued what was
20 passionate for him and what had value to him, and I really
21 respect that about Mr. Brown.

22 You can also see from some of the exhibits I
23 submitted that he engaged in regular community service with
24 the Boy Scouts. He's touched many lives, Kiwanis Club, always
25 willing to step up and contribute to the community; and that's

1 a very commendable and noble trait of Mr. Brown.

2 Mr. Brown has also been praised by his children and
3 other relatives who know him and his children. In my
4 conversations with them, he's been praised as a very good
5 father, very devoted father. All of his children had very
6 positive things to say about him and the influence he's had in
7 their lives. And the children have also had much to comment
8 on in terms of the unhappy marriage that he has found himself
9 in and some of the claims against him that have come with
10 that, and I can address those later if need be.

11 But the marital discord that he experienced was a
12 very -- very unfortunate for him because he very much wanted
13 to be good at everything he did, including being a good
14 husband and a good father; and with the marriage failing, it's
15 my sense that that took a little toll on him. But he was
16 always very devoted to his children.

17 And in addition, just his work ethic in general. I
18 love the words that we received from his current employer and
19 one of his partners that he works with now, the LaLoggias.
20 They cannot say enough good about Mr. Brown and his work ethic
21 and how they will literally feel devastated if they have to
22 lose him because he's provided just an incredible benefit to
23 them and their business and incredibly hard-working and
24 reliable and trustworthy. And all of these things are very,
25 very commendable.

1 In addition, Mr. Brown has sought to improve himself
2 with education, and he's, you know, gained various licensures
3 and things like that. He's always been in the position -- and
4 you can see there's a paper trail of it in all the exhibits I
5 submitted. He's always been striving to do things and
6 accomplish things and be good at what he does, and so those
7 are very commendable qualities of Mr. Brown.

8 So, it's very unfortunate that this -- we have this
9 offense, because this is clearly the first real glaring mark
10 on his very commendable record in his 58 years. He carried
11 that commitment to the home healthcare into Home Care America
12 when he joined with MediCall and Dr. Lucero, and he was very
13 devoted to that and very aggressively tied to this idea that
14 so much can be done for these patients to make them more
15 comfortable, make them healthier, and make them happier.

16 And so when he came in to this practice with
17 Dr. Lucero and started seeing -- at least in his opinion, he
18 felt that some of the doctors didn't have the passion that he
19 had developed over his years in the field, he was frustrated
20 with that and impatient with that. And he wanted the doctors
21 to genuinely care and provide more services that were actually
22 meaningful for the patient.

23 I actually had an opportunity to speak to two people
24 from home health agencies that actually worked with
25 Dr. Brown -- I mean Mr. Brown and Dr. Lucero. One, her name

1 is Laura Force and another woman named Christie Natrapachko,
2 and they both had interactions with Home Care America as --
3 when they worked with home health agencies. And they both
4 told me that the one thing that was very obvious to them about
5 Mr. Brown in their interactions with him was that he genuinely
6 wanted the very best care for all of the patients, and he
7 openly expressed that. He openly talked about it.

8 And I would imagine that there are many other
9 witnesses I could bring before the Court to say that very
10 thing, but that was what he was there for. He simply would
11 not have been in the Medicare reimbursement world if he were
12 in it for, you know, pursuing a very extravagant lifestyle,
13 because it's not easy to do when you're just being paid by
14 Medicare.

15 So, he had all the right motivations, and he early on
16 became very frustrated with the idea that -- or with the
17 experience he had that he saw that work was being done and
18 that the doctors were not getting around to documenting it in
19 a timely fashion.

20 And several of the witnesses in trial actually
21 attested to the fact that the doctors had to be hounded to get
22 their paperwork done and to -- and what that translated to for
23 Mr. Brown's purposes was that if the paperwork's not getting
24 done, it's slowing up the optimal care for the patient. And
25 so he was very frustrated with that and expressed that very

1 openly and very often.

2 (Mr. Smith entered the courtroom.)

3 (Ms. DeNicholas exited the courtroom.)

4 MS. LINDSAY-GUIMARAES: So, it appears to me from how
5 things developed with the care plan oversight, it appears that
6 through -- there's this common thread throughout the testimony
7 that seems to suggest that -- and Arian Shogren was one to
8 suggest that, that it seemed at Home Care America and MediCall
9 that a lot of services were actually being provided that may
10 not actually have been getting documented for because of, you
11 know, the doctors not appropriately doing it in the
12 appropriate time or for whatever reason.

13 And so it's my impression in looking at all of this
14 that if Mr. Brown would have directed everybody to bill for
15 everyone on home health, it was because, as he testified, he
16 had a legitimate belief that the work was actually getting
17 done, but people are just not doing the paperwork they're
18 supposed to do. And so he seemed to have a very genuine
19 belief that he was pushing for, number one, for the doctors
20 to get things documented and get it documented for what was
21 actually occurring.

22 And so I suppose that's where, you know, it evolved
23 with Dr. Lucero and Dr. Brown suggesting that, you know,
24 "Well, maybe if we're actually doing the work and we're on the
25 phone 24/7 talking to all of these people and coordinating

1 care," maybe that was their imperfect and improper way, in
2 retrospect, to account for the work that was actually
3 happening.

4 So, it very much could have been a very misguided but
5 nevertheless good faith effort to capture billing for work
6 that they believed they were doing.

7 The 2012 recorded phone call between Dr. Lucero, when
8 he knew he was being recorded, and Dr. Brown -- excuse me, I
9 keep saying Dr. Brown -- Mr. Brown, when he didn't know he was
10 being recorded, I think is enlightening in terms of
11 Mr. Brown's state of mind. There are a couple of areas where
12 he suggested that -- he talked about how he felt like they had
13 a policy that if they were on skilled nursing -- if the
14 patients were on skilled nursing and they could prove it, then
15 they should have been billing for it.

16 And he talked about it in those terms, if they were
17 on skilled nursing and they could prove it. So, he seemed to
18 have this idea that the billing, if they could prove that they
19 were doing the work, you know, they could then bill for it.

20 And again, misguided, but he seems to suggest in this
21 call that, you know, they were making a good faith effort to
22 manage everything that was going on and bill for what they
23 believed they were entitled to.

24 In the call, he also talks about how he felt like he
25 and Lucero hadn't done anything intentionally and that, in

1 fact, their intent all along had been to try to put mechanisms
2 in place to manage the imperfect system that they had in terms
3 of trying to keep up with all of the changes and trying to get
4 the documentation they needed from all of these different home
5 health agencies and just doing their best to manage, you know,
6 what he would describe as kind of a chaotic situation with
7 many moving parts and many different people involved.

8 Toward the end of the phone call with Dr. Lucero, he
9 actually says -- he says that, "You know, I guess if anything,
10 I have a concern about Ms. Talaga." And he says, "Did she do
11 anything that she shouldn't do despite our reassurances" --
12 or, "despite reassurances?" And when he says that, it leads
13 me to believe that at the time he was having this phone call
14 with Dr. Lucero, he's genuinely saying, "Wait a minute. Did
15 Mary go out of the bounds of what we told her to do? We were
16 just trying to bill for everyone on home health because we
17 thought we were legitimately already doing the work," again,
18 misguided, but he seems to have this good faith sense that,
19 "Wait a minute, I didn't intend to do this. I didn't intend
20 to defraud the United States government."

21 And when he says, "despite reassurances," you know,
22 it suggests that Mary had assured him that she was billing
23 according to what he directed her to do and billing
24 appropriately, and yet there was this lingering question for
25 Mr. Brown, "What did Mary do that I didn't know about or that

1 I didn't authorize?"

2 So, the evidence at trial, it is what it is, but I
3 do -- I do still think that there is -- you know, even in a
4 misguided way, I do still think there is room here for
5 Mr. Brown to have had a very positive motivation and yet erred
6 in how he would approach the problem and execute it.

7 And so when we look at the nature and circumstances
8 of the offense, I hope that the Court will at the end of the
9 day at least very strongly consider Mr. Brown and what seemed
10 to be driving him and what seemed to be his true motivation,
11 because I would suggest that it doesn't appear to just be pure
12 blatant greed. He wasn't in this industry to get super rich.
13 He wasn't motivated to buy a Ferrari, to live a luxurious
14 lifestyle. He was genuinely in the business because he cared
15 about the patients.

16 And coming into it without a business background and
17 making mistakes in managing things, you know, things could
18 have slipped away in terms of, you know, what he was trying to
19 do to keep up with this snowballing effect of lots of
20 paperwork and lots of things going on; but I think there's
21 definitely room here to see Mr. Brown as very -- very much
22 intending and hoping to do the right thing. And so I just
23 hope that the Court will consider that.

24 With respect to a couple very important 3553 factors,
25 specific deterrence and the need to promote respect for the

1 law with the Court's sentence, I want to say promote
2 Mr. Brown's respect for the law in this instance. I will just
3 point out that he is a first-time offender. He's never served
4 any time in jail. And it's commonly understood, at least
5 among the criminal defense bar, that for a first-time offender
6 who actually has to go to jail, has to do time in prison, the
7 custodial portion of a sentence is far more harsh for someone
8 who's never been there before than someone who's done a few
9 stints in prison and knows what it's like and can handle it.

10 So, for a first-time offender, any prison time will
11 be quite a shock and significantly harsh. So, in that
12 respect, even a shorter sentence can deter Mr. Brown in the
13 future from committing any further crimes because it's going
14 to be a traumatic and a shocking experience for him, and that
15 alone can promote his respect for the law in the future and
16 prevent him from re-offending.

17 The Court is also certainly able to keep in mind the
18 fact that Mr. Brown has already felt the effects of this case
19 for a few years now, and just the emotional toll that this
20 kind of a situation can take on someone, I would imagine if
21 there's any, you know, hint of rational thought left with
22 Mr. Brown, and there certainly is, that the anxiety and the
23 stress and the losses that he's already incurred as a result
24 of this offense, he certainly would not want to go through
25 this ever again and would do everything in his power to

1 avoid it.

2 So, I think that's another thing that leans towards
3 specific deterrence. He's also just proven his track record
4 of being on release that he's fully capable and willing and
5 able to comply with any of the Court's authority when he is
6 released and understands that he can't violate and he can't
7 break the law. And I certainly believe that he has no
8 intention of ever breaking the law in the future.

9 His age is another factor. Statistically speaking,
10 you know, if he's released from prison in his 60s,
11 statistically speaking, he's less likely to be getting in
12 trouble.

13 But I think the most important factor we can look at
14 with respect to specific deterrence is his background. He has
15 led a very good life, with doing lots of good things and
16 always striving to be better.

17 And so with respect to promoting respect for the law,
18 if we look at how this sentence can promote the public's
19 respect for the law, even if the Court were to give him
20 leniency, I think it would be appropriate, and I think many
21 people in the public would agree that for the kind of person
22 that Mr. Brown is, a first-time offender with his positive
23 background, his age, and his military service and community
24 service, a lighter sentence wouldn't hinder the goal of
25 promoting the government -- society's respect for the law

1 because they might expect that the Court would give some kind
2 of leniency for this kind of offender. So, I think that those
3 principles can be more than satisfied with leniency in this
4 case.

