CASE NOS. 23-5766 & 23-5773

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA — PLAINTIFF-APPELLEE

V.

DOUGLAS WILLIAM VANCE
MOLLY IRENE MCKINNON — DEFENDANTS-APPELLANTS

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

BRIEF OF THE PLAINTIFF-APPELLEE UNITED STATES OF AMERICA

CARLTON S. SHIER, IV
UNITED STATES ATTORNEY

CHARLES P. WISDOM JR.
CHIEF, APPELLATE DIVISION

BY: JAMES T. CHAPMAN
ASSISTANT UNITED STATES ATTORNEY
260 W. VINE STREET, SUITE 300
LEXINGTON, KENTUCKY 40507-1612
(859) 685-4804
James.Chapman2@usdoj.gov

COUNSEL FOR PLAINTIFF-APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. Cases

II. Statutes, Rules & Guidelines

III. Other Authorities

STATEMENT REGARDING ORAL ARGUMENT

The United States does not request oral argument.

STATEMENT OF THE ISSUES

Douglas William Vance

I. Whether Vance waived any argument regarding two reasons McKinnon's letter was excluded by failing to address them in his opening brief. Alternatively, whether the letter was properly excluded on the merits.

II. Whether prosecutorial misconduct occurred.

III. Whether Vance's within-guidelines sentence is procedurally and substantively reasonable.

Molly Irene McKinnon

IV. Whether McKinnon made a prima facie showing that she could produce evidence on each of the elements of a duress defense.

V. Whether the evidence was sufficient to support McKinnon's convictions.

VI. Whether McKinnon's within-guidelines sentence is procedurally and substantively reasonable.

STATEMENT OF THE CASE

Over the course of several years, from approximately August 2016 through December 2018, Douglas William Vance and Molly Irene McKinnon defrauded business investors and lenders out of millions of dollars. Vance was CEO and

McKinnon was CFO of a business endeavor called, among other names, Nex-Gen Industries in southeastern Kentucky. [R. 262: Notice at 2534, 2543 (Gov. Ex. 116); *see* R. 219: Christopher Hubbuch, TR (Evidentiary Hearing) at 2174 ("Nex-Gen is just one entity.").] Nex-Gen was purportedly "a clean coal company that also manufacture[d] bio-char for soil regeneration." [R. 210: Presentence Report at ¶ 9.] An early investor, Allan Deware, became involved in August 2016. [*See, e.g.*, R. 174: Allan Deware, TR (Trial Day 1) at 824.] Within about ten months, Deware's involvement with Vance and McKinnon soured:

> In approximately June 2017, [Deware] received a call from April Francis, the office manager at the Nex-Gen plant . . . , wherein she told [him] that she was leaving her job because the company was "a Ponzi scheme." [Deware] asked her for the bank statements for the company so that he could compare them to QuickBooks reports of checks and deposits that McKinnon, acting as the treasurer of the company, had sent to [him.] Francis complied, and the statements did not match the McKinnon provided reports. There were a number of deposits in the statements sent by Francis that did not appear in the reports sent by McKinnon, which indicated that the account had received one or more sources of income, such as sales, loans, or investments from other individuals, that were not reported to [Deware.]

[R. 210: Presentence Report at ¶ 10.] In effect, McKinnon doctored the Nex-Gen financial information provided to Deware to, among other things, depict the sale of product and conceal the infusion of money from other investors and lenders, unknown to Deware. [*See, e.g.*, R. 174: Allan Deware, TR (Trial Day 1) at 847.]

Vance and McKinnon separately defrauded a distinct group of investors known as the Shumard group: Kenneth Shumard, Gary Chamblee, Mendie Hogan, and associated entities. [R. 210: Presentence Report at ¶ 12.] Similarly, the bank "statements provided to [the Shumard group] did not match the actual bank statements." [*Id.* at ¶ 15.] The statements "were fabricated to show that [Chamblee] and his associates were the only sources of investment and funding." [*Id.*] They were altered to, for instance, remove any reference to Deware's infusion of money; in other words, Vance and McKinnon "had created competing business entities to hide one set of investors from the other set of investors. And they hadn't disclosed the existence of the other set to the other side." [R. 179: James Chapman, TR (Trial Day 6) at 1853; *see, e.g.*, R. 174: Allan Deware, TR (Trial Day 1) at 840 (stating he was unaware of operating agreement with Shumard group); *id.* at 850 (stating that he did not know Chamblee); R. 175: Kenneth Shumard, TR (Trial Day 2) at 951-52 (stating that he did not know Deware); R. 175: Gary Chamblee, TR (Trial Day 2) at 1003, 1072 (same).]

Lies and misrepresentations saturated Vance's and McKinnon's actions. Among others, there were lies to Kentucky River Properties (KRP). [R. 179: James Chapman, TR (Trial Day 6) at 1855-56.] There were lies to Koch Industries. [*Id.* at 1856.] There were lies concerning AK Steel, Washington Mills, and Nucor Steel. [*Id.* at 1857.]

Vance and McKinnon occasionally returned money to investors or lenders. For example, the Shumard group described how, "when some money would come back to them from Mr. Vance and Ms. McKinnon, it was disguised as income from the sale of product." [*Id.* at 1854.] There was "one cashier's check . . . that purportedly came from sales to a company called Cabot when . . . it actually came from money from [a] loan from Koch Industries." [*Id.*] The Shumard group described "how returns like that encouraged them to invest more, because they perceived the business to be more successful than it really was." [*Id.*] "This falsity encouraged further lending and further investment because it showed . . . that the business was more successful than it truthfully was. And Mr. Vance and Ms. McKinnon's lies concealed the true source of those funds"—that they were wire fraud proceeds. [*Id.* at 1855.]

The grand jury charged Vance and McKinnon with wire fraud, conspiracy to commit wire fraud, and conspiracy to launder money. [R. 1: Indictment at 1-12.] The duo stood trial; the jury convicted on all counts. [R. 133: Verdict at 485-88.] Vance received 174 months of imprisonment, followed by three years of supervision. [R. 200: Judgment at 1971-73.] McKinnon received 156 months of imprisonment, followed by three years of supervision. [R. 201: Judgment at 1978-80.] These appeals followed. [R. 202: Notice of Appeal at 1985; R. 204: Notice of Appeal at 1993.]

SUMMARY OF THE ARGUMENT

Douglas William Vance

I. Vance waived any argument regarding two reasons McKinnon's letter was excluded by not addressing them in his opening brief. The court excluded the letter on three bases, and Vance challenges only one, so he cannot change the result. Alternatively, the letter was properly excluded on the merits. The district court acted within its discretion in declining to let Vance reopen his case-in-chief, and the letter was properly excluded under Fed. R. Crim. P. 16 based on a failure to disclose it in reciprocal discovery, all as Vance does not contest. Further, the letter was inadmissible hearsay. Vance does not contest the letter was hearsay, and the narrow, fact-specific holding of *Chambers* does not apply in this distinct scenario. Even applying *Chambers*, the letter was neither sufficiently reliable nor crucial to Vance's defense.

II. No prosecutorial misconduct occurred. The prosecutor properly argued that Vance was not a credible witness based on the trial evidence and Vance's demeanor while testifying, and the prosecutor did not improperly vouch for a witness. Even if the Court determines the statements were improper, they were not flagrant. Even if they were, they were not so exceptionally flagrant to require reversal under plain error review.

III. Vance's within-guidelines sentence is procedurally and substantively reasonable. The loss-amount enhancement properly applied. Including loss from before an investigation was open was correct; what matters is Vance's knowledge of the offense, as a personal participant, not his knowledge of *an investigation of* the offense. The district court, further, properly included $495,900 as loss to Faybik. Even if there were two permissible views of the evidence regarding the loss amount or Faybik, the district court's choice between them was not clearly erroneous. Alternatively, any error regarding Faybik's loss amount was harmless because it would not change the guideline calculation.

Likewise, the substantial-financial-hardship enhancement properly applied. The district court correctly concluded that a roughly $500,000 loss to Faybik, a hairdresser with significant financial strains, was such a hardship. Even if there were two permissible views of the evidence, the district court's choice between them was not clearly erroneous.

The sophisticated-means enhancement also properly applied. Vance was complicit and personally participated in various sophisticated means to defraud investors and lenders, including falsehoods to investors, fraudulent bank and financial documents, funneled money between investors, and the like. Even if there were two permissible views of the evidence, the district court's choice between them was not clearly erroneous.

The abuse-of-a-position-of-trust enhancement was proper too. Vance, the Founder and CEO of Nex-Gen, had tremendous discretion and was able to commit his crimes by virtue of his position of power and trust. Victims made themselves vulnerable to Vance, crediting and relying on his purported carbon-product business expertise, as well as trusting his representations regarding actual sales, production capabilities, and the like. When victims gave Vance money, they made themselves vulnerable to his fraud, and they ceded to him control over that portion of their financial affairs. Once he had their money, he had the type of substantial discretion to manage the victims' funds required to apply the enhancement.

Finally, Vance does not raise a true substantive reasonableness challenge. If the Court concludes that Vance's guideline objections should have been sustained, it will vacate his sentence as procedurally unreasonable. If, however, the Court concludes that the challenged enhancements properly applied, the predicate of Vance's substantive reasonableness challenge vanishes.

Molly Irene McKinnon

IV. McKinnon did not make a prima facie showing that she could produce evidence on each of the elements of a duress defense. During her over-two-year-long conspiracies and the alleged year of duress, she had numerous alternatives to violating the law, including reporting Chamblee to law enforcement, informing others involved in Nex-Gen, or simply leaving her position with Nex-Gen. Her

criminality also lasted longer than absolutely necessary; it started before and endured after the alleged duress. The district court, thus, properly refused to permit her to present a duress defense to the jury.

V. The evidence was sufficient to support McKinnon's convictions. The evidence sufficiently proved McKinnon's knowledge, intent, and participation in a scheme to defraud. It was for the jury to resolve testimonial conflicts, not this Court on sufficiency review. Alleged inconsistencies do not raise a sufficiency issue; they are, regardless, not true inconsistencies.

VI. McKinnon's within-guidelines sentence is procedurally and substantively reasonable. The loss-amount enhancement properly applied. Faybik was a victim, and her loss was properly calculated. McKinnon caused Faybik's loss through her central role in the conspiracies and her own direct acts and omissions. Chamblee's losses were properly included because he was a victim, not a conspirator. Koch's loss was also properly included based on McKinnon's extensive fraud directed at Koch. Alternatively, any error in including Faybik's, Chamblee's, or Koch's losses would be harmless because it would not affect the guideline range. The district court did not err in not reducing loss based on Koch's collateral or two calciners because there was no evidence of fair market value.

The district court also did not plainly err, based on McKinnon's false trial testimony, in applying the obstruction-of-justice enhancement. McKinnon told

numerous material falsehoods on the stand, including the overarching lie that Chamblee, not her or Vance, was to blame for the fraud.

Likewise, the substantial-financial-hardship enhancement properly applied based on either the district court's relevant conduct determinations or McKinnon's own behavior of preying on Faybik through the conspiracies and actively concealing Faybik from other investors and lenders.

Further, McKinnon does not qualify as a Zero-Point Offender. The district court properly applied the guidelines in effect at the time of sentencing, which did not include this reduction. On the merits, McKinnon does not qualify because she personally caused substantial financial hardship to Faybik. At a minimum, McKinnon has not met her burden of proving that she did not personally cause substantial financial hardship. Even if there were two permissible views of the evidence, the district court's choice between them was not clearly erroneous. Alternatively, if the Court determines that McKinnon is not disqualified from the reduction, the appropriate procedure is to affirm her sentence and remand for the district court to consider a yet-unfiled 18 U.S.C. § 3582(c)(2) motion for a reduction in sentence. The district court may deny the motion based on the statutory sentencing factors in 18 U.S.C. § 3553(a).

Finally, the district court did not err in not considering generalized sentencing data that McKinnon did not cite below. District courts are not required

to consider national sentencing statistics. Regardless, her data is not convincing; she compares the wrong guideline and fails to account for differences in offenders, other covered crimes, various enhancements, and the facts and circumstances of her and her case. The district court also did not give unreasonable weight to the loss amount—an argument that, in any event, boils down to an assertion that the district court should have balanced the § 3553(a) factors differently, something outside the scope of the Court's review.

ARGUMENT

Douglas William Vance

I. Vance waived any argument regarding two reasons McKinnon's letter was excluded. Alternatively, the letter was properly excluded on the merits.

"[A]rguments not raised in a party's opening brief are deemed waived." *Amezola-Garcia v. Lynch*, 846 F.3d 135, 139 n.1 (6th Cir. 2016).

Vance closed his case-in-chief on the fifth day of trial. [R. 178: Colloquy, TR (Trial Day 5) at 1756-57.] The next day, however, despite announcing close, Vance asked "for leave to reopen" his case-in-chief and "call Mr. Vance back" to admit "a letter written by [McKinnon] and signed by her that was given to [him]." [R. 179: Jeffrey Darling, TR (Trial Day 6) at 1776.] The government objected, pointing out (1) there was "no reason this" letter could not have been "put in or

attempted to be put forward in Mr. Vance's case in chief," (2) "this was not provided as reciprocal discovery under Rule 16," and (3) "it's impermissible hearsay." [R. 179: Gregory Rosenberg, TR (Trial Day 6) at 1777-78.] The district court held that the letter "will not be allowed . . . for several reasons that the United States has indicated." [R. 179: Court, TR (Trial Day 6) at 1779 (denying "the request to reopen").] In general, this Court reviews evidentiary rulings for abuse of discretion. *United States v. Davis*, 577 F.3d 660, 666 (6th Cir. 2009).

Although the district court excluded the letter for the "several reasons that the United States . . . indicated," [R. 179: Court, TR (Trial Day 6) at 1779], Vance challenges only the hearsay ruling. *See* Vance's Brief at 18-22. Vance makes no attempt to explain why he could not have attempted to introduce the letter during his case-in-chief, and he nowhere cites Rule 16 or argues relative to reciprocal discovery. *See id.* "[A]rguments not raised in a party's opening brief are deemed waived." *Amezola-Garcia*, 846 F.3d at 139 n.1; *see United States v. Bauer*, 82 F.4th 522, 534 & n.4 (6th Cir. 2023) (same principle).

Further, "[w]hen a district court provides [three] alternative grounds for its decision, the losing party must challenge each ground on appeal to change the outcome." *Stewart v. IHT Ins. Agency Grp., LLC*, 990 F.3d 455, 456 (6th Cir. 2021). The district court provided three bases to exclude the letter. [R. 179: Court, TR (Trial Day 6) at 1779 (excluding letter "for several reasons that the

United States has indicated," including reopening, hearsay, and reciprocal-discovery bases).] Thus, even if Vance, hypothetically, cleared the hearsay hurdle, "[i]t does no good for [him] to clear just the first hurdle in a race and then sit down on the track." *Stewart*, 990 F.3d at 457. Simply put, Vance "cannot prevail by challenging only one of the bases for the district court's decision." *Id.* "Even if [the Court] agreed" with Vance's hearsay argument, "the district court's" other two decisional bases, unchallenged by Vance, "would still stand." *Id.* The Court should affirm the exclusion of the letter on this basis—Vance's failure to "follow this cardinal rule"—alone. *Id.* at 456.

The merits of either unaddressed basis suffice, too. On the declination-of-reopening basis, the "decision on reopening is committed to the sound discretion of the trial judge and . . . courts should be extremely reluctant to grant reopenings." *United States v. Blankenship*, 775 F.2d 735, 740 (6th Cir. 1985). "Reopening is often permitted to supply some technical requirement such as the location of a crime . . . or to supply some detail overlooked by inadvertence." *Id.* And the "party moving to reopen should provide a reasonable explanation for failure to present the evidence in its case-in-chief." *Id.* at 741. Vance's "motion failed because he [di]d not provide the court with a reasonable explanation why the evidence was not presented during his case-in-chief." *United States v. McCoy*, Nos. 92-4364, 93-3850, 93-4022, 1994 WL 652765, at *5 (6th Cir. Nov. 18, 1994)

(per curiam). Nor does he attempt to provide one here. Vance "was clearly aware of" the letter but chose not to seek its introduction during his case-in-chief. [R. 179: Court, TR (Trial Day 6) at 1778.] The district court, thus, did not abuse its discretion in declining to let Vance reopen his case-in-chief to introduce the letter. *McCoy*, 1994 WL 652765, at *5.

On the reciprocal-discovery basis, Vance agreed that the letter was not provided. [R. 179: Colloquy, TR (Trial Day 6) at 1778 (Vance agreeing that it was "fair summary" that letter "was never provided to the United States in reciprocal discovery").] "Failure to comply with the reciprocal discovery requirement under Rule 16 may result in . . . a prohibition on introducing the undisclosed evidence." *United States v. Hardy*, 586 F.3d 1040, 1043 (6th Cir. 2009). "The district court followed the clear guidelines for reciprocal discovery in Rule 16." *Id.* "A proper sanction for failure to disclose, under Rule 16, is exclusion of the evidence. Fed. R. Crim. P. 16(d)(2)(C). The district court did not err when it imposed this sanction under the Rule." *Id.* at 1044.

