No. 26-

IN THE

# Supreme Court of the United States

VICTORIA DAVIDSON,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

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

## PETITION FOR A WRIT OF CERTIORARI

JAMESA J. DRAKE
*Counsel of Record*
DRAKE LAW LLC
P.O. Box 56
Auburn, ME 04212
(207) 330-5105
jdrake@drakelawllc.com

394402

## QUESTION PRESENTED

Does creating a single fictitious document, which purports to grant authority to the defendant to act on behalf of a third party, qualify as especially complex so as to warrant application of the so-called "sophisticated means" sentencing enhancement under U.S.S.G. § 2B1.1(b)(10)(C)?

## PARTIES TO THE PROCEEDINGS

- Victoria Davidson, *Petitioner*
- United States of America, *Respondent*

## RELATED PROCEEDINGS

- *United States v. Davidson*, No. 24-0448-cr
  (2d Cir. April 6, 2026)

- *United States v. Guldi*, No. 23-6909-cr
  (2d Cir. June 27, 2025)

- *United States v. Davidson*, Crim. No. 19-cr-126
  (S.D.N.Y. Feb. 20, 2024)

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Victoria Davidson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

## OPINIONS BELOW

The relevant order of the district court appears in the transcript excerpt at Pet. App. 17a. The opinion of the Second Circuit on co-defendant George Guldi's case is reported at *United States v. Guldi*, 141 F.4th 435 (2d Cir. 2025), and it appears at Pet. App. 5a. The Second Circuit's summary order in Davidson's appeal is reported at *United States v. Davidson*, 2026 U.S. App. LEXIS 9807, 2026 WL 925462 (2d Cir. Apr. 6, 2026), and it appears at Pet. App. 1a.

## JURISDICTION

The judgment of the Court of Appeals was entered on April 6, 2026. On May 6, 2026, Davidson timely filed a petition for rehearing or in the alternative, rehearing en banc. On June 15, 2026, the Second Circuit denied the petition for panel rehearing and rehearing en banc. This petition is timely filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## SENTENCING GUIDELINE INVOLVED

The so-called "sophisticated means" sentencing enhancement provides for a two-level enhancement when:

> [T]he offense…involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means.

U.S. SENT'G GUIDELINES MANUAL § 2B1.1(b)(10)(C) (U.S. SENT'G COMM'N 2021).

## STATEMENT OF THE CASE

### I. Proceedings in the district court

Davidson's co-defendant George Guldi believed that roughly $250,000 of his own money was erroneously transferred to the sub-servicer of one of his mortgages, Ditech Financial LLC ("Ditech"). Pet. App. 6a. Guldi never sent Ditech any money, but he believed it was his own money nonetheless.[1] *Id.* Ditech refused to credit the payment towards Guldi's mortgage account, and it invited Guldi to call for more information. *Id.* Guldi was incarcerated. *Id.* He called Davidson,

[1] Guldi believed that the money was sent to Ditech by a state prosecutor acting in bad faith. Pet. App. 6a. In actuality, the money was sent to Ditech as part of a legal settlement; Guldi was not a party to that legal proceeding. *Id.*

informed her of the situation, and told her: "This is information I'm giving you to use as you will." *Id.*

Davidson called Ditech repeatedly and requested that it send the money to her. *Id.* In response, Ditech asked for proof that Davidson was Guldi's authorized agent, so Davidson faxed a one-page forged letter to Ditech purporting to be from Guldi which said:

> I hereby give my agent, Ms. Victoria Davidson, full authority to manage the return of this payment made in error.... I authorize you to wire the full amount of $253,236.00 to her attention[.]

*Id.*, A—256.[2] The letter provided routing and account numbers corresponding to Davidson's personal bank account. *Id.* The signature block contained a misspelling of Guldi's last name. A—256.

On various occasions, Davidson also falsely told Ditech that she was an officer of one of Guldi's companies, and that she was an attorney. Pet. App. 7a. And Davidson threatened to take "legal action," because she believed Ditech was too slow in returning the money. *Id.*

The Ditech customer services representatives with whom Davidson spoke were also confused about the source of the money. When they

[2] The "A" citations refer to the Appendix on file in the Second Circuilt.

asked Davidson about that, Davidson falsely said that Guldi sent the money to Ditech in error. *Id.* at 6a-7a.

Eventually, Ditech wired the money to Davidson, and she immediately started to spend it. *Id.* at 7a. When only about $70,000 of the money remained, Davidson began converting it to bank checks and cash to avoid "additional reporting." *Id.*

For her transgressions, Davidson was convicted of conspiracy to commit wire fraud and bank fraud, 18 U.S.C. § 1349; wire fraud, 18 U.S.C. § 1343; and bank fraud, 18 U.S.C. § 1344. Pet. App. 1a.

At sentencing, over Davidson's objection, the district court imposed the "sophisticated means" guidelines sentencing enhancement, with the understanding that it was also relevant to the section 3553(a) factors. *Id.* at 3a, 20a. The district court reasoned:

> I find there are sophisticated means. Ms. Davidson had to put herself in position of having standing with the bank [*sic*: Ditech]. She did that by creating a letter which purported to give that standing.
>
> Now, an agent can't arrogate to herself the right to be an agent. It needs the signature of the principal. And Ms. Davidson understood that, and forged the name of George Guldi, the principal. And that gave her standing to present herself to the bank [*sic*: Ditech], the [complainant], and only to get the funds after making 19 persistent telephone calls.

> The whole of that, I think is sophisticated. Whether it's sophisticated or not, it shows a great deal of culpability. I find that an additional upward adjustment of two points is appropriate.

*Id.* at 20a-21a. The court then imposed a below-guidelines carceral term, which Davidson has now served. *Id.* at 1a. Davidson remains on supervised release.

## II. Proceedings in the Second Circuit

### A. The splintered *Guldi* decision

Guldi was likewise convicted of conspiracy to commit wire fraud and bank fraud, wire fraud, and bank fraud, and the district court applied the sophisticated means sentencing enhancement to his guidelines calculation. Pet. App. 7a, 12a. A panel majority found the application of the sophisticated means enhancement to be in error as to Guldi, and it remanded his case for resentencing. *Id.* at 12a, 15a.

Relying heavily on the application note to U.S.S.G. § 2B1.1(b)(10)(C), the majority observed that "sophisticated means" is defined as "especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense." *Id.* at 13a. The majority further reasoned that the examples of "sophisticated means" provided in the application note, *i.e.* "in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction" or "hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts," were "illustrative, not exclusive." *Id.*

Turning to the facts, the majority explained that Guldi "employed two tactics to conceal his fraud: (1) using cashier's checks to move funds out of the account to which Ditech sent the wire, and (2) avoiding transactions of $10,000 or more to avoid triggering bank reporting requirements." *Id.* at 14a. The majority concluded that "there is nothing sophisticated about moving money out of one's bank account soon after receiving a fraudulently induced transfer." *Id.* Likewise, "structuring transactions to avoid the $10,000 reporting threshold also does not require any particular sophistication" because that reporting requirement "has been common knowledge for more than fifty years." *Id.* Finally, the majority observed that it "has never, in a published or unpublished decision, applied the enhancement to a scheme this simple." *Id.* The majority noted, "[a]s far as we can tell, no court has ever watered down the 'sophisticated means' enhancement to the degree that would be required to apply it to Guldi." *Id.* at 15a.

Dissenting, Judge Park said that the majority cited "no case in which a court has said that conduct like Guldi's does not warrant the enhancement. Indeed, our sister circuits have held that using cashier's checks to obscure the movement of funds constitutes sophisticated means." *Id.* at 16a (collecting cases). Judge Park reasoned that the sophisticated-means enhancement does not warrant "inside information" or "special technology" and that it does not matter whether a defendant's conduct was "common knowledge" or "required particular skill." *Id.* The salient issue was "whether the scheme in its totality was especially complex." *Id.* According to Judge Park, Guldi's scheme met that definition because what Guldi did was no more complex than the examples provided in the application note. *Id.* Judge Park believed greater deference was due to the district court's "reasonable," "fact-intensive inquiry." *Id.*

### B. The summary order in *Davidson*

*Guldi* was decided before the government filed its brief in Davidson's case. Despite the splintered *Guldi* decision, the government made only a superficial argument that the enhancement properly applied to Davidson. In a footnote, it largely attempted to sidestep the issue:

> The Government notes that Davidson engaged in at least some sophisticated conduct – such as forging an authorization note and sending it to Ditech – that Guldi did not, and the Court did not consider such conduct in deciding Guldi's appeal. Here, however, the Court need not address whether the District Court erred in applying the enhancement to Davidson because the purported error was harmless in any event.

Gov't Br. 55, n. 5. The entirety of the government's argument was that Davidson's complaint about the sophisticated means enhancement was either harmless or moot because she had served the carceral term of her sentence – arguments that the Second Circuit rejected *sub silencio* by deciding the issue on the merits.

The Second Circuit reasoned as to Davidson:

> The sophisticated means enhancement was appropriate here, notwithstanding our decision in *Guldi*, 141 F.4th at 452. As the district court noted in finding sophisticated means, Davidson had to put herself in position of having standing with the bank [*sic*: Ditech] and did so through forgery that reflected an understanding that "an agent can't arrogate to herself the right to be an agent" but "needs the signature of the principal." App'x at 111-12. The district court thus did not err in applying the sophisticated means enhancement here, having distinguished Davidson's conduct from Guldi's "garden-variety fraud." *Guldi*, 141 F.4th at 452.

Pet. Appx. 4.

## REASONS FOR GRANTING THE WRIT

### I. The summary order in *Davidson* creates a division among the federal appellate courts over the proper interpretation and application of the "sophisticated means" sentencing enhancement.

Assuming that especially sophisticated efforts necessitate heavier sentences to promote deterrence, the guidelines' interest in deterrence must be balanced against the equally important goal of proportionality. *United States v. Booker*, 543 U.S. 220, 264 (2005) (citing U.S. SENT'G GUIDELINES MANUAL § 1A1.1, cmt. n.3 (U.S. SENT'G COMM'N 2003)). Proportionality concerns factored prominently in panel majority's reasoning in *Guldi*. *See* Pet. App. 15a ("As far as we can tell, no court has ever watered down the 'sophisticated means' enhancement to the degree that it would be required to apply it to Guldi.").

Treating Davidson's rudimentary behavior as especially intricate or complex likewise erroneously dilutes the guideline's purpose, and the Second Circuit's reasoning is at odds with other federal courts that have considered the proper meaning and interpretation of the sophisticated means enhancement.

The *Davidson* summary order alluded only to Davidson's single forged document as justifying application of the enhancement.

Everything else she did, *i.e.* the persistent phone calls, lying about the source of the money, etc. is simply offense conduct and apiece with the forged document. The totality of all that Davidson did is far south of what other federal appellate courts have determined to be especially complex. And here, it is important to bear in mind that unlike the mine-run of cases involving complexity in the fraud *and* the concealment, the majority panel in *Guldi* already concluded that there was no concealment here. The focus is on the fraud's execution, only.