5 With respect to general deterrence, I'll just note
6 briefly that the statute only requires adequate deterrence,
7 not maximal deterrence with the sentence the Court imposes.
8 And I would also add that studies have shown that it's really
9 the certainty of punishment that drives people more in terms
10 of deterrence than the actual severity or even the swiftness
11 of the imposition of punishment.

12 So, the certainty of punishment, when the public is
13 able to know that people who commit Medicare fraud will get
14 caught and will be punished, that's the kind of message that
15 deters, not the fact that a person who committed Medicare
16 fraud got X amount of years in prison.

17 So, even a modest prison term for Mr. Brown could
18 send that adequate message to society that law enforcement
19 can and will investigate you for Medicare fraud if there is
20 any kind of suspicious billing practices, and that you will
21 be punished if you are found guilty of that kind of conduct.

22 So, these principles can fully be satisfied in
23 Mr. Brown's case if leniency is imposed, because I think at
24 the end of the day, all of these things need to be balanced
25 with the good of his life that he's led up to this point with

1 the offense itself.

2 So, speaking of the offense itself, the Court also
3 has to take into account the seriousness of the offense. And
4 when we're talking loss in the millions of dollars, you know,
5 we certainly can't deny that that would be deemed serious.
6 Medicare is there for a reason, and it's a tremendous benefit
7 to the public, and it shouldn't be abused. We don't deny that
8 at all.

9 But this -- the seriousness of this offense in terms
10 of the Court's decision should also take into account the
11 Federal Sentencing Guidelines and the fact that the fraud
12 Guideline is driven primarily by the loss amount when so many
13 other considerations are left out of the equation.

14 And so when looking at the seriousness of the
15 offense, like I mentioned before, I hope that the Court will
16 very strongly consider the intention behind the crime that
17 should be weighed with, you know, in my opinion, weighed even
18 more heavily than the actual dollar amount driving the
19 Guideline, because I think logically speaking, when we look at
20 someone's state of mind behind an action, the state of mind
21 behind the action says so much more about the person than the
22 crime.

23 And again, I would suggest that in this case,
24 Mr. Brown's motive did not appear to be blatant greed, but to
25 keep a business afloat that benefited the patients that he

1 genuinely cared about. And his motive appears to be that he
2 wanted to get paid for the work that he believed that they
3 were always doing, though not adequately documenting.

4 Just one moment. I also just wanted to add with
5 respect to the seriousness of the offense and Mr. Brown's
6 intention, I hope the Court will at least consider the kinds
7 of frustrations that the Court heard about at trial with
8 respect to the sometimes confusing aspects of applying the
9 different Medicare rules and regulations.

10 And obviously, the government is absolutely right
11 that at the end of the day, it's not complicated to -- when
12 you ask should someone be billed for something that they
13 didn't receive services for, and obviously, that answer is no,
14 they shouldn't. But I do think it's important here,
15 especially in light of Dr. Bayne's letter to the Court where
16 he talks about still the ongoing process of, you know,
17 challenges within the Medicare system and the difficulties in
18 dealing with coding and payments and things like that. I
19 think that's something that the Court should definitely
20 consider in thinking about Mr. Brown's intentions here.

21 The Court is required to impose a just punishment;
22 and obviously, if we want to talk about a just punishment,
23 that suggests this idea of retribution, but just also means
24 fair. And a fair punishment in this case would acknowledge
25 the problems that we've talked about in the Guidelines

1 calculations that we've already gone over, and would account
2 for the fact that this is Mr. Brown's first and only offense
3 and the fact that -- and I think this is an important one that
4 is often not fully addressed, the fact that a fair punishment
5 will take into account the fact that this is a permanent
6 punishment for him in the sense that he's now a convicted
7 felon, and this will continue with him throughout the
8 remainder of his life.

9 And aside from this, though, I think it's so
10 important that the Court consider the positive things about
11 Mr. Brown. He served our country, that he served others, that
12 he's done good, and that this is clearly an aberration for
13 him, to say the least, and that the good he has done certainly
14 deserves significant weight.

15 The final thing I would note with respect to -- well,
16 two final things. Avoiding unwarranted sentencing
17 disparities, I just wanted to emphasize that in *Gall versus*
18 *United States*, the Supreme Court requires the Court to
19 individualize the sentence to the individual defendant. And
20 in *United States versus Bartlett*, this is a Seventh Circuit
21 case, it's 567 F.3d rd 901, and it's a 2009 case. The Seventh
22 Circuit said that the Section 3553 permits a judge to reduce
23 one defendant's sentence because of another's lenient
24 sentence, not because of Section 3553(a)(6), but despite it.

25 So, the Seventh Circuit has acknowledged that the

1 Court can certainly look at leniency that others have received
2 in considering whether Brown also might afford leniency.

3 And when it comes to the disparity issue here, in
4 looking at the United States Sentencing Commission's
5 statistics on sentences that are imposed in federal fraud
6 cases, the statistics overall suggest that many people who are
7 convicted of even multi-million-dollar fraud crimes, there's a
8 significant percentage that actually get straight probation,
9 and then another significant percentage of people who actually
10 receive a below-Guidelines sentence. So, it's not outside the
11 realm of possibility.

12 And with respect to Mr. Brown, he's not looking at a
13 required -- you know, a mandatory minimum, so he can
14 technically get whatever sentence the Court deems appropriate
15 for him. And the Court can certainly consider multiple facets
16 of a sentence in structuring a punishment that is sufficiently
17 addressing all of the purposes of the sentencing statute, but
18 at the same time providing different means of imposing
19 restrictions on Mr. Brown's liberty that will be a sufficient
20 punishment for him.

21 And so the judge -- this Court has all kinds of
22 options available in terms of how to fashion that. And
23 there's tremendous value in some of the alternatives, such as
24 community confinement and home confinement, because they
25 reduce the burden on the taxpayers tremendously.

1 So, at the end of the day, for all of these reasons,
2 and in particular, you know, in light of all of the positive
3 things that people have had to say about Mr. Brown -- I was
4 completely overwhelmed at the wonderful letters that were
5 submitted on his behalf. And people don't do that, people
6 don't come knocking down my door and, you know, urge me for
7 an opportunity to help unless there's a legitimate reason
8 behind that. And the legitimate reason is that Mr. Brown has
9 behaved himself very kindly and very wonderfully outside of
10 this case in a way that really reflects that he does have good
11 character, that he is a good person, and that he does deserve
12 some kind of consideration.

13 And so for all of these reasons, we are asking the
14 Court to consider a sentence substantially below what
15 Probation and the government are asking for, because all of
16 these taken together seem to suggest to me that a sentence to
17 the tune of a decade for Mr. Brown would be far in excess of
18 what the sentencing statute requires. And so we would ask the
19 Court to go substantially below that. And it certainly can
20 and still accomplish everything that the Court's required to
21 accomplish.

22 THE COURT: All right. Thank you, Ms. Guimaraes.
23 Government?

24 MS. HARPER: Yes, your Honor. The Court sat through
25 the trial in this matter, and I'm not intending to rehash all

1 the facts and evidence that were put in at trial. I will
2 briefly address Ms. Guimaraes's arguments relating to the
3 nature and circumstances of the offense and the suggestion
4 that what Mr. Brown was really doing here was not an
5 intentional fraud, that he didn't intend to steal money from
6 Medicare for services that weren't provided, and just remind
7 the Court about the e-mail that Dr. Patel sent to Rick Brown
8 and Dr. Lucero saying that the documents that he was being
9 instructed to create would constitute Medicare fraud because
10 he had already documented all the services he provided.

11 And the implication from that e-mail, the clear
12 statements in that e-mail are that, "You can't bill Medicare
13 for every single home healthcare patient for care plan
14 oversight because I didn't do care plan oversight for
15 30 minutes a month on all of my home healthcare patients."

16 Whatever Mr. Brown's intentions were when he got into
17 the house call business in the 1990s, I would just like to
18 remind the Court about Miss Wardzala's testimony, about the
19 car ride that she had with Rick Brown when she worked at
20 MediCall in 2007 right around the start of her employment,
21 when, as Ms. Wardzala reported at trial, Rick Brown said to
22 her, "The reason I got into this business is because you can
23 make a lot of money. You're working with the government, and
24 they pay you a lot."

25 Mr. Brown himself testified at trial that although

1 he didn't particularly like working with Medicare, the thing
2 he did like is that they paid fast, and they paid reliably.

3 There are some things that are not in dispute here
4 today. Ms. Guimaraes has argued about the 3553(a) factors,
5 but it's worth bearing in mind that Ms. Guimaraes has not
6 argued that Mr. Brown was not the leader of an extensive fraud
7 committed at MediCall over the span of many years, and she has
8 not argued that Rick Brown did not take the stand and perjure
9 himself in the trial. And he did.

10 And in that recording that Ms. Guimaraes referenced,
11 in Mr. Brown's testimony at trial, and in his letter to the
12 Court, he continues to try to pawn responsibility for this
13 offense off on Mary Talaga, the others who worked at MediCall,
14 when, in fact, he is the one who instructed everyone on how to
15 commit the fraud that was perpetrated here.

16 In terms of the 3553(a) factors, such as Mr. Brown's
17 criminal history and other characteristics, it is clear that
18 this is Mr. Brown's first offense. The Guidelines account for
19 that. If Mr. Brown had committed other offenses, his criminal
20 history category would be higher, and he would, therefore, be
21 facing a higher Guideline sentence than the one he's currently
22 facing.

23 And aside from that, I have not so far heard anything
24 that persuades me that Rick Brown should be treated
25 differently from other people who commit this type of crime

1 and that the Guidelines range is not appropriate for him
2 because he is in some way particularly unique and differently
3 situated from people who commit healthcare fraud.

4 Clearly, he has served the country. He has a
5 military past, and that is commendable. But there are other
6 aspects to Mr. Brown -- well, I should also say, it is clear
7 that he is a charismatic individual. It is clear that he is
8 personable, and the Court has received many letters that
9 attest to that.

10 Being charismatic, personable, displaying the ability
11 to work hard, these are characteristics that many people who
12 commit fraud have, charisma, personability are things that
13 allow people to convince others to go along with the fraud,
14 that help them get away with committing fraud.

15 In addition to some of the cases that Ms. Guimaraes
16 cited, I would like to refer the Court to a Seventh Circuit
17 case, *United States versus Jaderany*, in which the court noted,
18 in relation to treating well-educated people with talents
19 differently from run-of-the-mill defendants, "We have
20 cautioned that the Guidelines do not permit district courts to
21 grant middle-class sentencing discounts because criminals who
22 have the education and training that enables people to make a
23 decent living without resorting to crime are more, rather than
24 less, culpable than their desperately poor and deprived
25 brethren in crime."

1 Mr. Brown has had numerous advantages in his life,
2 clearly has a work ethic. He received training in the
3 military. He is an intelligent individual. And rather than
4 choosing to carry forward in his life and make an honest
5 living, he chose to steal money from the Medicare program for
6 years. And rather than his gifts and talents making him less
7 culpable of that offense, they make him more culpable.

8 I would also note that in addition to Mr. Brown's
9 charisma and personability, the Court has seen substantial
10 evidence of the other side of Mr. Brown. It has heard
11 statements from the witnesses who were former employees of
12 MediCall who testified about how they, one by one, in separate
13 encounters, felt threatened by Mr. Brown.