Vance contends, without citation, that "Agent Hubbuch was, in fact, aware of the letter and its contents." Vance's Brief at 20 n.5. That is wrong; Agent Hubbuch never received the letter. [R. 177: Christopher Hubbuch, TR (Trial Day 4) at 1521-22.] Further, Vance admitted that, while he "referr[ed]" to the letter "in his interview with the FBI," he "would not disclose the contents of it." [R. 179:

Colloquy, TR (Trial Day 6) at 1778 (agreeing that was "fair summary").] The letter implores recipients to "not provide a copy to the FBI." [R. 262: Notice at 2530 (Court Exhibit 1).][1]

The hearsay basis for exclusion likewise requires affirmance. Vance does not challenge that the letter was hearsay. *See* Vance's Brief at 18-22. Hearsay is "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c). McKinnon's letter was just that, as Vance does not contest. Such hearsay "is not admissible." Fed. R. Evid. 802. Vance, instead, argues that *Chambers v. Mississippi*, 410 U.S. 284 (1973)—a case that went uncited to the district court—required the letter's admission. Vance's Brief at 18-22. Because Vance "did not raise this argument below, . . . plain-error review applies." *United States v. Fields*, 53 F.4th 1027, 1035-36 (6th Cir. 2022).

"In *Chambers*, the defendant was accused of shooting a police officer but consistently denied it." *Rogers v. Mays*, 69 F.4th 381, 394 (6th Cir. 2023) (en banc). "Another man, Gable McDonald, confessed to shooting the officer and then recanted his confession." *Id.* "The defendant called McDonald as a witness at trial, but the court refused to let the defendant treat McDonald as an adverse

[1] The letter was "filed in the record as a Court exhibit" but did not "go back to the jury." [R. 179: Court, TR (Trial Day 6) at 1779.]

witness." *Id.* "The court also excluded the testimony of three other witnesses who would have corroborated McDonald's confession." *Id.* "The Supreme Court held that these two evidentiary decisions—the refusal to deem McDonald an adverse witness and the exclusion of the three witnesses' testimony—*together* violated the defendant's due-process rights." *Id.* "In sum, the holding of *Chambers*—if one can be discerned from such a fact-intensive case—is narrow." *Id.* "Multiple erroneous evidentiary rulings excluding reliable, direct evidence of actual innocence in a criminal case can, in combination, violate due process." *Id.*

"*Chambers* is not a general abrogation of the hearsay rule." *United States v. Camuti*, 78 F.3d 738, 743 (1st Cir. 1996). Instead, "*Chambers* was an exercise in highly case-specific error correction." *Montana v. Egelhoff*, 518 U.S. 37, 52 (1996). "*Chambers* therefore does not stand for the proposition that the defendant is denied a fair opportunity to defend himself whenever a . . . federal rule excludes favorable evidence." *United States v. Scheffer*, 523 U.S. 303, 316 (1998). The "holding of *Chambers*" is "not that a defendant is denied a fair opportunity to defend against the [government]'s accusations whenever critical evidence favorable to him is excluded, but rather that erroneous evidentiary rulings can, in combination, rise to the level of a due process violation." *Egelhoff*, 518 U.S. at 53.

Accordingly, because this situation does not fall within *Chambers*'s highly fact-specific ambit, the *Chambers* rule does not apply. Vance cites no case where

this Court has reversed a criminal conviction applying *Chambers*, particularly under plain-error review. Instead, the default rule that a defendant must follow the Rules of Evidence governs and counsels affirmance of the hearsay letter's exclusion. *See Taylor v. Illinois*, 484 U.S. 400, 410 (1988) (holding that defendant "does not have an unfettered right to offer testimony that is . . . inadmissible under standard rules of evidence").

Even if the Court follows out-of-Circuit case law purporting to implement *Chambers* in the context of a direct criminal appeal, *see, e.g., United States v. Hayat*, 710 F.3d 875, 898-99 (9th Cir. 2013), the letter was still properly excluded because it was not "sufficiently reliable and crucial to the defense." *Id.* at 898.

First, the letter was not sufficiently reliable. Many of its allegations are internally self-contradictory or contrary to trial evidence. For example, the letter references McKinnon "compiling additional written (and hopefully audio) documentation," but no corroborative written materials (aside from McKinnon's own statements) or audio documentation was provided. [R. 262: Notice at 2525 (Court Exhibit 1).] The letter also references a contemporaneously-provided "excel attachment," but no such attachment appears as part of Court Exhibit 1. [*Id.* at 2525-30.]

Additionally, for example, the letter alleges that "Vance divulged to Deware from the very beginning that he had an existing partnership agreement with Ken

Shumard and partners . . . and was willing to allow Deware to buy out their investment to secure a partnership with Vance." [*Id*. at 2525.] This is contrary to Deware's testimony about his knowledge of Shumard's involvement. [*See* R. 174: Allan Deware, TR (Trial Day 1) at 839-40 (stating that Vance and McKinnon told him that Shumard was competing prospective investor or lender); *id*. at 841 (stating that "[a]t no point in time" did he understand Shumard to be partner).] As another example, the letter alleges that Chamblee asked McKinnon to falsify bank statements and made physical threats against her and others. [R. 262: Notice at 2529 (Court Exhibit 1).] This is likewise contrary to trial testimony. [R. 175: Gary Chamblee, TR (Trial Day 2) at 1027-29 (denying directing McKinnon to falsify documents and denying making threats toward her); R. 176: Mendie Hogan, TR (Trial Day 3) at 1182-83 (similar); R. 177: Christopher Hubbuch, TR (Trial Day 4) at 1527-28 (similar); R. 178: Douglas Vance, TR (Trial Day 5) at 1746-47, 1750 (similar).] Statements that are "contradicted, rather than supported, by the other evidence in the case" are not sufficiently reliable. *Christian v. Frank*, 595 F.3d 1076, 1085 (9th Cir. 2010).

Further, contrary to Vance's argument that the letter constituted McKinnon's "confession," Vance's Brief at 21, the letter sought to exonerate herself based on a duress defense. [*See* R. 262: Notice at 2525-30 (Court Exhibit 1).] McKinnon wrote:

> Chamblee . . . told me that he needed me to 'make up' bank statements to coincide with the entries I made. I immediately refused and we had subsequent conversations including several where his threats ranged from civil & criminal charges for willful misconduct & fraud, to reporting me to the FBI, to physical threats to me, Vance, my sister, and 'anyone else important to me.' I hate to admit it but I was terrified and told him I would do it but still held out hope that something would change and he would find another solution. I stalled as long as I could but ultimately produced altered bank statements and submitted those to Hogan because his threats became increasingly worse.

[*Id*. at 2529.] The letter was, thus, not McKinnon's confession; it was her own attempted absolution—her one-sided effort to inject exonerating proof early in the narrative to try to insulate herself from responsibility via duress. A statement "not as clearly self-incriminating" as those in *Chambers* "does not have" equivalent indicia of reliability. *Washington v. Renico*, 455 F.3d 722, 735 (6th Cir. 2006); *see McCullough v. Cain*, 370 F. App'x 443, 448 (5th Cir. 2010) (similar, when declarants "gave their statements in an attempt to exculpate themselves"). The letter, in essence, was an unsworn written narrative by a codefendant on trial, setting out her portrayal of the case events, designed to vindicate both defendants without being subject to cross-examination or meaningful adversarial testing. *See Nelson v. Farrey*, 874 F.2d 1222, 1228 (7th Cir. 1989) (lauding "vindication of the adversary character of Anglo-American criminal procedure" by avoiding "trial by affidavit"). Statements like this from a person "anticipating no . . . personal risk from the[m] are the opposite poll from the statements involved in *Chambers*." *Lee*

v. McCaughtry, 933 F.2d 536, 538 (7th Cir. 1991); *see United States v. Jones*, 554 F. App'x 460, 473 (6th Cir. 2014) (no *Chambers* violation when statement sought "to excuse his own role in the arson by alleging that he too had been coerced").

McKinnon's letter is, additionally, not sufficiently reliable for a simple reason: McKinnon is not reliable. As the prosecutor described:

> As I indicated earlier, judging Ms. McKinnon's credibility is also solely your responsibility, it's not mine, it's not the defense attorneys['']. But again, ask yourself, did she appear to be a credible, trustworthy witness? I submit to you that the answer is no.
>
> Remember how she started her cross-examination with me? She said she was never actually the CFO of Nex-Gen. But yet, ladies and gentlemen, you saw in several emails her email signature purporting herself to be the CFO.
>
> So every single email that she sent to an investor or a lender with that email signature purporting to be the CFO, every single email was a mis—with that signature was a misrepresentation, as she admitted to you today.
>
> She admitted falsifying the financial information sent to Mr. Deware. And she admitted false representations to Mr. Deware about the sale of the product. Again, admitting making false statements.
>
> She admitted statements to the Shumard Group in those emails I showed her were inaccurate. And she admitted to falsifying the banking records sent to Ms. Hogan. After all of these misrepresentations, after all this falsification, she wants you to believe her.
>
> And, ladies and gentlemen, recall her inconsistent testimony on the stand about that email to Dell Jaggers. At first she denied sending that email. But then her story started shifting. First, it shifted to 'I can't recall.' Then it shifted to 'probably, I probably sent it.'

> Ladies and gentlemen, is that how an honest person answers questions? She gave you three different answers to the same question in a matter of minutes. Is that how a truthful witness testifies? It is not, ladies and gentlemen.

[R. 179: James Chapman, TR (Trial Day 6) at 1871-72.] McKinnon "was already a proven liar, having engaged for [years] in" defrauding Nex-Gen investors and lenders. *Camuti*, 78 F.3d at 744 (rejecting *Chambers* challenge). Her letter was not "sworn." *McCullough*, 370 F. App'x at 448. And her actions "raise[] questions as to the reliability of" the letter. *Id.*; *see, e.g.*, *Carson v. Peters*, 42 F.3d 384, 385 (7th Cir. 1994) (stressing need to analyze motive and reliability by emphasizing that declarants had "every reason to protect [defendant]").

Second, and independently, the letter was not crucial to Vance's defense. He and McKinnon testified at trial; Vance had a full opportunity to, and did, cross examine McKinnon. [R. 179: Colloquy, TR (Trial Day 6) at 1839-44.] He secured favorable testimony from her; she testified, for instance, that Vance did not give her information to use to falsify bank records. [*Id.* at 1840.] She testified that Vance was not involved in the Washington Mills purchase order falsification. [*Id.* at 1841-42.] She testified that Vance was unaware of false financial information sent to Hogan. [*Id.* at 1842.] *See United States v. Lopez-Alvarez*, 970 F.2d 583, 588 (9th Cir. 1992) (holding evidence was not important to defense based on information conveyed during cross-examination). Vance, for his part, denied

providing falsified information to Koch. [R. 178: Colloquy, TR (Trial Day 5) at 1668.] He denied sending false information to Dell Jaggers at KRP. [*Id.* at 1672.] He denied fabricating bank statements. [*Id.* at 1674-75.] Vance denied "ever provid[ing] any falsified information to anybody involved in this business to support anything that [his] company [was] doing." [*Id.* at 1675.] That Vance eschewed seeking the letter's admission during his case-in-chief demonstrates its lack of cruciality. *See Washington*, 455 F.3d at 735-36 (emphasizing that Washington "could have asked Corcoran" about "out-of-court statement," unlike in *Chambers*, where "the defendant could neither proffer reliable hearsay evidence nor call the alleged murderer (the declarant) as a witness and then impeach him").

Vance's one-sentence argument on the crucial-to-the-defense prong is a citation-free assertion that the "letter was critical because it corroborated [his] testimony." Vance's Brief at 22. The case law rejects such a theory. *See United States v. Orizu*, 438 F. App'x 757, 762 (11th Cir. 2011) (per curiam) ("Because the letters merely corroborated Nsoedo's trial testimony, they were not crucial to Orizu's defense."); *United States v. Spencer*, No. 93-10638, 1994 WL 650040, at *3 & n.3 (9th Cir. Nov. 16, 1994) (not crucial when hearsay videos would have corroborated other evidence presented at trial); *cf. Perry v. Rushen*, 713 F.2d 1447, 1452 (9th Cir. 1983) (crucial when, unlike here, "no other avenues were available to prove the defendant's story"). Vance cites no case holding that merely

corroborative hearsay—particularly when the hearsay author testifies and is subject to examination by him at trial—satisfies the crucial-to-the-defense prong. *See Washington*, 455 F.3d at 735-36 (emphasizing this distinction).

II. No prosecutorial misconduct occurred.

Prosecutorial misconduct can violate due process. *Washington v. Hofbauer*, 228 F.3d 689, 708-09 (6th Cir. 2000). Presented with a claim of misconduct during closing argument, the Court applies "a two-step analysis to determine if alleged prosecutorial misconduct requires reversal." *United States v. Eaton*, 784 F.3d 298, 309 (6th Cir. 2015). The Court first determines whether the at-issue statement was improper. *Id.* If so, the Court determines whether the impropriety was "flagrant such that a reversal is warranted." *Id.* Four factors are relevant when evaluating flagrancy: "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." *Id.* Prosecutors are afforded "wide latitude . . . during closing argument." *United States v. Bradley*, 917 F.3d 493, 506 (6th Cir. 2019).

In closing argument, the prosecutor said the following:

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?

And we showed you documents where he signed an email in some other way other than 'Best, Doug Vance.' I think Exhibit 129 was one of those documents, and 186 was as well.

And think about the word games he was playing with you all, where he said calcined coal in one sentence, and said he was selling 1,500 tons a month, but when he said that, in the very next sentence he meant some other unnamed product. Is that consistent with a truthful witness? Does that make any sense?

Ladies and gentlemen, I'm sure you'll remember that he wouldn't give a straight answer on whether owning 50 out of a hundred shares of a company meant owning half the company. I specifically remember him saying, 'It depends on how you look at it.' Is that the type of testimony a truthful witness gives?

Think about how, at the end of his testimony, he was left simply saying 'You have to take my word for it.' Ladies and gentlemen, the proof in this case has shown you that Doug Vance's word is not who you want to be taking.

Mr. Vance also said one thing in particular that was really revealing on the stand, one thing that stood out. When he was talking about money from investors and from lenders, he said 'it's not theirs, it's mine.' That was his attitude when it came to the money that came into his business endeavors in this case. That's an encapsulation of how he viewed that money that he lied to get.

Once he told his lies and had gotten that money, it didn't matter to him what the fund represented, whether it was an investment or a loan or anything else. What mattered to him was that the money was now his to do with as he pleased.

[R. 179: James Chapman, TR (Trial Day 6) at 1868-71.]

Because Vance did not object, the Court reviews for plain error. *United States v. Carter*, 236 F.3d 777, 783 (6th Cir. 2001). To constitute plain error, the alleged misconduct must be "so exceptionally flagrant" that it "is grounds for reversal even if [Vance] did not object to it." *United States v. Carroll*, 26 F.3d 1380, 1385 n.6 (6th Cir. 1994).

The prosecutor's argument was proper. "If a defendant testifies as here, a prosecutor may attack his credibility to the same extent as any other witness." *United States v. Francis*, 170 F.3d 546, 551 (6th Cir. 1999). A "prosecutor may assert that a defendant is lying during h[is] closing argument when emphasizing discrepancies between the evidence and that defendant's testimony." *Id.*

That is what occurred. The prosecutor began with an exhortation to the jury that "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." [R. 179: James Chapman, TR (Trial Day 6) at 1868.] The prosecutor then turned to Vance's "history of lying," tying the comment to testimony of Vance lying to the Tazewell County Circuit Court. [*Id.* at 1868-69; R. 178: Colloquy, TR (Trial Day 5) at 1676-78.] The prosecutor then recounted Vance's inconsistent testimony "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." [R. 179: James Chapman, TR (Trial Day

6) at 1869; *see* R. 178: Colloquy, TR (Trial Day 5) at 1729-30 (said testimony).] The prosecutor then summarized many of the lies that the jury had heard about during trial: to Special Agent Hubbuch, Deware, the Shumard group, Koch, and KRP. [R. 179: James Chapman, TR (Trial Day 6) at 1869.] Each reference was to specific proof. [*See, e.g.*, R. 178: Colloquy, TR (Trial Day 5) at 1722-24 (KRP loan issue); R. 174: Colloquy, TR (Trial Day 1) at 815-63 (detailing some falsehoods to Deware); R. 175: Colloquy, TR (Trial Day 2) at 961-66 (detailing some falsehoods to Shumard group); *id.* at 1005-21 (same); R. 177: Colloquy, TR (Trial Day 4) at 1429-72 (detailing some falsehoods to Koch); R. 176: Colloquy, TR (Trial Day 3) at 1303-17 (detailing some falsehoods to KRP); R. 177: Colloquy, TR (Trial Day 4) at 1325-42 (same).] The prosecutor had summarized each these witnesses' testimony earlier in closing. [R. 179: James Chapman, TR (Trial Day 6) at 1853-58.] This was, in truth, a textbook example of a prosecutor properly "giv[ing] examples of discrepancies in [Vance]'s testimony or between his testimony and other documents, testimony or evidence, and *then* draw[ing] the conclusion that he had lied." *Francis*, 170 F.3d at 552; *see Wogenstahl v. Mitchell*, 668 F.3d 307, 331 (6th Cir. 2012) (no misconduct when "prosecutor was careful to tie his comments to the evidence").