To begin with, the summary order in Davidson marks a departure from Second Circuit precedent. In *United States v. Fofanah*, 765 F.3d 141, 146 (2d Cir. 2014), this Court explained that "the creation and use of false documents, and other tactics to conceal offense conduct, are indicia of the sophistication of an offense." In that case, the defendant, *inter alia*, used fraudulent titles and fraudulent dock receipts to facilitate the shipment of cars from the United States to Africa. *Id.* at 146. This Court agreed that the defendant's scheme was sophisticated because the offense conduct was repetitive (it involved 17 stolen cars); it involved coordination (loading the vehicles into containers and driving them to a port); and it involved moving contraband across jurisdictions (from the

United States to Guinea rather than Senegal "because in Senegal one needs to present real titles."). *Id.* at 146-47.

Similarly, in *United States v. Stitsky*, 536 F. App'x 98, 112 (2d Cir. 2013), the scheme was sophisticated because it involved, *inter alia*, creating and disseminating marketing publications and "call scripts" containing material misrepresentations, and the creation of other fictitious documents, to defraud investors.

Other decisions from the Second Circuit affirm application of the enhancement where the defendant created multiple false documents, and those documents were themselves inordinately complex. *See United States v. Amico*, 416 F.3d 163, 169-70 (2d Cir. 2005) (The mortgage fraud scheme included "the creation of false bank documents; the solicitation and creation of false appraisals; and the creation and submission of false blueprints); *United States v. Elia*, 392 F. App'x 883, 886 (2d Cir. 2010) ("the creation of phony loan documents"); *United States v. Valente*, 688 F. App'x 76, 80 (2d Cir. 2017) (summary order) ("fabrication of sophisticated documents relating to the status of the funds he took from his victims"); *United States v. Valente*, 915 F.3d 916, 920 (2d Cir. 2019) ("monthly performance statements that falsely reported gains in various accounts" and "false financial statements to make it appear as if [the company] was holding investors' retirement accounts as legitimate IRA accounts")).

Likewise, other federal appellate courts have approved of the enhancement in cases involving more than a single false document. *See United States v. Snow*, 663 F.3d 1156, 1164 (10th Cir. 2011) (commenting that the defendant did more than "conceal merely a single fraudulent transaction using false documentation"); *United States v. Kennedy*, 714 F.3d 951 (6th Cir. 2013) (the defendant was directly involved in "preparing various sham legal documents")).

The sophisticated means enhancement does not apply to *every* fraudulent effort, and plainly, not all efforts are *especially* complex or intricate. Following Ditech's guidance and creating a single forged document, and then signing (but misspelling) Guldi's name, does not fit that bill. Application of the enhancement not only impacts Davidson, who could benefit from a shortened term of supervised release if the enhancement were removed from the section 3553(a) calculus in her case, but it threatens to impact other defendants in other cases.

*Davidson* signals to the district courts that there is, essentially, no floor to the enhancement's application because even a single, rudimentary, forged document counts as *especially* complex. *Davidson* contravenes the guardrails the Sentencing Commission placed on the enhancement's application.

And in so doing, *Davidson* stands in sharp contrast to recent decisions from the Fourth Circuit, which grappled with whether to consult the sophisticated-means application note at all post-*Kisor*, and a divided panel of the D.C. Circuit, which thoroughly examined other courts' application of the enhancement to further the guidelines' interest in proportionality. *United States v. Sanders*, 146 F.4th 372 (4th Cir. 2025) (discussing *Kisor v. Wilkie*, 588 U.S. 558 (2019)); *United States v. Milligan*, 77 F.4th 1008 (D.C. Cir. 2023). Such considerations are omitted from the *Davidson* decision.

## II. ***Davidson*** is also at odds with the Guidelines' commentary and application note.

The relevant guideline directs sentencing courts to increase the offense level by two points if "the offense otherwise involved sophisticated means." U.S.S.G. § 2B1.1(b)(10)(C). Commentary and an application note provide guidance as to the meaning of "sophisticated means," and this guidance was integral to the outcome in *Guldi*. *See* Pet. App. 13a.

The Second Circuit seems to have broadly held that it may defer to guidelines commentary without contravening either *Stinson v. United States,* 508 U.S. 36 (1993) or *Kisor*. *United States v. Kukoyi*, 126 F.4th 806 (2d Cir. 2005).

It is an open question whether courts may defer to the sophisticated-means guidelines commentary either for the reasons set out in *Kukoyi*, or for the reasons set out in the Fourth Circuit's *Sanders* decision, which work through the *Kisor* analysis before deferring to the sophisticated means guideline commentary. *Sanders*, 146 F.4th at 379-81. Whether, in fact, the commentary is due judicial deference is also cause enough to grant certiorari.

*First*, the commentary says that "'sophisticated means' means *especially* complex or *especially* intricate offense conduct pertaining to the execution or concealment of an offense." U.S.S.G. § 2B1.1 cmt. n.9(B) (emphasis added). "Concealment of an offense" is not at issue in Davidson's case and cannot provided a basis for imposing the enhancement, for two reasons. *One*, although this was the point that divided the panel, the majority decided in *Guldi* that the cashier's checks and the structuring behavior did not amount to sophisticated means, and that holding applies to Davidson, too. Pet App. 14a-15a. *Two*, aside from that, no efforts at concealment were ever made: there was no use of pseudonyms, no fake bank accounts, nothing. The fraud was committed in the wide-open.

*Second*, the only remaining question is whether the "execution" of the fraud was "especially" complex or "especially" intricate. *See e.g. Milligan*, 77 F.4th at 1019 (Millett, J., dissenting) ("[B]y employing the adverb "especially" – by employing it twice over – the Commission emphasized that 'sophisticated means' reaches only those measures that go beyond the run-of-the-mill fraudulent or deceptive actions undertaken by an ordinary hustler."); *but see* Pet. App. 16a (Park, J., dissenting) (Agreeing that "[t]he question is…whether the scheme in its totality was especially complex," but adding, "[w]e have never required a defendant's actions to be beyond the capability of an ordinary person or based on particular skill, knowledge, planning, or coordination.") (cleaned up).

The panel majority said that what Davidson did satisfied that standard because: "Davidson had to put herself in a position of having standing with the bank [*sic*: Ditech] and did so through forgery that reflected an understanding that an agent can't arrogate to herself the right to be an agent but needs the signature of the principal." Pet. App. 4a. But respectfully, there is nothing *especially* complex about *that*.

Davidson called Ditech to inquire about the money. A Ditech customer service agent told Davidson at the outset: "I can't give out any information because you *are not authorized* on [Guldi's] account." (App—142). Davidson echoed that back: "Mr. Guldi…*has authorized me as his agent* to handle this…." (App—142). Davidson asked, "what do you need from me?" and the Ditech customer service representative hold her that it needed a letter, giving Davidson "agency," with Guldi's signature:

> [Ditech]: There would have to be a letter written with the borrower stating that he gives you all account details on this account with the account number and then –
>
> [Davidson]: Okay.
>
> [Ditech]: Um, with his signature. And then you would have to fax or send it in.
>
> [Davidson]: Okay, that's no problem. Does it have to be notarized?
>
> [Ditech]: No.
>
> [Davidson]: Okay, so a letter from the borrower citing the account number, giving me agency to, um, to manage this.
>
> [Ditech]: All account details.

[Davidson]: All account details, um.

[Ditech]: With his signature and a date that he signs it.

(App—143). Remarkably, the call then continues at length with the Ditech representative ostensibly dictating the contents of the letter. (App-144; Ditech representative: "All he has to state is that he gives you all account details. He doesn't have to go into details.").

Obviously, Ditech is not to blame for the poor decision that Davidson made next. But the letter itself was Ditech's idea, not Davidson's, and Davidson did not engage in a complex or intricate fraud – certainly not one *especially* so – by drafting the very letter that Ditech told her was necessary to dislodge the funds. Characterizing what Davidson did as "arrogat[ing] to herself the right to be an agent," and then calling that sophisticated or especially complex, is, respectfully wrong. Pet. App. 4a. Reframing this Court's logic only slightly: doesn't every schoolkid know that he or she needs to forge a parent's signature on a permission slip? Davidson was persistent in her efforts to confirm that Ditech received the forged letter, and in frustration, she claimed to be an attorney and made a one-time threat to sue, but neither the *Davidson* panel nor the district court found that notable because obviously, there's nothing especially complex about blurting out the threat of a lawsuit (on unspecified grounds) in a moment of irritation.

Davidson's conduct was the anthesis of sophistication, and nowhere near *especially* complex or intricate. To borrow Judge Millett's language in *Milligan*, "it is hard to think of what less" Davidson could have done to execute her fraud here. *Milligan*, 77 F.4th at 1022 (Millett, J., dissenting).

## CONCLUSION

Davidson respectfully urges this Court to grant certiorari. Alternatively, Davidson asks this Court to hold her Petition pending the outcome of another case raising the issue of whether after *Kisor*, courts should defer to U.S. Sentencing Guidelines commentary. *See Lawrence v. Chater*, 516 U.S. 163, 181 (1996) (Scalia, J., dissenting) ("We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided.") (cleaned up).

Respectfully submitted,

/s/ Jamesa J. Drake

Jamesa J. Drake
*Counsel of Record*
Drake Law LLC
P.O. Box 56
Auburn, ME 04212
(207) 330-5105
jdrake@drakelawllc.com

# APPENDIX

## Table of Appendices

# United States v. Davidson

United States Court of Appeals for the Second Circuit

April 6, 2026, Decided

24-448

**Reporter**

2026 U.S. App. LEXIS 9807 *; 2026 LX 141694; 2026 WL 925462

UNITED STATES OF AMERICA, Appellee, v. VICTORIA DAVIDSON, Defendant-Appellant.*

**Notice:** PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

**Prior History:** [*1] Appeal from a judgment of the United States District Court for the Southern District of New York. (Hellerstein, J.).

United States v. Guldi, 2021 U.S. Dist. LEXIS 118949, 2021 WL 2531092 (June 21, 2021)

**Counsel:** For Appellee: JONATHAN LEAVITT BODANSKY (Madison Reddick Smyser, Daniel C. Richenthal, James Ligtenberg, on the brief), Assistant United States Attorneys, for Jay Clayton, United States Attorney for the Southern District of New York, New York, NY.

For Defendant-Appellant: JAMESA J. DRAKE, Drake Law, LLC, Auburn, ME.

**Judges:** Present: DEBRA ANN LIVINGSTON, Chief Judge, BARRINGTON D. PARKER, MYRNA PÉREZ, Circuit Judges..

## Opinion

**SUMMARY ORDER**

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of the district court is **AFFIRMED**.