14 I have included in the Court's materials for the day
15 and provided to defense counsel an e-mail that I think is
16 indicative of the clash between the sort of two sides of
17 Mr. Brown, where he's talking about donations to scouts, and
18 he says that he will hold all of the employees' paychecks at
19 MediCall until they make contributions to the Boy Scouts, and
20 that if the receptionist working at MediCall doesn't receive
21 everyone's contributions, he's going to fire her.

22 Now, there are good things that Mr. Brown has done in
23 his life, but he also ran the MediCall company kind of like a
24 tyrant. He bullied employees so that they would go along with
25 the fraud. He conducted a long-running extramarital affair

1 with his codefendant in this case, Ms. Talaga. And the Court
2 should consider the way that he conducted that business in
3 addition to and alongside the good things that have been said
4 about Mr. Brown here today.

5 I would also like to speak to deterrence principles.
6 And while it may be true that there -- the need for specific
7 deterrence as to Mr. Brown is limited, there is a substantial
8 and overwhelming need for general deterrence as to the type of
9 crime that Mr. Brown committed. Mr. Brown was operating in an
10 area of healthcare that is riddled with fraud in Chicago and
11 across the country, and that is particularly the home health
12 area of healthcare.

13 In the Chicago area alone, the Medicare program has
14 imposed a moratorium on additional companies joining the
15 program to provide home healthcare services because it is --
16 the fraud in the area is so prevalent.

17 Mr. Brown is one of unfortunately a great number who
18 have entered that area of business and are stealing, robbing
19 the taxpayers blind. While it may be true that in the case of
20 one patient, treating the patient in the home saves money, the
21 fact is Mr. Brown took that population of patients and used it
22 as a launching board to steal millions of dollars for billing
23 for services that were not -- never needed and not provided.

24 Now, the problem is huge. So is the ability to deter
25 in this area, because these -- the people who commit these

1 crimes, they're not run-of-the-mill criminals. They're not
2 people who are engaging in drug offenses, drug conspiracies.
3 These are educated people who make rational decisions about
4 what the risks of getting caught are, and not just the risks
5 of getting caught, but they can make a risk/benefit
6 calculation as to, "If I steal this much money from the
7 Medicare program and I only have to serve a little bit of
8 time in prison, it's worth it."

9 It is important to outweigh the risk/benefit
10 calculation that these criminals do by deter -- by outweighing
11 the possible benefits that people can gain by stealing the
12 money and indicating that the downsides, the jail time, the
13 sentences that people will have to serve are not worth the
14 money that they can steal.

15 I will also note that in this area in particular,
16 in home healthcare, it is clear that the people who are
17 participating in this community are watching law enforcement
18 activity and paying attention, when in this area there have
19 been a number of searches and arrests done in the home
20 healthcare area; and I will say it is almost -- it is more
21 common than not that when you go in to conduct searches and
22 arrests in companies that are committing fraud in this area,
23 you find the press releases from other businesses where
24 searches and arrests have been conducted and other law
25 enforcement activity.

1 So, the need for deterrence in this area is
2 particularly grave. We're talking about a class of criminals
3 who are particularly susceptible to deterrence, and there is
4 an understanding and a clear -- a clear attention in that
5 community right now to law enforcement actions and the
6 penalties that are being faced by others around them. And I
7 would just urge the Court to impose a sentence within the
8 Guidelines for Mr. Brown so that others who are similarly
9 situated to him and would consider committing the same type of
10 crime that he committed in taking advantage of a program that
11 is intended to serve elderly seniors will think otherwise.

12 THE COURT: Thank you. Anything from Probation? And
13 do you want to make your appearance?

14 MR. SMITH: Yes, your Honor. Greg Smith on behalf of
15 the Probation Office. We have nothing to add.

16 THE COURT: Okay. Thank you for your Presentence
17 Investigation Report and sentencing recommendation.

18 Ms. Guimaraes, would you like to reply to anything
19 the government has argued?

20 MS. LINDSAY-GUIMARAES: Judge, could I have just a
21 moment?

22 THE COURT: Sure.

23 MS. LINDSAY-GUIMARAES: We don't have anything
24 further, Judge.

25 THE COURT: Okay. So, you mentioned that you might

1 have others who will be addressing the Court before Mr. Brown
2 has the opportunity to address the Court?

3 MS. LINDSAY-GUIMARAES: Yes. Who would like to --

4 Your Honor, this will be Mr. Matthew King. If you
5 could just go to the podium and state your name.

6 MR. KING: Hello, my name is Matthew King, your
7 Honor.

8 THE COURT: Matthew King?

9 MR. KING: King, K-I-N-G.

10 THE COURT: Good afternoon.

11 MR. KING: Good afternoon. I worked with Rick Brown
12 from 2008 to 2011 at Home Care America and MediCall Physicians
13 Group. He hired me originally as a medical assistant and
14 technician.

15 I think the things that impressed him about me on my
16 resume were the things that we shared, our military
17 background, our love for the Boy Scouts, and both being
18 paramedics. In fact, he did point out on my first day to
19 everyone at the company that I was an eagle scout, and that
20 was the thing that impressed him the most. And it -- it
21 really -- I appreciated it then as I do today, that I had an
22 employer that would acknowledge that.

23 And I did not, in my almost four years with the
24 company, witness the things that he's been accused of; but
25 toward the end of my tenure there, I became chief medical

1 technician and helped with the human resources aspect of the
2 company. And I had an office that was right next to his, and
3 he always had an open-door policy. And what I did witness
4 over those four years is his passion for the work and his
5 compassion for the patients.

6 Almost on a daily basis, he'd have practitioners,
7 doctors in his office that he was encouraging to do more for
8 the patients, to spend more time with their patients. I know
9 on more than one occasion, he went out and actually personally
10 was with a family who had a loved one and family member who
11 was on hospice and slipping away in those hours, and he wanted
12 to be there with them because that was the type of
13 relationship that he built with those patients.

14 I think that's pretty much all that I can say about
15 my experience with Rick Brown. He encouraged us, and he came
16 up with the company motto, together with me when I created the
17 standard operating procedures and manual for our technicians.
18 The motto that he always pushed and I almost heard on a daily
19 basis, was, "Be the best there is at what you do." And I
20 still incorporate that into what I do today.

21 I know that he was very frustrated, almost on a daily
22 basis, with some of the doctors coming back early, not
23 spending the time with the patients that were required for the
24 care that he wanted his doctors to provide. And there were a
25 couple of nights where he was the last one to leave, and I

1 would check on him in his office. And it was hard for me to
2 leave knowing that he was staying and still working hard,
3 still trying to coordinate things for a patient and their
4 family.

5 And I know on one occasion, I asked him, because I
6 knew he had an hour drive home. I said, "Are you going to
7 make it home tonight?" And he said, "I have a bedroll, and
8 I'll sleep here if necessary. I've slept in worse places."

9 So, that's all. Thank you, your Honor.

10 THE COURT: Okay. Thank you, Mr. King. And I also
11 was able to read your letter as well.

12 MR. KING: Thank you.

13 MS. LINDSAY-GUIMARAES: This is Michael LaLoggia,
14 Mr. Brown's employer.

15 MR. LaLoggia: Hello, your Honor.

16 THE COURT: Good afternoon.

17 MR. LaLoggia: Pardon me, because I'm an emotional
18 person, but we met Rick for the first time in December of
19 2013, and base based on our conversation -- my son is also
20 here. And we chose to bring him in as a participant in our
21 little small remodeling company in Rockford. And so we spent
22 a real lot of time with him for the last year and eight
23 months.

24 And if anything, this is the most sincere and
25 hardest-working man I've known in very much of my life. I'm

1 64 years old. I've been around enough to know a lot of
2 people; and I have never, ever, ever, even when I found out
3 about this experience going on in his life, ever suspected him
4 of anything but total honesty and truth-telling.

5 He works harder than I do, than most people I've
6 known, with a determination because he wants to be good at
7 what he does. He always tells me, "I'm only doing what I told
8 you I would do." And his military background is very obvious
9 to me. He has a tendency to be efficient and effective and
10 determined to do it the right way.

11 My customers love him. He has gone out and worked at
12 places where the customer needed help, and he went in and did
13 extra work that had nothing to do with him being paid. It
14 wasn't a show-off thing. It wasn't because he's trying to be
15 a -- putting on any pretenses. He is really as sincere of a
16 person as I've non.

17 And if I might ask a question to the government, this
18 is --

19 THE COURT: You can say whatever you want. You
20 can --

21 MR. LaLoggia: This man has no money, your Honor.

22 THE COURT: Hold on. When I'm talking, you have to
23 let me talk.

24 MR. LaLoggia: Okay. Pardon me.

25 THE COURT: You can say whatever you want, you can

1 ask whatever you want, but nobody is obligated to answer
2 anything you say.

3 MR. LaLoggia: I understand that. He came in to us.
4 He's been going through his divorce proceedings. He's lost
5 his home. He does not -- his brakes went out. He fixed them
6 on his own truck. He does what he has to do to try to
7 navigate his way through his life where he's at.

8 This is not a person of means. And if he ever had it
9 and hid it somewhere, it is not evident. And he isn't trying
10 to hide anything from us, from what we can see.

11 My son works with him directly. Their offices are
12 right next to each other. We've grown to love him and care
13 for him. It will affect us if he has to go away, as things do
14 in life. But our opinion is he's a wonderful, sincere,
15 honest, and true, idealistic man; and I find nothing about him
16 to be wrong or inappropriate.

17 THE COURT: Okay. Thank you, Mr. LaLoggia. I
18 appreciate your comments, and I also appreciate the letter
19 that you submitted.

20 MR. LaLoggia: Thank you, your Honor, for letting me
21 speak.

22 THE COURT: Sure.

23 MS. LINDSAY-GUIMARAES: This is Ashley Brown,
24 Mr. Brown's daughter, oldest daughter.

25 THE COURT: Good afternoon.

1 MS. BROWN: Good afternoon, your Honor. I know that
2 you've heard people speak about -- excuse me -- about my
3 father on a professional level. What you don't know is the
4 personal level of the man that he was.

5 There were many a times that my father would not come
6 home because he stayed late at his company to make sure that
7 his patients were taken care of. There were times when the
8 patients could not afford the services that were provided to
9 them, so instead of forcing them to pay, he said, "Make me
10 chocolate chip cookies," and that is how they paid him for
11 his services.

12 He would go out and see them even after he no longer
13 went out with the technicians and the doctors. He made it a
14 point to make sure that his people were all right. So, I just
15 cannot see my father stealing money from the people that he
16 accepted cookies as payment from.

17 Now, a lot has gone on between my parents, which I
18 believe has affected my father. They never really ever got
19 along too well; but for the most part, they both tried to
20 support us the best that they could, with my father instilling
21 all of our values and good work ethic. You know, you don't
22 steal from people. You have to be honest. That's the kind of
23 person my father was, and that's the kind of person that he
24 expected us to become, which we did.

25 And in the past few years, things between him and

1 my mother got very tense. Now, what the Court needs to
2 understand is that my mother has a very heavy drinking
3 problem. Things that she will say are out of proportion.
4 She will attack people for no reason. I lived with her for
5 several years. I was attacked many a time a night, not only
6 in a mental way, but in a physical way as well.

