

APPEAL NO. 23-5766

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DOUGLAS WILLIAM VANCE,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Kentucky
Original Crim. No. 5:20-cr-00063-DCR-MAS-1
Hon. Danny Reeves, Presiding in the District Court

**OPENING BRIEF OF DEFENDANT-APPELLANT
DOUGLAS WILLIAM VANCE**

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STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument, as he believes argument would aid the court in reaching a just and correct result in this matter.

JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 18 U.S.C. §3231 as Mr. Vance was charged with violations of the laws of the United States, including conspiracy to commit wire fraud, in violation of 18 U.S.C. §§ 1343 and 1349 (Count One); wire fraud, in violation of 18 U.S.C. § 1343 (Counts Two-Five); and conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h) and 18 U.S.C. § 1343 (Count Seven). RE 1, Indictment, PageID#1-11. This Court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), as Mr. Vance filed a timely notice of appeal from a final judgment of the district court. RE 200 Judgment; PageID#1971; RE 202 Notice of Appeal, PageID#1985.

STATEMENT OF THE ISSUES

- I. Whether Appellant's right to a fair trial was violated when the district court refused to permit the defense to introduce into evidence a codefendant's letter admitting to the fraudulent conduct and exonerating the Appellant.
- II. Whether Appellant's convictions must be vacated because the prosecution engaged in misconduct by repeatedly telling the jury that Appellant was a liar

and that his testimony could not be believed and then vouching for the credibility of its witnesses.

III. Whether Appellant's 174-month sentence is procedurally and substantively unreasonable.

A. The Sentence Issued to the Appellant Was Procedurally Unreasonable

- (1) The district court erroneously determined the amount of loss was between \$1,500,000 and \$3,500,000 and imposing a 16-level enhancement under U.S.S.G. §2B1.1(b)(1).
- (2) The district court erroneously found the offense resulted in financial hardship and assessing a two-level enhancement under U.S.S.G. §2B1.1(b)(2)(A)(I) and (iii).
- (3) The court abused its discretion by applying a use of a sophisticated means enhancement under U.S.S.G. § 2B1.1(b)(10)(c), when any conduct requiring a special skill was committed by McKinnon and McKinnon admitted to concealing her conduct from the Appellant.
- (4) The district court abused its discretion in assessing a two-level enhancement for abuse of position of trust under U.S.S.G. §3B1.3.

STATEMENT OF THE CASE

On June 18, 2020, a Grand Jury sitting in the United States District Court for the Eastern District of Kentucky issued an Indictment charging the Appellant and Molly McKinnon with conspiracy to commit wire fraud, in violation of 18 U.S.C. §§ 1343 and 1349 (Count One); wire fraud, in violation of 18 U.S.C. § 1343 (Counts Two-Five); and conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h) and 18 U.S.C. § 1343 (Count Seven). RE 1, Indictment, PageID#1-11.

According to the charges, from about August 2016, and continuing through December 2018, Appellant and McKinnon engaged in a conspiracy to benefit and profit by inducing lenders and investors to loan money and invest in “[Appellant’s and McKinnon’s business ventures under the false pretenses that these ventures were more successful and capable than they were and that the money would be used entirely to further the business ventures, when, in reality, Vance and McKinnon intended to use some of the money on personal interests.” Id.; PageID#1-2

Trial commenced on October 4, 2022 and ended on October 13, 2022 when the jury returned a verdict of guilty on all counts. At the close of the government’s evidence, Appellant moved for judgment of acquittal arguing, the evidence failed to show Appellant did not act in good faith. RE 178 Trial Day 5; PageID#1596. The court denied the motion, finding:

It would be for the jury to determine whether there would be good faith. And while that is the burden of the United States to establish the defendants did not act in good faith, it has provided sufficient evidence that a jury certainly could conclude that neither defendant acted in good faith here and that their actions were all within the scope of the agreement that is outlined in the first count, the conspiracy charge.

Id; PageID#1599-1600.

Appellant subsequently testified at trial. He denied acting in bad faith or having knowledge that statements had been altered and sent to investors. PageID#1602-1757.

On day six of trial, Appellant's codefendant, McKinnon was scheduled to testify in support of her justification defense to the charges. RE 179 Trial Day 6; PageID#1763. She would offer testimony that, in June of 2017, a Mr. Chamblee demanded that she change bank statements that were requested by Mendie Hogan. Id; PageID#1765. "She thought he was joking at first but he implied bad things could happen." Id. The next day she received text messages from Mr. Chamblee containing three images of her, one in her car, one in her bed asleep, and one while outside. "That placed her in fear that she could be harmed by him or someone that he would send, especially given that somebody had been in her house." Id; PageID#1766. Approximately a month later Chamblee again demanded that she create more bank statements. Id. She was afraid to contact law enforcement 'because she did not know

what Chamblee was capable of.” Id.; PageID#1767.

McKinnon also proffered testimony that on September 21, 2017, McKinnon was attacked by an unidentified party, Id. PageID#1768, and on June 3, 2018, her home caught on fire. Mr. Chamblee told her that he would make sure she was in the house the next time it caught on fire. Id. She did not report the comments to law enforcement or to the Appellant. Id. “Three days later [McKinnon] was assaulted in her hotel room in Hazard, Kentucky, again by an unidentified assailant. Mr. Chamblee made comments a few days later, and again, this was not reported to law enforcement.” PageID#1769. Also in June 2018 Chamblee grabbed McKinnon by the throat and pushed her against the wall. This was not reported to law enforcement or the Appellant. Id.

The government objected to the testimony and admission of the letter because (1) Appellant did not attempt to admit the letter during his case in chief; (2) the government had not received the letter through reciprocal discovery under Rule 16;¹ and (3) the letter was a statement of a non-testifying party that is not a party opponent and impermissible hearsay. Id.; PageID#1778. For the reasons argued by the government, the court denied the request to permit the introduction of the letter and

¹Evidence at trial revealed that Agent Hubbuch was aware of the letter and its contents.

its contents at trial for the jury to consider. Id.; PageID#1779. The court allowed the letter to be listed as a Court exhibit, but prohibited reference to the letter or its contents in the presence of the jury because the court believed the letter to be hearsay. Id.; PageID#1779.

McKinnon was then called to testify, but the letter and its contents were not addressed in her testimony. Id. McKinnon testified that Appellant was unaware of the fact she had altered bank statements or illegally transferred funds. PageID#1840. She further testified that she had access to Appellant's email username and password and that she would send emails from that account purporting to be the Appellant. Id.; PageID#1841-1842. And, she stated that Appellant was unaware that she was sending false information to others using his email credentials. Id.

Subsequently, Appellant renewed his motion for judgment of acquittal, arguing:

Your Honor, on behalf of Mr. Vance, I would move -- I would renew the motions for acquittal pursuant to Rule 29. Ask the Court to enter a judgment of acquittal on behalf of Mr. Vance. The reason being that he has specifically denied all of the charges against him, any of the individual charges, while we then have had competent testimony from co-defendant that he was unaware of either false bank records or transactions or that any of the information provided to these investors it was determined or testified to that he didn't know anything about.