The prosecutor also asked the jury to "think about Mr. Vance's body language when he was on the stand," emphasizing that the jury "saw him shifting

in his seat," "shifting eye contact," "look[ing] around," and "mumbl[ing] his answers." [R. 179: James Chapman, TR (Trial Day 6) at 1869.] It is proper for the jury to consider a witness's body language and demeanor on the stand; consistent with Sixth Circuit Pattern Jury Instructions 1.07 and 7.02B, the jury was instructed to evaluate, when assessing credibility, "how the witness acted while testifying." [R. 131: Jury Instructions at 442, 468.] *See United States v. Lundy*, 83 F.4th 615, 618 (6th Cir. 2023) (lauding jury's evaluation of "demeanor"); *Allen v. Woodford*, 395 F.3d 979, 997 (9th Cir. 2005) ("The prosecutor's comments regarding Allen's courtroom demeanor were permissible because Allen chose to testify."); *United States v. Schuler*, 813 F.2d 978, 981 n.3 (9th Cir. 1987) ("When a defendant chooses to testify, a jury must necessarily consider the credibility of the defendant. In this circumstance, courtroom demeanor has been allowed as one factor to be taken into consideration."). At least when, as here, the defendant testifies, his "demeanor . . . is not only proper evidence, but it is impossible to prevent the jury from observing and being influenced by it. It is, therefore, *better* that [the jury] should have *the aid of counsel* and the supervision of the court in interpreting such evidence rather than be left to their own unguided impressions." *Waller v. United States*, 179 F. 810, 812 (8th Cir. 1910) (emphasis added). Accordingly, the prosecutor properly recounted and "argue[d] reasonable inferences" from the defendant's demeanor while testifying, a valid jury

consideration. *United States v. Collins*, 78 F.3d 1021, 1040 (6th Cir. 1996); *cf. Cunningham v. Perini*, 655 F.2d 98, 100 (6th Cir. 1981) ("*Until a defendant has placed his own demeanor in evidence by taking the stand to testify*, his personal appearance at the trial is irrelevant to the question of his guilt or innocence." (emphasis added)).[2]

Vance also thinks the prosecutor improperly vouched by saying, "Ms. Francis made the courageous decision not to just timidly sit by and hide that information." Vance's Brief at 31-32. [R. 179: James Chapman, TR (Trial Day 6) at 1853.] Improper vouching is a prosecutorial misconduct variant. *Francis*, 170 F.3d at 549-51. It "occurs when a prosecutor supports the credibility of a witness by indicating a personal belief in the witness's credibility." *Id.* at 550.

The prosecutor's characterization of Francis's decision to expose Vance's and McKinnon's criminality as "courageous" was proper because it reasonably commented on the evidence and did not suggest a personal belief in her credibility. *Francis*, 170 F.3d at 551; *see United States v. Burroughs*, 465 F. App'x 530, 535

[2] Vance attempts an undeveloped argument that "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." Vance's Brief at 26. Vance cites no authority and fails to specify any particular alleged false testimony for the government to respond to. Accordingly, "this argument has been waived." *United States v. Fekete*, 535 F.3d 471, 482 (6th Cir. 2008).

(6th Cir. 2012) ("A prosecutor may argue all reasonable inferences that may be drawn from the evidence admitted at trial as they relate to the prosecutor's case."). The prosecutor described the act—Francis's "decision"—not Francis herself, and whether she made a courageous decision does not speak to credibility; one could make a courageous decision and still lack credibility. [R. 179: James Chapman, TR (Trial Day 6) at 1853.] Francis described how "irate" McKinnon, a person in authority over her, became when McKinnon learned that Francis had observed a true financial document. [R. 174: April Francis, TR (Trial Day 1) at 754-55; *see id.* at 774 (noting that she "report[ed] to" McKinnon).] Vance attacked Francis for "t[aking] it upon [her]self to take company property and divulge it and send it outside the company to third parties," "not acting in the best interest of the principles of the company, Molly and Doug," "not" doing her "job," and "st[ealing] from the company." [R. 174: Jeffrey Darling, TR (Trial Day 1) at 766-67.] McKinnon accused Francis of lying. [R. 179: Molly McKinnon, TR (Trial Day 6) at 1807.] It is a reasonable inference that a decision to garner one of your bosses' wrath by exposing her criminality requires courage, particularly when McKinnon and Vance—also in authority over Francis—attacked the decision, and Francis generally, during trial. *See, e.g.*, *United States v. Bonventre*, 646 F. App'x 73, 88-89 (2d Cir. 2016).

Further, the remark, in context, was properly tied to the evidence of Francis's decision to inform Deware of the criminality and was not suggestive of personal opinion, particularly when considering prosecutors' wide latitude in closing argument:

> Now, ladies and gentlemen, let's go back several days and remember what we have heard in this case. April Francis told you how she was the office manager at Nex-Gen. She was just doing her job, and then there was that incident where Mr. Vance asked her to help him out with a bank statement.
>
> Well, Ms. Francis looked at that bank statement and that was the spark of this case. She saw that what was being sent to investors was not the same as that true bank statement.
>
> And she told you how irate Molly McKinnon was when she realized that April had seen the statement. Ms. McKinnon realized at that moment that the scheme they had devised was about to come crumbling down.
>
> Ms. Francis made the courageous decision not to just timidly sit by and hide that information. She approached Allan Deware, an investor she had met during a previous site visit, and she told Mr. Deware the truth of what she had learned.

[R. 179: James Chapman, TR (Trial Day 6) at 1852-53.] *See, e.g.*, *United States v. Birdsong*, 330 F. App'x 573, 578-79 (6th Cir. 2009) (comment that "main witness" was "brave enough to come forward and tell you the truth" was not improper); *Rodriguez v. Scillia*, 193 F.3d 913, 919 (7th Cir. 1999) (no vouching when prosecutor said "this little girl was brave enough to accuse him"); *United States v. Carter*, 953 F.2d 1449, 1461 (5th Cir. 1992) ("The prosecutor's praise of the

officers' bravery was expressly based on the evidence that the jurors had already heard; he did not imply that he had independent knowledge of their bravery, much less their truthfulness."). A comment such as this falls well within prosecutors' "wide" zone of "latitude" in closing argument. *Bradley*, 917 F.3d at 506.

Even if the Court determines the challenged statements were improper, they were not sufficiently flagrant to require reversal. The remarks, which fairly recounted the evidence in the case, expressed reasonable inferences based on the proof, and argued the government's theory of the case, would not mislead the jury or unfairly prejudice Vance. *United States v. Forrest*, 402 F.3d 678, 686 (6th Cir. 2005). Not even taking an additional step and asking the jury "to show th[e] same courage" as a witness was reversible. *United States v. Poandl*, 612 F. App'x 356, 366 (6th Cir. 2015). Nor was referencing "those courageous women." *United States v. Roberts*, 185 F.3d 1125, 1143-44 (10th Cir. 1999). The prosecutor, further, reminded the jury that "judging a witness's credibility in a case is your job, it's not mine." [R. 179: James Chapman, TR (Trial Day 6) at 1868.] And the district court instructed the jury that the "lawyers' statements and arguments are not evidence." [R. 131: Jury Instructions at 439.] *See Roberts*, 185 F.3d at 1144 (considering such factors).

Second, the remarks were isolated. The challenged remark regarding Francis "only occurred once." Vance's Brief at 32. The argument that Vance was

not credible was a discrete portion of closing, clearly bookended by the prosecutor, that took roughly three pages of a twenty-two-page argument, in the context of a complex, seven-day, nearly-1,200-page-long jury trial. [R. 179: James Chapman, TR (Trial Day 6) at 1868-71.] The prosecutor spent the bulk of closing walking through the evidence witness-by-witness, reviewing the charges count-by-count, addressing McKinnon, and summing up. [*Id.* at 1852-68, 1871-74.] Third, the arguments were deliberate, though not deliberately improper. Fourth, the evidence was strong. The jury heard "overwhelming evidence"—witness after witness, document after document—showing Vance and McKinnon lying to persuade investors and lenders to part with their money. [*Id*. at 1872.]

Even if the Court determined the arguments to be flagrant, they were not "so exceptionally flagrant" to require reversal under plain error review. *Carroll*, 26 F.3d at 1385 n.6. The prosecutor carefully tied the arguments regarding Vance's credibility to the evidence and his demeanor while testifying, and there is no impropriety in, one time, characterizing a witness's decision to blow the whistle on her bosses, drawing their in- and out-of-court ire, as courageous. The district court did not err in failing to *sua sponte* interrupt these remarks. They were not so exceptionally flagrant so as to plainly—*i.e.*, beyond reasonable dispute—require reversal. *United States v. Prater*, 766 F.3d 501, 518 (6th Cir. 2014).

III. Vance's within-guidelines sentence is procedurally and substantively reasonable.

A. Vance's sentence is procedurally reasonable.

A criminal sentence must be procedurally reasonable, which generally requires an accurately calculated guideline range. *United States v. Snelling*, 768 F.3d 509, 515 (6th Cir. 2014).

i. The loss-amount enhancement properly applied.

The offense level increases by sixteen if the loss is more than $1,500,000 but less than $3,500,000. U.S.S.G. § 2B1.1(b)(1)(I). Loss means "the greater of actual loss or intended loss." *United States v. Riccardi*, 989 F.3d 476, 481 (6th Cir. 2021). Actual loss is "the reasonably foreseeable pecuniary harm that resulted from the offense." *Id.* at 482. Pecuniary harm is "harm that is monetary or that otherwise is readily measurable in money." U.S.S.G. § 2B1.1 cmt. n.3(A)(iii). Reasonably foreseeable pecuniary harm is "pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense." *Id.* cmt. n.3(A)(iv); *see United States v. Wendlandt*, 714 F.3d 388, 393-94 (6th Cir. 2013) (explaining loss-calculation principles).

The presentence report applied a "16-level increase" to the offense level "because the loss amount exceed[ed] more than $1,500,000, but not more than $3,500,000," per U.S.S.G. § 2B1.1(b)(1)(I). [R. 210: Presentence Report at ¶ 47.]

Vance objected. [*Id.* p. 23.] The district court extensively analyzed and overruled the objection, finding a loss amount "of a little over $2.7 million." [R. 219: Court, TR (Evidentiary Hearing) at 2207-13.] The Court reviews "the district court's factual finding[s] as to amount of loss for clear error" and the "method used to calculate loss . . . de novo." *Wendlandt*, 714 F.3d at 393.

The district court's loss calculation was correct. Vance's primary contrary argument is that "until he became aware of the investigation, any amount of loss was not foreseeable to him." Vance's Brief at 37. Vance did not make this new argument to the district court, so "plain error review governs." *United States v. Skouteris*, 51 F.4th 658, 671-72 (6th Cir. 2022).

The argument misunderstands the facts and law. The date an investigation opened is not the loss-calculation starting line; such an illogical rule would perversely reward fraudsters better at keeping their schemes covert. The key is Vance's knowledge, as a personal participant, of "the offense," not his knowledge of *an investigation into* the offense. U.S.S.G. § 2B1.1 cmt. n.3(A)(iv). Vance, mirroring his jury-rejected defense, claims that he was unaware of the fraud prior to becoming aware of the investigation. Vance's Brief at 37. This is counter to the evidence introduced at trial, the jury's verdict, and the district court's findings at sentencing. [R. 219: Court, TR (Evidentiary Hearing) at 2220 ("[Vance] did take the Sergeant Schultz approach during the trial of the case, and now, that he had

a very limited view of what was happening, and to do that, you have to ignore a significant amount of evidence and testimony presented during the course of the trial.");[3] *id.* (finding that Vance was "aware of and engaging in fraudulent activities" and "egregious conduct").] The events of this case, and Vance's personal and pervasive involvement, go back to August 2016. [*See, e.g.*, R. 174: Allan Deware, TR (Trial Day 1) at 821.] The jury convicted Vance of conspiracies spanning August 2016 through December 2018. [R. 1: Indictment at 1-12; R. 133: Verdict at 485-88.] The district court found that Vance and McKinnon "did work together and were certainly aware of the activities of the other and that the losses that occurred were reasonably foreseeable to both." [R. 219: Court, TR (Evidentiary Hearing) at 2208; *see also* R. 220: Court, TR (Sentencing) at 2238 (finding that Vance "concocted and . . . carried out" this "scheme . . . with Ms. McKinnon"); *id.* at 2252 (finding that "it's clear . . . that [Vance] knowingly engaged in this fraudulent activity, committed wire fraud, money laundering as well").] "Given this state of affairs, [there was] no clear or obvious error in the

[3] Sergeant Schultz was a character on the television show *Hogan's Heroes* known for, instead of reporting known rule-breaking to his commanding officer, comically declaring, "I see nothing!"

district court's application of the U.S.S.G. § 2B1.1(b)(1)([I]) enhancement." *Skouteris*, 51 F.4th at 672.[4]

Even if there were "two permissible views of the evidence," the district court's "choice between them cannot be clearly erroneous." *United States v. Dillard*, 438 F.3d 675, 681 (6th Cir. 2006). The district court's conclusion was "not clearly erroneous" because it was "supported by competent evidence in the record." *United States v. Jeross*, 521 F.3d 562, 570 (6th Cir. 2008); *see United States v. Vance*, 956 F.3d 846, 853 (6th Cir. 2020) ("A district judge's finding of fact is not clearly erroneous simply because there is evidence in the record that might support a different finding."). The district court's factual finding was "plausible in light of the record viewed in its entirety." *United States v. Grant*, 15 F.4th 452, 457 (6th Cir. 2021).

Vance also contends that the district court should not have included Joan Faybik's loss. Vance's Brief at 37. The district court included $495,900 "attributable as a loss to Ms. Faybik." [R. 219: Court, TR (Evidentiary Hearing)

[4] The district court's reference to when Vance "was reasonably aware of the investigation" was a shorthand reference to U.S.S.G. § 2B1.1 cmt. n.3(E)(i), regarding amounts to subtract from loss. [R. 219: Court, TR (Evidentiary Hearing) at 2209-10.] June 7, 2017, was "the time the offense was discovered by a victim," Deware. § 2B1.1 cmt. n.3(E)(i). [R. 219: Christopher Hubbuch, TR (Evidentiary Hearing) at 2134-35.] "[R]oughly $4,550" was returned to victims prior to that date. [*Id.* at 2135.] The district court subtracted this amount from the loss calculation. [R. 219: Court, TR (Evidentiary Hearing) at 2182, 2210-11.]

at 2211.] This was consistent with the evidence. [R. 219: Christopher Hubbuch, TR (Evidentiary Hearing) at 2145 ("[B]y [Faybik's] own admission the last time she was interviewed, she finally came forward and said that she's good for more than $500,000 of investment into Doug Vance's entity."); *id.* at 2146 ("What is her own estimate of the true amount of money? Over [$]500,000.").] Although Faybik did not view herself as a victim at the time of sentencing, "the definition of 'victim' is not tethered to" an individual's self-identification as such. *United States v. Stokes*, 392 F. App'x 362, 368 (6th Cir. 2010). "So long as a person suffers reasonably foreseeable pecuniary harm as a result of an offense, [s]he qualifies as a victim." *Id.*; *see United States v. Teadt*, 653 F. App'x 421, 428 (6th Cir. 2016) ("The [Mandatory Victims Restitution Act] does not require a victim to have a subjective belief that he or she has been harmed. Rather, it is left to the court to make that determination. We agree with the district court that they are victims, regardless of their subjective beliefs."). [R. 219: Court, TR (Evidentiary Hearing) at 2212-13 (finding that Faybik was victim).]

Even if there were "two permissible views of the evidence" regarding Faybik's victim status or loss amount, the district court's "choice between them cannot be clearly erroneous." *Dillard*, 438 F.3d at 681. The district court's conclusion was "not clearly erroneous" because it was "supported by competent evidence in the record." *Jeross*, 521 F.3d at 570; *see Vance*, 956 F.3d at 853

("A district judge's finding of fact is not clearly erroneous simply because there is evidence in the record that might support a different finding.").

Alternatively, any error in including Faybik's loss was harmless because it would not affect the guideline calculation. *United States v. Castro*, 960 F.3d 857, 867 (6th Cir. 2020). The district court found a "loss amount of a little over $2.7 million." [R. 219: Court, TR (Evidentiary Hearing) at 2213.] Subtracting the contested sum would lead to loss of roughly $2.2 million, still within the applicable range of $1.5 to $3.5 million. "Accordingly, even if the district court erred . . ., that error would not have affected [Vance]'s offense level or Guideline range and was therefore harmless." *Castro*, 960 F.3d at 867; *see United States v. Johnson*, 79 F.4th 684, 706 (6th Cir. 2023) (same, in loss calculation context).

ii. The substantial-financial-hardship enhancement properly applied.

The offense level increases by two if the offense "resulted in substantial financial hardship to one or more victims." § 2B1.1(b)(2)(A)(iii). "In determining whether the offense resulted in substantial financial hardship to a victim, the court shall consider, among other factors, whether the offense resulted in the victim," for example, "suffering substantial loss of a retirement, education, or other savings or investment fund" or "suffering substantial harm to his or her ability to obtain credit." § 2B1.1 cmt. n.4(F)(iii), (vi). Comment 4(F) is "instructive" but "non-

exhaustive." *United States v. Howder*, 748 F. App'x 637, 642-44 (6th Cir. 2018). The Court "ought to consider not only the pecuniary value of the loss but also such intangibles as its impact on the victim," evaluating the impact on the victim's "overall financial health and appropriately using its discretion to infer the magnitude of financial hardship based on" the victim's "financial circumstances." *Id.* at 644; *see also United States v. Piper*, No. 20-1867, 2021 WL 5088709, at *2-3 (6th Cir. Nov. 2, 2021) (synthesizing and applying principles). At bottom, the test is whether "the loss was more than minimal or trivial as gauged by the victim's specific financial circumstances." *Skouteris*, 51 F.4th at 672.