7 So, her saying that my dad was a very physically
8 abusive person or a mentally abusive person, yes, there were
9 times that they would get into it when they shouldn't have,
10 but the majority of the time, it was my mother. So, most of
11 what you will read, like the letter that she sent to you, sir,
12 there's no real reason for that. She's angry with my dad, and
13 she will do anything to help him behind bars.

14 Now, when things started getting bad, please know
15 that my mother took my siblings from my father, which is when
16 the restraining order came out that my father was armed,
17 dangerous, and suicidal. My father is not any of those
18 things. He was angry because my mom took my siblings. She
19 would not tell him where we were.

20 I was off at school. I didn't know where my family
21 was. That caused him to do some things that probably he
22 shouldn't have done, but he was never a violent person. He
23 was trying to find us. He was never -- he never took guns to
24 people's places and threatened them. He never put a gun to
25 his own head. And he never, ever threatened any of us in any

1 way to make him dangerous.

2 So, I hope that the Court will take that into
3 consideration when he is sentenced.

4 THE COURT: Thank you, Miss Brown.

5 Ms. Guimaraes?

6 MS. LINDSAY-GUIMARAES: I think that's it, your
7 Honor.

8 THE COURT: Okay.

9 MS. LINDSAY-GUIMARAES: Thank you.

10 THE COURT: All right. And if Mr. Brown would like
11 to address the Court, he has the opportunity to do so. If he
12 would like to address the Court, I'd very much like to hear
13 from him; but he also must know that he is not obligated to
14 talk to the Court.

15 THE DEFENDANT: I'm happy to do it.

16 THE COURT: Okay.

17 THE DEFENDANT: Well, I'm certainly not perfect. You
18 heard all about that. I am not necessarily as nice and sweet
19 as has been characterized. I am a sergeant. I have been a
20 sergeant, and I always will be a sergeant. I've worn a green
21 beret, a blue beret. I have fired off rounds over people's
22 heads and towards them. I have had my hand in people's
23 chests. I have squeezed hearts. I have clamped aortas. I
24 have done it all.

25 This is the first time we've been able to really

1 talk. Ever since the OIG people came to visit with me, I knew
2 something was brewing; but even at that point in time, I was
3 like, "You've got to be kidding me, kidding me." I accused
4 them of having no idea. I thought it was kind of an
5 opportunity to educate them. I hope I did.

6 I didn't learn until the course of this situation
7 here in the courtroom the gravity of what occurred. I could
8 never get my hands on barely anything that gave me an idea. I
9 certainly had the opportunity to look at charts. I certainly
10 didn't get the opportunity to look at the hundreds of
11 thousands of documents that they looked at. I certainly
12 didn't get the opportunity to really defend myself here.

13 And, your Honor, you heard lots of positive things
14 about honor. I have it. There's no question about that. I
15 did sneak whiskey into my canteen once when I was in the Army
16 and got busted for that. I got a ticket when I was 16, maybe
17 a ticket or two. But I'm the only one in my entire family
18 that one, got an education, and two, stayed out of trouble. I
19 did that because I hung out in church. I got that foundation.

20 I went into the military, three tours. None of those
21 tours were easy. And not everybody becomes an intelligence
22 analyst. Not everybody gets a secret clearance. Not
23 everybody becomes an interrogator. It's not an easy thing to
24 do. You are chosen to do those things. Why was I chosen?
25 Well, I guess for the same reasons these people are

1 indicating. I don't know. It's just the way it was.

2 With respect to these crimes, you've heard from
3 people, lots of people, not enough, as far as I am concerned.
4 There are all kinds of reasons why this person who would have
5 known or this person who would have known couldn't stand here,
6 or this recording that was conducted by the FBI couldn't be
7 admitted even though it was their recording.

8 There are lots and lots of folks who would have said
9 to you with a lot greater merit as in having been there, like
10 Matt King, who worked next door to me, who would have had a
11 very different story. The stories that I've heard coming off
12 of this witness stand are so surreal, although, Judge, as far
13 as I can tell, although I can't quantify it, I have no doubt
14 that there was a bucket-load of billing done there that should
15 not have been done.

16 The difference being is that it wasn't directed. We
17 were trying to deal with a mess, with chaos. Medicare's
18 ever-changing rules and regulations, an amazing cadre of the
19 most sloppy, non-caring, third-world, excuse me, but that's
20 the way it is, fringe physicians whose only interest was
21 showing up at work, grabbing a paycheck, and leaving, and then
22 having them be in a point of -- or a position to be supervised
23 by Dr. Roger Lucero, who was one damn good doctor, among the
24 best I've ever known. And I've known a lot, hundreds of
25 physicians, hundreds. And out of those hundreds, Judge, there

1 is maybe a few that I would allow to touch me or someone I
2 loved for lots of very legitimate reasons, for which there's
3 no point in getting into. You can use your own imagination.

4 He and I started off pretty well; and although there
5 are references all over the place about what, you know, poor
6 businesspeople we were -- oh, by the way, that business was
7 growing very, very rapidly. We were becoming nationally
8 recognized as being the fastest-growing business of its type
9 in the United States, per the American Academy of Home Care
10 Physicians, Dr. Gresham Bayne, who's the guy who founded it
11 all. He's the guy who hired me back in 1989, out of a group
12 of 40 candidates to help him get this project going, this
13 concept which just made all the sense in the world to me.

14 I liked what I was doing a whole lot, no question
15 about it. Yeah, it's true, I would do the late nights. I
16 would do the kneeling at the side of the bed, watching them
17 die, hold their hands and stuff like that. It's typical, real
18 typical. I could do it. I could do it pretty well, quite
19 frankly.

20 People have been calling me Doc, incidentally, since
21 1977. So, when you hear references to doctor this or doc
22 that, so on and so forth, it in no way phases me, alters me,
23 or gives me the false impression that I am or have been a
24 physician. I know less than a tenth of what the typical
25 physician knows. I've said it very openly many, many times.

1 It got to the point when people would say doctor this and
2 doctor that, well, I absolutely got tired of responding to it,
3 quite frankly. They would all me that more about attitude,
4 because of attitude instead of practical knowledge.

5 So, here we are clicking away, Lucero and I doing
6 great. We start adding staff. We're operating a very
7 aggressively-growing enterprise with national recognition.
8 We're actually starting to learn a little bit about business.

9 And one of the things we learned was that all the
10 non-professionals needed to work for me and all the
11 professionals needed to work for him. Sometimes we blurred
12 the lines. I'd hire them. He'd hire them. I'd fire them.
13 He'd fire them. All over there. But we started to clean it
14 up.

15 And one of the last people that had to be moved over
16 to MediCall Physicians Group was the biller. Yep, most
17 everybody took direction from me in some way, shape, or form.
18 Most of the doctors were asking me how to do different
19 procedures because they didn't know. They didn't care to look
20 it up, even though they were supplied every piece of
21 assistance, from fine paramedics like that one right there,
22 who knew real well. They would call me. The patients would
23 call me. The patients' family members would call me.

24 I was on the phone constantly. I was constantly on
25 the phone. Two or three other people were constantly on the

1 phone talking to patients, caregivers, or home health nurses.

2 We were taking the overflow, Judge, the overflow.

3 So, if I've heard and been criticized for, "Well, how
4 dare you presume that everybody that's on skilled nursing is
5 actually being qualified for physician supervision," well,
6 with hearing that, you can certainly understand why wrestling
7 with that issue, wrestling with the complicated elements of
8 dealing with Medicare's rules and regulations, and even then,
9 I supplied them the only and latest technology, them being the
10 providers, to thoroughly document what it was they were
11 supposed to be doing. They still had a problem doing it.

12 Lucero came up with the idea. Quite frankly, I
13 agreed with it. I agreed with it. He directed his biller.
14 I had a staff member dedicated, set up a database to track
15 these issues, to harass these home health agencies, that ones
16 that you could get ahold of, the ones that you could
17 communicate with.

18 I did many, many things to try to deal with that
19 issue. I did so, your Honor, for the right reasons, not the
20 wrong ones. This extra income that these people are all
21 talking about, I did not see it. Should I have seen it? You
22 bet. Absolutely, I should have seen it. But we saw no
23 spikes, any identical spikes, unusual incomes or otherwise
24 coming in to that practice.

25 As far as Lucero and I were concerned, especially me,

1 until such time as I learned differently in this courtroom, we
2 didn't know that there was a problem. The billing was going
3 as smooth as it had ever been. The biller had problems? You
4 bet. You bet. But we were very empathetic toward her for
5 lots of reasons.

6 She was among the best examples of the people that
7 we were intending and intended to take care of. This lady was
8 in an impossible situation. Maybe we should have looked
9 harder, probably. I'll call that a mistake. You bet.

10 So, your Honor, I just wanted to let you know that
11 I'm not a criminal. I'm a flag-waving, PBR-drinking normal
12 guy who's not afraid of anybody. I'm not intimidated by
13 anything. I am regretful that I didn't see what I should have
14 seen and, therefore, had an opportunity to put a stop to it,
15 changed the course; but I did not make that happen.

16 And for the rest of you, I apologize. I've
17 interrupted your lives and many, many others, many, many
18 others. I have shaken the confidence of many, many people.
19 People on a national level, even, are like, "Oh, my God. How
20 is this possible that it happened to be him?"

21 So thanks for hearing that, your Honor. I know it's
22 tough to hear. I know I'm probably a little bit of an
23 oddball. I am certainly an eccentric guy, no question about
24 it.

25 I think I deserve to be slapped a little bit for that

1 mistake. Off to prison? Um-um. The smartest thing, the best
2 thing I can do for society right now is go right back out
3 there and under the correct, I don't know, supervision, if you
4 want to call it, spread the word that you had better watch
5 what your biller's doing and otherwise.

6 I was once the most knowledgeable person about house
7 call operations in the United States. The modern house call
8 would not be occurring today on a nationwide level if it
9 wasn't for the things I did. Dr. Bayne himself will tell
10 you that, and he's not kidding.

11 So, I appreciate it, your Honor. That's all I've got
12 to say.

13 THE COURT: Okay. Thank you, Mr. Brown.

14 I do want to talk a little bit -- I think we ought to
15 break for lunch, given that it's 20 to 1:00, but I do --
16 before we do break, I do want to talk about the supervised
17 release conditions so we don't -- so we can -- some of the
18 time that would otherwise be devoted after I announce the
19 sentence can be taken care of right now.

20 So, I do want to first address the defendant's
21 objections to the Probation Office's recommendations. And
22 number -- the first objection is to Mandatory Condition No. 6,
23 which has to do with refraining from unlawful use of
24 controlled substance and drug-testing. And the defendant's
25 brief, Mr. Brown's brief suggests that this -- at least the

1 drug-testing condition is not warranted because there's no
2 history of drug abuse.

3 What's the government's position on that?

4 MS. HARPER: I don't disagree with the defense
5 objection, your Honor.

6 THE COURT: Probation?

7 MR. SMITH: No objection, your Honor.

8 THE COURT: Okay. So, what I will -- and I'm -- I
9 anticipate when I announce the sentence Mandatory Condition 6
10 is going to say only refrain from any unlawful use of a
11 controlled substance and will not require drug testing.

12 The second objection is to discretionary condition
13 No. 6. Probation recommended that Mr. Brown, as a condition
14 of his supervised release, refrain from knowingly meeting or
15 communicating with any former employees of MediCall and HCA,
16 including his codefendants. And in his sentencing brief,
17 Mr. Brown suggests that the limitation should apply only to
18 his codefendants and any MediCall or HCA employee who was a
19 government witness at trial.