In particular, I would direct the Court to Count 5 of the indictment, which is a count solely against Mr. Vance, which deals with an email to

DJ, who is Dell Jagers, providing falsified NGI bank records, that is the subject of Government's Exhibit 153. The Court will remember that Mr. Vance vehemently denied sending that while Ms. McKinnon said she probably did send those documents to Mr. Jagers. I believe that on that particular count, looking at the evidence even in the light most favorable to the government, there is -- clearly it would be unreasonable for anybody to find Mr. Vance guilty on that.

Basically, I hate that it came to this, but Ms. McKinnon at every opportunity exonerated Mr. Vance from any wrongdoing in this case, and I think that would create reasonable doubt and it would be unreasonable for a jury to find him guilty. I would ask the Court to enter judgments of acquittal on all counts.

Id.; PageID#1848-49. The court denied the motion. Id.

The jury returned a verdict of guilty on all counts and set the matter for sentencing. RE 133 Verdict; PageID#485-488; RE 180 Trial Day 7; PageID#1905-1907. Bond was revoked and both Appellant and McKinnon were remanded into custody. Id.; PageID#1910-1911.

Prior to sentencing the presentence investigation report (PSR) was prepared by a U.S. Probation Officer. RE 210 PSR. The PSR contained the following calculations. Pursuant to U.S.S.G. § 2B1.1(a)(1), Appellant's base offense level was seven. RE 210 PSR ¶ 41. Based on the chart of victims and losses in paragraph 33 of the PSR, it was determined that the total loss attributable to the Appellant was \$2,479,240.90. This amount resulted in a 16-level increase in Appellants offense level under § 2B1.1(b)(1)(I). Id.

Pursuant to § 2B1.1(b)(2)(A)(I) and (iii), a 2-level enhancement was applied because the offense involved 10 or more victims or resulted in substantial financial hardship to one or more victims. Id.

A 2-level increase was applied under §2B1.1(b)(10)(C) because the offense allegedly “involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means.” Id.²

Appellant also received a 2-level enhancement under § 3B1.3 based on the assertion he “abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense.” RE 210 PSR ¶¶44, 50.³

Finally, a 2-level enhancement was applied under § 3C1.1 because Appellant was found guilty after testifying at trial that he did not commit the offense. PSR ¶¶ 45, 51.⁴ Accordingly, the total offense level was determined to be 33. RE 210 PSR ¶ 33.

Appellant had one prior conviction (PSR ¶64) and committed the offense while

²No analysis is provided in the PSR explaining what conduct constituted a “sophisticated means.”

³No analysis is provided in the PSR explaining what conduct constituted an “abused a position of public or private trust” or “use of a special skill” to commit or conceal the offense.

⁴No analysis is provided explaining what conduct constituted obstruction of justice.

on probation for that offense (PSR ¶68), resulting in three criminal history points. Based on a Criminal History Category II and an offense level 33, Appellant faced a guideline range of 151 to 188 months' imprisonment. RE 210 PSR ¶ 88.

Appellant objected to the enhancements and guideline calculations in the PSR. RE 210 Final PSR (Sealed), p 23-29. Appellant pointed out that the government failed to prove the existence of 10 or more victims. Several of the victims listed did not testify at trial, one alleged victim, Ms. Faybik, provided statements to the court strongly expressing that she did not lose money as a result of the Appellant and that she is not a victim in the case. In addition, FBI interviews with two other alleged victims show that they do not consider themselves to be victims of any fraudulent activity. (A.R and S.W.). And, the President and CEO of Kentucky River Properties, filed a letter with the court stating that their dealings with Appellant were investments and they do not consider themselves to be victims. Id

Sentencing took place on August 21, 2023. At the outset, the court conducted a hearing to address the unresolved objections to the PSR. RE 219 Hearing; PageID#2120-2224. The government called Agent Hubbuch to provide testimony supporting application of the contested enhancements. Id; PageID#2122-2123.

The district court found that the loss exceeded \$1.5 million based on any “person or [] individual or entity [who] suffered a loss as a result of being a victim in

the case through the fraudulent activities of one or both defendants.” RE 210 Hearing; PageID#1109. The starting date for the amount of loss calculation was April 2017. Id. The court found the victims included Shumard, with a loss of \$801,819; Koch Minerals and Dragon Technologies, with a loss of \$373,500; GGC Funding and Mendie Hogan, with losses in the amount of \$232,983.79; Shannon Wells with a loss in the amount of \$50,000, Creola Holdings, with a loss of \$123,400; Mr. Chamblee, with a loss in the amount of \$53,938.11; and Ms. Faybik, with a loss of \$495,900. Id. PageID#2210-2211.

The court found that Kentucky River Properties, Kenneth Shpakoff, Mr. Rolfes and Mr. Phillips were not victims. RE 219 Hearing, PageID#2209-2212. However, it found Faybik was a victim and that the loss to Faybik was just under \$500,000. Id. This finding was made despite the fact the government alleged a loss of merely \$42,500. Further, no documentation or testimony from Faybik was produced demonstrating that Faybik had lost \$500,000 or that such a loss was the result of the fraudulent conduct in this case. Despite the lack of evidence, the court found that the loss to Faybik was \$500,000 and resulted in a financial hardship and applied the § 2B1.1(b)(2) enhancement. Id.

The court also found, without evidentiary support, that Faybik’s assertion that Appellant had done nothing wrong and that she was not a victim was a result “of Mr.

Vance's ongoing attempt to defraud Ms. Faybik and to prevent her from asserting her status as a victim in the case.” RE 219 Hearing, PageID#2213. No evidence of communication between the Appellant and Faybik was produced to support the court’s conclusion. By increasing the Faybik’s loss amount from \$42,500 to just under \$500,000, the court found the total loss to be “a little over \$2.7 million,” and “that the two-level increase is properly applied for a substantial financial hardship.”

Id.

The court also found “sufficient evidence presented during the course of the trial” to apply a sophisticated means enhancement because misrepresentations were made to investors and lenders “about the status of equipment, about their ability to sell the product, [] about the ongoing sales, and then when they were questioned about that, they created false documentation” to hide the number of investors or “make it appear there were purchasers for their product” in order to “induce others either to loan significant amounts of money or to continue with their investments.”Id.: PageID#2213-2214.

And the court found that Appellant should receive an abuse of trust enhancement, not because Appellant held a position of trust, but because the court believed he made “attempts to convince Ms. Faybik, for example, that she's not a victim of his egregious conduct.” Id.: PageID#2220-2221. However, no evidence had

been presented demonstrating Appellant was continuing to communicate and influence Faybik. This finding was based solely on the fact Faybik provided victim impact statements forcefully stating that Appellant had done nothing wrong and that she was not a victim of the Appellant and the district court's subjective believe that Appellant must have communicated with Faybik. Id

After resolving the objections to the PSR, the court proceeded with sentencing. RE 220 Sentencing; PageID#2224-2261. Based on a total offense level 33 and a Criminal History Category II, the court found the guideline range to be 155 to 188 months' imprisonment. Id; PageID#2228. The court found that a sentence above the middle of the guideline range was appropriate and imposed a sentence of 174 months imprisonment. Id; 2253-2254.