Faybik, a victim, was "one of the early investors in Doug Vance, who appears to have had a relationship with him from well preceding 2016, but then has been infusing her own funds into the operations of Doug Vance and Nex-Gen, believing that she was basically co-owners with Nex[-]Gen, with Doug Vance solely and no other investors and lenders." [R. 219: Christopher Hubbuch, TR (Evidentiary Hearing) at 2129.] "[O]ver time," Faybik "provided Vance with use of her personal credit cards so that he could buy whatever he needed for the business. Also provided monies from her investment accounts, her Fidelity Investment accounts, would wire transfer money from her Fidelity Investment accounts to Doug Vance." [*Id.* at 2145.] "And by her own admission the last time

she was interviewed, she finally came forward and said that she's good for more than $500,000 of investment into Doug Vance's entity." [*Id.*]

Faybik is "a hairdresser." [*Id.* at 2146.] "She spent all her life working as a hairdresser. She scrimped and saved pennies and was relying on this, from what she told us, to be her retirement. So she was taking money and investing into Vance, and Vance promised her that this would provide her with her retirement." [*Id.*] She "provided money from a Fidelity Investment account," "commonly called a retirement account." [*Id.*; *see id.* at 2167 (noting that Faybik showed Fidelity transfer documents to agent).] "[H]er own estimate of the true amount of money" she invested was "[o]ver [$]500,000." [*Id.* at 2146.] A few years before Vance's scheme began, a comparatively small loss (roughly $50,000, compared to roughly $500,000) caused Faybik to apply "for a nighttime cleaning job because of all the credit cards that [she] tapped to come up with the cash." [*Id.* at 2149.] Jason Faybik, her son, largely corroborated her story. [*Id.* at 2150-51.] In "the 2018 time period," Jason Faybik indicated that his mother's "financial status was not good," that she "had recently gone through a divorce," and that she "was back-due on her credit cards." [*Id.* at 2151.] "[B]y her own estimation," Faybik "invested over $500,000 and received [$]59,600 in return," resulting in "a substantial loss to Ms. Faybik." [*Id.* at 2152.]

The presentence report included a two-level § 2B1.1(b)(2)(A)(iii) enhancement. [R. 210: Presentence Report at ¶ 47.] Vance objected. [*Id.* at p. 24-25.] The district court overruled the objection, finding that Faybik's loss resulted in substantial financial hardship. [R. 219: Court, TR (Evidentiary Hearing) at 2212-13.] The Court reviews these factual findings for clear error and legal conclusions de novo. *Piper*, 2021 WL 5088709, at *2.

The district court's conclusion that Faybik's loss resulted in substantial financial hardship was correct. The court reasoned:

> I do find that the loss to Ms. Faybik did result in financial hardship based upon the testimony presented about not only her status, her job, the type of work she had performed, the amount of money she'd invested, and representations made to her that apparently were continued after Mr. Vance was aware of the investigation. I do find that the amount of monies that were then given to her have in part caused her to take the position or believe that for some reason she's not a victim in the case when, in fact, the Court concludes that she was, and that was the 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.
>
> So I do find that she has suffered substantial financial hardship based upon her investments of approximately $500,000. And even when we consider the total amount that was returned to her under, as the government has captioned it, Ponzi-style returns of $59,000, of course, that . . . does not affect the loss amount under [§] 2B1.1.

[R. 219: Court, TR (Evidentiary Hearing) at 2212-13.]

These conclusions tracked the evidence noted above showing Faybik's profession and reliance on her investments with Vance to fund her retirement. [*See*

R. 219: Christopher Hubbuch, TR (Evidentiary Hearing) at 2146.] Vance's promised retirement security did not "pan out." [*Id.* at 2151.] *See* § 2B1.1 cmt. n.4(F)(iii), (iv). Turning over retirement-account money—particularly when considering the total amount of money she invested—is well within the heartland of the guidelines' instruction on substantial financial hardship. *See* § 2B1.1 cmt. n.4(F)(iii), (iv). She also "provided Vance with use of her personal credit cards." [R. 219: Christopher Hubbuch, TR (Evidentiary Hearing) at 2145; *see id.* at 2167 (noting that government did not have "her credit card statements" and that she gave Vance "money under the mattress" she had "saved"); R. 178: Douglas Vance, TR (Trial Day 5) at 1733-34 (agreeing that Faybik let him use her credit card and being unable to even estimate amount of money he took from her).] Faybik got "just enough from Doug Vance in order to make her minimum payments on her credit cards." [R. 219: Christopher Hubbuch, TR (Evidentiary Hearing) at 2151.] *See* § 2B1.1 cmt. n.4(F)(vi).

The district court, further, appropriately considered "not only the pecuniary value of the loss but also such intangibles as its impact on" Faybik, evaluating the impact on her "overall financial health and appropriately using its discretion to infer the magnitude of financial hardship based on" her "financial circumstances." *Howder*, 748 F. App'x at 644. A few years before Vance's scheme began, a comparatively small loss (roughly one-tenth of her loss here) caused Faybik to

apply "for a nighttime cleaning job because of all the credit cards that [she] tapped." [R. 219: Christopher Hubbuch, TR (Evidentiary Hearing) at 2149.] If a loss of one-tenth of the loss here caused Faybik to apply for a second job, the district court reasonably inferred a magnitudes-greater impact of a loss ten times that amount. § 2B1.1 cmt. n.4(F)(iv); *Howder*, 748 F. App'x at 644. There were no material changes in Faybik's financial picture between 2013 and 2016. [R. 219: Colloquy, TR (Evidentiary Hearing) at 2185.] Further, "her son" made "corroborating statements." [*Id.*] In "the 2018 time period," he indicated that her "financial status was not good," that she "had recently gone through a divorce," and that she "was back-due on her credit cards." [*Id.* at 2151.] These considerations likewise reasonably factored into the substantial financial hardship determination. § 2B1.1 cmt. n.4(F)(vi); *Howder*, 748 F. App'x at 644.

Looking at Faybik's circumstances holistically, a loss at this scale "was more than minimal or trivial as gauged by [her] specific financial circumstances." *Skouteris*, 51 F.4th at 672. A loss of roughly $500,000 to a hairdresser who counted on her Nex-Gen investments to finance her retirement, who sunk money from her retirement account into Nex-Gen, and who became back-due on her credit cards after Vance used them—when she had recently divorced and was generally in a not good financial status, and particularly considering the comparative proof from a few years prior—had more than a minimum or trivial impact. *Id.* In sum,

Faybik suffered pecuniary harm analogous to the commentary's examples, *see id.* at 673 (emphasizing that harms "align[ed] with examples offered by the Guidelines' commentary"), and a "broader, holistic evaluation of Faybik's overall financial health, circumstances, and resources confirms that her loss of roughly $500,000 to [Vance's and McKinnon's] scheme had significant impacts." [R. 151: Sentencing Memorandum at 583.]

Even if there were "two permissible views of the evidence" of Faybik's hardships, the district court's "choice between them cannot be clearly erroneous." *Dillard*, 438 F.3d at 681. The district court's conclusion was "not clearly erroneous" because it was "supported by competent evidence in the record." *Jeross*, 521 F.3d at 570; *see Vance*, 956 F.3d at 853 ("A district judge's finding of fact is not clearly erroneous simply because there is evidence in the record that might support a different finding.").

iii. The sophisticated-means enhancement properly applied.

The offense level increases by two if "the offense otherwise 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). "'[S]ophisticated means' means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense." § 2B1.1 cmt. n.9(B). The analysis is holistic; a "series of criminal actions . . . may constitute

sophisticated means even if none of the[m], standing alone, is especially complex." *United States v. Montgomery*, 592 F. App'x 411, 418-19 (6th Cir. 2014).

The presentence report applied a two-level sophisticated-means enhancement. [R. 210: Presentence Report at ¶ 47.] Vance objected. [*Id.* at p. 23-26.] The district court overruled the objection. [R. 219: Court, TR (Evidentiary Hearing) at 2213-14.] The Court "review[s] a district court's factual findings" in this context "for clear error and its legal conclusions *de novo*." *Montgomery*, 592 F. App'x at 417.

The district court properly applied the enhancement:

> I do find that there is sufficient evidence presented during the course of the trial for this Court to make a determination that sophisticated means w[ere] used in order to carry out the fraud.
>
> This involved not only making misrepresentations by both defendants to investors as well as to lenders about the status of equipment, about their ability to sell the product, representations about the ongoing sales, and then when they were questioned about that, they created false documentation to make it appear, number one, that there were not other investors, for example, with regard to Ms. McKinnon's activities, or to make it appear that there were purchasers for the product, which did occur on several occasions to induce others either to loan significant amounts of money or to continue with their investments. So I do find that that two-level increase is appropriate as well and will be applied in the case.

[R. 219: Court, TR (Evidentiary Hearing) at 2213-14.]

The sophisticated-means "glove fits this operation." *United States v. Bertram*, 900 F.3d 743, 753 (6th Cir. 2018). The enhancement applies to this

"Ponzi-like scheme[.]" *United States v. Phelps*, No. 20-5889, 2021 WL 4315947, at *6 (6th Cir. Sept. 23, 2021) (collecting cases). Vance "was complicit in various sophisticated means to attract investors, to lull them into thinking that their investments were making money over the course of a few years." *Id.* "The means . . . included multi-step falsehoods to investors, fraudulent bank documents, . . . funneled money between investors, and more." *Id.* The Court "has upheld this enhancement for less intricate fraud schemes involving, for example, false documents and funneled funds." *Id.* (citing cases). Indeed, "the use of . . . false documents . . . typically justifies the sophisticated means enhancement." *Bertram*, 900 F.3d at 753; *see United States v. Griffith*, 663 F. App'x 446, 453 (6th Cir. 2016) ("Fabricating paperwork . . . can support the sophisticated means enhancement."). As does using "corporate entities in furtherance of [the] criminal activities." *United States v. Benchick*, 725 F. App'x 361, 369 (6th Cir. 2018). The use of multiple corporate entities and false documents to dupe investors and lenders pervades this case. [*Compare, e.g.*, R. 262: Notice at 2852-54 (Gov. Ex. 617 (Operating Agreement signed with Deware)), *with id*. at 2971-3003 (Gov. Ex. 703 (Operating Agreement signed with Shumard group)); *compare, e.g.*, *id*. at 2859-72 (Gov. Ex. 627 (false financial document)), *with id*. at 2873-76 (Gov. Ex. 628 (true financial document)); *see, e.g.*, *id*. at 2578-79, 2645-46, 2619-22 (Gov.

Ex. 142 (fraudulent Washington Mills purchase order); Gov. Ex. 175 (same); Gov. Ex. 166 (fraudulent Nucor specification sheet); Gov. Ex. 166A (same)).]

To the extent Vance seeks to blame McKinnon for their scheme's sophistication, the "argument misunderstands the guidelines definition of relevant conduct." *United States v. Crosgrove*, 637 F.3d 646, 666 (6th Cir. 2011).[5] The enhancement can "be applied to [Vance] even if his role in the conspirac[ies] did not involve the use of sophisticated means so long as the use of such means was reasonably foreseeable to him." *Id.* The use of such means was reasonably foreseeable to Vance; as founder and CEO of Nex-Gen, he was aware of his company's true level of business output and financial picture. His head-in-the-sand arguments to the contrary are, again, counter to the evidence introduced at trial, the jury's verdict, and the district court's findings at sentencing. [R. 219: Court, TR (Evidentiary Hearing) at 2220 ("[Vance] did take the Sergeant Schultz approach during the trial of the case, and now, that he had a very limited view of what was happening, and to do that, you have to ignore a significant amount of evidence and testimony presented during the course of the trial."); *id.* (finding that Vance was "aware of and engaging in fraudulent activities" and "egregious

[5] Vance says that "the district court did not make a specific relevant conduct finding." Vance's Brief at 42. That is wrong. [R. 219: Court, TR (Evidentiary Hearing) at 2188-89, 2208-09, 2219-20 (making relevant conduct findings).]

conduct"); *id.* at 2208 (finding that Vance and McKinnon "did work together and were certainly aware of the activities of the other").]

Vance emailed false documents to induce Koch's monetary transfers. [R. 262: Notice at 2619-22 (Gov. Ex. 166) (fraudulent Nucor specification sheet), (Gov. Ex. 166A) (same).] Vance was aware of and participated in the creation of fraudulent Washington Mills purchase orders. [*Id*. at 2578-79, 2645-46 (Gov. Exs. 142, 175).] Vance received and sent false financial and production information. [*See, e.g.*, *id*. at 2549-57, 2586-618 (Gov. Exs. 119, 120, 120A, 127, 153).] He deceived Chamblee into thinking "that actual sale of products to Koch had occurred." [R. 175: Colloquy, TR (Trial Day 2) at 1020-21.] While there were "attempts to blame other individuals or perhaps to close your eyes or to look the other way," it was "clear to the [c]ourt that [Vance] knowingly engaged in this fraudulent activity, committed wire fraud, money laundering as well." [R. 220: Court, TR (Sentencing) at 2252.]

Vance, thus, participated in and had knowledge of the creation of several falsified documents, such as altered bank statements, other false financial documents, the fabricated Washington Mills purchase order, and the fictitious Nucor specification sheet. Using false documents to deceptively induce monetary transfers triggers the enhancement. *Bertram*, 900 F.3d at 753; *United States v. Pierce*, 643 F. App'x 500, 503-04 (6th Cir. 2016); *United States v. Johnston*, 631

F. App'x 381, 386 (6th Cir. 2015) ("fraudulent bank documents"); *see also United States v. Rogers*, 580 F. App'x 347, 351 (6th Cir. 2014) (affirming when defendant "knowingly submitted false" information and "was complicit in . . . misrepresentations"); *United States v. Kraig*, 99 F.3d 1361, 1371 (6th Cir. 1996) (affirming when defendant "undoubtedly knew of [Swiss bank accounts' and shell corporations'] existence and function in the conspiracy"). Vance "fully participated in the fundamental aspects of the scheme—convincing victims to part with their money using promises of" an exclusive and financially sound business partnership. *United States v. Kennedy*, 714 F.3d 951, 961 (6th Cir. 2013). He "was directly involved in wire transactions," sending "various sham . . . documents" to lenders and investors, and "solicit[ing] numerous investors." *Id.* (affirming enhancement); *see United States v. Stafford*, 639 F.3d 270, 276 (6th Cir. 2011) ("suppl[ying] . . . falsified" documents and "misus[ing] his specialized knowledge of the [carbon] industry"). Moreover, the jury and district court rejected Vance's attempts to pin the blame on McKinnon, as evidenced by the verdict convicting him on every charge and the findings during the sentencing process.

Even if there were "two permissible views of the evidence" regarding the sophisticated means used in this scheme, the district court's "choice between them cannot be clearly erroneous." *Dillard*, 438 F.3d at 681. The district court's

conclusion was "not clearly erroneous" because it was "supported by competent evidence in the record." *Jeross*, 521 F.3d at 570; *see Vance*, 956 F.3d at 853.

iv. The abuse-of-a-position-of-trust enhancement properly applied.

The offense level increases by two if "the defendant abused a position of public or private trust . . . in a manner that significantly facilitated the commission or concealment of the offense." U.S.S.G. § 3B1.3. "When this Court determines whether an individual occupies a position of trust, [it] focus[es] on the relationship between the defendant and the victim of the crime." *United States v. Tatum*, 518 F.3d 369, 373 (6th Cir. 2008). "A position of trust arises . . . when a person or organization intentionally makes himself or itself vulnerable to someone in a particular position, ceding to the other's presumed better judgment some control over their affairs." *Id.* The "enhancement is appropriate where the position occupied by the defendant involved considerable discretion and authority." *Id.*

The presentence report applied a two-level abuse-of-a-position-of-trust enhancement. [R. 210: Presentence Report at ¶ 50.] Vance objected. [*Id.* at p. 26.] The district court overruled the objection. [R. 219: Court, TR (Evidentiary Hearing) at 2213-14.] "When determining whether the § 3B1.3 enhancement has been properly applied, this Court reviews a district court's legal conclusions

regarding the Sentencing Guidelines de novo and a district court's factual findings in applying the Sentencing Guidelines for clear error." *Tatum*, 518 F.3d at 372.