Defendant-Appellant Victoria Davidson ("Davidson") appeals from the judgment of the United States District Court for the Southern District of New York (Hellerstein, *J.*), entered on February 20, 2024 and convicting her, following a jury trial, of one count of conspiracy to commit wire fraud and bank fraud, in violation of 18 U.S.C. § 1349; one count of wire fraud, in violation of 18 U.S.C. § 1343; and one count of bank fraud, in violation of 18 U.S.C. § 1344. Davidson conspired with co-defendant George Guldi ("Guldi") to misappropriate $253,236 that Guldi's mortgage sub-servicer had [*2] received as a settlement payment from JPMorgan Chase Bank, N.A. The district court sentenced Davidson principally to nine months in prison and to three years of supervised release, a sentence significantly below the applicable Sentencing Guidelines range. On appeal, Davidson argues that the district court erred in instructing the jury about Guldi's criminal history, in denying her motions to sever her trial from Guldi's, and in applying a two-level Sentencing Guidelines enhancement for sophisticated means. We affirm because Davidson forfeited or waived her arguments about the jury instructions and because the district court did not err in denying the motions to sever or in applying the Guidelines enhancement. We assume familiarity with the remaining facts, procedural history, and issues on appeal.[1]

### I. Jury Instructions

We review *de novo* any preserved objections to jury instructions, reversing only where there was prejudicial error when "viewing the charge as a whole." *United States v. Guldi*, 141 F.4th 435, 446 (2025) (citation omitted). We review for plain error any complaints about instructions where a defendant does not "inform the court of the specific objection and the grounds for the

* The Clerk of Court is respectfully directed to amend the official case caption.

1 Throughout its brief, the Government cites to various trial exhibits that are included in the appendix. This is impermissible. FED. R. APP. P. 28(e) ("References to the parts of the record contained in the appendix filed with the appellant's brief must be to the pages of the appendix.").

objection before the jury retires to deliberate." [*3] *Id.* (quoting FED. R. CRIM. P. 30(d)).

Before the jury began deliberations, the district court delivered a lengthy charge in which it addressed how the jury could consider evidence of Guldi's prior convictions:

> You heard in the case that Guldi was in jail for a crime. . . .
>
> Evidence of a similar act in the past which is not charged in the indictment, is not proof, not a substitute for proof that the defendant committed the crimes charged in the indictment, nor may you consider the evidence as proof of a bad character.
>
> The evidence that was given to you was given for contextual purposes, to help you understand what was going on here and to give you an explanation. You can take it also as evidence of motive, opportunity, intent, knowledge, plan, absence of mistake, so on, but not generally of character, and not because he did something at one time, he's likely to do it again. Those are not permissible. Mr. Guldi has the same presumption of innocence as to the charges here as any other defendant. And what was admitted against Mr. Guldi in terms of the prior conviction does not count at all against defendant Davidson. She's not in jail. She's not responsible for what he did before, at least there is no allegation [*4] of that. . . .
>
> As to defendant Davidson, however, there is one other aspect of it. She was asked to do things or did things for George Guldi. If she knew about Guldi's convictions, and she did because he was in jail, that may be considered by you as relevant in terms of her state of mind. So if she's asked to do different things, you have to examine what she knew and what she believed and what she did.

App'x at 82-83.

Davidson takes issue with (1) the use of "so on" in referring to permissible uses for Guldi's prior convictions, (2) the comment that "at least there is no allegation" of Davidson's responsibility for Guldi's prior criminal conduct, and (3) the district court's statement concerning whether Davidson "knew about Guldi's convictions, and she did because he was in jail." Davidson Br. at 20-23. Each argument fails.

Davidson did not preserve her first two instructional objections because she did not raise "the specific objection . . . before the jury retire[d] to deliberate," as required by Federal Rule of Criminal Procedure 30(d). We therefore review these statements for plain error. *See Guldi*, 141 F.4th at 446. At the start, because Federal Rule of Evidence 404 prohibits the use of other act evidence "to prove a person's character in order to show that on a particular [*5] occasion the person acted in accordance with the character," while permitting it for other purposes, FED. R. EVID. 404(b), the reference to "so on" in a list of permissible purposes of the evidence of Guldi's prior bad acts in context of the overall instruction given was not error, let alone plain error. Moreover, the statement about permissible purposes was in a section of the instruction that dealt with Guldi, not Davidson. When transitioning to its discussion of Davidson, the district court limited the permissible purpose of the evidence to a single purpose, saying that "what was admitted against Mr. Guldi in terms of the prior conviction does not count at all against defendant Davidson," except "in terms of her state of mind." App'x at 83. This instruction was not erroneous.[2]

In terms of the district court's statement that Davidson was "not responsible for what [Guldi] did before, at least there is no allegation of that," Davidson agreed on the use of similar language in both a stipulation and a limiting instruction. *See id.* at 417 (stipulating that "[a]t no time was DAVIDSON alleged to have been involved in any way in the above-discussed conduct that resulted in GULDI's Suffolk County convictions"); [*6] Trial Tr. at 165, *United States v. Davidson*, No. 19-cr-126 (S.D.N.Y. Feb. 3, 2023), Dkt. No. 149 at 58 (limiting instruction that "Davidson is not alleged to have been involved in any of the conduct that resulted in Guldi's state convictions"). Viewing the charge as a whole, the

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[2] Indeed, the limiting instruction the district court proposed and delivered earlier in the trial followed the same model of a categorical bar with a subsequent carveout. *See* Trial Tr. at 165, *United States v. Davidson*, No. 19-cr-126 (S.D.N.Y. Feb. 3, 2023), Dkt. No. 149 at 58 ("Davidson is not alleged to have been involved in any of the conduct that resulted in Guldi's state convictions, and those convictions are not to be considered in the case against Davidson. One element, however, of the case against Victoria Davidson is the state of her knowledge when asked to do things or while doing things for George Guldi. If Davidson knew about Guldi's convictions, that may be considered by you as relevant in the government's case against her."); Letter at 2, *id.*, Dkt. No. 134 (pre-trial letter from Davidson saying that the district court "should deliver" the proposed instruction). Viewing the charge as a whole, it was substantively both accurate and consistent, the use of "so on" notwithstanding.

additional words "at least" in the final instructions did not affect her "substantial rights" or "the outcome of the district court proceedings," which is what Davidson must show for plain error. *United States v. Marcus*, 560 U.S. 258, 262, 130 S. Ct. 2159, 176 L. Ed. 2d 1012 (2010) (citation omitted).

Finally, even assuming the district court erred in stating that Davidson knew about Guldi's convictions, this was one of the "less egregious cases" where "the failure to request specific instructions before the jury retires . . . limit[s] the defense's ability to complain about the relative lack of curative measures for the first time on appeal." *United States v. Deandrade*, 600 F.3d 115, 119 (2d Cir. 2010) (citation omitted). After the district court deviated from the language it had previously used in a limiting instruction, Davidson objected but ultimately declined the district court's invitation to propose changes. Instead, she only "ask[ed] . . . that if the jury asks for further instruction on this issue, that the Court read the instruction that it previously gave in court during the trial." App'x at 104. In any [*7] event, any error was harmless given the overwhelming evidence that Davidson knew about Guldi's convictions. *See id.* at 258 (operator telling Davidson that Guldi was "[a]n inmate at Marcy, a New York State correctional facility"); *id.* at 308 (Davidson telling Guldi "I want to get you a lawyer to help get your parole"); *id.* at 327 (Guldi telling Davidson "I'm in prison").

**II. Severance**

Davidson's second argument is that the district court abused its discretion in denying her repeated motions to sever. We review for abuse of discretion the denial of a motion to sever, reversing "only where the defendant demonstrates prejudice so severe as to amount to a denial of a constitutionally fair trial or a miscarriage of justice." *United States v. Wynder*, 147 F.4th 200, 211 (2d Cir. 2025) (citation modified). That high bar is why we have said severance decisions are "virtually unreviewable." *See United States v. Yousef*, 327 F.3d 56, 150 (2d Cir. 2003) (citation omitted).

The district court did not abuse its discretion in denying the motions to sever. Davidson has not identified evidence that would have been inadmissible in a solo trial sufficient to "demonstrate[] prejudice so severe as to amount to a denial of a constitutionally fair trial or a miscarriage of justice." *Wynder*, 147 F.4th at 211 (citation modified). She argues that the jury in a separate trial would [*8] not have learned about Guldi's prior convictions. But even assuming *arguendo* that Davidson is correct, evidence about Guldi presented little risk of prejudicing Davidson, particularly given that the conduct was not particularly inflammatory or salacious. *See United States v. Mercado*, 573 F.3d 138, 142 (2d Cir. 2009) ("[I]t does not appear that prejudice here was likely to be great. Gun transactions are not especially worse or shocking than the transactions charged. And the District court gave several careful instructions to the jury regarding what inferences it could draw from the admitted evidence.").

And, even assuming *arguendo* that Davidson faced a risk of spillover prejudice given that Guldi's criminal history involved fraud and a mortgage, "less drastic measures, such as limiting instructions, . . . suffice[d] to cure any risk of prejudice" here. *Zafiro v. United States*, 506 U.S. 534, 539, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993). In *Wynder*, we held that "[t]he district court . . . mitigated any potential prejudice by instructing the jury to consider each defendant's involvement in each count separately and reach a verdict based solely upon the evidence about each defendant." 147 F.4th at 211 (citation modified). Judge Hellerstein instructed the jury similarly, informing the jury in his charge that it "ha[d] to be convinced beyond a reasonable [*9] doubt unanimously as to each defendant's guilt on each of the charges" and that, in evaluating whether there was the requisite unlawful purpose element of the conspiracy count, "[the jury] must find separately with respect to each defendant." App'x at 41, 58. That is more than enough to limit the relatively low risk of prejudice.[3]

**III. Sentencing Enhancement**

Finally, Davidson argues that resentencing is required given the district court's application of a "sophisticated means" sentencing enhancement for Davidson's use of a forged letter showing her authority to act on Guldi's behalf. *See* U.S. SENT'G GUIDELINES MANUAL § 2B1.1(b)(10)(C) (U.S. SENT'G COMM'N 2021) (providing for a two-level enhancement when "the offense . . . involved sophisticated means and the defendant intentionally engaged in or caused the conduct

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[3] We also reject Davidson's argument that there is cumulative instructional and severance error. *See In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 93, 147 (2d Cir. 2008) ("The cumulative error doctrine comes into play only where the total effect of the [actual] errors found casts such a serious doubt on the fairness of the trial that the convictions must be reversed." (citation modified)).

constituting sophisticated means"). We review "factual determinations underlying a district court's Guidelines calculations . . . for clear error" and "a district court's application of the Guidelines . . . *de novo*." *United States v. Conca*, 635 F.3d 55, 62 (2d Cir. 2011) (citation omitted).

The sophisticated means enhancement was appropriate here, notwithstanding our decision regarding Guldi. *See Guldi*, 141 F.4th at 452. As the district court noted in finding sophisticated means, Davidson "had [*10] to put herself in position of having standing with the bank" and did so through forgery that reflected an understanding that "an agent can't arrogate to herself the right to be an agent" but "needs the signature of the principal." App'x at 111-12. The district court thus did not err in applying the sophisticated means enhancement here, having distinguished Davidson's conduct from Guldi's "garden-variety fraud." *Guldi*, 141 F.4th at 452.

* * *

We have considered Davidson's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

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# United States v. Guldi

United States Court of Appeals for the Second Circuit

November 1, 2024, Argued; June 27, 2025, Decided

No. 23-6909-cr

**Reporter**

141 F.4th 435 *; 2025 U.S. App. LEXIS 15898 **; 2025 LX 226698; 2025 WL 1774801

UNITED STATES OF AMERICA, Appellee, v. GEORGE GULDI, Defendant-Appellant.*

**Prior History:** [**1] Appeal from the United States District Court for the Southern District of New York. No. 19-cr-126. Alvin K. Hellerstein, Judge.