The court then turned to sentence Ms. McKinnon whereupon she gave a lengthy prepared statement to the court pointing out lies promulgated by the prosecution at trial, but more importantly, provided more information exonerating Appellant. RE 235 Sentencing; PageID#2362-2387.

The final judgment was issued by the court and Appellant timely filed a notice of appeal. RE 776 Judgment; PageID#6783; RE 759 Notice of Appeal, PageID#6507.

STATEMENT OF FACTS

According to the PSR, the investigation into Appellant and McKinnon's business activities began February 2018, after the FBI received a referred complaint from a U.S. Citizen (A.D.), residing in Honduras. On June 19, 2017, A.D. and his business associate D.S. spoke to FBI agents in Florida. A.D. and D.S. told agents they had entered into a business agreement with Vance and McKinnon. Under the terms of this agreement, A.D. and D.S. became 51 percent owners of a company named Nex-Gen. Vance and McKinnon were 49 percent owners.

During the time-period of the conspiracy, Appellant and McKinnon participated in the creation of a related business entity, NexGen Energy Partners, LLC, which was a "clean coal" company that also manufactures bio-char for soil regeneration. D.S. introduced A.D. to McKinnon and Vance in August 2016. RE 210 PSR ¶ 9, 26. Material misrepresentations were made to investors and lenders to induce investments and loans to the business ventures. Some of these investments and loans involved interstate wire and ACH transfers of funds to bank accounts for Nex-Gen Industries, Inc., and NexGen Energy Partners, LLC. Id. Also during this time period, McKinnon utilized email accounts and Internet communications to correspond and exchange information with investors and lenders. Id. McKinnon, via means of wire in interstate or foreign commerce provided, falsified banking records

to investors and lenders to the business ventures which overstated the business ventures' actual production figures and capabilities. RE 210 PSR ¶ 26. McKinnon also created false business documents, such as purchase orders, purporting to show buyers' purchases of Nex-Gen Industries, Inc. and NexGen Energy Partners, LLC products, and provided said documents to investors and lenders. Id. McKinnon also created false Nex-Gen Industries, Inc. and NexGen Energy Partners, LLC financial reports, and provided said documents to investors and lenders. RE 210 PSR ¶ 26. After obtaining loans and investments under false pretenses, some of the funds were used on non-business and personal matters, including personal spending and to pay personal debt. Id.

McKinnon created the false financial information and sent that information to the victims at the demand of Chamblee. She hid the false information from the Appellant and used Appellant's email credentials to send the false financial information to the victims. PSR ¶ 25.

SUMMARY OF THE ARGUMENT

Appellant sought the introduction of a letter written by codefendant McKinnon that exonerated Appellant from much of the fraudulent conduct charged in the indictment and attributed to Appellant. The court denied introduction of McKinnon's letter, finding that it was impermissible hearsay. The court accepted McKinnon's letter as a "court exhibit" so as to allow review on appeal. The refusal to allow the introduction of the letter at trial was error because it was admissible as a statement against interest. McKinnon's letter amounted to her confession and explained that she created and sent fraudulent financial information to the victims in this case at the direction of Mr. Chamblee. Furthermore, McKinnon admits in her letter that Appellant was unaware of her fraudulent conduct and that she used Appellant's email credentials to send the fraudulent information to the victims. Because the letter was admissible and relieved Appellant of any wrongdoing, the failure to allow Appellant to introduce McKinnon's letter of confession is error. The error requires a new trial because it deprived Appellant of the ability to present a viable defense.

The government engaged in prosecutorial misconduct, in violation of Appellant's right to due process and a fair trial. Government misconduct occurred throughout trial when the government either actively sponsored false testimony of its witnesses, or failed to correct testimony from its witnesses that it knew to be false.

The misconduct became egregious and glaringly evident during closing argument where the government repeatedly called the Appellant a liar and argued that Appellant's body language demonstrated that he had lied. These comments were not tied to evidence that Appellant had lied and were designed to improperly influence the jury. The improper comments were exceedingly prejudicial in this case because McKinnon had testified that she was responsible for the fraud occurring in this case and that Appellant was unaware of her fraudulent activities. Accordingly, Appellant's convictions must be overturned.

Next, Appellant's sentence is both procedurally and substantively unreasonable.

The district court incorrectly applied Guidelines' enhancements for the amount of loss and use of a sophisticated means based on conduct of others that was not attributable to Appellant as relevant conduct. The court erroneously increased the amount of loss to Faybik to \$500,000 despite the fact the government agreed with the finding in the PSR the amount of loss was \$42,500. This finding lacked evidentiary support and is an abuse of discretion. Additionally, McKinnon provided a letter confessing that she was responsible for the creation of falsified financial statements and sending emails containing falsified financial statements and other misrepresentations. She also testified at trial that Appellant was unaware she had created false financial

information or that she used Appellant's email credentials to send falsified financial statements and other misrepresentations to the victims in this case. McKinnon's hidden activities cannot be attributed to Appellant as relevant conduct under the Guidelines because they were hidden from the Appellant and not within the scope of Appellant's agreement in the offense.

Additionally, the district court erroneously applied enhancements for an abuse of trust and for causing a significant financial hardship. These enhancements were based on the court's finding that Appellant continued to exert influence on Ms. Faybik causing her to assert in victim statements that she was not a victim of the Appellant. Faybik was never called as a witness in this case and no effort was made by the court to determine if Appellant had communicated with Faybik or if Appellant influenced her to write the victim impact statements. Thus, the court's finding that Appellant continued to communicate with Faybik and wrongfully influenced her lacks evidentiary support and was made based on nothing more than bald speculation. Accordingly, Appellant's sentence is both procedurally and substantively unreasonable and must be vacated.

LAW ARGUMENT

I. Appellant’s right to a fair trial was violated when the district court refused to permit the defense to introduce into evidence his codefendant’s letter confessing to the fraudulent conduct and exonerating the Appellant.

Standard of Review. This court reviews evidentiary decisions for abuse of discretion. See United States v. Trevino, 7 F.4th 414, 423 (6th Cir. 2021). Whether Appellant’s right to due process was violated is reviewed de novo. United States v. Johnson, 581 F.3d 320, 325 (6th Cir. 2009).

Prior to trial, McKinnon wrote a letter confessing to her crimes and explaining why she engaged in the conduct. The letter represented a full confession, but also absolved Appellant of any wrongdoing. The district court entered the letter as an exhibit at trial, but determined that the letter was hearsay and refused its admission for the jury to consider. The refusal to allow the admission of McKinnon’s letter into evidence violated Appellant’s right to due process and a fair trial. Therefore, his convictions must be vacated.

It is well established that “where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.” Chambers v. Mississippi, 410 U.S. 284, 302 (1973). The refusal to allow evidence of a codefendant’s confession, therefore, can be violation of the right to trial and due process. Id. “[W]hen a hearsay statement

bears persuasive assurances of trustworthiness and is critical to the defense, the exclusion of that statement may rise to the level of a due process violation.” (citing Chambers, 410 U.S. at 302. That is precisely what occurred in the instant case.