The district court properly applied the enhancement:

> The guideline in issue[, §] 3B1.3[,] provides that if a defendant abused a position of public or private trust or used special skill in a manner that significantly facilitated the commission or concealment of the offense, increase by two levels. And then the application note gives further information in defining these terms. It refers to a position of public or private trust characterized by a professional or managerial discretion, individuals that are subject to less supervision, for example.
>
> And for this to apply, the position must have contributed in some significant way to facilitate in the commission or concealment of the offense. And then it uses the example of a bank executive engaged in a fraudulent loan scheme as opposed to the bank teller, or a hotel clerk who either embezzles or steal from the organization.
>
> I do find that the—well, first, let me also make reference to relevant conduct once again, [§] 1B1.3, because in this particular case, there is sufficient evidence presented during trial of the defendants' communications with each other, that it was reasonably foreseeable that their activities—the fraudulent activities that were undertaken by each one would be reasonably foreseeable to the other and were engaged in to advance the fraudulent conduct, which did include making representations to not only lenders but potential investors with regard to this company.
>
> Ms. McKinnon, for example, provided false bank statements. I'm still not sure how she did it, but apparently changed bank statements in very significant ways to make it appear that some investors weren't on those statements or monies from those investors were not on those statements and it appeared that other monies were coming from the sale of product, for example, as opposed to investments or loans, or that there were individuals, that there were

> contracts or potential contracts with individuals when in fact that wasn't the case.
>
> And it is true, as Mr. Darling points out, that Mr. Vance was the person on the ground. He did take the Sergeant Schultz approach during the trial of the case, and now, that he had a very limited view of what was happening, and to do that, you have to ignore a significant amount of evidence and testimony presented during the course of the trial. That does indicate that not only was Mr. Vance aware of and engaging in fraudulent activities, but, again, just pointing back to his conversations and his attempts to convince Ms. Faybik, for example, that she's not a victim of his egregious conduct.
>
> With regard to the discretion, these individuals did have significant discretion in obtaining loans, obtaining investors. They worked together in doing that. They were not under supervision of others. And they did have an obligation to provide true and accurate information to individuals from whom they were seeking loans or individuals who they were seeking to invest in the company, and they failed miserably in providing truthful information. And not only truthful information, but they withheld information that should have been provided to persons that were willing to invest these sums of money. And so I do find that the two-level increase under [§] 3B1.3 is properly applied with respect to both of these defendants.

[R. 219: Court, TR (Evidentiary Hearing) at 2219-21.]

Vance was the "Founder and Chief Executive Officer" of Nex-Gen and "overs[aw] all aspects of the entire operation." [R. 262: Notice at 2543 (Gov. Ex. 116); *see* R. 219: Christopher Hubbuch, TR (Evidentiary Hearing) at 2127 (reading Vance's description of role, including to "have the lead role in making decisions").] "It is clear" from the evidence that Vance "had a tremendous amount of discretion and was able to commit the offenses of which []he has been convicted

by virtue of that discretion and h[is] position of power and trust at" Nex-Gen. *United States v. Freeman*, 86 F. App'x 35, 43 (6th Cir. 2003) (CEO defendant). "[A]ll decisions came through Doug." [R. 174: April Francis, TR (Trial Day 1) at 770.] He was the "key" player. [R. 174: Allan Deware, TR (Trial Day 1) at 797.] Victims made themselves "vulnerable" to Vance, "ceding to [his] presumed better judgment some control over their affairs." *Tatum*, 518 F.3d at 373. Victims made clear that they credited and relied on Vance's purported business acumen and alleged expertise at running a carbon-product business, trusting his representations regarding actual sales, production capabilities, and the like. [*See, e.g.*, R. 174: Allan Deware, TR (Trial Day 1) at 861-62; R. 175: Gary Chamblee, TR (Trial Day 2) at 1017.] When victims gave away money based on Vance's representations, they made themselves vulnerable to his lies, and they ceded to him control over that portion of their financial affairs. Once he had their money, he had "the type of substantial discretion to manage the [victims'] funds that is required for the application of the abuse-of-trust enhancement." *United States v. Sweet*, 630 F.3d 477, 482 (6th Cir. 2011); *cf. United States v. Dobish*, 102 F.3d 760, 762 (6th Cir. 1996) (per curiam) (holding that an "investment manager normally occupies a position of trust"). Vance "abused that position to defraud his victims." *Dobish*, 102 F.3d at 762. His position was more analogous to a "bank executive" than "an

ordinary bank teller or hotel clerk," justifying the enhancement's application. U.S.S.G. § 3B1.3 cmt. n.1.

Vance thinks "[t]here was no evidence presented that [he] had the ability to administer the property of the . . . victims." Vance's Brief at 44. But he said that, once he got money from investors and lenders, they are no longer "privy to" it. [R. 178: Douglas Vance, TR (Trial Day 5) at 1688.] At that point, the money is "not theirs, it's mine." [*Id.*] Vance candidly admitted that he "took" such money "as a reimbursement." [*Id.* at 1681.] The destinations for the bulk of the money, proven by financial records and consistently related to Vance and his interests, likewise belie his assertion. [R. 179: James Chapman, TR (Trial Day 6) at 1862 ("[Y]ou're seeing where the money is going. It's going to ATM withdrawals where Ms. Faybik lived and it's going to transfers to Doug Vance's personal checking account. It's also going to that over $1,900 purchase at a jewelry store. It's also going to pay a prior criminal judgment, pay restitution at the Tazewell County Circuit Court. It's also going to Mr. Vance's wife, Heather Vance.").] By Vance's actions and words, once he had victims' money, it was his, and he spent it as he liked. [*Id.* at 1871.]

Even if there were "two permissible views of the evidence," the district court's "choice between them cannot be clearly erroneous." *Dillard*, 438 F.3d at 681. The district court's conclusion was "not clearly erroneous" because it was

"supported by competent evidence in the record." *Jeross*, 521 F.3d at 570; *see Vance*, 956 F.3d at 853.

B. Vance's sentence is substantively reasonable.

"Substantive reasonableness, when challenged by a defendant, concerns whether a sentence is too long." *United States v. Johnson*, 95 F.4th 404, 418 (6th Cir. 2024).

Vance's substantive reasonableness argument is that, "[h]ad [his] objections been sustained at sentencing, . . . his guideline range would [have been] 63 to 78 months' imprisonment." Vance's Brief at 46-47. This is not an actual substantive reasonableness challenge. *United States v. Pennington*, 78 F.4th 955, 962 (6th Cir. 2023). The Court "first address[es] the procedural reasonableness of a sentence and do[es] not analyze its substantive reasonableness unless the sentence is procedurally sound." *Id.* If the Court concludes that Vance's objections should have been sustained, it will vacate his sentence as procedurally unreasonable. *See id.* If, however, the Court concludes that the enhancements properly applied, the predicate of Vance's substantive reasonableness challenge ("[h]ad [his] objections been sustained at sentencing") vanishes. Vance's Brief at 46-47. In either scenario, there are no additional substantive reasonableness arguments to address. *See Pennington*, 78 F.4th at 962.

Molly Irene McKinnon

IV. McKinnon did not make a prima facie showing that she could produce evidence on each of the elements of a duress defense.

A "trial judge has a duty to require a *prima facie* showing by the defendant that [s]he can produce evidence on each of the elements of [an affirmative] defense." *United States v. Capozzi*, 723 F.3d 720, 725 (6th Cir. 2013). "A trial judge does not invade the province of the jury when determining, as a preliminary matter, whether a defendant has met the burden of introducing sufficient evidence on each of the elements of an asserted defense." *United States v. Johnson*, 416 F.3d 464, 468 (6th Cir. 2005). "Where an affirmative defense consists of several elements and testimony supporting one element is insufficient to sustain it even if believed, the trial court and jury need not be burdened with testimony supporting other elements of the defense." *Id.* "Therefore, where the evidence is insufficient as a matter of law to support a duress defense, a trial judge should exclude that evidence." *Id.* When the issue is raised prior to the defendant's testimony, "the rule is to be applied just the same: if the defendant's proffered evidence is legally insufficient to support a duress defense, the trial judge should not allow its presentation to the jury." *Id.*; *see Capozzi*, 723 F.3d at 725-26 (requiring proof at "pretrial hearing"); *United States v. Ridner*, 512 F.3d 846, 849 (6th Cir. 2008) (requiring "proffer" of "evidence"); *United States v. Moreno*, 102 F.3d 994, 997-98

(9th Cir. 1996) (affirming exclusion of defendant's testimony after "proffer of evidence"). Indeed, not until the defendant makes "a prima facie case for the . . . defense" is she "entitle[d] . . . to present evidence to support it." *United States v. Wiseman*, 932 F.3d 411, 418 (6th Cir. 2019).

> To state a *prima facie* case of duress, a defendant must offer some evidence in support of each of the following five elements:
>
> (1) that defendant was under an unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury;
>
> (2) that the defendant had not recklessly or negligently placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct;
>
> (3) that the defendant had no reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm;
>
> (4) that a direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of the threatened harm;
>
> (5) that defendant did not maintain the illegal conduct any longer than absolutely necessary.

Johnson, 416 F.3d at 468 (second emphasis removed); *see* Sixth Circuit Pattern Jury Instruction 6.05, 6.07 (substantially similar tests). The defense "arises only in rare situations and should be construed very narrowly." *Wiseman*, 932 F.3d at 418.

At trial, McKinnon wanted to present a duress defense. [R. 179: Brandi Lewis, TR (Trial Day 6) at 1763.] The district court "require[d a] proffer . . . as to

the elements that must be established." [R. 179: Court, TR (Trial Day 6) at 1764.] According to the proffer, Chamblee first asked McKinnon to change financial records on June 16, 2017. [R. 179: Colloquy, TR (Trial Day 6) at 1765.] He allegedly "implied bad things could happen." [*Id.*] On June 27, 2017, McKinnon supposedly received three text messages containing pictures of her—"one in her car, one in her bed asleep, and one while outside." [*Id.* at 1766.] About a month later, Chamblee purportedly "demanded that she create more bank statements." [*Id.*] She did not contact law enforcement during this month-long pause. [*Id.* at 1766-67.] She never contacted law enforcement at any point. [*Id.* at 1767.] Another incident allegedly occurred telephonically on September 1, 2017. [*Id.*] She did not contact law enforcement. [*Id.*] On September 21, 2017, she was allegedly "mugged by an unidentified party," and Chamblee purportedly "made comments after the fact about" it. [*Id.* at 1768.] "She did not report anything in regards to Mr. Chamblee to law enforcement." [*Id.*] Her home allegedly burned on June 3, 2018, and Chamblee supposedly said, "I will make sure you're in the house next time." [*Id.*] Again, the comments were not reported to police. [*Id.*] "Three days later," McKinnon was allegedly "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." [*Id.* at 1769.] "In June of 2018 is where they [allegedly] ha[d] [an] encounter at

the plant. And it would be Ms. McKinnon's testimony that Mr. Chamblee grabbed her by the throat and pushed her against the wall. This was not reported to law enforcement either." [*Id.*] This was "approximately a year after the[] first demands were made to change records." [*Id.*] There was "absolutely no reporting to law enforcement or accusing Mr. Chamblee of any of this conduct." [*Id.*]

Based on the proffer, the district court determined that McKinnon did not meet "the very low burden of establishing prim[a] faci[e] evidence . . . to justify or allow" a duress defense. [R. 179: Court, TR (Trial Day 6) at 1771.] "[C]learly," the court reasoned, "based upon the length of time that has passed, there would be reasonable alternatives to creating false documents and acting in the way" that she did. [*Id.* at 1772.] Accordingly, the district court found that McKinnon did not establish a prima facie case "as to the third and the fifth elements that must be established" and therefore precluded her from "present[ing] such testimony to the jury." [*Id.* at 1774.] The Court reviews "[w]hether a defendant has established a *prima facie* case of duress . . . *de novo*." *Johnson*, 416 F.3d at 468.

McKinnon did not establish a prima facie case as to the third and fifth elements. McKinnon "clearly" had "reasonable alternatives" to violating the law during the year of Chamblee's alleged coercion. [R. 179: Court, TR (Trial Day 6) at 1772.] She could have simply reported Chamblee—based in a far-away office in Georgia—to law enforcement. [R. 175: Gary Chamblee, TR (Trial Day 2) at

988-89 (noting he lives in Atlanta suburb).] Chamblee, who helped manage several investments, visited Nex-Gen only "once every month, every six weeks." [*Id.* at 1004.] But McKinnon did not "report[] any" of the alleged criminality to law enforcement over a lengthy period. *Capozzi*, 723 F.3d at 726; *see United States v. White*, 134 F. App'x 880, 883 (6th Cir. 2005) (similar considerations). She "told [law enforcement] nothing of the alleged threats" or other alleged criminality. *Capozzi*, 723 F.3d at 726 (favorably quoting *United States v. Lizalde*, 38 F. App'x 657, 660 (2d Cir. 2002)).

During the year, McKinnon also could have simply reported Chamblee to other involved individuals, such as Vance, Deware, or any Nex-Gen employee; she, further, could have simply disassociated herself from Nex-Gen, leaving her position with the company. *United States v. Nwoye*, 663 F.3d 460, 462-64 (D.C. Cir. 2011) ("A defendant who has the opportunity to avoid committing a crime, either by contacting police or by otherwise removing herself from a threatening situation, cannot seek to excuse her criminal conduct by claiming to have acted under duress.") (cataloguing "quite harrowing situations" that failed to meet duress elements and numerous legal "opportunities" to avoid committing crime); *United States v. Sixty Acres in Etowah Cnty.*, 930 F.2d 857, 860 (11th Cir. 1991) (similar principles); *United States v. Jenrette*, 744 F.2d 817, 821 (D.C. Cir. 1984) (no duress based on fear of mobsters because no notification to police during two-day

gap between being offered and accepting bribe). Chamblee was not "present at all times, . . . forcing her to act under constant compulsion." *United States v. Sawyer*, 558 F.3d 705, 712 (7th Cir. 2009); *see id.* (noting "it would be virtually impossible . . . to present" evidence of duress "over the course of a year"). "[McKinnon] had countless opportunities to contact law enforcement authorities or escape the perceived threats by [Chamblee] during this time." *United States v. Scott*, 901 F.2d 871, 874 (10th Cir. 1990); *see United States v. Newcomb*, 6 F.3d 1129, 1137 (6th Cir. 1993) ("When criminal conduct endures for 125 days, or a year, or two years, it is logical to conclude that a defendant who is not being held hostage must have ample opportunity to alert the authorities"); *United States v. Liu*, 960 F.2d 449, 455 (5th Cir. 1992) ("For obvious reasons, the record is a fertile field to find many reasonable legal alternatives to violating the law over a two year period.").

"[McKinnon]'s failure to proffer any competent evidence that [s]he had no reasonable, legal alternative to [defrauding lenders and investors over the course of more than two years] was fatal to h[er] showing a *prima facie* case and precluded the presentation of a duress defense." *Johnson*, 416 F.3d at 469. "Therefore, the district court did not err in barring [McKinnon] from presenting that defense to the jury." *United States v. Al-Kadumi*, 661 F. App'x 340, 344 (6th Cir. 2016). "Because [McKinnon] failed to show that [s]he had no reasonable alternative but to engage in [wire fraud and money laundering] conspirac[ies] with [Vance], the

district court properly rejected h[er] defense of duress." *United States v. Gaviria*, 116 F.3d 1498, 1531 (D.C. Cir. 1997); *see, e.g.*, *United States v. Jennell*, 749 F.2d 1302, 1306 (9th Cir. 1984) (no duress when "the conspiracy . . . dragged on for a period of more than a year").

McKinnon's own timeline belies the notion that her criminality lasted no "longer than absolutely necessary." *Johnson*, 416 F.3d at 468. Chamblee's alleged threats began on June 16, 2017. [R. 179: Colloquy, TR (Trial Day 6) at 1765.] But McKinnon's fraud began far beforehand. In August and September 2016, McKinnon was involved in forming competing Nex-Gen entities with Deware and the Shumard group, without disclosing the existence of each entity to the other. [*Compare* R. 262: Notice at 2531-33, 2971-3006 (Gov. Exs. 105, 106, 703, 704) *with id.* at 2846-54 (Gov. Exs. 601, 602, 612, 613, 617).] On May 3, 2017, McKinnon represented to Deware that she was "waiting on the Koch checks to come in," based on sales of product to Koch, although there were no such sales. [*Id*. at 2855 (Gov. Ex. 621); R. 174: Allan Deware, TR (Trial Day 1) at 837-38; R. 177: David Severson, TR (Trial Day 4) at 1472.] In "the spring of 2017," Deware became aware that she was doctoring financial information. [R. 174: Allan Deware, TR (Trial Day 1) at 842.] McKinnon had sent him a false bank statement dated "2/20/2017." [R. 262: Notice at 2873-76 (Gov. Ex. 628).] She

sent fraudulent financial information through May 8, 2017. [*Id*. at 2859-72 (Gov. Ex. 627).]

McKinnon's criminality also lasted well beyond June 2018. The jury, for instance, convicted her of two conspiracies spanning until December 2018. [R. 1: Indictment at 1-12; R. 133: Verdict at 485-88.] McKinnon emailed Chamblee numerous falsities on July 16, 2018. [R. 262: Notice at 2571 (Gov. Ex. 138); R. 175: Gary Chamblee, TR (Trial Day 2) at 1011-12.] She emailed Severson false financial information on July 17, 2018. [R. 262: Notice at 2572-77 (Gov. Ex. 139).] She helped create a false Washington Mills purchase order on September 9, 2018. [*Id*. at 2578-79, 2645-46 (Gov. Exs. 142, 175).] She helped create a false Nucor spec sheet on September 11, 2018. [*Id*. at 2580-84 (Gov. Ex. 148); *see id*. at 2619-22 (Gov. Exs. 166, 166A).] She continued to scheme with Vance, drafting an email for him, on October 7, 2018. [*Id*. at 2585 (Gov. Ex. 149).] *See Sawyer*, 558 F.3d at 713 ("Sawyer failed to meet [the] requirement that she cease committing the crime as soon as the threats against her lost their coercive force [because] she continued to sell drugs after the threat had passed.").