20 What does the government think?

21 MS. HARPER: I don't object to that modification,
22 your Honor.

23 THE COURT: Probation?

24 MR. SMITH: No objection, your Honor.

25 THE COURT: Okay. I agree with that modification,

1 so when I announce the sentence, it will be limited to
2 Mr. Brown's codefendants and any MediCall or HCA employee
3 who testified at trial.

4 The third objection -- or it's not really an
5 objection, it's more of a modification -- pertains to special
6 condition No. 10. And instead of defendant's monthly payment
7 schedule for restitution being 10 percent of the defendant's
8 net monthly income, the defendant recommends that it be up to
9 10 percent.

10 What does the government think about that?

11 MS. HARPER: I don't agree with that change, your
12 Honor. I think Ms. Guimaraes states that the change is needed
13 to account for living expenses, et cetera; but the condition
14 as it is is already net of those types of expenses, and so I
15 would say that the number should stay as it is.

16 MR. SMITH: Your Honor, I would concur with the
17 government on that.

18 THE COURT: Okay. Ms. Guimaraes, what the government
19 is saying is that net monthly income is already defined as
20 income net of reasonable expenses for basic necessities such
21 as food, shelter, utilities, insurance, and employment-related
22 expenses.

23 MS. LINDSAY-GUIMARAES: Oh, yes, I'm sorry. I did
24 not articulate that very clearly. What I was meaning to say
25 here is I know that in the past, some clients have had trouble

1 when the language says at least a certain percentage, because
2 then with respect to Social Security benefits being drawn or
3 taxes or any other financial situations like that where the
4 government can draw more than 10 percent, that can be very
5 problematic for certain clients when it's out of their control
6 how much Social Security chooses to garnish or things like
7 that.

8 And so I was just trying to anticipate a situation
9 where garnishment could be well in excess of 10 percent and
10 then leave Mr. Brown in a situation where he's not able to
11 then cover his basic expenses.

12 THE COURT: I understand.

13 MS. LINDSAY-GUIMARAES: So, I didn't articulate that
14 well. I apologize.

15 THE COURT: No, I think you articulated it fine. I
16 didn't read it well.

17 So, I guess what Ms. Guimaraes is saying is that she
18 wants to reflect that the monthly payment should not be more
19 than 10 percent.

20 MS. HARPER: Well, why don't we just say 10 percent,
21 then?

22 MR. SMITH: Your Honor --

23 MS. LINDSAY-GUIMARAES: That seems reasonable.

24 THE COURT: Okay. So, that's what it will be.

25 Any other objections to the Probation Office's

1 proposed conditions of supervised release from the defendant?

2 MS. LINDSAY-GUIMARAES: No, your Honor.

3 THE COURT: Let me now turn to the government. You
4 did have some proposed modifications, and I wanted to discuss
5 those. If you could -- I know what your recommendations are,
6 and that's in docket 221. If you could direct me to the
7 instances in which your recommendation differs from that of
8 Probation.

9 MS. HARPER: Are you talking about the specific
10 wording of the condition, your Honor?

11 THE COURT: Any way in which your -- the government's
12 proposal differs from that of Probation's recommendation,
13 because I'm going to use Probation's recommendation as the
14 template.

15 MS. HARPER: I would be happy to do that if the Court
16 could give me just a couple of minutes to do a side-by-side
17 comparison. Because I would note that aside from the
18 conditions at the end of my paper, which is titled, "Other
19 conditions," I believe that all of the conditions that I have
20 included, although perhaps in different orders, are also
21 conditions proposed by the Probation Office.

22 THE COURT: I see.

23 MS. HARPER: So, what I would need -- I do believe
24 that I suggested a couple of wording changes in conditions
25 that were recommended by both myself and the Probation Office,

1 so I would need to do just a brief comparison to confirm the
2 ones that had a wording difference.

3 THE COURT: Why don't I let you do that over our
4 break.

5 MS. HARPER: Fine.

6 THE COURT: So, I -- well, let me ask, before we take
7 our break, is there anything that either Probation or defense
8 counsel or the government would like to say? I know I didn't
9 give the government an opportunity to address any of the
10 statements made by Mr. Brown, Mr. King, Mr. LaLoggia, and
11 Ms. Brown.

12 MS. HARPER: I don't have anything to add, your
13 Honor.

14 THE COURT: Okay.

15 MS. LINDSAY-GUIMARAES: Your Honor, I just have one
16 question. Will the Court prefer to address now or later our
17 request for a self-surrender date?

18 THE COURT: We can do that later.

19 MS. LINDSAY-GUIMARAES: Okay.

20 THE COURT: So, why don't we -- I don't -- I want to
21 give people a chance to stretch their legs and have lunch,
22 given that it's 10 to 1:00. Or -- I mean, it's really -- this
23 is -- I was going to take a break for your convenience. I'm
24 at your pleasure. If -- I could -- I could announce the
25 sentence at about five after 1:00, and we would be finished at

1 about 1:30, maybe a little after; but if you'd prefer to take
2 a lunch break -- I'm going to leave this up to Mr. Brown's
3 table.

4 MS. LINDSAY-GUIMARAES: Your Honor, a brief break
5 would be just fine.

6 THE COURT: Just a short one, 15 minutes?

7 MS. LINDSAY-GUIMARAES: Yes.

8 THE COURT: Okay. Then that's what we'll do. Then
9 I'll be back at about five after 1:00.

10 THE CLERK: All rise. Court stands in recess.

11 (Recess had.)

12 THE COURT: Okay. Good afternoon. I want to thank,
13 again, the Probation Office for its comprehensive Presentence
14 Investigation Report and the sentencing recommendation. I
15 want to thank counsel for both sides for their very helpful
16 presentations, the briefing, and the arguments here in court.

17 I see that the gallery is populated with what I'm
18 assuming to be Mr. Brown's family members and friends. I want
19 to acknowledge their presence and thank in particular
20 Mr. King, Mr. LaLoggia, and Ms. Brown for addressing the
21 Court. It's not an easy thing to do, I understand that, and I
22 very much appreciate your input.

23 And I also appreciate -- all three of them wrote
24 letters to the Court, and I want to thank everybody else who
25 wrote letters to the Court. When a judge has to sentence a

1 defendant, and particularly under our current system, the
2 judge has to look at the whole person. And there are things
3 that the defendant's family members and friends and colleagues
4 know about the defendant that would not have come out in the
5 trial, in a plea agreement -- although there was no plea
6 agreement in this case -- in the Presentence Investigation
7 Report. So, I very much appreciate hearing from friends,
8 colleagues, and family members about the defendant because it
9 rounds out, in a very important way, the picture of the
10 defendant here, of course, Mr. Brown.

11 I'm going to go through the 3553(a) factors one by
12 one. 3553(a) requires the Court to consider and nature and
13 circumstances of the offense and the history and
14 characteristics of the defendant.

15 The offenses here are serious. There are 10 counts
16 of healthcare fraud under 18 USC 1035 and 1347. As the jury
17 found beyond a reasonable doubt, and I have no basis to
18 question the verdict, and I agree with the verdict, Mr. Brown
19 defrauded Medicare over an extended period of time, together
20 with Ms. Talaga and Dr. Lucero, from January of 2007 through
21 December of 2011. There were about \$4.3 million in false
22 claims, of which about \$1.3 million was paid.

23 In terms of the circumstances of the offense, and
24 these are important here, Mr. Brown himself on the stand and
25 through counsel argued at trial that it was difficult --

1 whatever problems there were arose from difficulties dealing
2 with a complex -- with complex regulations and the
3 bureaucracy. But the conduct at the heart of these charges,
4 of which Mr. Brown justifiably was found guilty, these weren't
5 technical violations. They were claims for care plan
6 oversight every month for every home healthcare patient.

7 And the numbers -- the numbers were just not
8 realistic that all that care plan oversight was being done.
9 Even -- even accepting -- and I think it's debatable. Even
10 accepting that there was at some point for some period of time
11 confusion as to whether the prolonged visits could be used to
12 reimburse for travel time, at some point, it became clear that
13 you can't do that, and yet those billings continued at
14 Mr. Brown's direction.

15 So, this -- Justice Holmes once said -- or wrote,
16 "When you're dealing with the government, you need to turn
17 square corners." That's not -- that's not what Mr. Brown was
18 convicted of. He wasn't convicted of a mere failure to turn
19 square corners in dealing with the government. The conduct
20 went well beyond just mere sloppiness or inattention or
21 failure to supervise or getting tripped by vague and complex
22 regulations.

23 The evidence showed beyond a reasonable doubt that
24 Mr. Brown intentionally caused the submission of millions of
25 dollars of false claims for care plan oversight in the main,

1 and for some of the other matters as well.

2 The evidence also showed beyond a reasonable doubt, I
3 believe, although for sentencing purposes, certainly for --
4 certainly by a preponderance of the evidence, that the fraud
5 in the main was undertaken at Mr. Brown's direction. He
6 directed the submission of the false claims, if not all of
7 them, and maybe some of them he didn't, then certainly the
8 vast, vast majority of them.

9 I'm also taking into account for purposes of
10 evaluating the circumstances of the offense that Mr. Brown did
11 not do what he did in order to lead a life of luxury. There
12 weren't fancy cars. There wasn't a fancy house. There were
13 no yachts, anything like that.

14 And I do believe that Mr. Brown -- and I'll address
15 this later as well -- was very dedicated to his profession,
16 very dedicated to his patients. And that's why he -- at least
17 was among the reasons why he got into the home healthcare
18 business. And those circumstances, I'm going to take into
19 account as well.

20 Mr. Brown's history and characteristics, there's no
21 history of criminal conduct at all. Mr. Brown has zero
22 criminal history points. In terms of his personal history,
23 the letters and the Presentence Investigation Report reflect
24 that Mr. Brown had in many ways a difficult upbringing. He
25 suffered the death of his father at a very young age, abuse by

1 his stepfather, had a volatile mother. Still, he did well
2 through attending church and through his personal discipline,
3 and he joined the armed forces and served honorably in the
4 Air Force and also in the Army.

5 Mr. Brown is a father. He's devoted to his children.
6 And from Ashley's statement and from Ashley's and Justin's
7 letters and from the letters of other family members, it is
8 apparent that Mr. Brown's children are devoted to him as well.

9 Mr. Brown was very involved in scouting. He's
10 industrious. He's a hard worker. As I mentioned, he has
11 passion for his work. He cares very deeply about his
12 profession. And he has compassion for his patients and for
13 his friends and family members and even those he doesn't know.

14 And that came through -- that last point came through
15 from the many, many letters that were submitted on Mr. Brown's
16 behalf. And I read each of them very carefully.

17 Dr. Bayne and Dr. Cornwell wrote about Mr. Brown's
18 qualities as a colleague and as a medical practitioner,
19 dedication to his patients. A number of business colleagues
20 wrote about Mr. Brown's character and qualities as a
21 colleague: Mr. Keepper, Mr. Michaels, Mr. Barros, Mr. Otano,
22 Michael and Steven LaLoggia, Randy Brockington, Joyce
23 Lockinger, and Matthew King.