Defendant-Appellant George Guldi worked with his former girlfriend Victoria Davidson to persuade a mortgage servicer to wire her $253,236 that did not belong to either of them. A jury convicted Guldi of wire fraud, bank fraud, and conspiracy to commit wire fraud and bank fraud. He was sentenced to 36 months of imprisonment followed by three years of supervised release.

We affirm Guldi's convictions in most respects. First, when viewed in the light most favorable to the government, sufficient evidence supports the jury's findings on the existence of a conspiracy, fraudulent intent, and aiding and abetting. Second, the district court committed no reversible error in its jury instructions on conspiracy, wire fraud, and fraudulent intent. Third, the district court properly considered Guldi's medical needs during sentencing.

However, we conclude that Guldi's conduct did not warrant a two-offenselevel enhancement under the U.S. Sentencing Guidelines for using "sophisticated means" to commit or conceal the offense. The district court committed procedural error by applying [**2] that enhancement, and because we cannot say that error was harmless, Guldi's sentence is procedurally unreasonable.

Therefore, we AFFIRM the judgment of conviction except as to Guldi's sentence, which we VACATE and REMAND for resentencing consistent with this opinion.

United States v. Guldi, 2023 U.S. Dist. LEXIS 26787 (Feb. 16, 2023)

United States v. Guldi, 2021 U.S. Dist. LEXIS 118949, 2021 WL 2531092 (June 21, 2021)

**Counsel:** DANIEL C. RICHENTHAL (Jonathan L. Bodansky, Madison Reddick Smyser, Karl Metzner, on the brief), Assistant United States Attorneys, for DAMIAN WILLIAMS, United States Attorney for the Southern District of New York, New York, NY, for Appellee.

ALLEGRA GLASHAUSSER, Of Counsel, Federal Defenders of New York, Inc., New York, NY, for Defendant-Appellant.

**Judges:** Before: PARK, ROBINSON, and PÉREZ, Circuit Judges. Judge Park concurs in part and dissents in part in a separate opinion.

**Opinion by:** MYRNA PÉREZ

## Opinion

[*441] MYRNA PÉREZ, *Circuit Judge*:

Defendant-Appellant George Guldi worked with his former girlfriend Victoria Davidson to persuade a mortgage servicer to wire her $253,236 that did not belong to either of them. A jury convicted Guldi of wire fraud, bank fraud, and conspiracy to commit wire fraud and bank fraud. He was sentenced to 36 months of imprisonment followed by three years of supervised release.

We affirm Guldi's convictions in most respects. First, [**3] when viewed in the light most favorable to the government, sufficient evidence supports the jury's findings on the existence of a conspiracy, fraudulent intent, and aiding and abetting. Second, the district court committed no reversible error in its jury instructions on conspiracy, wire fraud, and fraudulent intent. Third, the

* The Clerk of Court is respectfully directed to amend the official caption as set forth above.

district court properly considered Guldi's medical needs during sentencing.

However, we conclude that Guldi's conduct did not warrant a two-offenselevel enhancement under the U.S. Sentencing Guidelines for using "sophisticated means" to commit or conceal the offense. The district court committed procedural error by applying that enhancement, and because we cannot say that error was harmless, Guldi's sentence is procedurally unreasonable.

## I. BACKGROUND

### A. Factual Background

George Guldi is a former Suffolk County legislator and a disbarred real estate attorney. In 2017, he and his former girlfriend, Victoria Davidson, deceived mortgage servicer Ditech Financial LLC ("Ditech") into wiring them $253,236. But the origins of this fraud trace back to 2008.

1. *The 2008 House Fire and Guldi's Prior Convictions*

In November 2008, Guldi's home in Suffolk County, New York, burned [**4] down in a fire. Guldi's insurance company sent him a check for $863,473.30 made out to both Guldi and his mortgage servicer, Countrywide Home Loans ("Countrywide"). Guldi's insurance policy required him to use the money to rebuild the home or repay the outstanding mortgage. But Guldi did neither. Instead, he forged an endorsement from Countrywide and deposited the check into his bank account at JPMorgan Chase Bank, N.A. ("Chase").

In 2011, Guldi was convicted in Suffolk County Supreme Court of grand larceny and insurance fraud in connection with his misuse of the insurance check. After that conviction was reversed on appeal, he pled guilty to grand larceny in 2017. Also in 2011, Guldi was convicted in a separate case in Suffolk County Supreme Court for an unrelated mortgage-fraud scheme. In that case, he pled guilty to 23 counts of grand larceny in the first degree, 11 counts of grand larceny in the second degree, and one count of a scheme to defraud in the first degree. Guldi was sentenced to a term of incarceration and disbarred from the practice of law.

[*442] 2. *The 2014 Civil Lawsuit and $253,236 Settlement Check*

In 2014, Countrywide and its parent, Bank of America, sued Chase for improperly [**5] allowing Guldi to deposit the $863,473.30 insurance check. Ditech, a sub-servicer of the mortgage on Guldi's Suffolk County home, was also a party to the lawsuit. The parties settled in late 2016. As part of that settlement, Chase sent a check for $253,236 to Ditech.

Ditech mistakenly treated the check as a payment from Guldi toward his mortgage loan on the property, rather than a settlement check from Chase. Ditech informed Guldi by letter in March 2017—when Guldi was incarcerated at Marcy Correctional Facility in upstate New York—that although Ditech had received a payment of $253,236 toward his mortgage, it was not enough to pay off the amount Guldi owed. The letter provided a phone number at which Guldi could reach Ditech.

3. *The 2017 Fraud Scheme*

Guldi did not know about the 2016 settlement when he received Ditech's letter. But he knew that he had not made any payments to Ditech. He guessed that the district attorney had seized funds from his Chase account and sent the funds to Ditech. Shortly after receiving the letter, Guldi called Davidson.

On a recorded call from prison, Guldi arranged with Davidson for her to call Ditech on his behalf. Guldi promised to pay Davidson $25,000—about [**6] ten percent of the total—if she could "break it loose." App'x at 290. When Davidson asked Guldi how she should approach the call, Guldi answered: "You can do whatever you want. This is information I'm giving you to use as you will." *Id.* at 292. When Davidson floated the idea that she could tell Ditech that the money was sent by mistake, Guldi told her to "go with what works." *Id.*

The next day, Davidson called Ditech and requested the "return[]" of the $253,236. Supp. App'x at 2-4. But customer service representatives would not speak to her without Guldi's authorization. When Davidson informed Guldi that she needed an authorization letter from him, Guldi hesitated, telling her he was not prepared to provide one.

Davidson then forged an authorization letter from Guldi dated April 3, 2015, and sent it to Ditech. The letter purported to give Davidson "full authority to manage the return" of the funds and directed Ditech to wire the money to Davidson's personal bank account. Supp. App'x at 190. Upon receiving the letter, Ditech representatives began speaking with Davidson. She told Ditech that she and Guldi had sent the money by mistake, that the payment was in the wrong amount and had been [**7] intended for another recipient, that she and Guldi were working to resolve the full balance of the mortgage, that Davidson was an attorney prepared to take legal action, and that Davidson was an officer of Guldi's companies. Those statements were all false.

During this time, Guldi still did not know that Davidson had forged an authorization letter. In fact, on April 14, 2017, Guldi called Davidson and told her he no longer wanted her help in getting the money from Ditech. Davidson asked him to reconsider and to make her his representative. She proposed an in-person meeting to continue the conversation, and Guldi agreed.

On April 16, 2017, Davidson visited Guldi in prison. That meeting, unlike their phone calls, was not recorded. But in a recorded call the next day, Guldi offered to double Davidson's share of the Ditech money from ten percent to twenty, or $50,000. He also began instructing her to [*443] write bank checks and to pay down his various debts if she obtained the money.

Over the next several days, Davidson called Ditech several times. On April 20, 2017, Ditech wired $253,236 to Davidson's personal account at Wells Fargo, taking her balance from negative $115 to positive $253,121.

[**8] Davidson did not immediately tell Guldi that she had obtained the funds. Instead, she began to spend the money, making out checks to towns where Guldi owed property taxes and to her own student loan account. It was not until May 1, 2017—when Davidson's balance was down to $69,960.13—that she finally told Guldi that she had received the money.

When Davidson shared the "good news," Guldi responded, "we're gonna have some real fun with this." App'x at 350. Davidson shared that she was a "little nervous," and Guldi warned her, "[w]ires can be reversed" and "bounced out of your account." *Id.* He made a "strong suggestion" that Davidson "[r]oll virtually all of it down into bank checks, whether [she was] gonna use them or not, so it's not laying in" her account. *Id.* at 354. He also suggested that she "might want to reduce some of it to cash" but "never take ten at a time," "take nine, because there's additional reporting . . . on ten." *Id.* at 355. Guldi also instructed Davidson on how to spend the money, including paying his mortgages, child support, and tax obligations.

The next day, Davidson purchased a cashier's check made out to herself. When she needed money, she cashed the cashier's check, [**9] took what she needed, and used the remaining funds to purchase a new cashier's check. Over the next six weeks, Davidson paid Guldi's debts and child support obligations. She also took a trip to Italy and purchased horseback-riding equipment. By July 11, 2017, her bank account balance was negative again.

Just as Guldi and Davidson exhausted the ill-gotten funds, Ditech uncovered its mistake. Ditech realized that Guldi and Davidson had not actually sent the $253,236 by mistake. In August 2017, Ditech requested that Guldi and Davidson return the funds, which they did not do.

B. <u>Procedural History</u>

Guldi and Davidson went to trial on five counts. Count One charged them both with conspiracy to commit wire fraud and bank fraud, in violation of 18 U.S.C. § 1349. Counts Two and Three charged them each, respectively, with wire fraud, in violation of 18 U.S.C. §§ 1343 and 2. And Counts Four and Five charged them each, respectively, with bank fraud, in violation of 18 U.S.C. §§ 1344 and 2.

After a two-week trial from January 10 to 25, 2023, the jury convicted Guldi on each of the three counts with which he was charged. On August 1, 2023, the district court sentenced Guldi to a term of 36 months of imprisonment to be followed by three years of supervised [**10] release. The district court also imposed a mandatory special assessment of $300, ordered Guldi to forfeit $253,236, and ordered him to pay $358,556 in restitution.

## II. DISCUSSION

On appeal, Guldi argues that the jury's verdict was not supported by sufficient evidence, that the district court improperly instructed the jury, and that the district court erred in imposing a sentence of 36 months' imprisonment. We agree that Guldi's sentence is procedurally unreasonable only insofar as the district court erred in applying the two-offense-level enhancement under the U.S. Sentencing Guidelines for using "sophisticated means" in committing or concealing the offense, so we vacate Guldi's sentence and remand for [*444] resentencing. We affirm Guldi's conviction in all other respects.

A. <u>Sufficiency of the Evidence</u>

Guldi cannot meet the heavy burden required to challenge the sufficiency of the evidence that he reached an agreement with Davidson to commit fraud, had fraudulent intent, and aided or abetted Davidson in committing fraud. A rational trier of fact could have found Guldi guilty beyond a reasonable doubt.