In sum, McKinnon "failed to" report Chamblee to law enforcement, or anyone else related to Nex-Gen, a "not foreclosed" option available to her. *United States v. Milligan*, 17 F.3d 177, 181 (6th Cir. 1994). She began her fraud before Chamblee's threats allegedly began, and she "failed to discontinue [her]

conspirac[ies] and fraud by revealing their deception once" Chamblee's alleged threats dissipated. *Id.* at 181-82; *see id.* at 182 (expressing significant general reluctance to authorize instruction in conspiracy case because "conspiracy is a continuing offense"). In other words, "[d]espite th[e] proffer, [McKinnon] failed to establish at least one essential element of the duress test." *United States v. Shemami*, 425 F. App'x 425, 427 (6th Cir. 2011). "Accordingly, because [she] failed to present evidence of every element of the [duress] defense, the district court did not err by refusing to permit [her] to present the defense to the jury." *Capozzi*, 723 F.3d at 726-27. Given the insufficient proffer, the district court properly declined to "burden[]" the "jury" with "testimony supporting other elements of the defense" and "exclude[d] . . . evidence" of duress, not "allow[ing] its presentation to the jury." *Johnson*, 416 F.3d at 468.

None of McKinnon's responses persuades. McKinnon's Brief at 8-33. First, she thinks that the cited cases do not "support prohibition of an accused's testimony." *Id.* at 16. She cites nothing for this proposition. For good reason—case law does not support such a distinction. *See, e.g., Zayac v. United States*, 771 F. App'x 54, 55-56 (2d Cir. 2019) (defendant's testimony "would not have altered the conclusion that Zayac had a reasonable opportunity to escape"); *Shemami*, 425 F. App'x at 427 (affirming lack of prima facie case based, in part, on defendant's "own testimony," including that he was "tortured"). As the Court stated: "where

the evidence is insufficient as a matter of law to support a duress defense, a trial judge should exclude that evidence." *Johnson*, 416 F.3d at 468. *Johnson* brooks no except-for-the-defendant's-own-testimony carve-out. *See id.*; *see also, e.g.*, *Capozzi*, 723 F.3d at 725-26 (similarly making no such exception). Almost any duress defense presentation would require the defendant's testimony, unwarrantedly risking a defendant's-own-testimony exception swallowing the general rule that such evidence may be excluded upon an insufficient proffer. *See United States v. Bailey*, 444 U.S. 394, 416 (1980) ("If, as we here hold, an affirmative defense consists of several elements and testimony supporting one element is insufficient to sustain it even if believed, the trial court and jury need not be burdened with testimony supporting other elements of the defense."); *United States v. Vasquez-Landaver*, 527 F.3d 798, 802-03 (9th Cir. 2008) (rejecting defendant's-own-testimony exception); *Moreno*, 102 F.3d at 998-99 (rejecting argument "that, pursuant to the constitutional right to testify, the district court was required to permit him to explain to the jury that he behaved in the manner that he did because he was acting under duress, whether or not he had demonstrated prima facie evidence of duress"); *United States v. Alicea*, 837 F.2d 103, 107 (2d Cir. 1988) (rejecting defendant's-own-testimony exception).

Second, McKinnon thinks, sans citation, that that the elements of duress are "inapplicable *ab initio* to the instant matter." McKinnon's Brief at 18. It is true

that *Newcomb* arose in the context of a firearm prosecution. 6 F.3d at 1130. But the five-factor test is a generally-applicable legal test; she concedes that the Court has applied it "to a fraud case." McKinnon's Brief at 22 (citing *Milligan*, 17 F.3d at 181). The myriad cases cited above, applying the factors in a variety of legal and factual scenarios, confirms as much. McKinnon's point may, if anything, query "whether the [duress] defense exists outside th[e] context" of firearm cases, not whether—assuming it exists—the five-factor test regulates its availability. Sixth Circuit Pattern Jury Instruction 6.07, Committee Commentary.

Third, McKinnon stresses that her husband allegedly told her that she "can't trust the FBI" and that she was "afraid to contact law enforcement." McKinnon's Brief at 20. These considerations do not move the needle. "Before breaking the law could have possibly become a reasonable course of action, [McKinnon] had to try to comply with it first. A general distrust of legal authorities isn't enough to excuse the failure to do so." *United States v. Fraser*, 647 F.3d 1242, 1246 (10th Cir. 2011); *see also, e.g.*, *Nwoye*, 663 F.3d at 464 (holding that belief "that all police forces were corrupt and that she therefore had nowhere to turn for help" did not permit duress defense); *United States v. Jankowski*, 194 F.3d 878, 883 (8th Cir. 1999) (similar). A mere belief that "police would have been ineffective or unwilling to protect [McKinnon] fall[s] well short of satisfying [her] burden." *United States v. Dixon*, 901 F.3d 1170, 1179 (10th Cir. 2018) (collecting cases);

see, e.g., *United States v. Gonzalez*, 407 F.3d 118, 122 (2d Cir. 2005) ("Gonzalez's subjective belief that going to the police would have been futile is insufficient to demonstrate that she had no reasonable alternative but to violate the law."). McKinnon did not claim, for example, that Chamblee had a "mole[]" in any of the various law enforcement agencies she could have gone to "such that it would have been unreasonable for her to seek their protection." *Sawyer*, 558 F.3d at 712-13. "[E]ven assuming that [McKinnon] could not report the [alleged threats] to the police because she feared retribution from [Chamblee], she has offered no evidence that *other* alternatives were unavailable to her," such as the ones discussed above, including simply leaving her employment with Nex-Gen. *Dixon*, 901 F.3d at 1180. This argument also fails to address the fifth duress factor—an independent basis to affirm.

Fourth, McKinnon claims that she "was prohibited from presenting testimony to the jury in her own defense which would have been relevant to the issue of whether she possessed the requisite specific intent to commit the indicted crimes." McKinnon's Brief at 26-27. That is wrong. McKinnon was prohibited from presenting a duress defense, not from testifying about her intent. [R. 179: Court, TR (Trial Day 6) at 1774 ("I do find that the defendant has not been able to establish a prim[a] faci[e] . . . case as to the third and the fifth elements that must be established and, therefore, will not be allowed to present such testimony to the

jury.").] She testified about her knowledge and intent at length. [*See, e.g.*, R. 179: Molly McKinnon, TR (Trial Day 6) at 1802 (saying that Chamblee gave her "the information for sales that went into that email report"); *id.* at 1805 (denying that she lied to investors and lenders); *id.* at 1808 (denying that she "set up alternative companies for Mr. Deware and the Shumards"); *id.* at 1810 ("I don't know if it's true or not. That was information that was conveyed to me."); *id.* at 1814 ("I did not hide them. I wasn't aware of them."); *id.* at 1815 ("I didn't know about that transaction so I wouldn't be hiding it if I didn't know about it."); *id.* ("Again, I had no knowledge of it, so it wasn't I'm trying to hide it, I didn't know about it. Information that's on here is information that I was given by Mr. Chamblee."); *id.* at 1817 ("The information that I input into QuickBooks was information that Mr. Chamblee gave me."); *id.* ("I didn't doctor anything. I put exactly what he gave me."); *id.* ("I can't say I doctored it when I didn't realize I was doctoring anything."); *id.* at 1817-18 ("I gave him information that I thought was correct at the time that I gave it to him."); *id.* at 1819 ("It was accurate in that I thought it was true when I sent that. I found out later that was incorrect."); *id.* at 1820 ("I provided him information that I was given by Mr. Chamblee."); *id.* at 1825 ("I received information from Mr. Chamblee that got conveyed to this report."); *id.* at 1826 ("I sent Mr. Chamblee information that he requested."); *id.* at 1827 ("But this is all information I got from Mr. Chamblee."); *id.* at 1828 ("I sent information that

Mr. Chamblee gave me."); *id.* at 1829 ("I thought there was when I sent it."); *id.* ("When Mr. Chamblee told me he was making sales, I had no reason to disbelieve him."); *id.* at 1830 ("I did what I was told to do."); *id.* at 1833 ("The information that I used for these was the information that I got from Mr. Chamblee."); *id.* at 1834 ("I put on this document what I was given by Mr. Chamblee."); *id.* ("I made sure the information that Mr. Chamblee gave me got conveyed to this."); *id.* at 1834-35 ("All I did was put the information that he gave me."); *id.* at 1835 ("I didn't have that information, so I can't remove it if I don't have it.").] All told, her "basic[]" story was that "any information [she] provided was just based upon information [she] w[as] given." [*Id.* at 1844.]

Fifth, McKinnon says that the government opened the door to testimony about Chamblee's alleged threats. McKinnon's Brief at 28-33. She is, again, mistaken. The government did question Chamblee about the alleged threats. [R. 175: Colloquy, TR (Trial Day 2) at 1026-29.] But McKinnon opened the door to that questioning via her opening statement:

> Molly McKinnon was terror filled and traumatized, but she did as she was told or else she was going to be threatened, her family members were going to be threatened, and they were.
>
> . . .
>
> [Chamblee] asked [McKinnon] to change bookkeeping records, he later would ask her to change bank records. She refused this, she thought he was joking at first. She continued to refuse and he

> continued to apply the pressure, he continued to threaten her, he started making accusations and threats of everyone she held dear to her.
>
> She eventually succame [sic] to those threats and did his bidding, and she followed what he wanted her to do because she was in fear. Again, she was in fear for herself and those she cared about.
>
> . . .
>
> And at the end, you will see that Molly was left terrorized and traumatized by Gary Chamblee. She was threatened, those she loved were threatened if she didn't do what he told her to do.

[R. 174: Brandi Lewis, TR (Trial Day 1) at 737-43 (making other allegations against Chamblee); *see* R. 175: Colloquy, TR (Trial Day 2) at 1026-27 (noting exchange was "[a]bsolutely" "in response to assertions made during opening statement").] *See, e.g.*, *United States v. Spotted Bear*, 920 F.3d 1199, 1201 (8th Cir. 2019) (holding defendant opened door through opening statement); *United States v. Acosta-Cazares*, 878 F.2d 945, 950 (6th Cir. 1989) (same), *abrogated on other grounds as recognized in Rattigan v. United States*, 151 F.3d 551, 556 n.2 (6th Cir. 1998); *United States v. Segal*, 852 F.2d 1152, 1155-56 (9th Cir. 1988) (same). Opening statement was when the government became aware that McKinnon would attempt a defense based on such accusations. [R. 174: Brandi Lewis, TR (Trial Day 1) at 737-38 ("[T]here is . . . another part of th[e] story that . . . I don't think [the government is] even aware of.").] Having predicted that the jury would hear evidence of Chamblee's threats, McKinnon had "[n]othing to"

object to about this exchange. [R. 175: Brandi Lewis, TR (Trial Day 2) at 1027.] That McKinnon, strategically seeking an element of surprise, eschewed seeking a pretrial ruling on the viability of a duress defense and told the jury that it would hear evidence of Chamblee's alleged threats—before knowing if such evidence would be permitted and when the government was unaware that she would attempt such a defense—does not permit her to unilaterally shoehorn such evidence into trial based on her opening statement forecast; McKinnon bringing these matters up in opening statement, in other words, cannot trump the Court's case law indicating such evidence should be excluded in this context. *See, e.g.*, *Capozzi*, 723 F.3d at 726-27; *Johnson*, 416 F.3d at 468.

V. The evidence was sufficient to support McKinnon's convictions.

Federal law criminalizes wire fraud, conspiring to commit wire fraud, and conspiring to launder money. 18 U.S.C. §§ 1343, 1349, 1956(h). Faced with a sufficiency of the evidence challenge, the Court "view[s] the evidence in the light most favorable to the prosecution" and determines whether "*any* rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *United States v. Brown*, 732 F.3d 569, 576 (6th Cir. 2013).

McKinnon moved for acquittal, pursuant to Fed. R. Crim. P. 29, at the close of the government's evidence and of all evidence. [R. 178: Brandi Lewis, TR

(Trial Day 5) at 1596; R. 179: Brandi Lewis, TR (Trial Day 6) at 1849-50.] The district court denied both motions. [R. 178: Court, TR (Trial Day 5) at 1596-1600; R. 179: Court, TR (Trial Day 6) at 1850-51.] This Court "review[s] the denial of a Rule 29 motion based on sufficiency of the evidence under the same standard" described above. *United States v. Mathis*, 738 F.3d 719, 735 (6th Cir. 2013). The Court does "not reweigh the evidence, reevaluate the credibility of witnesses, or substitute [its] judgment for that of the jury." *Id.* The Court "make[s] all reasonable inferences and credibility choices in support of the jury's verdict." *United States v. Johnson*, 440 F.3d 832, 839 (6th Cir. 2006).

A defendant "faces a very heavy burden in attempting to overturn the denial of a Rule 29 motion." *United States v. Rogers*, 769 F.3d 372, 377 (6th Cir. 2014).

McKinnon challenges sufficiency regarding the crimes' intent elements and her participation in a scheme to defraud. McKinnon's Brief at 35-40; *see United States v. Daniel*, 329 F.3d 480, 485 (6th Cir. 2003) ("intent to deprive a victim of money or property"). "[T]he question of intent is generally considered to be one of fact to be resolved by the trier of the facts . . . and the determination thereof should not be lightly overturned." *Daniel*, 329 F.3d at 487. The record is replete with indicia of McKinnon's intent and participation in a scheme with Vance to defraud.

McKinnon was CFO of Nex-Gen. [*See, e.g.*, R. 174: April Francis, TR (Trial Day 1) at 754.] In that role, she "worked closely with Mr. Vance." [R. 179:

Colloquy, TR (Trial Day 6) at 1805.] McKinnon "was very involved in" many aspects of Nex-Gen's operations. [R. 175: Kenneth Shumard, TR (Trial Day 2) at 947.] She "spent a lot of time" at the worksite "working closely with Mr. Vance." [*Id.* at 947-48.] She "was in charge of all the administration and finances." [R. 174: Allan Deware, TR (Trial Day 1) at 886.] She purported to be Vance's "[a]ttorney in fact." [R. 177: Colloquy, TR (Trial Day 4) at 1439.] The duo was so close that Vance gave McKinnon "power of attorney." [R. 178: Douglas Vance, TR (Trial Day 5) at 1752.]

McKinnon abused her position as CFO of Nex-Gen to provide false information to lenders and investors, doctor financial information, and fabricate documents. At the case genesis, when Francis discovered the true bank statement, McKinnon became "irate." [R. 174: April Francis, TR (Trial Day 1) at 755.] McKinnon "did not want anybody else seeing any of the financial details of what's coming in and what's going out." [*Id.*] A rational jury could understand this to mean that McKinnon knowingly "realized at that moment that the scheme [she and Vance] had devised was about to come crumbling down." [R. 179: James Chapman, TR (Trial Day 6) at 1853.] McKinnon also sent Deware false financial information. [*See, e.g.*, R. 174: Allan Deware, TR (Trial Day 1) at 842 ("[Francis] showed me a bank statement from Wells Fargo, and it showed that everything that Molly had presented to me as books was not true at all."); *id.* at 847-56 (narrating

alterations McKinnon made and comparing document Francis sent with document McKinnon sent).] She helped create competing entities involving Deware and the Shumard group, and she failed to disclose the existence of the other entity, as well as the true nature of the other party's investment relationship, to each respective side. [R. 174: Allan Deware, TR (Trial Day 1) at 838-41; R. 175: Kenneth Shumard, TR (Trial Day 2) at 951-52.] Deware relied on "the information" McKinnon provided being "true and accurate." [R. 174: Allan Deware, TR (Trial Day 1) at 861.] Knowing McKinnon was providing false financial documents would "[a]bsolutely" have impacted his decision to invest. [*Id.* at 861-62; *see id.* at 841 ("I don't believe I would have made the investment.").] The Shumard group reacted similarly. [*See, e.g.*, R. 175: Kenneth Shumard, TR (Trial Day 2) at 962-66.] McKinnon admitted that she "knew [she] w[as] falsifying bank statements," knowing that "a falsified bank statement would mislead someone reading it." [R. 179: Colloquy, TR (Trial Day 6) at 1839.]