24 Many patients or family members of patients wrote
25 and spoke of the care and concern that Mr. Brown showed to

1 them: Ms. Johnson, Hamilton, Lexvold, Bork, and Powell. Many
2 friends wrote speaking about Mr. Brown's loyalty as a friend
3 and generosity: Lundquist, Hearne, Jansen, and Mann. And
4 then the family members, Ashley and Justin Brown, Brenda
5 Lewis, Jan Ledesma, and Gary Brown spoke of Mr. Brown's
6 qualities as a generous and loyal father, brother; and they
7 spoke also of his dedication to his profession and to his
8 friends.

9 And Miss Platt, Christine Platt, Mr. Brown's domestic
10 partner, wrote of his personal qualities as well. I'm taking
11 all of that into account.

12 As for acceptance of responsibility, I think there's
13 none here. Even in his -- in his letter to the Court and in
14 his allocution, I don't know if he used -- I think he did say
15 in his allocution, but certainly in his letter to the Court,
16 Mr. Brown said that he's innocent of the charges against him.
17 And he says essentially that there was no -- he did not intend
18 to defraud the government, and that he wasn't in charge of
19 billing.

20 And I -- you know, I was here for the whole trial. I
21 listened very carefully. I was able to evaluate everybody's
22 testimony and look at the documents and the e-mails and
23 everything that was submitted, and I -- I don't see the things
24 the way that Mr. Brown sees them. I do think there was an
25 intent to defraud, and I do believe that Mr. Brown was a full

1 participant in the fraud and directed the commission of the
2 vast bulk of the fraud.

3 So, I can't give -- I'm not going to -- I'm certainly
4 not penalizing Mr. Brown for exercising his Sixth Amendment
5 right to trial, but I can't give him any credit for acceptance
6 of responsibility.

7 Subsection (a)(2) requires the Court to consider the
8 need for the sentence imposed to accomplish the various
9 purposes of criminal punishment. The first purpose is to
10 reflect the seriousness of the offense, to promote respect for
11 the law, and to provide just punishment for the offense. I've
12 already -- we've already talked about the seriousness of the
13 offense.

14 The second is to afford adequate deterrence to
15 criminal conduct. That's what the lawyers call general
16 deterrence. So, the sentence in this case has to -- one of
17 the functions it has to serve is to deter others from engaging
18 in healthcare fraud.

19 And this is a significant factor in this case.
20 Medicare fraud is, unfortunately, endemic in this country;
21 and those who are in the medical field and who are tempted to
22 engage in fraud must know, they have to know, that the
23 penalties are severe, particularly given the low likelihood
24 of getting caught.

25 And this is -- I do agree with -- I have certainly

1 not agreed with everything Miss Harper has argued, either at
2 trial or at sentencing; but I do agree with her wholeheartedly
3 on this point, that people in the healthcare business and in
4 the home healthcare business in particular will know about
5 this sentence, and this sentence has to send a signal. It's
6 not the only consideration, and it's not the most important
7 consideration, but it is a consideration that 3553(a)(2)(B)
8 directs me to consider, and I do have to consider that.

9 The third purpose of criminal punishment referenced
10 by subsection (a)(2) is the need to protect the public from
11 further crimes of the defendant, and that's specific
12 deterrence, and incapacitation, to stop Mr. Brown from
13 committing further crimes. I don't -- I agree with the
14 government. I agree with the defendant. I agree with
15 Probation. I don't think that this is a particularly
16 important factor in this case. I think the risk of
17 recidivism, of Mr. Brown re-offending is low.

18 This will be his first incarceration, so it's likely
19 to have a significant impact on him. And he's not an old man,
20 but he's at the point of his life where I don't believe that
21 he's going to -- when he's done serving his sentence, he's not
22 going to come out and commit more crimes. I shouldn't say
23 that with certainty. I think it's highly unlikely that that's
24 going to happen.

25 Subsection (a)(3) requires the Court to consider the

1 kind of sentences available. There's a 10-year maximum term
2 for Counts 1 through 7, a five-year maximum term for Counts 8
3 through 10. I guess all in theory could run consecutively, so
4 in theory -- and we're not even going to be close to this --
5 there's an 85-year maximum sentence. Probation is, I believe,
6 an option under statute, but for the reasons I've given and
7 will give, a probationary sentence would be entirely
8 inappropriate in this case.

9 The Advisory Guidelines range is 121 to 151 months.
10 That's subsection (a)(4). And I already talked about the
11 intended loss and giving Mr. Brown the benefit of the
12 soon-to-be-amended loss tables under the fraud Guideline. And
13 he's -- I would place him, for purposes of the new Guidelines,
14 the amended Guidelines, slightly into the 18-level territory.
15 And again, whether he's right at the 18 levels, slightly over,
16 or just a hair under, it's not moving the needle in terms of
17 what the sentence is going to be. Those differences are not
18 moving the needle in terms of what the sentence is going to
19 be.

20 Subsection (a)(5) are Guideline policy statements.
21 There are none that have been expressly referenced that I
22 haven't already addressed.

23 (A)(6) is the need to avoid unwarranted sentence
24 disparities. I haven't sentenced any of the codefendants,
25 so I have nothing to compare Mr. Brown to in terms of this

1 particular case; and as a general matter, (a)(6) weighs in
2 favor of a Guideline sentence.

3 (A)(7) is the need to provide restitution to any
4 victims of the offense. There is going to be a restitutionary
5 element of this sentence, and being incarcerated will prevent
6 him from making -- Mr. Brown from making restitution at least
7 while he's incarcerated. But given the amount of restitution
8 involved and the income that Mr. Brown could hope to make, I
9 hope that over the last 18 months, he was making a decent
10 living and I hope that he will continue to make a decent
11 living once he gets out of prison, but he's not going to be
12 making the kind of money that's going to allow him -- it's
13 unlikely that he's going to be making the kind of money that's
14 going to allow him to make a significant dent quickly in the
15 restitutionary amount, so this factor carries little weight.

16 I've considered everything that's been submitted
17 in writing and orally, and it's my obligation to impose a
18 sentence that is sufficient but no more than necessary to
19 fulfill the purposes of 3553(a). I'm going to impose a
20 custodial sentence in this case of 87 months, which is just
21 over seven years, seven years, three months.

22 And this is a significant downward variance from the
23 bottom end of the Guidelines range, and I want to explain why
24 I'm varying downward. And then I'm going to explain why I'm
25 not going any further.

1 This is Mr. Brown's first -- and I'm incorporating by
2 reference everything I've said good and bad about Mr. Brown,
3 but I want to highlight in particular these factors.

4 The first is that this will be Mr. Brown's first
5 incarceration. He has zero criminal history, so he's at the
6 bottom end of the criminal history I category, and this
7 incarceration is bound to have a greater impact on him than it
8 would for somebody who's been in and out of the system.

9 Mr. Brown's military service, I do want to
10 acknowledge that. It is a factor. Mr. Brown served our
11 country for 10 years, and that's something that I think
12 deserves recognition and consideration.

13 Mr. Brown didn't use the Medicare fraud to lead a
14 life of luxury. There were no -- no indication of any luxury
15 purchases.

16 Mr. Brown's genuine devotion to the medical
17 profession, the fact that he cares deeply about his patients.
18 Despite the fact that he committed this fraud, I believe
19 knowingly, it doesn't take away from Mr. Brown's qualities as
20 a professional and as a person who cares about those
21 individuals he provided care for.

22 The positive impact that Mr. Brown has had on the
23 lives of others, his friends, people he didn't quite know that
24 well but who he helped, Boy Scouts, customers, some of his
25 fellow employees like Mr. King.

1 And as I said, Mr. Brown is not an old man. I don't
2 think -- I do know how old he is, though, and I just don't see
3 the point, given everything else, of keeping Mr. Brown in
4 prison past the age of 65.

5 I don't think that anything less than 87 months would
6 be sufficient to fulfill the purposes of 3553(a), and here's
7 why: The duration of the scheme. It went on for several
8 years. This wasn't a momentary slip or even a short-term slip
9 or a mid-term slip. This was a sustained course of knowing
10 criminal conduct.

11 The amount actually stolen, over \$1.3 million.
12 That's a lot of money.

13 I'm going to come back to general deterrence. This
14 is a white collar crime, so the sentence imposed here is far
15 more likely to have a deterrent effect on Mr. Brown's cohorts,
16 those also involved in the medical profession, than a sentence
17 in a drug case or an illegal re-entry case.

18 I do agree with Miss Harper that people in the
19 healthcare field, people who are business -- men and women who
20 are businesspeople, they engage in a cost/benefit analysis.
21 And the benefit is the benefit if you don't get caught, and
22 the cost is the probability of getting caught multiplied by
23 the sanction.

24 And there's a low probability of getting caught, so
25 the sanction has to be serious. It has to be real, if there's

1 any hope of ensuring that at least when people look at the
2 cost and the benefits, when they're contemplating fraud, that
3 they realize that the cost will outweigh the benefits.

4 And finally, there's Mr. Brown's failure to accept
5 responsibility, and in particular his repetition of the claim,
6 which he made at trial, which I didn't believe, and which I
7 continue not to believe in light of all the other evidence,
8 that he wasn't responsible for the fraud.

9 There's a \$100 special assessment, which is
10 mandatory. There's restitution that I'm going to impose of
11 \$1,303,874.66 to Medicare/CMS. And I believe that will be
12 joint and several with Talaga and Lucero, is that correct?

13 MS. HARPER: That's my understanding, your Honor,
14 yes.

15 THE COURT: Probation, is that your understanding?

16 MR. SMITH: That is correct, your Honor.

17 MS. LINDSAY-GUIMARAES: Your Honor --

18 THE COURT: Yes?

19 MS. LINDSAY-GUIMARAES: I'm sorry. With respect to
20 the special assessment, did the Court say 100 or 1,000?

21 THE COURT: I meant to say 1,000. If I said 100,
22 that was a mistake, because there were 10 counts of
23 conviction, \$100 per count.

24 I'm not going to impose a fine on Mr. Brown. He's
25 not a wealthy man, and whatever -- I think the money that

1 Mr. Brown -- the financial penalty that Mr. Brown is going to
2 pay, I think the restitution is sufficient in light of the
3 seriousness of the offense. And the money's going -- the
4 restitution is going to the government anyway, and I don't see
5 the point of adding 5 or \$10,000 extra going to the
6 government. It just -- there's no point to it.

7 Supervised release, there's a three-year maximum
8 term. I'm going to impose a term of two years supervised
9 release. I think that's appropriate, given the seriousness of
10 the crime and the need to allow -- to help Mr. Brown get back
11 on his feet and keep him on the right path when he's released
12 from prison.

13 I'm going to go through the terms of supervised
14 release, the conditions of supervised release, and I'm going
15 to justify all of them, not the mandatory ones, because I
16 don't need to.

17 I'm going to impose mandatory condition No. 1.
18 Mr. Brown shall not commit another federal, state, or local
19 crime.

20 No. 2, he shall not unlawfully possess a controlled
21 substance.

22 No. 5, he shall cooperate in the collection of a DNA
23 sample if the collection of such sample is required by law.

24 And No. 6, he shall refrain from any unlawful use of
25 a controlled substance. And as I've discussed, there's not

1 going to be any drug testing.