1. *Legal Standards*

"We review de novo challenges to the sufficiency of the evidence." *United States v. Sabhnani*, 599 F.3d 215, 241 (2d Cir. 2010) (citing [**11] *United States v. Abdulle*, 564 F.3d 119, 125 (2d Cir. 2009)). In reviewing such a claim, "we view the evidence in the light most favorable to the government, drawing all inferences in the government's favor and deferring to the jury's assessments of the witnesses' credibility." *Id.* (quoting *United States v. Parkes*, 497 F.3d 220, 225 (2d Cir. 2007)). A jury verdict must be upheld if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) (emphasis in original). The standard of review is "exceedingly deferential," *United States v. Hassan*, 578 F.3d 108, 126 (2d Cir. 2008), and "[a] defendant challenging the sufficiency of the evidence bears a heavy burden," *United States v. Kozeny*, 667 F.3d 122, 139 (2d Cir. 2011). But the defendant's burden is not insurmountable, and our deference is not absolute. "If the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, then a reasonable jury must necessarily entertain a reasonable doubt." *United States v. Landesman*, 17 F.4th 298, 320 (2d Cir. 2021) (quoting *United States v. Hawkins*, 547 F.3d 66, 71 (2d Cir. 2008)).

Deference to the jury is "especially important" in the context of conspiracy convictions, as "a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel." *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003) (quoting *United States v. Pitre*, 960 F.2d 1112, 1121 (2d Cir. 1992)). "[A] defendant's knowledge [**12] of the conspiracy and his participation in it with criminal intent," for example, "may be established through circumstantial evidence." *United States v. Gordon*, 987 F.2d 902, 906-07 (2d Cir. 1993).

2. *Application*

There is sufficient evidence from which a rational jury could have found that Guldi entered into a conspiracy with Davidson. "A defendant's knowing and willing participation in a conspiracy may be inferred from, for example, [his] presence at critical stages of the conspiracy that could not be explained by happenstance," from "a lack of surprise when discussing the conspiracy with others," or from "evidence that the defendant participated in conversations directly related to the substance of the conspiracy . . . or received or expected to receive a share of the profits from the conspiracy." *United States v. Aleskerova*, 300 F.3d 286, 293 (2d Cir. 2002) (citations omitted).

Guldi and Davidson planned together to try to obtain the money from Ditech. Guldi first offered Davidson ten percent of the proceeds if she could "break [the funds] loose" by doing "whatever" she wanted. App'x at 290, 292. Even though Guldi at first did not provide the authorization letter, [*445] he later increased Davidson's share to twenty percent, after their in-person meeting on April 16, 2017. When Davidson proposed telling Ditech [**13] "this was a mistake, oops . . . we thought it would be enough to just kind of hold things over," Guldi did not object to Davidson lying to Ditech; his only objection was "that won't work," though it ultimately did. *Id.* at 295. And after Davidson obtained the money, Guldi was immediately prepared to have "some real fun." *Id.* at 350. He instructed her on how to spend the money, and they discussed how to prevent the fund transfer from being "reversed" and how to avoid "additional reporting" requirements. *Id.* at 350, 355.

Although Guldi initially hesitated to go along with Davidson's plan to acquire the money, and Davidson took certain steps without Guldi knowing—such as forging the authorization letter—that does not preclude a finding that they agreed to obtain the funds through fraud. "The government need not prove that he knew . . . all the details of [the conspiracy's] operation, so long as it proves that the coconspirators agreed on the essential nature of the plan." *United States v. Miranda-Ortiz*, 926 F.2d 172, 175-76 (2d Cir. 1991) (citations omitted). The evidence here, "viewed deferentially and in the aggregate," was sufficient to conclude that Guldi and Davidson agreed on the essence of the plan: lying to Ditech to obtain the funds. *United States v. Glenn*, 312 F.3d 58, 64 (2d Cir. 2002). Guldi's [**14] argument that there was insufficient evidence to prove that he conspired with Davidson thus fails.

Similarly, sufficient evidence supports the jury's finding that Guldi acted with fraudulent intent. Guldi argues that he lacked fraudulent intent, and did not agree with Davidson to break the law, because he believed the money was his—i.e., he merely intended to stop the District Attorney's office from taking his money. But even assuming Guldi genuinely believed he was entitled to the $253,236, there is sufficient evidence of fraudulent intent.

"[C]ourts have uniformly held that a claim-of-right is not a defense to mail fraud." *United States v. Gole*, 158 F.3d 166, 168 (2d Cir. 1998); *see also United States v. Ferguson*, 676 F.3d 260, 280 (2d Cir. 2011) (affirming jury instruction that "no amount of honest belief on the part of a defendant that the scheme will . . . not cause anyone harm[] will excuse fraudulent actions or false representations by him or her" (alteration adopted)). Here, Guldi knew that Davidson had planned to and ultimately had lied to Ditech to induce the fund transfer. For example, when Davidson suggested to Guldi that she would simply lie to Ditech and say they sent the money by mistake, Guldi told her he thought that would not work, and she was "gonna have to take a harder line [**15] with them," but he ultimately told her she could "go with what works." App'x at 292. Then, when Davidson confirmed to Guldi that she had told Ditech the money was "sent in error" and "the full amount [would] follow," Guldi expressed no surprise or hesitation. *Id.* at 303. Even if Guldi believed that the money rightfully belonged to him, he knew Ditech only gave it back to him because they believed a lie, and "a fraud is complete when the defendant has induced the deprivation of money or property under materially false pretenses." *Kousisis v. United States*, 605 U.S. 114, 145 S. Ct. 1382, 1394 n.5, 221 L. Ed. 2d 781 (2025); *see id.* (noting that "an 'injury' has occurred" that can support a fraud conviction "when a fraudster 'obtains from an owner . . . property which he would not otherwise have parted with upon the terms which he [*446] is thus induced to accept'" (alteration adopted)).[2]

Thus, viewing the evidence in the light most favorable to the government and drawing all inferences in its favor, sufficient evidence underpins the jury's findings here. While the evidence that Guldi participated in the conspiracy with fraudulent intent is mostly circumstantial, that evidence weighs far more heavily on the side of guilt than innocence, and therefore it is sufficient to sustain Guldi's conviction. [**16] *Cf. Landesman*, 17 F.4th at 320.

B. Jury Instructions

The district court also did not commit any error that requires vacatur in instructing the jury. Guldi's challenges to the district court's conspiracy and substantive wire fraud instructions are unpreserved, and Guldi has not identified any plain error in those instructions. Guldi's arguments about the district court's intent instruction were preserved, but his arguments are legally erroneous.

1. *Legal Standards*

"We review challenges to jury instructions *de novo* . . . ." *United States v. Calk*, 87 F.4th 164, 177 (2d Cir. 2023), *cert. denied*, 145 S. Ct. 144, 220 L. Ed. 2d 15 (2024). A jury instruction is "erroneous 'if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law.'" *United States v. Silver*, 864 F.3d 102, 118 (2d Cir. 2017) (quoting *United States v. Finazzo*, 850 F.3d 94, 105 (2d Cir. 2017), *abrogated on other grounds by, Ciminelli v. United States*, 598 U.S. 306, 143 S. Ct. 1121, 215 L. Ed. 2d 294 (2023)). "In reviewing a jury instruction, we examine not only the specific language that the defendant challenges but also the instructions as a whole to see if the entire charge delivered a correct interpretation of the law." *United States v. Raniere*, 55 F.4th 354, 362 (2d Cir. 2022) (internal quotation marks omitted) (quoting *United States v. Al Kassar*, 660 F.3d 108, 127 (2d Cir. 2011)). We "revers[e] only where, viewing the charge as a whole, there was a prejudicial error." *Calk*, 87 F.4th at 177 (quoting *United States v. Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003)).

The Federal Rules of Criminal Procedure require that "[a] party who objects to any portion of the instructions or to a failure [**17] to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate." Fed. R. Crim. P. 30(d). Where a defendant does "not object to the jury instructions at trial, we review the instructions for plain error." *United States v. Omotayo*, 132 F.4th 181, 195 (2d Cir. 2025); *see* Fed. R. Crim. P. 30(d). "To demonstrate plain error," a defendant "must show (1) error, (2) that was clear and obvious under existing law, *i.e.*, law established at the time of this appeal, (3) that affected his substantial rights, and (4) that cast doubt on the fairness, integrity, or public reputation of judicial proceedings." *United States v. Dennis*, 132 F.4th 214, 235-36 (2d Cir. 2025).

2. *Application*

a. Conspiracy

Guldi's first set of challenges to the jury instructions pertains to the district court's conspiracy instruction. We review this challenge for plain error because at trial,

[2] Guldi's argument that he cannot be guilty under an aiding-and-abetting theory because he lacked intent to defraud fails for the same reasons.

Guldi did not raise either of the two arguments he raises on appeal. At the charging conference, Guldi's only objection was that one portion of the conspiracy charge was [*447] "repetitive." App'x at 225. This "falls short because," as discussed below, "it was materially different from the objection[s] raised here." *United States v. Hunt*, 82 F.4th 129, 139 (2d Cir. 2023).

We find no plain error in either of the aspects of the conspiracy instruction to which Guldi objects.

[**18] First, the district court did not plainly err in instructing the jury that a "conspirator's liability is not measured by the extent or duration of his or her participation or whether he or she joined at the outset or some later time." App'x at 273. Even though there were only two conspirators, and therefore no conspiracy existed until and unless Guldi and Davidson had both "joined," we conclude that any possible confusion was dispelled by the rest of the instruction. *See United States v. Gore*, 154 F.3d 34, 40 (2d Cir. 1998) ("[T]he crime of conspiracy must involve the agreement of two or more persons to commit a criminal act or acts 'since the act of agreeing is a group act, unless at least two people commit it, no one does.'" (alteration adopted)). The district court repeatedly instructed the jury that the government had to prove "two or more persons made an agreement to violate a particular law," and "[a] conspiracy is a kind of criminal partnership, an agreement of two or more persons to join together to accomplish an unlawful purpose." App'x at 273. Therefore, the instructions were not plainly erroneous when "viewed as a whole." *United States v. Capers*, 20 F.4th 105, 116 (2d Cir. 2021) (quoting *United States v. Binday*, 804 F.3d 558, 581-82 (2d Cir. 2015)).