Further, McKinnon sent false sales information to Koch. [R. 262: Notice at 2561-70, 2572-77, 2631-36 (Gov. Exs. 134, 135, 139, 171).] She personally guaranteed that she "ha[d] only included confirmed sales." [*Id.* at 2631 (Gov. Ex. 171).] But there were not, for instance, sales to Nucor or AK Steel. [*See, e.g.*, R. 177: Adam Horrex, TR (Trial Day 4) at 1421; R. 177: David Chmielewski, TR (Trial Day 4) at 1364; R. 177: David Severson, TR (Trial Day 4) at 1460.] She

coordinated closely with Vance, even drafting an email for him to send to Koch. [R. 262: Notice at 2585 (Gov. Ex. 149).] She sent false information to the Shumard group. [*Id*. at 2571 (Gov. Ex. 138).] She fabricated weigh tickets that were sent to the Shumard group to fraudulently represent inventory loaded onto rail cars. [*Id*. at 2642-44, 3067-115, 3176-78 (Gov. Exs. 174, 708, 711); R. 175: Gary Chamblee, TR (Trial Day 2) at 1021-24, 1041.] She sent Hogan altered Wells Fargo statements—even including one false statement with a date range through "February 29, 2017," a date that does not exist. [R. 262: Notice at 2877-970, 3116-75 (Gov. Exs. 701, 710); R. 176: Mendie Hogan, TR (Trial Day 3) at 1118-21.] She falsely reported over $1.7 million in 2017 sales. [R. 262: Notice at 3007-66 (Gov. Ex. 707); R. 176: Mendie Hogan, TR (Trial Day 3) at 1122-23.] She, working with Vance, fabricated a Washington Mills purchase order. [R. 262: Notice at 2578-79, 2642-44 (Gov. Exs. 142, 175); R. 177: Nancy Gates, TR (Trial Day 4) at 1383-92.] She created a false Nucor spec sheet that influenced Koch's decision to infuse more money. [R. 262: Notice at 2580-84, 2619-22 (Gov. Exs. 148, 166, 166A); R. 177: David Severson, TR (Trial Day 4) at 1466-67.] "[A] combination of Ms. McKinnon and Mr. Vance" provided Koch information. [R. 177: David Severson, TR (Trial Day 4) at 1444-45.] She sent false sales information to Kentucky River Properties (KRP). [R. 262: Notice at 2550-52 (Gov. Ex. 120).] She was integral to the conspiracies' back end—spending the ill-

gotten funds. [*Id*. at 2558-60, 2623-26, 2637-41 (Gov. Exs. 128, 168, 172) (showing her involvement in paying Vance's judgment).] McKinnon, additionally, coordinated with Vance regarding falsifying customer and sales numbers; she warned Vance, for instance, not to "send" the numbers "to anyone" because she may need "to revise" them "to match Actual Sales that [she] gave [Severson] & info that you gave him." [*Id*. at 2627-30 (Gov. Ex. 170).] She cautioned Vance in the subject line, "Don't send to [Severson] yet." [*Id*. at 2627.]

McKinnon argues that her testimony was generally inconsistent with this narrative. McKinnon's Brief at 39. But when "faced with conflicting testimony, the trier of fact, not the appellate court, holds the responsibility . . . fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *United States v. Boring*, 557 F.3d 707, 711 (6th Cir. 2009). The Court is "loath to override the factfinder's conclusion." *Id*. at 712. Applying "this highly deferential standard," a rational jury could have rejected McKinnon's testimony and "found the existence of" the challenged elements "beyond a reasonable doubt based on the evidence presented." *Id*. Even if the jury credited McKinnon's denials of actual knowledge, the jury could have found knowledge via a deliberate ignorance theory, unaddressed by her. [R. 131: Jury Instructions at 452.] All told, a "reasonable jury could have found that [McKinnon] knowingly made several material misrepresentations" by making

"assertions [s]he knew were false and that would have affected a reasonable person's actions in the situation." *Daniel*, 329 F.3d at 487. A reasonable jury could have found that, in making those misrepresentations, McKinnon intended "to deprive the victim[s] of money or property." *Id.* at 488. And a reasonable jury could have found that McKinnon participated with Vance in "a scheme to defraud." *Id.* at 485.

McKinnon also argues insufficiency based on alleged inconsistencies. McKinnon's Brief at 40-41. This is a "simple challenge[] to the quality of the government's evidence and not the sufficiency of the evidence." *United States v. Conatser*, 514 F.3d 508, 519 (6th Cir. 2008). The Court does not "reweigh the evidence" in this context; instead, it "resolve[s] all issues" in favor of the jury's verdict. *Id.* This is not a sufficiency-of-the-evidence issue. *Cf. United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989) ("[I]nconsistencies in testimony by government witnesses do not establish knowing use of false testimony.").

Regardless, none of the alleged inconsistencies is a true contradiction. First, McKinnon targets Deware allegedly being "contradictory regarding whether he formed a formal corporation with Doug Vance." McKinnon's Brief at 40. But the targeted testimony concerns different entities—Nex-Gen Industries, LLC, and V4 Carbon. [R. 174: Allan Deware, TR (Trial Day 1) at 802-03, 865.] Second, she eyes "Chamblee claim[ing] that an investment of $5,600 . . . came from him, rather

than the business account of one of the ventures involved." McKinnon's Brief at 41. But the bank records show a $5,600 deposit from "Gary G Chamblee, Sender." [R. 262: Notice at 2815-16 (Gov. Ex. 202B); *see* R. 175: Gary Chamblee, TR (Trial Day 2) at 1008.] Third, she complains that "Chamblee also claimed not to have been repaid at all on a loan he made, yet another government witness . . . testified that in fact $35,000 had been repaid." McKinnon's Brief at 41. The September 2018 Bank of America statement shows a $30,000 transfer to "CHK 7126," with no explanation of what that means. [R. 262: Notice at 2714 (Gov. Ex. 201).] Hogan said that the account ending in 7126 was a "GGC Funding account." [R. 176: Mendie Hogan, TR (Trial Day 3) at 1172.] Chamblee, who would know his finances better than Hogan, said no principal had been returned "to [him]." [R. 175: Gary Chamblee, TR (Trial Day 2) at 1017.] Others invested through GGC Funding. [R. 219: Christopher Hubbuch, TR (Evidentiary Hearing) at 2138-39, 2169.] Sending money to an entity is different than sending money to Chamblee personally, so there is no inconsistency. [*See id.* at 2144.] Further, Hogan did not testify that the transfer was a return of principal, so there is, again, no discrepancy. [R. 176: Mendie Hogan, TR (Trial Day 3) at 1172.]

Finally, McKinnon argues that, because the "predicate convictions must fall, so too must [her] conviction for conspiracy to commit money laundering." McKinnon's Brief at 42. Because the evidence sufficiently supports the predicate

offenses, McKinnon's challenge to the money laundering conviction fails. *See id.* To the extent she attempts an undeveloped challenge to whether she knew that the proceeds "emanated from unlawful activity," the evidence discussed above shows that a jury could have rationally concluded that she did. *Id.*

VI. McKinnon's within-guidelines sentence is procedurally and substantively reasonable.

A. McKinnon's sentence is procedurally reasonable.

1. The loss-amount enhancement properly applied.

The offense level increases by sixteen if the loss is more than $1,500,000 but less than $3,500,000. U.S.S.G. § 2B1.1(b)(1)(I).

The presentence report applied such "a 16-level increase" to the offense level. [R. 208: Presentence Report at ¶ 47.] McKinnon objected. [*Id.* p. 24.] The district court extensively analyzed and overruled the objection, finding a loss amount "of a little over $2.7 million." [R. 219: Court, TR (Evidentiary Hearing) at 2207-13.] The Court reviews "the district court's factual finding[s] as to amount of loss for clear error" and the "method used to calculate loss . . . de novo." *Wendlandt*, 714 F.3d at 393.

For the reasons explained in Sections III.A.i and III.A.ii, the district court's loss calculation of roughly $2.7 million was correct. McKinnon first argues that Faybik was not a victim. McKinnon's Brief at 44-45. For the reasons explained in

Sections III.A.i and III.A.ii, the district court properly found Faybik to be a victim; at a minimum, that finding was not clearly erroneous. [*See* R. 235: Court, TR (Sentencing) at 2394 (so finding).] Second, McKinnon argues that, if Faybik was a victim, her loss was not $495,900. McKinnon's Brief at 44-47. Again, for the reasons explained in Sections III.A.i and III.A.ii, the district court properly calculated Faybik's loss; at a minimum, that finding was not clearly erroneous, and, for the reasons previously explained, any error in including $495,900 in loss was harmless because it would not affect the guideline calculation.

Third, McKinnon argues that, if Faybik was a victim and her loss was $495,900, McKinnon did not "factually or legally cause[] such a loss." McKinnon's Brief at 47. That is incorrect; Faybik's loss was "caused by the defendant's fraud." *United States v. Turner*, 615 F. App'x 264, 268 (6th Cir. 2015). [R. 235: Court, TR (Sentencing) at 2395 ("[T]his is a fraud perpetrated by [McKinnon] as well as [Vance] and it did result in significant loss to a number of individuals.").] "[T]here was certainly sufficient evidence presented during the trial to certainly counter" McKinnon's argument that "she is not criminally responsible for the actions that she has taken or those of co-defendant Mr. Vance." [*Id.* at 2396.] The case events, and McKinnon's personal and pervasive involvement, go back to August 2016, at the creation of competing Nex-Gen entities between Deware and the Shumard group. [*See, e.g.*, R. 174: Allan

Deware, TR (Trial Day 1) at 820-21; R. 262: Notice at 2846-47 (Gov. Ex. 601).] The jury convicted McKinnon of conspiracies spanning August 2016 through December 2018. [*See* R. 1: Indictment at 1-12; R. 133: Verdict at 485-88.] The district court found that Vance and McKinnon "did work together and were certainly aware of the activities of the other and that the losses that occurred were reasonably foreseeable to both." [R. 219: Court, TR (Evidentiary Hearing) at 2208.]

Faybik's losses occurred by "infusing her own funds into the operations of Doug Vance and Nex-Gen, believing that she was basically co-owners with Nex[-]Gen, with Doug Vance solely." [R. 219: Christopher Hubbuch, TR (Evidentiary Hearing) at 2129.] Faybik did "appear[] to have had a relationship with [Vance] from well preceding 2016," but that was background information; her loss "then"—2016 and after— occurred regarding "infusing her own funds" into "Nex-Gen." [*Id.*] Faybik's money did not go to McKinnon personally; it was "invest[ed] into" a Nex-Gen "entity." [*Id.* at 2145.]

McKinnon's central role in the Nex-Gen conspiracies—working closely with Vance to further their criminal ends—thus caused Faybik's loss. McKinnon knew who Faybik was. [R. 179: Molly McKinnon, TR (Trial Day 6) at 1810 ("And that's what [Vance] considered Ms. Faybik, was a personal friend.").] McKinnon, aware of Faybik, actively concealed Faybik from other investors and

lenders, cloaking Faybik from discovery and ensuring Faybik's financial harm continued. [R. 174: Allan Deware, TR (Trial Day 1) at 848-49, 854 (describing how McKinnon removed Faybik from financial document and that Deware did not know who Faybik was); R. 175: Kenneth Shumard, TR (Trial Day 2) at 963 ("I didn't know that there w[ere] other investors."); R. 175: Gary Chamblee, TR (Trial Day 2) at 1003 (same); R. 176: Mendie Hogan, TR (Trial Day 3) at 1136 (same).] One document alone shows McKinnon removing two transactions from Faybik. [R. 262: Notice at 2873-76 (Gov. Ex. 628).] And, again, any error in including Faybik's loss was harmless because it would not affect the guideline calculation.

Fourth, McKinnon thinks that Chamblee's losses should not count because he was involved in the fraud. McKinnon's Brief at 47-48. McKinnon did not make this new argument to the district court, so "plain error review governs." *Skouteris*, 51 F.4th at 671-72. This argument merely repeats McKinnon's rejected trial defense that Chamblee was responsible for the false information sent to investors and lenders. He was not. [R. 175: Gary Chamblee, TR (Trial Day 2) at 1027-29.] The jury concluded that McKinnon conspired with Vance, not Chamblee. [R. 131: Jury Instructions at 454-55.] Consistent with the evidence, the district court found Chamblee to be a victim, not a conspirator. [R. 219: Court, TR (Evidentiary Hearing) at 2211.] Accordingly, the district court did not

plainly err in failing to subtract Chamblee's losses. Alternatively, any error in including the under $290,000 in loss to Chamblee and GGC Funding was harmless because it would not affect the guideline calculation. *Castro*, 960 F.3d at 867. Subtracting that amount would lead to a loss of roughly $2.4 million, still within the $1.5 to $3.5 million range.

Fifth, McKinnon challenges the inclusion of $605,000 in loss to Koch. McKinnon's Brief at 48-49. McKinnon did not make this new argument to the district court, so "plain error review governs." *Skouteris*, 51 F.4th at 671-72. Koch was extensively defrauded by Vance and McKinnon from the outset. Koch was misled to believe that Vance was the sole owner of Nex-Gen. [R. 177: David Severson, TR (Trial Day 4) at 1429, 1437.] Vance and McKinnon concealed other loans from Koch. [*Id.* at 1429-30, 1437.] Vance and McKinnon concealed other investors from Koch. [*Id.* at 1477.] Vance and McKinnon defrauded Koch into believing that its money would be used for working capital, instead of "the personal, nonbusiness-related debts of one of the company's owners." [*Id.* at 1436.] Vance and McKinnon concealed that an "entity called NexGen Energy Partners owned the assets, equipment, and other property of Nex-Gen." [*Id.* at 1476-77.] "Through the course of [Koch's] dealings with Nex-Gen," Koch falsely "believe[d] Nex-Gen had a number of customers who made actual purchases of calcined coal" based on information provided by "a combination of Ms. McKinnon

and Mr. Vance." [*Id.* at 1444-45.] Severson narrated the course of negotiations between Koch and Vance and McKinnon, describing the timeline of the loan and the persistent falsities. [*Id.* at 1443-72; *see, e.g.*, R. 262: Notice at 2561-70, 2572-77, 2580-84, 2619-22, 2631-36 (Gov. Exs. 134, 135, 139, 148, 166, 166A, 171).] "[A]t the end of the day," Koch's loans were "induced through fraud." [R. 219: Christopher Hubbuch, TR (Evidentiary Hearing) at 2170.] The district court, thus, properly included Koch's loss. [R. 219: Court, TR (Evidentiary Hearing) at 2205, 2210.] Alternatively, any error in including Koch's loss was harmless because it would not affect the guideline calculation. *Castro*, 960 F.3d at 867. Subtracting the contested amount would lead to a loss amount of roughly $2.1 million, still within the applicable range.

Sixth, McKinnon invokes § 2B1.1 cmt. n.3(E)(ii), which instructs courts to reduce loss, in "a case involving collateral pledged or otherwise provided by the defendant, [by] the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing." § 2B1.1 cmt. n.3(E)(ii). McKinnon's Brief at 50. She cursorily says that Koch "held collateral secured as against their losses." *Id.* But Koch received no money in return for its $605,000. [R. 177: David Severson, TR (Trial Day 4) at 1471-72; R. 219: Christopher Hubbuch, TR (Evidentiary Hearing) at 2136-37.] McKinnon

offered nothing at sentencing, and nothing on appeal, to calculate the "fair market value of [Koch's] collateral." § 2B1.1 cmt. n.3(E)(ii). McKinnon does not even identify Koch's collateral. *See* McKinnon's Brief at 50. The loan document does not identify any particular calciner. [R. 262: Notice at 2831 (Gov. Ex. 301).] Nex-Gen's property had been promised to numerous different parties. [*See, e.g.*, R. 174: Allan Deware, TR (Trial Day 1) at 814; R. 175: Kenneth Shumard, TR (Trial Day 2) at 946-47; R. 177: Stephen Barker, TR (Trial Day 4) at 1323-24.]

Seventh, and finally, McKinnon says loss should have been reduced by the value of "one or two" calciners that "remained on site following the winding down of affairs." McKinnon's Brief at 50-51. But no evidence was presented about "the status of" those machines. [R. 219: James Chapman, TR (Evidentiary Hearing) at 2194.] No evidence was presented regarding "the fair market value in 2018" or "the fair market value today." [*Id.*] While there was evidence of original purchase prices, "the value . . . would certainly decline over years." [*Id.*] One calciner merely "looked like it may have been operational," and another "looked in pieces or partially operating." [R. 219: Christopher Hubbuch, TR (Evidentiary Hearing) at 2154.] Again, Nex-Gen's property had been promised to several different parties. [*See, e.g.*, R. 174: Allan Deware, TR (Trial Day 1) at 814; R. 175: Kenneth Shumard, TR (Trial Day 2) at 946-47; R. 177: Stephen Barker, TR (Trial Day 4) at 1323-24.] It was unclear "how many people had stakes in those

calciners" and who had "the true ownership interest," given the "competing interests in who owned what." [R. 219: Christopher Hubbuch, TR (Evidentiary Hearing) at 2156.] The sole sentencing witness had "no insight into" the calciners' value and "no idea" "what happened to" them. [*Id.*; *see* R. 219: Scott Hayworth, TR (Evidentiary Hearing) at 2199 (conceding that "there were a lot of unanswered questions about the value of the property").] The district court found that "we don't know a value on anything that was there," that "collateral [was] pledged to various entities," and "no one really knows who owns the property." [R. 219: Court, TR (Evidentiary Hearing) at 2197-98.] Accordingly, the district court did not err in failing to account for an unspecified value of years-old and seemingly abandoned calciners. [*Id.* at 2214 (declining to reduce loss by "the possible value of any property").] Alternatively, any error in including an alleged total value of $220,000, McKinnon's Brief at 50, was harmless because it would not affect the guideline calculation. *Castro*, 960 F.3d at 867. Subtracting that amount would lead to a loss of roughly $2.5 million, still within the applicable range.

2. The obstruction-of-justice enhancement properly applied.

"[T]he obstruction enhancement tells district courts to increase a defendant's offense level by two if [she] willfully obstructed or impeded . . . the administration of justice with respect to the prosecution of the charged offense." *United States v. O'Lear*, 90 F.4th 519, 534 (6th Cir. 2024) (citing U.S.S.G. § 3C1.1).