2 In terms of discretionary conditions, No. 2, he's
3 going to make restitution to the victim of the offense. Under
4 Section 3556, restitution, I believe, is mandatory, and it's
5 appropriate in this case.

6 No. 4, Mr. Brown shall seek and work conscientiously
7 at lawful employment or pursue conscientiously a course of
8 study or vocational training that will equip Mr. Brown for
9 employment.

10 I think -- given Mr. Brown's background, I think -- I
11 don't think -- I think this is a superfluous -- in other
12 words, I think Mr. Brown would do whatever he could to get
13 employed regardless of whether he's required to, but I do want
14 to impose this as a condition of supervised release. It will
15 provide Mr. Brown with a source of legitimate income and will
16 allow him to make restitution.

17 No. 5, Mr. Brown shall not maintain employment in
18 medical billing or for a program that obtains funds through
19 Medicare. That's why we're here, and I think it's
20 appropriate, at least during that two-year period, that
21 Mr. Brown not go back to the line of work that led to this
22 criminal -- to his criminal conduct in this criminal case.

23 No. 6, Mr. Brown shall refrain from knowingly meeting
24 or communicating with any person whom he knows to be engaged
25 or planning to be engaged in criminal activity. This was a

1 jointly undertaken enterprise with Dr. Lucero and Ms. Talaga,
2 and this condition is important to keeping Mr. Brown on the
3 right path. So, if he's -- he cannot be communicating with
4 any person who he knows is engaged or planning to be engaged
5 in criminal activity.

6 In addition, pursuant to defendant's recommendation,
7 Mr. Brown shall not knowingly meet or communicate with his
8 codefendants, Talaga and Lucero, and any former employees of
9 MediCall and HCA who testified at trial. I think that's
10 important given the interactions that are in the record about
11 Mr. Brown's interactions with at least some of those
12 individuals.

13 Mr. Brown shall refrain from any excessive use of
14 alcohol, which I'm going to define as -- in a way differently
15 than Probation recommended. It's defined as excessive or
16 heavy drinking, which itself is defined as more than 15 drinks
17 per week. I'm making that adjustment in accord with some of
18 the Seventh Circuit's recent precedents on the conditions of
19 supervised release.

20 And in addition, Mr. Brown shall refrain from any use
21 of a narcotic drug or other controlled substance as defined in
22 Section 102 of the Controlled Substances Act without a
23 prescription by a licensed medical practitioner.

24 I am imposing this condition as well as the first
25 part of mandatory condition No. 6 because Mr. Brown -- it's

1 just part and parcel of not committing another federal, state,
2 or local crime. He shouldn't be unlawfully using any kind of
3 narcotic drugs or other controlled substances.

4 No. 8, Mr. Brown shall refrain from possessing a
5 firearm, destructive device, or other dangerous weapon. I
6 think that's appropriate, given the weapons issues that have
7 been addressed; and also, Mr. Brown is going to have a felony,
8 and felons may not possess these materials.

9 No. 14 through 17 -- I'm sorry, 14 through 18 are
10 just the ordinary incidents of supervised release. No. 14 --
11 and I'm going to depart from the Probation Office's language
12 here. Mr. Brown shall not knowingly leave the jurisdiction
13 where he is being supervised unless granted permission to
14 leave by the Court or a probation officer.

15 No. 15, he shall report to a probation officer as
16 directed by the Court or a probation officer.

17 No. 16, he shall permit a probation officer to visit
18 him at any reasonable time at home, at work, if he's doing
19 community service at a community service location, or any
20 other reasonable location specified by the probation officer.
21 And Mr. Brown also shall permit the confiscation of any
22 contraband observed in the plain view of the probation
23 officer.

24 No. 17, Mr. Brown shall notify the probation officer
25 promptly within 72 hours of any change in residence, employer,

1 or workplace, and absent constitutional or other legal
2 privilege, he shall answer inquiries by a probation officer.

3 And No. 18, he shall notify the probation officer
4 promptly within 72 hours if he's arrested or questioned by a
5 law enforcement officer.

6 And, of course, Mr. Brown, I should have said this
7 at the beginning of the supervised release discussion, upon
8 release from imprisonment, Mr. Brown shall be placed on
9 supervised release for a term of two years on each of Counts 1
10 through 10, with all terms to run concurrently. And within
11 72 hours of release from the custody of the Bureau of Prisons,
12 he shall report in person to the Probation Office in the
13 district to which he is released.

14 And let me go back to the custodial sentence. The
15 term for Counts 1 through 7 is going to be 87 months on each
16 of those counts, to be served concurrently. And the term on
17 Counts 8 through 10 is going to be 60 months, and those terms
18 are to be served concurrently with each other and also with
19 Counts 1 through 7.

20 I'm going to check Box 22, which incorporates the
21 special conditions. And then in terms of the special
22 conditions of supervised release, I'm going to impose No. 3.
23 If Mr. Brown is unemployed after the first 60 days of
24 supervision or if unemployed for 60 days after termination or
25 layoff from employment, he shall perform at least 20 hours of

1 community service per week at the direction of the Probation
2 Office until gainfully employed. The amount of community
3 service shall not exceed 400 hours.

4 I don't believe that we're ever going to get to this
5 point, because I think Mr. Brown is very employable, a very
6 hard worker. I do believe he's going to be employed. But in
7 the unlikely event that he's not, the supervised -- I'm sorry,
8 the community service will allow Mr. Brown to occupy his time
9 productively and help with the reintegration into society.

10 Nos. 5 through 8 are all designed to ensure -- and 10
11 are designed to ensure that Mr. Brown is able to satisfy his
12 restitution obligation.

13 No. 5, Mr. Brown shall not incur new credit charges
14 or open additional lines of credit without the approval of a
15 probation officer unless he is in compliance with the
16 financial obligations imposed by this judgment, and that's
17 going to be No. 10.

18 Mr. Brown shall provide the probation officer with
19 access to any requested financial information necessary to
20 monitor compliance with the conditions of supervised release.

21 No. 7, he shall notify the Court of any material
22 change -- I'm going to change that, he shall notify the
23 probation officer of any material change in his economic
24 circumstances that might affect his ability to pay
25 restitution, fines, or special assessments.

1 No. 8, he shall provide documentation to the IRS and
2 pay taxes required by law.

3 No. 10, Mr. Brown shall pay the restitution that
4 remains unpaid at the commencement of his term of supervised
5 release, and the monthly payment schedule shall be an amount
6 that is 10 percent of his net monthly income, which is defined
7 as income net of reasonable expenses for basic necessities
8 such as food, shelter, utilities, insurance, and
9 employment-related expenses.

10 No. 11, I'm going to modify it a bit. Mr. Brown
11 shall not enter into any agreement to act as an informer or
12 special agent of law enforcement -- of a law enforcement
13 agency without the permission of the probation officer. And
14 that's because if Mr. Brown is acting as an informer or
15 special agent, he will be talking with people whom he knows
16 are engaged or about to be engaged in criminal activity, so
17 he'll, I guess, be running afoul of discretionary condition
18 No. 6. Obviously, if he's doing it at the request of law
19 enforcement, he can do it, but the probation officer needs to
20 know about it.

21 No. 13, there was no objection to No. 13, but I'd
22 like to discuss it. It says, "Notify as directed by the
23 probation officer third-parties of risks that may be
24 occasioned by his criminal record or personal history or
25 characteristics, and shall permit the probation officer to

1 make such notifications and to confirm the defendant's
2 compliance with such notification requirement."

3 What does the government think about this condition?

4 MS. HARPER: I don't --

5 THE COURT: I'll tell you my concerns. I hate to cut
6 you off. I think the first part is pretty vague. I don't
7 know -- I don't know how somebody in Mr. Brown's position
8 could know with the requisite degree of certainty and
9 specificity what it actually is that he needs to do.

10 MS. HARPER: Two responses, your Honor. Number one,
11 in light of the nature of this offense, I'm not sure that this
12 is a necessary condition.

13 Number two, I think that the Court's concerns may
14 have been -- someone may have attempted to address those
15 concerns by inserting the clause, "as directed by the
16 probation officer," because I agree without the notifications
17 being at the direction of a probation officer, I don't
18 understand how a defendant would comply with this condition.

19 But because it is at the direction of a probation
20 officer, if this were a condition that the Court were inclined
21 to impose or that Probation felt strongly about, I think that
22 the inclusion there helps to tailor this in a way that it is
23 not vague, that it's understandable, because the probation
24 officer will be giving direction of any notifications that are
25 required.

1 THE COURT: Probation?

2 MR. SMITH: Your Honor, we would defer to the Court
3 on the wording of this -- the imposition of this condition
4 and/or the wording of it.

5 THE COURT: Ms. Guimaraes?

6 MS. LINDSAY-GUIMARAES: Your Honor, if the reference
7 to the defendant's criminal record is referring to the
8 conviction for Medicare fraud, I think it's clearly covered by
9 the other conditions we already talked about, which requires
10 him to not go back into the field.

11 But I do agree with the Court in the sense that with
12 respect to personal history or characteristics, I mean, how
13 would we first know which characteristics and personal
14 history?

15 So, when I first read this, I thought this was a
16 standard condition that just refers to giving potential future
17 employers notice for their risk -- third-party risk purposes,
18 but I appreciate the Court pointing out the vagueness of the
19 other aspects of it, so I would agree with the Court.

20 THE COURT: Okay. Let me ask Probation, I know it
21 may be a different side of the house. Do you supervise
22 people?

23 MS. DeNICHOLAS: I do not supervise people, but I
24 have had occasions where I have supervised individuals.

25 THE COURT: What happens?

1 MR. SMITH: What happens is we would ask the
2 defendant -- just say, for instance, it was an employment
3 situation involving financials. We would ask the offender,
4 the defendant, to notify their employer of what they were
5 convicted of. That is usually many times often where this
6 comes into play.

7 But with that said, that's usually in regards to what
8 their criminal record, what they're on supervised release or
9 probation for.

10 THE COURT: I guess most employers ask, isn't that
11 right?

12 MR. SMITH: There are occasions where the employer
13 does not know, though. And so that's what in particular --
14 it's really kind of designed for.

15 THE COURT: And there are many employers,
16 Mr. LaLoggia, being among them, who when he learned about -- I
17 guess Mr. Brown had not been convicted at that point, but when
18 he learned about the situation, he said, "I don't care. I'm
19 going to hire him anyway."

20 But there are other employers who might not, and
21 what's -- what are the various considerations? Because we do
22 want -- everybody wants Mr. Brown to get back on his feet.

23 MR. SMITH: Right.

24 THE COURT: -- when he's released from prison.

25 MR. SMITH: Your Honor --

1 THE COURT: And it seems -- he's a hard-working guy,
2 and I guess he can collect Social Security because he's going
3 to be about 65, but he strikes me as the kind of guy who's
4 going to want to go out and work.

5 MR. SMITH: Exactly.

6 THE COURT: And we want to make his success as likely
7 as possible.

8 MR. SMITH: And, your Honor, and just for the Court
9 to know, really, the key is the communication between the
10 probation officer and the defendant. If the defendant's
11 communicating with the probation officer as to what's going on
12 in his life, what -- you know, what work is available. I
13 think that is the key. And that's why it's being left at
14 direction and discretion of the probation officer is really
15 the key. So, if there's communication, this condition may
16 never come into play.