Second, the district court correctly rejected Guldi's request to instruct the jury that Guldi could be liable for conspiracy only if Davidson's actions in furtherance thereof were foreseeable to him. Guldi relies on *Pinkerton v. United States*, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946), in which "the Supreme Court held that a criminal defendant may be liable for a substantive offense—apart from a conspiracy charge—based on the actions of the defendant's co-conspirators." *Gomez v. United States*, 87 F.4th 100, 109 (2d Cir. 2023). It is true that, under *Pinkerton*, one is liable for a co-conspirator's substantive offenses only "if commission of that offense was a reasonably foreseeable consequence of the conspiratorial agreement." *Id.* (quoting *United States v. McCoy*, 995 F.3d 32, 63 (2d Cir. 2021), *vacated on other grounds*, 142 S. Ct. 2863, 213 L. Ed. 2d 1087 (2022)). But, again, *Pinkerton* governs liability for substantive offenses in furtherance of a conspiracy, [**19] not for the conspiracy itself. *See, e.g., Gomez*, 87 F.4th at 109 ("[U]nder a *Pinkerton* theory the defendant is convicted of the substantive offense—not of conspiring to commit the offense."). The district court accordingly did not commit plain error in omitting foreseeability from its conspiracy instructions.

b. Wire Fraud

Next, Guldi challenges the following passage from the district court's instruction on the substantive offense of wire fraud:

> A person who comes in at a later point with knowledge of the scheme's general operation, although not necessarily all of its details, and intentionally acts in a way to further the unlawful goals or makes the goals his own, becomes a member of the scheme and is legally responsible for . . . all that may have been done in the past in furtherance of the criminal objective, and all that is done thereafter.

App'x at 275. We review this challenge for plain error because Guldi failed to object to this instruction at all at trial.

[*448] We find no plain error because, reviewing the district court's instruction as a whole, it adequately conveyed to the jury that, "with regard to *substantive offenses*, a defendant cannot be retroactively liable for offenses committed prior to his joining the conspiracy." [**20] *United States v. Blackmon*, 839 F.2d 900, 909 (2d Cir. 1988) (emphasis in original). In a scheme to defraud, the relevant substantive offense "is not complete until the proceeds have been received." *United States v. Vilar*, 729 F.3d 62, 95 (2d Cir. 2013) (quoting *United States v. Sindona*, 636 F.2d 792, 802 (2d Cir. 1980)). And shortly after giving the instruction quoted above, the district court reminded the jury: "All that is important is that the defendant specifically intended to obtain the money or property through fraud or deception, and the government must prove that as to each defendant beyond a reasonable doubt." App'x at 275. If the jury had found that Guldi only joined the scheme to defraud after Davidson had already obtained the money, then the jury could not have found that Guldi had any specific intent about how she did so. Therefore, the instruction "adequately communicated the essential idea[]" that the jury could convict Guldi only if he joined the wire fraud scheme before it was complete. *United States v. Schultz*, 333 F.3d 393, 414 (2d Cir. 2003) (alteration adopted) (quoting *United States v. Velez-*

*Vasquez*, 116 F.3d 58, 61 (2d Cir. 1997)).

*United States v. Blackmon*, on which Guldi relies, is not to the contrary. 839 F.2d 900. While the district court in *Blackmon* gave an instruction similar to the one Guldi objects to here, that is not why we vacated the convictions in *Blackmon*. Rather, this Court held that the district court erred by instructing the jury that it "*must* convict a member [**21] of the conspiracy for substantive offenses committed by coconspirators prior to the member's entry into the conspiracy." *Id.* at 909 (emphasis added); *id.* at 908 (quoting the instruction as telling the jury, "as to all defendants who were members of a single scheme *it is your duty to find them guilty of all substantive crimes* committed in furtherance of that single scheme whether or not they were directly involved in a particular fraudulent transaction" (emphasis in original)). The district court here did no such thing. Accordingly, we find no plain error in the district court's wire fraud instructions.

c. Fraudulent Intent

As for the intent necessary to convict Guldi of wire fraud and bank fraud, the district court instructed the jury: "A person acts with a specific intent to defraud if he or she intends to obtain money or property held by another through a fraudulent or deceptive scheme." App'x at 275. The district court added: "The government need not prove that the deceived person actually was harmed, nor is it relevant if the defendant thought that the money or property really belonged to him or her, or should be paid to him or her, or that the motives were good." *Id.* But, the court explained, "[i]f [**22] the defendant had a good-faith belief that his or her words and actions were truthful and honest, you must acquit that defendant." *Id.* at 275-76. As the court instructed, that is because to have intent to defraud, "[t]he defendant must know that his or her words and actions were untrue and deceptive and were used for the specific purpose of obtaining money or property through those untruths and deceptions." *Id.* at 275.

Guldi argues that these instructions erroneously undermined the "good faith" defense that he intended to assert—i.e., that he was not guilty of fraud because he genuinely believed the money at issue belonged to him, not to Ditech. Guldi preserved [*449] this argument at trial by specifically objecting to instructing the jury that his claim of right was not "relevant" and by requesting a broader instruction consistent with his planned "good faith" defense. App'x at 229. Therefore, we review this challenge to the district court's jury instructions de novo.

Even applying the more rigorous standard of review, however, the district court did not err, because as discussed above, "courts have uniformly held that a claim-of-right is not a defense to mail fraud." *Gole*, 158 F.3d at 168; *see also Ferguson*, 676 F.3d at 280. And, as the Supreme Court recently [**23] reaffirmed, "a defendant violates § 1343 by scheming to 'obtain' the victim's 'money or property,' regardless of whether he seeks to leave the victim economically worse off." *Kousisis*, 145 S. Ct. at 1392. That is, the fraud statutes prohibit schemes to obtain money or property of another through lies, even if the defendant believes the victim owes him money.

As we recognized in *Gole*, if Guldi's "theory of self-help were the law, anyone who believed that he was legally entitled to benefits . . . , but who was concerned that he or she might nevertheless be denied such benefits, would be given carte blanche simply to lie to obtain those benefits." 158 F.3d at 168. While that might "often be much easier than pursuing legal remedies through civil actions in court, and would guarantee success as long as the misrepresentation remained undiscovered," our law does not "encourage people to lie to obtain benefits rather than pursue their rights in civil actions." *Id.* "Such controversies may be resolved by civil suit or settlement, but cannot be won by using lies and deception." *Id.*

Guldi's reliance on *United States v. Rossomando*, 144 F.3d 197 (2d Cir. 1998), is misplaced, for the same reason this argument failed in *Gole*. In *Rossomando*, the defendant "carelessly filled out" forms seeking pension benefits, but he thought [**24] the pension fund "was *never* going to lose money," because he thought any misstatements would be immaterial. *Id.* at 198, 202 (emphasis in original). We held that the district court erred in instructing the jury that "[n]o amount of honest belief on the part of the defendant that the scheme would not ultimately result in a financial loss . . . will excuse fraudulent actions or false representations by him to obtain money," because it allowed the jury "to convict Rossomando of mail fraud without finding that he contemplated harm to the" victim. *Id.* at 199-200. And in *Gole*, we clarified that *Rossomando* did not create a general good faith defense to fraud, but rather "turned on the defendant's knowledge of the immateriality of the false statements he made." *Gole*, 158 F.3d at 168.

At bottom, where a defendant intends to obtain money by lying, it is no defense that he believes his victim owes him money. The district court correctly stated that principle, and thus properly instructed the jury on fraudulent intent.

C. Sentencing

Turning to the sentencing proceedings, Guldi contends that the district court committed two procedural errors in sentencing him to 36 months' imprisonment. First, we disagree that the district court improperly relied on the government's [**25] assertion that the Bureau of Prisons ("BOP") could provide Guldi adequate cancer care. Second, however, we agree that the district court erred in calculating the Guidelines range, by determining that he used "sophisticated means" in the commission or concealment of the offense.

1. *Legal Standards*

"[A]ppellate review of sentencing decisions is limited to determining [*450] whether they are 'reasonable.'" *Gall v. United States*, 552 U.S. 38, 46, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007). Reasonableness review has two components: "procedural review and substantive review." *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc). We "review[] criminal sentences 'for procedural and substantive reasonableness under a deferential abuse-of-discretion standard.'" *Hunt*, 82 F.4th at 142 (quoting *United States v. Singh*, 877 F.3d 107, 115 (2d Cir. 2017)). In practice, "the procedural inquiry looks to whether the sentencing judge has properly accounted for the factors that constrain its sentencing discretion; substantive reasonableness examines whether, after accounting for those constraints, the district court's exercise of its discretion can be located within the range of permissible decisions." *United States v. Sims*, 92 F.4th 115, 122 (2d Cir. 2024) (internal quotation marks omitted and alteration adopted) (quoting *United States v. Kunz*, 68 F.4th 748, 759 (2d Cir. 2023)).

"A district court commits procedural error where it fails to calculate the Guidelines range," "makes a mistake in its Guidelines calculation," [**26] "treats the Guidelines as mandatory," "does not consider the § 3553(a) factors," "rests its sentence on a clearly erroneous finding of fact," or "fails adequately to explain its chosen sentence" with "an explanation for any deviation from the Guidelines range." *Cavera*, 550 F.3d at 190 (internal quotation marks and citations omitted). "We review a district court's application of the guidelines *de novo*, but factual determinations are reviewed for clear error." *United States v. Rainford*, 110 F.4th 455, 475 (2d Cir. 2024) (citing *United States v. Cramer*, 777 F.3d 597, 601 (2d Cir. 2015)).

"Generally, 'if the ultimate sentence is reasonable and the sentencing judge did not commit procedural error in imposing that sentence, we will not second guess the weight (or lack thereof) that the judge accorded to a given factor or to a specific argument made pursuant to that factor.'" *United States v. Pope*, 554 F.3d 240, 246-47 (2d Cir. 2009) (alteration adopted) (quoting *United States v. Fernandez*, 443 F.3d 19, 34 (2d Cir. 2006), *abrogated in part on other grounds by, Rita v. United States*, 551 U.S. 338, 346, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007)); *see also United States v. Broxmeyer*, 699 F.3d 265, 289 (2d Cir. 2012) ("The particular weight to be afforded aggravating and mitigating factors is a matter firmly committed to the discretion of the sentencing judge . . . ." (internal quotation marks omitted) (quoting *Fernandez*, 443 F.3d at 32)). "[W]e presume that the sentencing judge has considered all relevant section 3553(a) factors and arguments unless the record suggests otherwise." *United States v. Williams*, 102 F.4th 618, 623 (2d Cir. 2024) (alteration adopted) (quoting *United States v. Smith*, 982 F.3d 106, 111 (2d Cir. 2020)).

In addition, a district [**27] court "has broad discretion 'as to what types of procedures are needed' at a sentencing proceeding for determination of relevant disputed facts," and its discretion "is similarly broad 'either as to the kind of information it may consider, or the source from which it may come.'" *United States v. Duverge Perez*, 295 F.3d 249, 254 (2d Cir. 2002) (alteration adopted) (quoting *United States v. Slevin*, 106 F.3d 1086, 1091 (2d Cir. 1996); then quoting *United States v. Carmona*, 873 F.2d 569, 574 (2d Cir. 1989)). We review those determinations for abuse of discretion. *Id.*

We review for "plain error" challenges to sentencing decisions that a defendant did not raise at sentencing. *Hunt*, 82 F.4th at 142 (citing *United States v. [*451] Villafuerte*, 502 F.3d 204, 207 (2d Cir. 2007)).

2. *Application*

a. Medical Needs

Guldi first argues that the district court failed adequately to account for his medical needs at sentencing, and instead uncritically accepted the government's representations that the BOP was equipped to meet those needs. Guldi's argument is contrary to the record of his sentencing, which shows that the district court exercised sound discretion in weighing competing considerations.