Appellant testified at trial that he was unaware of the fact false financial information had been sent to the victims in this case. He testified he did not know about the falsehoods even though the false financial materials had been sent from his email. McKinnon proffered testimony to the court that she had engaged in fraudulent activities because she and her family were being threatened and extorted by Mr. Chamblee. RE 179 Trial Day 6; PageID#1763. She would offer testimony that, in June of 2017, Chamblee demanded that she change bank statements that were requested by Mendie Hogan. Id; PageID#1765. “She thought he was joking at first but he implied bad things could happen.” Id. The next day she received text messages from Mr. Chamblee containing three images of her, one in her car, one in her bed asleep, and one while outside. “That placed her in fear that she could be harmed by him or someone that he would send, especially given that somebody had been in her house.” Id; PageID#1766. Approximately a month later Chamblee again demanded that she create more bank statements. Id. She was afraid to contact law enforcement ‘because she did not know what Chamblee was capable of.’ Id; PageID#1767.

Prior to trial, McKinnon wrote a letter to Appellant corroborating and

expanding on her proffered testimony. She confessed that she had altered the bank statements because she was being threatened by Mr. Chamblee.

[McKinnon] takes an awful lot, if not all, of the responsibility for everything that happened, particularly the bank statements. She admits in this letter that she had access to Mr. Vance's email account and that she routinely sent emails under his name and actually opened them, as she put it on the end, so he wouldn't even know it had been sent.

Appellant sought the admission of the letter at trial because it represented McKinnon's confession and it confirmed Appellant's testimony that he was unaware of her illegal activities. McKinnon did not object to the admission of the letter. Id. However, the government objected because (1) Appellant did not attempt to admit the letter during his case in chief; (2) the government had not received the letter through reciprocal discover under Rule 16;⁵ and (3) the letter was a statement of a non-testifying party that is not a party opponent and impermissible hearsay. Id.; PageID#1778. For the reasons argued by the government, the court denied the request to permit the introduction of the letter and its contents at trial for the jury to consider. Id.; PageID#1779. The court permitted the introduction of the letter in the record as a Court exhibit, but prohibited reference to the letter or its contents in the presence of the jury because the court believed the letter to be hearsay. Id.; PageID#1779.

⁵Evidence at trial revealed that Agent Hubbuch was, in fact, aware of the letter and its contents.

The decision to exclude the letter is reversible error. First, McKinnon's letter confessing to the illegal conduct was inherently reliable. "Self-inculpatory statements have long been recognized as bearing strong indicia of reliability." Williamson v. United States, 512 U.S. 594, 599, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994). "[R]easonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true." Id. See also Fed. R. Evid. 804(b)(3)). A statement against interest is inherently reliable if, "it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability." Fed. R. Evid. 804(b)(3)(A). See Williamson v. United States, 512 U.S. 594, 600, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994).

McKinnon's confession in her letter was corroborated at trial when she testified that she had created the fraudulent financial materials and used Appellant's email to transmit those materials to the victims. See Chambers, 410 U.S. at 300. ("When a defendant seeks to introduce an out-of-court statement, the corroboration of the contents of that statement with other evidence is a factor weighing in favor of its reliability"). McKinnon testified that Appellant was unaware of the fact she had altered bank statements or illegally transferred funds. Id.; PageID#1840. She further testified that she had access to Appellant's email username and password and that she

would send emails from that account purporting to be the Appellant. Id.; PageID#1841-1842. Appellant was unaware that she was sending false information to others using his email credentials. Id.

“[W]hen a hearsay statement bears persuasive assurances of trustworthiness and is critical to the defense, the exclusion of that statement may rise to the level of a due process violation.” Chambers, 410 U.S. at 302. Such is the case here. McKinnon’s letter was more than an admission to the crimes, but made clear that Appellant had no involvement in any of McKinnon’s illegal or fraudulent actions and that Appellant was not aware that McKinnon had engaged in fraudulent actions or used his email to send fraudulent financial statements. The letter was critical because it corroborated Appellant’s testimony that he did not send altered documents to the victims in this case and had no knowledge that McKinnon had used his email credentials to do so.

Accordingly, crucial and reliable evidence demonstrating that Appellant is innocent of the crimes charged was kept from the jury. The refusal to allow the introduction of the letter violated Appellant’s right to a fair trial and to present evidence supporting his defense. Therefore, Appellant’s right to due process and a fair trial was violated, requiring that his convictions be vacated. Chambers, 410 U.S. at 302.

II. Appellant's convictions must be vacated because the prosecution engaged in misconduct by repeatedly telling the jury that Appellant was a liar and that his testimony could not be believed and vouching for the credibility of its witnesses.

Standard of Review. The court reviews de novo “the question of whether prosecutorial misconduct requires reversal.” United States v. Stover, 474 F.3d 904, 914 (6th Cir. 2007). If the defendant did not preserve the specific objections at trial, the court reviews for plain error. United States v. Henry, 545 F.3d 367, 376 (6th Cir. 2008). Plain error is satisfied if there is “(1) error, (2) that is plain, (3) that affects substantial rights.” United States v. Webb, 403 F.3d 373, 380 (6th Cir. 2005). “[E]xceptionally flagrant” prosecutorial misconduct is grounds for reversal, even under a plain-error standard. United States v. Carter, 236 F.3d at 783 (6th Cir. 2001).

The Fifth Amendment to the United States Constitution states that “[n]o person shall be. . . deprived of life, liberty, or property, without due process of law.” U.S. Const., amend. V. In evaluating due process claims, this court inquires whether the practice “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934).

The Due Process Clause is offended when actions “violate those fundamental conceptions of justice which lie at the base of our civil and political institutions and

which define the community's sense of fair play and decency." United States v. Lovasco, 431 U.S. 783, 790, 97 S.Ct. 2044, 2049, 52 L.Ed.2d 752 (1977). Accordingly, the duty of the prosecution to behave in a fair and impartial manner is a deeply ingrained principle in American jurisprudence. The prosecutor is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all and whose interest, therefore, in a criminal prosecution is not that it shall win a case but that justice shall be done. Strickler v. Greene, 527 U.S. 263, 281, 119 S.Ct. 1936, 1948, 144 L.Ed.2d 286(1999)(citing Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935)).

The rule is well established that the government may prosecute with earnest and vigor. Berger v. United States, 295 U.S. 78, 88 (1935). But "while [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones." Id. "It is as much [the prosecutors] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Id. A prosecutor is more than an advocate; she or he is a representative of the sovereign, and in that capacity, is expected to exercise restraint and to be fair to all. United States v. Pinto, 850 F.2d 927, 938 (2nd Cir. 1988). It is important that prosecutors in our system exercise restraint because what they say in front of a jury

carries great weight. “Arguments delivered while wrapped in the cloak of state authority have a heightened impact on the jury. For this reason misconduct by the prosecutor, normally an elected official, must be scrutinized carefully.” Berger, *supra*.

A defendant’s due process rights are violated when the prosecutor’s misconduct renders a trial “fundamentally unfair.” Darden v. Wainwright, 477 U.S. 168, 181 (1986); Smith v. Phelps, 455 U.S. 209, 210 (1982). In ascertaining whether a prosecutor’s conduct constitute a denial of due process the court should determine if a prosecutor’s conduct misstates or manipulates the evidence. Darden, 477 U.S. at 182. Further, the overall weight of the evidence of guilt should be considered in determining the denial of due process. United States v. Young, 470 U.S. 1, 19 (1985). Whether the misconduct relates to a critical part of the case is also considered in determining denial of a fair trial. Giglio v. United States, 405 U.S. 150, 154 (1972). Likewise, it is necessary to review the entire proceedings and place the prosecutor’s conduct in context. Greer v. Miller, 483 U.S. 756, 765-66 (1987).