17 MS. LINDSAY-GUIMARAES: Your Honor, could I just add
18 one comment based on experience? I've had a handful of
19 clients where this situation has come up, and every time it's
20 come up for a previous client, it's always been where there's
21 a potential employment opportunity, but it's very directly
22 related to the underlying offense. For example, someone who
23 received stolen cellular phones wanted to work at AT&T or
24 something like that. And so there was an opportunity where
25 the company could be notified so they could make the

1 determination as to whether they could have that kind of
2 employee.

3 So, I think with respect to the previous condition
4 that Mr. Brown is not supposed to engage in employment related
5 to Medicare billing, maybe that covers it.

6 THE COURT: Okay. Anything -- do you have anything
7 to add?

8 MS. HARPER: No, your Honor.

9 THE COURT: Okay. I'm going to -- I'm going to
10 impose this condition, and I'm going to take out the words
11 "or personal history or characteristics" because I just don't
12 know what that means. I do know what it means, but it's not
13 anything that can be complied with because it's so vague.

14 So, it's going to read, "Notify, as directed by the
15 probation officer, third parties" -- I guess I should say,
16 "prospective employers of risks that may be occasioned by the
17 defendant's criminal record and shall permit the probation
18 officer to make such notifications and to confirm the
19 defendant's compliance with such notification requirement."

20 And let me add this proviso, which is implicit, but
21 let me make it explicit. The terms and conditions -- the
22 conditions of supervised release can be changed. They are
23 subject to amendment during the term of supervised release.
24 And it could very well be that Mr. Brown will tell the
25 probation officer, "Hey, I have a job interview at

1 such-and-such. It has nothing to do with billing. It has
2 nothing to do with Medicare." And the probation officer will
3 say, "You don't have to say anything."

4 If there's a situation where the probation officer
5 believes that Mr. Brown should say something about the
6 conviction and Mr. Brown disagrees, that's a situation that
7 can be brought to the Court to see whether the Court will
8 modify the conditions of supervised release. Maybe the judge
9 will. Maybe the judge won't.

10 But it leaves -- the way it's worded now and given
11 the background of conditions being subject to amendment, it
12 initially leaves it to the judgment, the good judgment of the
13 probation officer, taking into account everything that a
14 probation officer has to take into account. And to the extent
15 there's a disagreement, it can always be brought to the judge.

16 So, I think that's it for the terms of -- the
17 conditions of supervised release. Did you have any other
18 recommendations or modifications?

19 MS. HARPER: Your Honor, the only -- the only
20 suggestion I would make in terms of language relates to
21 discretionary condition No. 5, and it is the employment
22 condition.

23 THE COURT: Right.

24 MS. HARPER: Where I had proposed slightly different
25 wording.

1 THE COURT: Okay. What was your proposal?

2 MS. HARPER: That the defendant would refrain from
3 seeking or obtaining employment in any business whose primary
4 source of income is derived from supplying medical goods and
5 services and submitting claims for such goods and services to
6 public or private insurers. That way, it encompasses other
7 public health insurance programs such as Medicaid.

8 MS. LINDSAY-GUIMARAES: That language is fine, Judge.

9 THE COURT: Okay. So, it's, "The defendant will
10 refrain from seeking or obtaining employment in any business
11 whose primary source of income is derived from supplying
12 medical goods and services and submitting claims for such
13 goods and services to public or private insurers."

14 Anything else on supervised release?

15 MS. HARPER: Not from the government.

16 MS. LINDSAY-GUIMARAES: Nothing from us, your Honor.

17 THE COURT: Has there been a preliminary order of
18 forfeiture entered?

19 MS. HARPER: Yes, your Honor.

20 THE COURT: So, I've already entered it?

21 MS. HARPER: You have entered the preliminary order,
22 yes, and now what remains to print out is the forfeiture
23 judgment.

24 THE COURT: Okay. So, is there any objection to
25 entry of a final order of forfeiture?

1 MS. LINDSAY-GUIMARAES: No, your Honor.

2 THE COURT: So, I'll enter a final order of
3 forfeiture. And do I have a draft order?

4 MS. HARPER: For the final order?

5 THE COURT: Yes. If I don't have one, I'll have one
6 soon.

7 MS. HARPER: No. You will have one shortly, your
8 Honor.

9 THE COURT: Okay. Thank you. As I mentioned, there
10 was no -- in terms of technical Guidelines calculations, I
11 agreed with the defendant's position that it should be 32 --
12 the offense level should be 32. Even if -- and I did consider
13 the soon-to-be-amended fraud Guidelines under 3553(a).

14 Even if those were in place officially, I would have
15 given the same exact sentence, which still would have been a
16 below-Guidelines sentence, had I agreed with the defendant
17 that the intended loss was \$3.44 million for the reasons that
18 I've given, which is we were in that border area between 16
19 and 18, and the marginal difference between the amount of
20 intended loss, which I think is correct, which is somewhere
21 south of \$4.1 million, and north of \$3.44 million, wouldn't
22 have made any difference to the final sentence under 3553(a).

23 Let me -- pursuant to *United States versus Donelli*,
24 747 F.3d 936 at 941, Seventh Circuit 2014, I'm going to ask
25 defense counsel a question. And the question is: Is the

1 defendant satisfied that the Court has addressed, not to your
2 satisfaction, but has addressed his main arguments in
3 mitigation?

4 And answering yes does not waive any argument as to
5 the merits or reasonableness of the Court's treatment of the
6 issue.

7 In other words, is there a main argument in
8 mitigation that you made that I just didn't address or that
9 I've ignored?

10 MS. LINDSAY-GUIMARAES: I don't think so, Judge.

11 THE COURT: Do you have any recommendation as to a
12 place of incarceration?

13 MS. LINDSAY-GUIMARAES: May I have just a moment?

14 THE COURT: Sure.

15 MS. LINDSAY-GUIMARAES: Your Honor, our
16 recommendation would simply be that the judgment and
17 commitment order include a recommendation to a facility as
18 close to Rockford, Illinois, as possible.

19 THE COURT: Okay. You wanted to address
20 self-surrender?

21 MS. LINDSAY-GUIMARAES: Yes.

22 THE COURT: And you would like Mr. Brown to have the
23 opportunity to self-surrender?

24 MS. LINDSAY-GUIMARAES: Yes. And there are a couple
25 of dates of things he has coming up on the calendar that I

1 just wanted to make the Court aware of.

2 THE COURT: First let me address, is there any
3 objection from Probation or the government to Mr. Brown's
4 self-surrendering?

5 MR. SMITH: No, your Honor.

6 MS. HARPER: No, your Honor.

7 THE COURT: Okay.

8 MS. LINDSAY-GUIMARAES: He's scheduled for an
9 October 20th sleep study at the Madison V.A., which is an
10 overnight visit. And he also wanted to have the opportunity
11 to visit -- or to attend his son Christian's boot camp
12 graduation, and that's supposed to be scheduled within the
13 next six weeks or so.

14 THE COURT: So, it's going to happen within the next
15 six weeks?

16 MS. LINDSAY-GUIMARAES: That's their understanding,
17 but they don't have a specific date yet.

18 THE COURT: And surrenders are on Tuesday, is that
19 correct, Jackie?

20 THE CLERK: Yes.

21 THE COURT: So, why don't we say November 3rd by
22 2:00 p.m.

23 MS. LINDSAY-GUIMARAES: If we get a solid date on the
24 boot camp graduation soon and it's different, could we just
25 let you know?

1 THE COURT: Yes. File a motion to extend the
2 surrender date.

3 MS. LINDSAY-GUIMARAES: Okay. We'll do that.

4 THE COURT: If it's, you know, after November 3rd or
5 like the day before November 3rd, something like that.

6 MS. LINDSAY-GUIMARAES: Okay. Thank you.

7 THE COURT: I'll enter the forfeiture order. Any
8 other recommendations from -- that the defendant would like me
9 to make?

10 MS. LINDSAY-GUIMARAES: In terms of BOP --

11 THE COURT: Right.

12 MS. LINDSAY-GUIMARAES: -- placement or issues?

13 THE COURT: Right.

14 MS. LINDSAY-GUIMARAES: I don't think there are any
15 that are applicable that we can make at this time.

16 THE COURT: Okay.

17 Mr. Brown, you have 14 days to appeal your
18 convictions and your sentence.

19 And, Ms. Guimaraes, you will talk to Mr. Brown about
20 his appeal options and the necessity to file the notice of
21 appeal within 14 days of the date that the sentencing order is
22 entered on the docket if, in fact, he wants to pursue an
23 appeal?

24 MS. LINDSAY-GUIMARAES: I certainly will do that,
25 Judge.

1 THE COURT: Is there anything that we need to
2 address?

3 MS. HARPER: One minor record-keeping matter. Your
4 Honor, and I will supply the Court with a final order for
5 forfeiture, but I believe the Court is required to state on
6 the record at the time of sentencing the amount for which the
7 forfeiture order will be, and that is the same amount as the
8 amount of restitution. So, if the Court could, just for
9 record-keeping purposes, do that, that would be appreciated.

10 THE COURT: Any objection from the defendant?

11 MS. LINDSAY-GUIMARAES: No, Judge.

12 THE COURT: So, the preliminary order of forfeiture
13 was the 1.3 million and change? Okay. The forfeiture is
14 going to be \$1,303,874.66.

15 Thanks for bringing that to my attention. Is there
16 anything else we need to address?

17 MS. HARPER: Not from the government.

18 MS. LINDSAY-GUIMARAES: I just wanted to make a
19 motion for leave to supplement the record with redacted
20 versions of all the exhibits I submitted to the Court. I
21 didn't have a chance to redact out some addresses and things
22 like that in the letters.

23 THE COURT: Okay. That's fine.

24 MS. LINDSAY-GUIMARAES: So I'll supplement the record
25 with that.

1 (Bench conference, not reported.)

2 THE COURT: The letters are under seal, aren't they?

3 MS. LINDSAY-GUIMARAES: Oh, did -- was that already
4 done, the entire package?

5 THE CLERK: The letters that you sent?

6 MS. LINDSAY-GUIMARAES: Uh-huh.

7 THE CLERK: Yes.

8 THE COURT: Are they on the docket?

9 MS. LINDSAY-GUIMARAES: That's what I wasn't clear
10 about.

11 THE CLERK: She sent those letters -- was that in
12 that package? Those are not on the docket. It was just the
13 ones that I received through e-mail that were put on the
14 docket under seal.

15 MS. LINDSAY-GUIMARAES: Okay. Then, yes, I'm making
16 the motion with respect to the larger packet.

17 THE COURT: That's fine.

18 MS. LINDSAY-GUIMARAES: Okay. Thank you, Judge.

19 THE COURT: Is there anything else that we need to
20 address?

21 MS. HARPER: Not from the government.

22 MS. LINDSAY-GUIMARAES: And nothing from us.

23 MR. SMITH: Nothing, your Honor.

24 THE COURT: Thank you again. Good luck to you,
25 Mr. Brown.

1 MS. LINDSAY-GUIMARAES: Thank you, Judge.

2 (Which were all the proceedings heard.)

3 CERTIFICATE

4 I certify that the foregoing is a correct transcript from
5 the record of proceedings in the above-entitled matter.

6

7 */s/Charles R. Zandi*

May 3, 2016

8 Charles R. Zandi
9 Official Court Reporter

Date

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