Guldi requested a "nonincarceratory sentence" based on his age and health concerns, including prostate cancer, which required radiation and possibly chemotherapy. App'x at 392-408. The government noted that BOP "has medical facilities and inmates have cancer and undergo radiation [**28] and various treatments." *Id.* at 395-96. But Guldi responded that the primary BOP medical facility, located in North Carolina, was "horrific" and was "being sued for lack of care." *Id.* at 401-02. The district court ultimately imposed a below-Guidelines sentence of 36 months' imprisonment, balancing its consideration of Guldi's physical condition with the other Section 3553(a) factors, including the seriousness of the offense and the need for deterrence. The court explained: "I think Mr. Guldi deserves a time in confinement, I probably would have, if he were healthy, given him more than 36 months. But it's hard for me to go below it. I think the crime was a very serious one." *Id.* at 397; *see also id.* at 410-11.

As an initial matter, Guldi did not object to the procedures used to resolve any purported factual disputes at sentencing. Even if he had objected, the district court was not required to "hold a full-blown evidentiary hearing." *Slevin*, 106 F.3d at 1091. "All that is required is that the court 'afford the defendant some opportunity to rebut the Government's allegations.'" *Id.* (quoting *United States v. Eisen*, 974 F.2d 246, 269 (2d Cir. 1992)). Guldi had ample opportunity to do so both in writing and at his sentencing.

Further, the district court did not reflexively accept the government's claim that the BOP could [**29] treat Guldi without issue. The district court noted "great concern" about Guldi's medical needs and about whether imprisonment was "consistent with letting Mr. Guldi continue his radiation therapy and his chemotherapy." App'x at 395, 398. When the government's initial response was unsatisfactory, the district court pressed on whether the BOP could accommodate the "delicate balancing" and "constant adjustment" required for radiation and chemotherapy, which made it "very hard to have a confined person be running back and forth to get these treatments." App'x at 395. The court seriously considered options for confinement in Guldi's home rather than prison, but rejected them as inconsistent with other goals of sentencing. *Id.* at 396-99. And the court credited Guldi's claims about the deficiencies of the main BOP medical facility and recommended Guldi be designated to a different one, though BOP did not act on that recommendation. *Id.* at 408, 410-11, 419.

In sum, the district court did not make an erroneous factual finding, that Guldi's medical needs would be met in prison without difficulty, based only on the government's say-so. On the contrary, the district court credited Guldi's argument that his age and medical needs [**30] would make incarceration more punishing for Guldi than for a typical defendant and accounted for that in deciding on his ultimate sentence. The "particular weight" to [*452] afford each Section 3553(a) factor is a matter "firmly committed to the discretion of the sentencing judge." *Broxmeyer*, 699 F.3d at 289 (internal quotation marks omitted). The district court's careful resolution of this difficult issue at sentencing does not constitute an abuse of discretion.[3]

b. "Sophisticated Means" Enhancement

Finally, we agree with Guldi's argument that the district court erred in applying the "sophisticated means" enhancement because he was convicted of a simple fraud. Since we cannot find that this error was harmless, Guldi's sentence was procedurally unreasonable and must be vacated for resentencing.

The Sentencing Guidelines provide for a two-offense-level enhancement when "the offense . . . involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means." U.S.S.G. § 2B1.1(b)(10)(C). The application note to that Guideline defines "sophisticated means" as "especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense." *Id.* § 2B1.1 app. n.9(B). The application note elaborates: [**31]

> For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means.

*Id.* "[T]he examples are by their own terms simply illustrative, not exclusive," *United States v. Lewis*, 93 F.3d 1075, 1082 (2d Cir. 1996), but they offer an indication of the level of sophistication that is required to warrant a sentencing enhancement.

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[3] However, we express no view on whether Guldi's medical needs, and the BOP's ability or inability to meet those needs, might give rise to a claim for compassionate release if Guldi remains incarcerated following resentencing, 18 U.S.C. § 3582(c), nor whether the actual conditions of Guldi's confinement are consistent with the Eighth Amendment.

We find no clear error in the district court's factual findings that Guldi employed two tactics to conceal his fraud: (1) using cashier's checks to move funds out of the account to which Ditech sent the wire, and (2) avoiding transactions of $10,000 or more to avoid triggering bank reporting requirements. App'x at 377-78. However, for the reasons below, we conclude that the district court erred as a matter of law because Guldi's two relatively unsophisticated tactics, in combination, do not add up to "sophisticated means" warranting a harsher sentence than a garden-variety fraud.

First, there is nothing sophisticated [**32] about moving money out of one's bank account soon after receiving a fraudulently induced transfer. Even an unsophisticated fraudster knows that account is the first place anyone would look to recover the money and can easily move it. Guldi's suggestion to use cashier's checks, rather than withdrawing thousands of dollars in cash, does not transform this obvious move into a ruse worthy of an enhanced sentence.

Second, structuring transactions to avoid the $10,000 reporting threshold also does not require any particular sophistication. *Cf.* U.S.S.G. § 2B1.1 app. n.9(B). The $10,000 reporting threshold has been common knowledge for more than fifty years. *See, e.g.*, Financial Recordkeeping and Reporting of Currency and Foreign Transactions, 37 Fed. Reg. 6912, 6913 (Apr. 5, 1972) [*453] (codified at 31 C.F.R. pt. 103). Criminals have been trying to avoid triggering reporting for so long that Congress made structuring a separate crime almost forty years ago. *See* Money Laundering Control Act of 1986, Pub. L. No. 99-570, § 1354, 100 Stat. 3207-18, 3207-22 (1986). And structuring is easy for anyone to execute. If someone thinks structuring might help conceal their crime, it is often as simple as making two withdrawals instead of one. Unlike, for example, creating "fictitious entities, corporate shells, or offshore financial accounts," U.S.S.G. § 2B1.1 app. n.9(B), structuring does not require any particular skill, knowledge, planning, or coordination. Accordingly, it does not turn [**33] a simple fraud into an especially "sophisticated" one.

To be sure, "[w]e have recognized that . . . tactics to conceal offense conduct[] are indicia of the sophistication of an offense." *United States v. Fofanah*, 765 F.3d 141, 146 (2d Cir. 2014). And we have acknowledged that an offense may be sophisticated "even if each step in the scheme was not elaborate," if "the total scheme was sophisticated in the way all the steps were linked together." *United States v. Jackson*, 346 F.3d 22, 25 (2003). But we have never said *every* multi-step effort to conceal an offense warrants an enhancement. Such a rule would be flatly inconsistent with the Guidelines, which tell us that the enhancement is warranted only for "especially complex or especially intricate" conduct. U.S.S.G. § 2B1.1 app. n.9(B).

Further, no precedent suggests that the "sophisticated means" enhancement is appropriate in this case. This Court has never, in a published or unpublished decision, applied the enhancement to a scheme this simple.[4] The dissenting opinion suggests that our decision is contrary to some non-precedential and out-of-circuit "sophisticated means" cases that have involved cashier's checks or structuring as one piece of a much larger puzzle, but those cases generally [*454] involved far more complex and sophisticated overall schemes

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[4] *Cf. Fofanah*, 765 F.3d at 146-47 (applying enhancement where defendant, among other things, displayed a "sophisticated knowledge of the respective means of shipping stolen cars to different African countries," and engaged in "repetitive and coordinated" conduct to "mov[e] the cars across jurisdictions and then abroad"); *United States v. Amico*, 416 F.3d 163, 169-70 (2d Cir. 2005) (applying enhancement to offense that involved "the creation of false bank documents; the solicitation and creation of false appraisals; the creation of false blueprints; submission of false blueprints to town officials in order to inflate the assessment of comparable home values; collusion with the attorney representing many of the purchasers at closing; and other tactics designed to conceal the scheme"); *Jackson*, 346 F.3d at 25 (applying enhancement based on defendant's "use of hotels and courier services to take delivery of fraudulently obtained goods, his use of prepaid phone cards to prevent tracking of his activities, and his manipulations of victims' credit lines and billing addresses" to defraud numerous distinct victims); *cf. also, e.g., United States v. Elia*, 392 F. App'x 883, 886 (2d Cir. 2010) (summary order) (applying enhancement to "an elaborate combination of means to evade taxes," which included "structuring of investments in multiple deposits to avoid reporting requirements" as just one factor, and also included "the purchase of money orders at multiple locations; . . . the creation of phony loan documents; and numerous cash real estate investments"); *United States v. Valente*, 688 F. App'x 76, 80 (2d Cir. 2017) (summary order) (applying enhancement because "the Defendant's fabrication of sophisticated false documents relating to the status of the funds he took from his victims constituted sophisticated means"); *see also United States v. Valente*, 915 F.3d 916, 920 (2d Cir. 2019) (in another decision arising out of the same prosecution, noting that the defendant created "monthly performance statements that falsely reported gains in various accounts," and "false financial account statements to make it appear as if [his company] was holding the investors' retirement accounts as legitimate IRA accounts").

than Guldi's.[5] As [**34] far as we can tell, no court has ever watered down the "sophisticated means" enhancement to the degree that would be required to apply it to Guldi. Considering Guldi's conduct in its entirety, applying the enhancement here went a step further than the Guidelines allow.

We also conclude that the district court's procedural error in applying the enhancement was not harmless, and the government does not argue otherwise. *Cf. United States v. Mandell*, 752 F.3d 544, 553 (2d Cir. 2014) ("If we 'identify procedural error in a sentence, but the record indicates clearly that the district court would have imposed the same sentence in any event, the error may be deemed harmless, avoiding the need to vacate the sentence and to remand the case for resentencing.'" (quoting *United States v. Jass*, 569 F.3d 47, 68 (2d Cir. 2009))). The district court accepted the government's recommendation of a modestly below-Guidelines sentence based on Guldi's serious medical needs, discussed above, which the district court also found compelling. Spec. App'x at 61, 75-76. While the district court made clear it thought some term of incarceration was appropriate, given the seriousness of Guldi's offense, the court's explanation of its reasons for selecting 36 months does not make "clear that the [**35] judge based the sentence . . . on factors independent of the guidelines." *Molina-Martinez v. United States*, 578 U.S. 189, 200, 136 S. Ct. 1338, 194 L. Ed. 2d 444 (2016). On the contrary, it is at least plausible that, on resentencing with a lower Guidelines range, the district court will find that a shorter term of incarceration will meet the goals of sentencing. Accordingly, we vacate Guldi's sentence and remand for resentencing.

[*455] **III. CONCLUSION**

We have considered the remainder of Guldi's arguments and find them to lack merit. For these reasons, we **AFFIRM** the judgment of the district court except as to Guldi's sentence, which we **VACATE** and **REMAND** for resentencing consistent with this opinion.