To determine whether prosecutorial misconduct requires reversal, the appellate court first evaluate whether the statements at issue were improper. United States v. Carson, 560 F.3d 566, 574 (6th Cir. 2009). The Court then determines whether such statements were flagrant using four factors: (1) whether the conduct and remarks of

the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the conduct or remarks were isolated or extensive; (3) whether the remarks were deliberate or accidentally made; and (4) whether the evidence against the defendant was strong. Id.(quoting United States v. Carter, 236 F.3d 777, 783 (6th Cir. 2001)).

Throughout this case, the government engaged in misconduct designed to mislead the jury and improperly prejudice the Appellant. As noted in McKinnon's statement to the court at sentencing, government misconduct occurred throughout trial when the government either actively sponsored false testimony of its witnesses, or failed to correct testimony from its witnesses that it knew to be false. See RE 235 McKinnon Sentencing; PageID#2362-2386.

Appellant agrees with McKinnon that the evidence presented by the government was not consistent, but recognizes it is the job of the jury to consider the inconsistencies and then weigh the evidence. However, that function of the jury was contaminated by the prosecutorial misconduct occurring during closing argument. Rather than make arguments based on the evidence submitted at trial, the government repeatedly made improper comments calling the Appellant a liar and argued to the jury that Appellant's body language and mannerisms demonstrated that he was a liar. These comments expressed the prosecutor's personal belief that Appellant was a liar and were designed to improperly influence the jury.

The prosecutor made the following improper argument to the jury:

Now, I promised you a moment ago that we were going to return to Mr. Vance's denial of sending that email. So let's talk about the defendants' testimony in this case, I'll begin with Mr. Vance.

So let's think about his testimony and his credibility. Ladies and gentlemen, judging a witness's credibility in a case is your job, it's not mine, it's not the defense lawyers. It is your job alone. But it is my argument to you that Mr. Vance was not a credible witness.

Let's start, ladies and gentlemen, with his history of lying. He admitted to you that he lied under oath to the Tazewell County Circuit Court. He admitted under oath to that Court that he was guilty of a crime when he says he was not actually guilty of that crime. He lied to that Court under oath and now he wants you to believe him. Ladies and gentlemen, he admitted he lied to you under oath here in this trial when he claimed that he was the sole owner of Nex-Gen, and then it was revealed to him that he was not, that he had given shares away to Ms. Faybik.

So ladies and gentlemen, he has already, in his very testimony in this case, lied to you. He lied to Special Agent Hubbuch about the KRP money being from a loan. He lied to Allan Deware, he lied to the Shumards, he lied to Koch, he lied to KRP. And yet he asks you to believe him.

Ladies and gentlemen, think about Mr. Vance's body language when he was on the stand. I know you were all watching him testifying. You saw him shifting in his seat. He was shifting eye contact, he wasn't looking directly at his attorney or to you all, the jury. He would look around, he would mumble his answers. Ask yourself, is that how a truthful witness testifies? I submit to you that it is not.

Do you remember the exchange with Mr. Vance about that Nucor spec sheet? Those were incredibly evasive answers. I don't think he ever gave a straight answer on that. And think about, ladies and gentlemen, the accusation that someone else was using his email account, but that the

only emails that this person sent were the fraudulent ones. Does that make any sense to you? Someone who went on conducting the same business that Mr. Vance was conducting, does that seem believable or does that seem like a lie to avoid being held responsible?

RE 179 Trial Day 6; PageID#1868-1870.

Although “[t]he prosecution may imply that a defendant is lying during its closing argument so long as the prosecutor emphasizes the discrepancies between the defendant’s testimony and the record,” United States v. Stover, 474 F.3d 904, 916 (6th Cir. 2007), that is not what happened here. Herein, the prosecution stated that the Appellant lied when he claimed that he was the sole owner of Nex-Gen. RE 179 Trial Day 6; PageID #1869. However, the alleged lie was countered by the revelation that the Appellant was not the sole owner of Nex-Gen, as he had given his shares to Ms. Faybik. Id; PageID #1869. It was alleged that the Appellant “lied to Special Agent Hubbuch about the KPR money being from a loan. He lied to Allen Deware, he lied to the Shumards, he lied to Koch, he lied to KRP.” Id. In making these claims, the prosecution did not present information from the record supporting the claims that the Appellant lied. Instead, the prosecution pointed to the Appellant’s “body language” while testifying and his “evasive answers.” Id. References that Deware believed Appellant provided false information was presented much earlier in closing arguments and prior to the prosecutors statements that Appellant was a liar. Id;

PageID #1853. Similarly, reference to the Shumards, Koch, and KRP were discussed well prior to the above allegation that Appellant was a liar because of his body language. Id.; PageID#1853-1856.

This Circuit found the prosecution had engaged in misconduct and violated due process when the prosecutor relied on defendants statements in his closing arguments and repeatedly calling defendant a liar. Stermer v. Warren, 959 F.3d 704, 725, 729-30 (6th Cir. 2020). To determine whether a prosecutor’s remarks constitute “flagrant misconduct,” the court must “assess (1) whether the conduct and remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the conduct or remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally made; and (4) whether the evidence against the defendant was strong.” United States v. Modena, 302 F.3d 626, 635(quoting United States v. Carter, 236 F.3d 777, 783 (6th Cir. 2001)).

Here, the prosecutor began lengthy speech in which he repeatedly said defendant was a liar. However, these repeated statements were not tied to the evidence but instead expressed the prosecutors own opinion about how the jury should view defendants story. Nearly the entire closing argument was a broadside attack on defendants truthfulness without any real effort to tie it to the evidence. The prosecution referred to the Appellant’s “body language” and mannerisms to support

the allegation that he lied. Said assertions were not supported by evidence on the record, but expressed only the prosecutor's personal opinion, but stated as fact. Those repeated assurances that Appellant was a liar made it appear as if the prosecution had knowledge, outside of the record, that proved allegations of dishonesty. As a result, the jury was left with repeated allegations from the United States that the Appellant lied, stated as fact, and backed up by the prosecutor's interpretation of Appellant's body language. In light of the prosecutor's asserted special knowledge about the truthfulness of the Appellant, the jury could not properly weigh the evidence on the record. Accordingly, the remarks of the prosecutor mislead the jury and prejudiced the defendant. Modena, 302 F.3d at 635.

Next, the conduct or remarks were not isolated but extensive. The prosecution could not stop referring to the Appellant as a liar during closing. RE 179 Trial Day 6; PageID#1852, 1855, 1858, 1867, 1868, 1869, 1870, 1871, 1872, 1873, and 1874. The closing argument was largely devoid of references to the facts of the case, but instead consisted of the prosecutor telling the jury that it should not believe Appellant's testimony because Appellant is a liar. Thus, the prosecutor improper conduct was extensive. Modena, 302 F.3d at 635

Third, the remarks were deliberate. The improper remarks were too numerous and obviously planned to have been accidental. The remarks were designed to

mislead the jury and to distract from the testimony of McKinnon, who admitted to committing the fraudulent conduct and absolving Appellant of wrongdoing. The prosecution's entire closing argument centered upon calling the Appellant a liar. Id.

Finally, the evidence against the defendant was far from overwhelming. Although evidence demonstrated that fraud had been committed, McKinnon provided critical testimony admitting to creating falsified financial documents and using Appellant's email to send those fabricated materials and misrepresentations to the victims in this case. She further testified that took those steps without Appellant's assistance or knowledge and at the instruction of Mr. Chamblee. If the evidence against the Appellant had been strong, the prosecution would not need to resort to telling the jury Appellant is a liar and referencing body language as proof of Appellant's guilt. Accordingly, the evidence was not strong. Modena, 302 F.3d at 635

The prosecution's misconduct did not end with mud slinging against the Appellant, but spilled into efforts at witness vouching during closing arguments. "Improper vouching occurs when a prosecutor supports the credibility of a witness by indicating a personal belief in the witness's credibility." United States v. Francis, 170 F.3d 546, 550 (6th Cir. 1999). In United States v. Acosta, 924 F.3d 288 (6th Cir. 2019), the court found the prosecution improperly vouched for a witness, stating that "Detective Bowles, a fine young man, picked it up and there it was."

The improper vouching was far more obvious in this case where the prosecution stated “Ms. Francis made the courageous decision not to just timidly sit by and hide that information.” RE 179 Trial Day 6; PageID#1853. In labeling Francis as ‘courageous,’ the prosecution was supporting the credibility of her testimony, especially when contrasting Francis to the Appellant, who had been constantly labeled a liar. The prosecution’s reference to Francis’ courage was not supported by evidence on the record, but made it appear as if the prosecution had knowledge, outside of the record, that proved that Francis was credible, and therefore Appellant was not credible. Accordingly, the conduct and remarks of the prosecutor tended to mislead the jury and prejudice the Appellant in this case.

While the reference to Francis as courageous only occurred once, such must be countered against the number of times that the prosecution referred to the Appellant as a liar. Doc. 179, PageID #1852, 1855, 1858, 1867, 1868, 1869, 1870, 1871, 1872, 1873, and 1874. When viewed as a whole, the prosecutors improper comments were extensive. And for similar reasons, the third factor under Modena, also favors the Appellant. The prosecution was deliberate in referring to the Appellant as a liar. Doc. 179, PageID #1852, 1855, 1858, 1867, 1868, 1869, 1870, 1871, 1872, 1873, and 1874. There can be little doubt that painting Francis as a contrary figure to the Appellant, the courageous beacon of light that could be believed, was also deliberate.

Finally, testimony had been offered by McKinnon admitting to creating and sending false information to the victims in this case using Appellant's email. The testimony, if believed, absolved Appellant of wrongdoing in this case. Thus, the evidence of Appellant's guilt was not strong. If the evidence against the Appellant had been strong, the prosecution would not have needed to resort to vouching and reliance upon inferences to be made from outside the record. The prosecution would simply have referred to the evidence.

In sum, the prosecution engaged in misconduct by repeatedly telling the jury that Appellant was a liar and that his testimony could not be believed and then vouching for the credibility of its witnesses. The conduct violated Appellant's right to due process and a fair trial requiring that his convictions must be vacated.

III. Appellant's 174-month sentence is procedurally and substantively unreasonable.

Standard of Review. This Court reviews district court sentencing decisions under a deferential abuse-of-discretion standard, United States v. Johnson, 79 F.4th 684, 705 (6th Cir. 2023), factual findings for clear error and its legal conclusions de novo, giving due deference to the district court's application of the Guidelines to facts. United States v. Abdalla, 972 F.3d 838, 850 (6th Cir. 2020).

A. The Sentence Issued to the Appellant Was Procedurally Unreasonable.

A sentence is procedurally unreasonable if, *inter alia*, the district court fails to recognize its authority to deviate from the Guidelines, see Gall v. United States, 552 U.S. 38, 41 (2007), or fails to provide an individualized sentence, see United States v. Herrera-Zuniga, 571 F.3d 568, 582 (6th Cir. 2009). Procedural errors include “failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the §3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence--including an explanation for any deviation from the Guidelines range.” Gall, 128 S. Ct. at 597; see also Herrera-Zuniga, *supra*.

When rendering a sentence, the district court “must make an individualized assessment based on the facts presented.” Gall, *supra*. That is, the sentencing court must apply the relevant §3553(a) factors to the specific circumstances of the case before it. Such individualized treatment is necessary “to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.” Id. at 598.

Moreover, the district court must “state in open court” the particular reasons supporting its chosen sentence. 18 U.S.C. §3553(c). In doing so, “[t]he sentencing judge should set forth enough to satisfy the appellate court that he has considered the

parties' arguments and has a reasoned basis for exercising his own legal decision making authority." Rita v. United States, 551 U.S. 338, 127 S. Ct. 2456, 2468, 168 L. Ed. 2d 203 (2007). This not only "allow[s] for meaningful appellate review" but it also "promote[s] the perception of fair sentencing." Gall, 128 S. Ct. at 597. Accordingly, "a talismanic recitation of the §3553(a) factors without application to the defendant being sentenced does not demonstrate reasoned decision making or provide an adequate basis for appellate review." United States v. Stephens, 549 F.3d 459, 466-467 (6th Cir. 2008).

Herein, the district court failed to properly calculate the appropriate Guideline sentence. The lower court erred in its calculation of loss amounts, determination of substantial hardship, the use of sophisticated means, the abuse of a position of trust, and obstruction of justice, as discussed below.

- (1) The district court erroneously determined the amount of loss was between \$1,500,000 and \$3,500,000 and imposing a 16-level enhancement under U.S.S.G. §2B1.1(b)(1).**

According to U.S.S.G. §2B1.1(b)(1), a defendant's offense level can be increased based upon the amount of loss accrued due to the offense. However, the amount of loss must be reasonably foreseeable to the defendant. U.S.S.G. §2B1.1, app. Note 3. Reasonably foreseeable loss is defined as the "pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a

potential result of the offense.” *Id.* at application note 3(A)(iv). “[T]he Sentencing Guidelines import the legal concept of a causal relationship between the defendant’s conduct and the determined loss.” United States v. Rothwell, 387 F.3d 579, 583 (6th Cir. 2004).

Although §2B1.1 directs district courts to increase the offense level based on the amount of the ‘loss,’ the guideline itself leaves this critical word undefined. United States v. Riccardi, 989 F.3d 476 (6th Cir. 2021). Application Note 3 provides a detailed code for “the determination of loss under subsection (b)(1).” This application note sets a general rule that “loss” means “the greater of actual loss or intended loss.” *Id.* It defines “actual loss” to mean “the reasonably foreseeable pecuniary harm that resulted from the offense” and “intended loss” to mean “the pecuniary harm that the defendant purposely sought to inflict[.]” *Id.*

In the instant matter, the district court counted the loss as occurring from April 2017, the date upon which the Appellant allegedly became aware of the investigation at issue. RE 219, Sentencing; PageID #2209. However, the pre-sentence investigation stated that the investigation did not commence until February 2018. RE 210 PSR ¶9. The time line is critical, as the pre-sentence investigation report put forth numerous instances of allegedly fraudulent activity occurred prior to February 2018. PSR at ¶28.