**Concur by:** PARK (In Part)

**Dissent by:** PARK (In Part)

## Dissent

PARK, *Circuit Judge*, concurring in part and dissenting in part:

I agree with the majority except for its conclusion that the district court erred in applying the sophisticated-means enhancement. Defendant George Guldi, a former Suffolk County legislator and disbarred real-estate attorney, worked with co-conspirator Victoria Davidson to trick a mortgage servicer into wiring $253,236 to Davidson's personal bank account. Once Davidson received the money, Guldi coached her to use cashier's checks in order to prevent the loan servicer from reclaiming the funds and to [**36] avoid transactions over $10,000 in order to evade bank-

[5] In *United States v. Snow*, 663 F.3d 1156 (10th Cir. 2011), for example, the court found "Mr. Snow did not undertake to execute or conceal merely a single fraudulent transaction using false documentation but orchestrated a vast and complex fraud scheme in which he participated in over forty fraudulent mortgage-related transactions to defraud at least twelve different financial institutions." *Id.* at 1164. While some of the defendant's conduct superficially resembled Guldi's, it also included "providing, and directing others to provide, fraudulent documentation and information sufficient to fool those reviewing it; . . . providing down payments, closing funds, and debt reduction for buyers to qualify for loans; circulating, or instructing his son to circulate, funds through his and his son's business and bank accounts to avoid detection; and teaching a loan originator how to create fictitious second mortgages to help qualify buyers and fool the title and financial institutions involved." *Id.* In *United States v. Kennedy*, 714 F.3d 951 (6th Cir. 2013), the district court found that "Kennedy was directly involved in wire transactions, preparing various sham legal documents, handling promissory notes, and restructuring deposits to avoid bank-reporting requirements," and "Scarborough solicited numerous investors by the use of promissory notes and based her solicitations on purported interstate real estate transactions," and the Court of Appeals applied clear error review not only to facts but to the ultimate legal determination of whether the facts rose to the level of "sophisticated means," which is contrary to the law of this Circuit. *Id.* at 961. In *United States v. Okeke*, 779 F. App'x 389 (7th Cir. 2019) (non-precedential disposition), relied upon by the government, the court recited several "examples of Okeke's sophisticated efforts to evade authorities," including transaction structuring but also "transferr[ing] the money to an offshore account," and "us[ing] his business as a front, lying to bank officials that the suspicious transactions were car sales," two of the specific examples given in the application note. *Id.* at 392. And *United States v. Clements*, 73 F.3d 1330 (5th Cir. 1996), is inapposite both because it involved a different Guideline that is specific to tax cases, U.S.S.G. § 2T1.1, and because the court applied "clear error" review to the ultimate application of the Guidelines in addition to the underlying facts. *Id.* at 1340.

reporting requirements. That is enough to constitute sophisticated means.

"[T]actics to conceal offense conduct[] are indicia of the sophistication of an offense." *United States v. Fofanah*, 765 F.3d 141, 146 (2d Cir. 2014); *see also United States v. Amico*, 416 F.3d 163, 170 (2d Cir. 2005) (affirming an application of the enhancement where defendant "recommended strategies . . . to reduce the likelihood that lenders would . . . discover the fraud"); *United States v. Jackson*, 346 F.3d 22, 25 (2d Cir. 2003) (same where defendant "prevent[ed] tracking of his activities," even though "each step in the scheme was not elaborate" in isolation).[1]

The majority cites no case in which a court has said that conduct like Guldi's does not warrant the enhancement. Indeed, our sister circuits have held that using cashier's checks to obscure the movement of funds constitutes sophisticated means. *See, e.g., United States v. Snow*, 663 F.3d 1156, 1164 (10th Cir. 2011); *United States v. Clements*, 73 F.3d 1330, 1340 (5th Cir. 1996). Similarly, we and other courts have found transactions structured to avoid banking requirements to be sophisticated. *See, e.g., United States v. Bailey*, 820 F. App'x 57, 62 (2d Cir. 2020); *Elia*, 392 F. App'x at 886; *United States v. Kennedy*, 714 F.3d 951, 961 (6th Cir. 2013); *Snow*, 663 F.3d at 1164. The majority's conclusion is contrary to the weight of authority.

We have never required a defendant's actions to be beyond the capability of an ordinary person or based on "particular skill, knowledge, planning, or coordination." *Ante* at 35. In fact, in *Jackson*, we rejected [**37] the argument that sophisticated means requires "inside information" or "special technology." 346 F.3d at 25 (quotation marks omitted). Moreover, it is not relevant whether the $10,000 reporting threshold is "common knowledge." *Ante* at 34; *see United States v. Loles*, 628 F. App'x 7, 9-10 (2d Cir. 2015) (rejecting defendant's argument that the enhancement should not apply because he employed means "commonplace in similar fraudulent schemes"); *United States v. Ojemen*, 465 Fed. Appx. 69, 72 (2d Cir. 2012) (explaining that a "scheme as a whole" was sophisticated even though defendant argued "that [*456] he engaged only in garden variety fraud by filling out various forms inaccurately"). The question is not whether a defendant's conduct required particular skill, but whether the scheme in its totality was especially complex. *See United States v. Lewis*, 93 F.3d 1075, 1083 (2d Cir. 1996) (affirming an application of the enhancement even though "each step . . . was simple").

The majority observes that Guldi did not use means like "fictitious entities, corporate shells, or offshore financial accounts." U.S.S.G. § 2B1.1 app. n.9(B) (noting that such conduct "ordinarily indicates sophisticated means"). But the Guidelines do not say that the absence of such conduct indicates lack of sophistication. *See Lewis*, 93 F.3d at 1082 ("While their absence might mean that the case cannot be disposed of by reference to one of the examples specifically [**38] enumerated in the commentary, the examples are by their own terms simply illustrative, not exclusive."). The same application note states that "in a telemarketing scheme," for example, "locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means." U.S.S.G. § 2B1.1 app. n.9(B). Such conduct is no more complex than Guldi's.

Finally, the majority fails to afford the requisite deference to the district court. Whether the sophisticated-means enhancement applies is a fact-intensive inquiry. Here, the district court found after a two-week trial that Guldi was involved in "setting up" Davidson "to pretend that she could have access to the account" and "playing bank rules off one against the other and breaking up the check[s] in various amounts." App'x at 378. In my view, the district court's application of the enhancement on those facts was reasonable. *See Gall v. United States*, 552 U.S. 38, 46, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007).

I respectfully concur in part and dissent in part.

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[1] *See also United States v. Elia*, 392 F. App'x 883, 886 (2d Cir. 2010) (affirming an application of the enhancement where defendant took steps to "avoid reporting requirements"); *United States v. Valente*, 688 F. App'x 76, 80 (2d Cir. 2017) (same for defendant's "fabrication of sophisticated false documents," though defendant argued that the creation of false documents was not "especially complex or especially intricate" (quotation marks omitted)).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 19 CR 126(AKH)

VICTORIA DAVIDSON,

Defendant.

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New York, N.Y.
October 4, 2023
11:00 a.m.

Before:

HON. A VIN K. HE ERSTEIN,

District Judge

APPEARANCES

DAMIAN WI IAMS,
United States Attorney for the
Southern District of New York
BY: JONATHAN BODANSKY
DANIE RICHENTHA
MADISON SMYSER
Assistant United States Attorneys

EZRA SPI KE
Attorney for Defendant

THE COURT: -- is to establish the sentencing guidelines. The offense level under Section 2B1.1 is seven there's an upward adjustment of 12 because the amount of loss is between $250,000 and $550,000. Probation adds another two points because sophisticated means we use to carry out the offense, the defendant takes issue with that. And we'll have a discussion. According to the probation and the government, the net offense level is 21.

Do I have it right?

MR. BODANSKY: Yes, your Honor.

THE COURT: And I think I should hear right now whether or not this was carried on by sophisticated means.

I have the brief of the defendant on the issue. I don't think the government has spoken on the issue. But we took it up in the Guldi sentence.

MR. BODANSKY: Yes, your Honor, the government did address this in connection with Mr. Guldi's sentencing. And I think the analysis is precisely the same here, as the Court has already found the offense here involved a number of sophisticated means.

THE COURT: If you're going to stand, take the podium please.

MR. BODANSKY: As the Court already found, the offense conduct here involves sophisticated means. Among other things it involved a forgery of a purported authorization letter, it involved numerous lies told to the victim institution, and it involved a number of bank transactions involving cashier's checks, among other things, that were designed to conceal the fraud and protect the criminal proceeds.

The Court already determined that all --

THE COURT: The fact that Guldi may have been the one who originated that idea doesn't make it less sophisticated.

MR. BODANSKY: No, your Honor. The offense conduct is just as sophisticated in this context as it was in the context of the earlier sentencing.

The defendant argues that she is differently situated because that conduct was -- the guidance behind that conduct came from the codefendant, Mr. Guldi. That is really besides the point.

The conduct was sophisticated and much of that conduct was directly carried out by the defendant, in fact. She was the one who prepared and submitted the forged authorization letter, she was the one conducting the bank transactions that were sophisticated. Whether or not some of those actions, the concept of those actions originated with Mr. Guldi or not she's the one who carried them out.

Furthermore, some of those actions, such as the authorization letter, actually were done at her own initiative and without Mr. Guldi's knowledge or consent.

THE COURT: Both the authorization letter and I think also the letter that arrogated herself to the position as joint owners with Guldi.

MR. BODANSKY: I believe that may have been the same letter, your Honor. There was a purported authorization letter purporting to give her authorization to act on his behalf in managing --

THE COURT: So there's one forgery, not two.

MR. BODANSKY: I believe that's correct, your Honor.

THE COURT: Mr. Spilke.

MR. SPI KE: Yes, your Honor. Would you like me to use the lectern?

THE COURT: Yes.

MR. SPI KE: Sure. The government has it largely correct, that's -- I think the one real sophistication here was taking the money and converting it into bank checks so that the money couldn't be clawed back. That took real specialized knowledge. I think that this may be a 3553(a) argument. Ms. Davidson is --

THE COURT: I figured the 3553(a) argument.

MR. SPI KE: Well, we understand your Honor's ruling. We understand it from the Guldi sentencing. We'd like to preserve our objection, but that's basically it.

THE COURT: I find there are sophisticated means. Ms. Davidson had to put herself in position of having standing with the bank. She did that by creating a letter which purported to give that standing.

Now, an agent can't arrogate to herself the right to be an agent. It needs the signature of the principal. And Ms. Davidson understood that, and forged the name of George Guldi, the principal. And that gave her standing to present herself to the bank, the complaint, and only to get the funds after making 19 persistent telephone calls.

The whole of that, I think is sophisticated. Whether it's sophisticated or not, it shows a great deal of culpability. I find that an additional upward adjustment of two points is appropriate.

So the net offense level is 21. There's no deduction for acceptance of responsibility because to this date there has been no acceptance of responsibility.

That's true, right, Mr. Spilke?

MR. SPI KE: Correct, your Honor.

THE COURT: Therefore, they indicated the range of custodial punishment is 37 to 46 months of custody, up to five years of supervised release on Counts One to Five, up to three years of supervised release on Count Three.

Do I have it right, Mr. Bodansky?

MR. BODANSKY: Yes, your Honor.

THE COURT: Mr. Spilke?

MR. SPI KE: Yes, your Honor.

THE COURT: I so find.

# UNITED STATES COURT OF APPEALS
## FOR THE
## SECOND CIRCUIT

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of June, two thousand twenty-six.

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United States of America,

Appellee,

v.

George Guldi,

Defendant,

Victoria Davidson,

Defendant - Appellant.

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**ORDER**

Docket No: 24-448

Appellant, Victoria Davidson, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

Catherine O'Hagan Wolfe