Appellant submits that, until he became aware of the investigation, any amount of loss was not foreseeable to him. Co-defendant McKinnon provided a letter to the district court stating that the Appellant was unaware of the fraud occurring herein. RE 153 PageID #603. The Appellant's ignorance of the fraud scheme is echoed by an alleged victim, Joan Faybick, who provided victim impact statements in which she stated that loss she suffered was not due to any wrong doing by the Appellant. RE 152-2, Supplement Victim Impact Statement; PageID#597-598. If the Appellant was unaware that fraud was occurring until February 2018, then the loss amount occurring prior to said date was not reasonably foreseeable to him.

In addition, the district court made the finding that the loss to Faybik was \$500,000, not \$42,500 as asserted by the government. RE 219 Sentencing; PageID#2211; RE 220 Sentencing; PageID#2229. The court's finding entirely lacks evidentiary support and appears to be based on the Agent Hubbuch's testimony at trial that Faybik had invested \$500,000 with Appellant's company even though "[government] records only show a tenth" of that amount. RE 219 Sentencing; PageID#26. Faybik filed 2 victim impact statements and no where in those statements does she claim to have invested \$500,000. In fact no evidence was presented to substantiate Agent Hubbuch's allegation that Faybik invested \$500,000 with the Appellant.

Accordingly, the Appellant submits that the amount of loss was under \$1.5 million and his offense level was improperly calculated. Therefore, his sentence should be vacated.

(2) The district court erroneously found the offense resulted in financial hardship and assessing a two-level enhancement under U.S.S.G. §2B1.1(b)(2)(A)(I) and (iii).

According to U.S.S.G. §2B1.1(b)(2)(A), an enhancement shall apply if the offense “(iii) resulted in substantial financial hardship to one or more victims, increase by 2 levels.” U.S.S.G. §2B1.1(b)(2)(A). The enhancement for substantial financial hardship “focuses on the ‘extent of the harm’ to a particular victim and requires a showing that the loss was ‘more than minimal or trivial’ as gauged by the victim’s specific financial circumstances.” United States v. Skouteris, 51 F.4th 658, 672 (6th Cir. 2022). In determining whether the enhancement applies, the district court “may make reasonable inferences about the victims’ financial circumstances and about their level of financial harm, so long as those inferences find some support in the record.” United States v. Howder, 748 F. App'x 637, 644 (6th Cir. 2018).

In United States v. Soulliere, 2023 U.S. App. LEXIS 4539 (6th Cir. 2023), it was found that the district court properly attributed the substantial financial hardship enhancement regarding several victims of an identity theft offense. One of the victims reported that finding creditors for his business had been challenging as a result of a

50-point drop in his credit score due to “constant” credit inquiries in his name, while another victim had been unable to purchase a home on two occasions because of the damage to his credit score, which had dropped from 740 to 620 due to fraudulent purchases and credit inquiries in his name. Id.

In the instant case, the district court found that there were nine victims, meaning that U.S.S.G. §2B1.1(b)(2)(A)(I) did not apply. RE 219 Sentencing; PageID #2212. And even though Faybick had strongly asserted to the court that the Appellant had done nothing wrong and had not defrauded her, the court found she was a victim and, due to “her status, her job, the type of work she had performed, the amount of money she’d invested (nearly \$500,000),” found that she suffered a financial hardship. RE 219 Sentencing; PageID#2211-2212. The court appeared to believe Faybick had to ‘tap’ into her credit cards to make up for the loss caused by the Appellant. Id.; PageID#2150-2151.

As an initial matter, the finding that Faybik lost close to \$500,000 is clearly erroneous. Agent Hubbuch even admitted during sentencing that no documentation exists to show that Faybik invested \$500,000 with the Appellant. Instead, the evidence demonstrated that Faybik invested a total of \$42,500. At no point was evidence introduced that Faybick’s ability to obtain credit was harmed. Further, although retirement funds may have been utilized to invest with the Appellant, no

evidence was presented regarding the totality of Faybick's retirement savings or that any lifestyle changes had to be made due to the financial loss.

In sum, the court correctly determined that the government failed to prove at least 10 victims. But remarkably, the court ignored what Faybick stated in her victim impact statements and found that Faybick was a victim. Even more remarkable, the court found that Faybick lost \$500,000, and therefore, suffered a substantial financial harm. This finding was made despite the fact the government alleged a loss of \$42,500, not \$500,000. Further, no evidence was produced demonstrating that Faybick had lost close to \$500,000 as a result of the fraudulent conduct occurring in this case.

In sum, the district court abused its discretion applying a financial hardship enhancement based on the finding that Faybick was a victim that lost \$500,000. Because the court's determination that Faybick was a victim who suffered a significant financial hardship finds no evidentiary support, the district court abused its discretion in applying an enhancement under §2B1.1(b)(2)(A)(iii), Appellant's sentence is procedurally unreasonable and must be vacated.

- (3) The court abused its discretion by applying a use of a sophisticated means enhancement under U.S.S.G. §2B1.1(b)(10)(c), when any conduct requiring a special skill was committed by McKinnon and McKinnon admitted to concealing her fraudulent conduct from the Appellant.**

The sophisticated means enhancement is appropriate if the offense conduct was “more intricate than that of the garden-variety offense.” United States v. Sethi, 702 F.3d 1076, 1079 (8th Cir. 2013) (punctuation modified); see also United States v. Benchick, 725 F. App'x. 361, 369 (6th Cir. 2018); U.S.S.G. § 2B1.1(b)(10), cmt. 9(B) (defining "sophisticated means" as "especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense"). The commentary to § 2B1.1(b)(10) provides a list of examples of conduct that ordinarily constitutes sophisticated means, including "hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts." U.S.S.G. § 2B1.1(b)(10), cmt. 9(B). Courts have consistently held that the creation and use of such falsified documents warrants the sophisticated means enhancement. The relevant inquiry is whether the conduct, taken as a whole, constitutes sophisticated means. See United States v. Tandon, 111 F.3d 482, 491 (6th Cir. 1997).

In the instant case, the conduct at issue involved providing falsified banking records to investors, falsely overstating the business ventures' actual production figures and capabilities, created false documents and provided said documents to investors and lenders, and created false financial reports to provide to investors and lenders. PSR at ¶26. Importantly, however, McKinnon testified that she was the individual that used her skills to prepare and disseminate false financial information

to the victims in this case and that Appellant was unaware of her conduct. No proof was offered that Appellant used any special skill whatsoever. Instead, the enhancement was based on the conduct McKinnon and attributed to the Appellant by the court at sentencing.

Of course a district court may consider "relevant conduct," which, in the case of a conspiracy, includes "all acts and omissions of others that were . . . (I) within the scope of the jointly undertaken criminal activity, (ii) in furtherance of that criminal activity, and (iii) reasonably foreseeable in connection with that criminal activity." U.S.S.G. § 1B1.3(a)(1)(B); see United States v. Iossifov, 45 F.4th 899, 924 (6th Cir. 2022). To determine whether "these criteria are met," a court "must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake." United States v. Donadeo, 910 F.3d 886, 894 (6th Cir. 2018).

Although the district court did not make a specific relevant conduct finding at sentencing, the "special skills" conduct could only attributed to Appellant through relevant conduct, and McKinnon, who is the individual who created the false financial documents and emailed them using Appellant's email credentials. To attribute McKinnon's conduct to the Appellant was error because McKinnon testified and provided a letter admitting to her role in the offense. She stated that she, without the Appellant's knowledge, fabricated false bank statements that were

sent to investors and partners and that she emailed these statements using the Appellant's email account and password. RE 153 Sentencing Memorandum; PageID#603. Because McKinnon actively hid her illegal conduct from the Appellant, such conduct could not be within the "scope of the criminal activity [Appellant] agreed to jointly undertake" and thus, cannot be relevant conduct under § 1B1.13.

Accordingly, Appellant's offense level should not have been increased pursuant to §2B1.1(b)(10)(C). His sentence is procedurally unreasonable and must be vacated.

(4) The district court erred in assessing a two-level enhancement for abuse of position of trust under U.S.S.G. §3B1.3.

The Guidelines provide for a two-level increase to the offense level for an individual who abuses a position of trust. U.S.S.G. §3B1.3. According to the application notes, a "[p]ublic or private trust" refers to a position of public or private trust characterized by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference)." U.S.S.G. §3B1.3, application note 1. Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature. Id.

Such a relation arises when “a person ... intentionally makes himself ... vulnerable to someone in a particular position, ceding to the other’s presumed better judgment some control over their affairs.” United States v. Brogan, 238 F.3d 780, 783 (6th Cir. 2001). The Sixth Circuit has stated that an “investment consultant” occupies a position of trust. United States v. Humphrey, 279 F.3d 372, 381 (6th Cir. 2002). In Humphrey, however, the defendant was not found to have occupied a position of trust, as the defendant could not administer the property of another or otherwise act in another’s best interest. Id.; see also Brogan, 238 F.3d at 784 (distinguishing “employees who administer another’s property from those authorized only to handle it but who are lightly supervised”).

In the instant matter, Appellant did not hold a position of trust as defined by the Guidelines. There was no evidence presented that the Appellant had the ability to administer the property of the purported victims. It was co-defendant McKinnon who was the Chief Financial Officer of the business. RE 151, PageID #585. McKinnon had control over the company’s bank accounts and “acted apparently without supervision.” Id. It was McKinnon who admitted to fabricating false bank statements that were sent to investors and that she e-mailed these statements using the Appellant’s e-mail account and password. Without the ability to administer the purported victims’ property, the Appellant could not have been in a position of trust.

The district court appeared to recognize these facts, but still decided to apply the enhancement. However, the reason it applied the enhancement was based on the unsupported finding that Appellant continued to exert influence on Faybik, which caused her to assert in victim statements that she was not a victim of the Appellant. RE 219 Hearing; PageID#2206-2207. Faybik was not called as a witness in this case and no effort was made by the court to determine if Appellant had communicated with Faybik or influenced her in some way to write the victim impact statements. There is nothing to suggest that Faybik was continuing to communicate with the Appellant about her victim status. Instead, Faybik's statement provides that Appellant did nothing wrong and that the case agent bullied her into making the statements that they are using to make it look like she was a victim that suffered a substantial financial hardship. RE 219 Hearing; PageID#2206.

Accordingly, the court's finding that Appellant continued to communicate with Faybik and wrongfully influence her lacks evidentiary support, was made based on the court's bald speculation, and the application of the enhancement is an abuse of discretion. RE 219 Hearing; PageID#2206. Appellant's sentence is procedurally unreasonable and must be vacated.

B. The Sentence Issued to the Appellant Was Substantively Unreasonable.

Substantive review involves whether the length of the sentence is reasonable given all the circumstances of the case in light of the factors set forth in 18 U.S.C. §3553(a). United States v. Graham, 622 F.3d 445, 464 (6th Cir. 2010). In order for a sentence to be substantively reasonable, the sentencing court must first correctly calculate the range of imprisonment under the Guidelines. Id.; see also United States v. Garcia-Lara, 499 F.3d 1133 (10th Cir. 2007). Additionally, a sentence must be “sufficient, but not greater than necessary,” to achieve the four purposes of sentencing set forth in §3553(a)(2): (a) retribution; (b) deterrence; (c) incapacitation; and (d) rehabilitation. Since §3553(a) requires sentence to be no greater than necessary to meet four purposes of sentencing, imposition of sentence greater than necessary to meet those purposes is reversible, even if within guideline range. United States v. Ferguson, 456 F.3d 660, 667 (6th Cir. 2006) (the parsimony provision serves as “the guidepost for sentencing decisions post-Booker”). A sentence based on a guideline range that was erroneously enhanced is substantively unreasonable because it is greater than necessary to achieve the goals of sentencing.

As presented, the district court improperly calculated the offense level when it sentenced the Appellant. He was sentence based on an offense level 33 and a Criminal History Category II yielding an imprisonment range of 151 to 188 months. Had Appellant’s objections been sustained at sentencing, Appellant’s

offense level would be no higher than 25 and his guideline range would be 63 to 78 months' imprisonment. Accordingly, Appellant's sentence of 174 months' imprisonment is greater than necessary to achieve the goals of sentencing and substantively unreasonable.

CONCLUSION

In light of the above, Appellant's convictions and sentences should be vacated, and this matter remanded for rehearings in conformity therewith.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this opening brief complies with Sixth Circuit limitations with respect to font and type size. The brief is prepared using Times New Roman in type-size 14. The brief exceeds 30 pages, but contains a total of 10,829 words, including footnotes.

/s/ Matthew M. Robinson
Matthew M. Robinson, Esq.

CERTIFICATE OF SERVICE

The undersigned certifies that a on January 18, 2024, a true and accurate copy of the foregoing opening brief was entered in this Court's ECF/CM filing system, constituting delivery upon the Assistant United States Attorney for the Eastern District of Kentucky.

/s/ Matthew M. Robinson
Matthew M. Robinson, Esq.

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record Entry Number & Description of Document	PageID#
RE 1 Indictment 1-11	PageID#1-11
RE 133 Verdict	PageID#485-488
RE 151-1 Victim Impact Statement	PageID#592-596
RE 152-2 Supplement Victim Impact Statement	PageID#597-598.
RE 210 Presentence Investigation Report (sealed)	No PageID#
RE 200 Judgment	PageID#1971-1978
RE 202 Notice of Appeal	PageID#1985-1986
RE 178 Trial Transcript Day 5	PageID#1596-1600
RE 179 Trial Transcript Day 6	PageID#1760-1880
RE 180 Trial Transcript Day 7	PageID#1905-1911
RE 219 Evidentiary Hearing, 8/21/23	PageID#2120-2224
RE 220 Sentencing Hearing, 8/21/23	PageID#2224-2261
RE 235 McKinnon's Sentencing, 8/21/23	PageID#2362-2387