"[C]ommitting perjury during the trial qualifies as behavior that obstructs or impedes the prosecution within the meaning of this enhancement." *Id.*

The presentence report included a § 3C1.1 enhancement. [R. 208: Presentence Report at ¶ 51.] McKinnon did not object. The district court found "that [she] obstructed justice by falsely testifying in the case." [R. 235: Court, TR (Sentencing) at 2352.] Because McKinnon never objected, she "forfeited h[er] appellate challenge to the enhancement." *O'Lear*, 90 F.4th at 534. "So plain-error review applies." *Id.* at 535. "On plain-error review, . . . the burden shifts to [McKinnon] to show that the district court committed an obvious error when applying" the enhancement. *Id.*

McKinnon does not show an obvious error in § 3C1.1's application. The district court broadly found, twice, that McKinnon testified falsely at trial. [R. 235: Court, TR (Sentencing) at 2352 ("I do find . . . that the defendant obstructed justice by falsely testifying in the case."); *id.* ("So I do find that the defendant testified falsely [and] it was material in the case.").] That finding is correct—and certainly not obviously incorrect. McKinnon's material lies included:

- Testifying that Deware knew that Vance was logging. [R. 179: Molly McKinnon, TR (Trial Day 6) at 1786.] Deware did not know. [R. 174: Allan Deware, TR (Trial Day 1) at 842.]

- Testifying that Chamblee asked her to use an app called Silent Circle.

[R. 179: Molly McKinnon, TR (Trial Day 6) at 1794.] Chamblee had not heard of Silent Circle until trial. [R. 175: Gary Chamblee, TR (Trial Day 2) at 1087, 1090.]

- Testifying that she reported Chamblee's sales to KRP. [R. 179: Molly McKinnon, TR (Trial Day 6) at 1796.] Chamblee did not report sales to McKinnon. [R. 175: Gary Chamblee, TR (Trial Day 2) at 1077-78.]

- Testifying that Chamblee gave her the information she reported to Koch. [R. 179: Molly McKinnon, TR (Trial Day 6) at 1801-02.]

- Denying being CFO. [*Id.* at 1804.]

- Denying lying to investors and lenders. [*Id.* at 1805.]

- Denying becoming irate to Francis. [*Id.* at 1806.]

- Accusing Francis of lying. [*Id.* at 1807.]

- Denying setting up alternative companies for Deware and the Shumard group. [*Id.* at 1808.]

- Denying hiding a transaction from Chamblee to Deware. [*Id.* at 1813.] She did. [R. 174: Allan Deware, TR (Trial Day 1) at 854.]

- Denying hiding transactions from Faybik. [R. 179: Molly McKinnon, TR (Trial Day 6) at 1814.] She did. [R. 174: Allan Deware, TR (Trial Day 1) at 854.]

- Denying having the true banking records. [R. 179: Molly McKinnon, TR (Trial Day 6) at 1815.] She had to have them to doctor them and to become irate when Francis saw one.

- Testifying that the royalty reports sent to KRP were accurate. [*Id.* at 1822-23.]

- Denying coordinating with Vance regarding information sent to Koch. [*Id.* at 1824-26.]

- Testifying that she thought there were AK Steel sales. [*Id.* at 1829.]

- Denying concocting the Washington Mills purchase order with Vance. [*Id.* at 1830-32.] She did. [R. 262: Notice at 2578-79, 2645-46 (Gov. Exs. 142, 175).]

- Denying removing transactions from statements sent to Hogan. [R. 179: Molly McKinnon, TR (Trial Day 6) at 1833-35.] Hogan would not have had to "hound[]" her for statements if she was simply sending true statements. [R. 263: Notice at 3182 (Gov. Ex. 151).] McKinnon also would not have fretted about "shredd[ing her] copies" if she was sending true statements. [*Id.*]

- Testifying that Chamblee was aware of a loan from Koch. [R. 179: Molly McKinnon, TR (Trial Day 6) at 1837.] Chamblee was told, falsely, that sales to, not a loan from, Koch occurred. [R. 175: Gary Chamblee, TR (Trial Day

2) at 1020-21; R. 262: Notice at 2557 (Gov. Ex. 127); R. 263: Notice at 3181 (Gov. Ex. 123).]

The overarching lie in McKinnon's testimony was that Chamblee—not her or Vance—was to blame for the fraud. [R. 179: Colloquy, TR (Trial Day 6) at 1837 (agreeing she "made a lot of accusations . . . about Mr. Chamblee providing [her] information that [she] then used").] Her basic narrative was a denial that she schemed with Vance and a denial of knowledge and intent—that, instead of knowingly and intentionally committing fraud, she believed the information Chamblee fed her. This is what the district court "essentially" summarized as demands "by a victim in the case" to "alter[] documents and then provide[] those documents to other victims." [R. 235: Court, TR (Sentencing) at 2352.] The district court could have made more comprehensive and exact findings, if McKinnon had "place[d] the court on notice of the need for them." *O'Lear*, 90 F.4th at 535. The district court need not act with such precision "when the defendant says nothing about" the § 3C1.1 enhancement. *Id.*; *see United States v. Harbin*, 9 F. App'x 438, 441-42 (6th Cir. 2001) (similar).

"In any event," given McKinnon's numerous testimonial falsehoods and her overarching lie, the district court "could reasonably [have] believed that" its findings of false testimony and "general description" of her principal lie met the "requirement to identify the specific parts of [her] testimony that it found

perjurious." *O'Lear*, 90 F.4th at 535. Coupled with the materiality finding, the district court "could reasonably believe that its general description met the . . . requirement to rule on all of the factual predicates for a finding of perjury." *Id.* [R. 235: Court, TR (Sentencing) at 2352 ("So I do find that the defendant testified falsely, it was material in the case, and it would be sufficient to constitute obstruction of justice inasmuch as it was relevant to the issues presented, falsely given, and would have affected the outcome of the case had it been believed.").] In sum, "[t]he court found that [McKinnon]'s efforts to shift blame for the fraud were knowingly false, and these efforts were obviously material to whether [s]he committed the fraud." *O'Lear*, 90 F.4th at 535; *see Harbin*, 9 F. App'x at 442 ("[I]t was not plain error for the court to conclude, in the absence of an objection by the defendant, that Harbin's denial of his guilt was willful, material perjury.").

3. The substantial-financial-hardship enhancement properly applied.

The offense level increases by two if the offense "resulted in substantial financial hardship to one or more victims." § 2B1.1(b)(2)(A)(iii).

The presentence report included a two-level § 2B1.1(b)(2)(A)(iii) enhancement. [R. 208: Presentence Report at ¶ 47.] McKinnon objected. [*Id.* at p. 24.] The district court overruled the objection, finding that Faybik's loss resulted in substantial financial hardship. [R. 219: Court, TR (Evidentiary

Hearing) at 2212-13.] The Court reviews factual findings for clear error and legal conclusions de novo. *Piper*, 2021 WL 5088709, at *2.

For the reasons stated in Section III.A.ii, the district court's conclusion that Faybik's loss resulted in substantial financial hardship was correct.[6] McKinnon argues that the enhancement's factual basis "was the independent conduct of" Vance. McKinnon's Brief at 54. That is wrong. Specific offense characteristics are "determined on the basis of" relevant conduct. U.S.S.G. § 1B1.3(a)(1)(B). The district court made relevant conduct findings. [R. 219: Court, TR (Evidentiary Hearing) at 2188-89, 2208-09, 2219-20.] The court found that Vance and McKinnon "work[ed] together and were certainly aware of the activities of the other and that the losses that occurred were reasonably foreseeable to both under the relevant conduct section of the guidelines [§] 1B1.3." [*Id.* at 2208.] The court later referenced relevant conduct again, finding that "there [wa]s sufficient evidence presented during trial of the defendants' communications with each other, that it was reasonably foreseeable that . . . the fraudulent activities that were undertaken by each one would be reasonably foreseeable to the other and were engaged in to advance the fraudulent conduct, which did include making

[6] To the extent McKinnon purports to "adopt[] and incorporate[] by reference" Vance's arguments regarding this enhancement, McKinnon's Brief at 55, the government relies on its refutation of those arguments in Section III.A.ii.

representations to not only lenders but potential investors." [*Id.* at 2219-20.] Accordingly, based on Vance's actions alone, this enhancement properly applied to McKinnon via operation of § 1B1.3. [*Id.* at 2208.] McKinnon does not challenge the district court's relevant conduct determinations.

Regardless, McKinnon's own actions caused Faybik substantial financial hardship. McKinnon personally organized and executed, in all the ways described at trial and in this brief, a scheme to defraud Faybik and other Nex-Gen lenders and investors. McKinnon knew who Faybik was. [R. 179: Molly McKinnon, TR (Trial Day 6) at 1810.] McKinnon's scheme defrauded Faybik out of roughly $500,000, causing her substantial financial hardship. McKinnon also affirmatively concealed Faybik from other investors and lenders, cloaking Faybik from discovery by outsiders and ensuring Faybik's financial harm continued. [R. 174: Allan Deware, TR (Trial Day 1) at 848-49, 854 (describing how McKinnon removed Faybik from financial document and that Deware did not know who Faybik was); R. 175: Kenneth Shumard, TR (Trial Day 2) at 963 ("I didn't know that there w[ere] other investors."); R. 175: Gary Chamblee, TR (Trial Day 2) at 1003 (same); R. 176: Mendie Hogan, TR (Trial Day 3) at 1136 (same).]

4. McKinnon does not qualify as a Zero-Point Offender.

"Generally, a district court applies the version of the Guidelines in effect at the time of sentencing." *Huff v. United States*, 734 F.3d 600, 608 (6th Cir. 2013).

McKinnon's sentencing occurred before the Zero-Point Offender guideline, U.S.S.G. § 4C1.1, went into effect. *See* McKinnon's Brief at 57 (so conceding). At sentencing, McKinnon did not request consideration under § 4C1.1. Since § 4C1.1 went into effect, McKinnon has not filed a motion under 18 U.S.C. § 3582(c). The district court nevertheless *sua sponte* "determined that [McKinnon] is disqualified from th[is] two-point offense level reduction" via operation of § 4C1.1(a)(6). [R. 240: Notice at 2441.] The district court factually determined that McKinnon "caus[ed] substantial financial loss." [*Id.*] When "reviewing the application of a sentencing guideline," the Court "generally review[s] factual issues deferentially for whether there is clear error . . . but review[s] legal issues de novo." *United States v. Terry*, 83 F.4th 1039, 1040-41 (6th Cir. 2023).

At sentencing, the district court properly "applie[d] the version of the Guidelines in effect at the time," which did not include § 4C1.1. *Huff*, 734 F.3d at 608. Accordingly, McKinnon's argument that "the district court erred in failing to apply the amendment prospectively . . . is without merit." *United States v. McPhearson*, 303 F. App'x 310, 321 (6th Cir. 2008). "[I]t would have been improper had the district court applied the not yet enacted . . . amendment at the time of sentencing." *Id.* (citing authority).

Moreover, the district court's conclusion that § 4C1.1(a)(6) disqualifies McKinnon from the Zero-Point Offender reduction is correct. McKinnon did not

make this new argument to the district court, so "plain error review governs." *Skouteris*, 51 F.4th at 671-72. McKinnon "personally cause[d] substantial financial hardship" to Faybik. § 4C1.1(a)(6). "In determining whether the defendant's acts or omissions resulted in substantial financial hardship to a victim," courts "consider, among other things, the non-exhaustive list of factors provided in" § 2B1.1 cmt. n.4(F). U.S.S.G. § 4C1.1(b)(3). McKinnon personally caused substantial financial hardship to Faybik by personally organizing and executing, in all the ways described at trial and in this brief, "a scheme to prey upon" her and other Nex-Gen lenders and investors. *United States v. Haro*, No. 18-20506-CR-Scola, 2024 WL 1406555, at *2 (S.D. Fla. Apr. 2, 2024). Her scheme defrauded Faybik out of roughly $500,000, causing substantial financial hardship for all the reasons described in this brief, after analyzing the applicable § 2B1.1 cmt. n.4(F) factors. In other words, McKinnon's actions in keeping her Ponzi-like scheme active—*i.e.*, her central role in the Nex-Gen conspiracies—caused Faybik substantial financial hardship, as the district court concluded. Separately, as previously established, McKinnon, aware of Faybik, actively and personally concealed Faybik from other investors and lenders, cloaking Faybik from discovery by outsiders and ensuring Faybik's financial harm continued unabated. Thus, through McKinnon's "acts and omissions" in the conspiracies, essential to the conspiracies' successes and longevity, as well as through

McKinnon's "acts and omissions" of actively and personally concealing Faybik from discovery by other investors or lenders, § 4C1.1(b)(3), McKinnon "personally cause[d Faybik] substantial financial hardship." § 4C1.1(a)(6). This disqualifies her from the Zero-Point Offender reduction. § 4C1.1(a). With no advocacy from McKinnon, the district court was not plainly wrong to so conclude. *Skouteris*, 51 F.4th at 671-72.

At a minimum, McKinnon has not met her burden of proof that she "did not personally cause substantial financial hardship." § 4C1.1(a)(6). The Zero-Point Offender reduction burdens the defendant with proving its applicability. *See* § 4C1.1(a) ("*If the defendant meets* all of the following criteria") (emphasis added); *United States v. Keleta*, 552 F.3d 861, 866 (D.C. Cir. 2009) ("[T]he defendant bears the burden in seeking sentencing reductions."); *cf. United States v. Reinberg*, 62 F.4th 266, 268 (6th Cir. 2023) (placing burden on defendant to prove entitlement to safety valve relief); *United States v. Trevino*, 7 F.4th 414, 431 (6th Cir. 2021) (placing burden on defendant to prove entitlement to acceptance-of-responsibility reduction). Considering the record evidence, the district court's findings, McKinnon's declination to pursue this argument at or after sentencing in the district court, and her briefing of the issue on appeal (citing no evidence), McKinnon has, at a minimum, not met her burden of affirmatively proving that she "did not personally cause substantial financial hardship." § 4C1.1(a)(6).

McKinnon, with the burden, did not litigate this issue before the district court and introduced or cited no evidence related to the issue.

Further, even if there were "two permissible views of the evidence" regarding whether McKinnon personally caused Faybik substantial financial hardship, the district court's "choice between them cannot be clearly erroneous." *Dillard*, 438 F.3d at 681. The district court's conclusion was "not clearly erroneous" because it was "supported by competent evidence in the record." *Jeross*, 521 F.3d at 570; *see Vance*, 956 F.3d at 853.

Alternatively, if the Court determines that § 4C1.1(a)(6) does not disqualify McKinnon from the Zero-Point Offender reduction, the appropriate procedure is for her to "file[] a motion in the district court requesting that h[er] sentence be reduced . . . pursuant to 18 U.S.C. § 3582(c)." *McPhearson*, 303 F. App'x at 321. "In determining whether to grant a motion for reduction of sentence under § 3582(c), the district court must consider the § 3553(a) sentencing factors, the danger posed to the community by reducing the defendant's term of imprisonment, and the defendant's post-sentencing conduct." *Id.* "Thus, the decision to grant or deny [the] motion requires factual findings that are more appropriately within the province of the district court." *Id.* In this scenario, McKinnon would "have h[er] case remanded . . . for the opportunity to present an 18 U.S.C. § 3582(c)(2) motion for a reduction in sentence." *United States v. Ursery*, 109 F.3d 1129, 1137 (6th

Cir. 1997). "However, this does not mean that the current sentence is vacated." *Id.* "The current sentence is not erroneous, because it was properly imposed based on the guidelines in effect at the time of sentencing." *Id.* "Moreover, a district court has the discretion to deny a [§] 3582(c)(2) motion." *Id.*

Thus, if Court determines that § 4C1.1(a)(6) does not disqualify McKinnon, the case should be affirmed but "remanded to the district court to allow [her] to make a § 3582(c)(2) motion for a reduction in sentence and to allow the district court to consider, in the exercise of its discretion, whether Amendment [821] should be applied retroactively to reduce [her] sentence." *Id.* at 1138 (affirming sentence but remanding "to allow defendant to make a § 3582(c)(2) motion for a reduction in sentence"); *see United States v. Poole*, 538 F.3d 644, 646 (6th Cir. 2008) ("[T]he proper procedure is for this [C]ourt to affirm the sentence but to remand for consideration of whether the prisoner is entitled to a sentence reduction under § 3582(c)."). The government may oppose her motion, including based on the § 3553(a) factors, and the district court would render a decision. [*Cf.* R. 244: Response at 2449-54 (similarly opposing as to Vance); R. 249: Notice and Order at 2470-72 (denying sentence reduction as to Vance).]

B. McKinnon's sentence is substantively reasonable.

District courts are "not required to consider national sentencing statistics." *United States v. Axline*, 93 F.4th 1002, 1013 (6th Cir. 2024); *see United States v.*

Hymes, 19 F.4th 928, 936 (6th Cir. 2021) (rejecting requirement of consulting Sentencing Commission data before imposing sentence).

McKinnon received a within-guidelines sentence. [R. 201: Judgment at 1978-79; R. 208: Presentence Report at ¶ 91 (providing guideline range); R. 235: Court, TR (Sentencing) at 2353.] She challenges substantive reasonableness based on data from "the United States Sentence Commission's Interactive Data Analyzer." McKinnon's Brief at 59-60. This may be a procedural-reasonableness claim, *compare Hymes*, 19 F.4th at 935, *with Axline*, 93 F.4th at 1012, but it fails all the same.

The Court generally reviews a sentence's substantive reasonableness for abuse of discretion. *United States v. Carter*, 510 F.3d 593, 600 (6th Cir. 2007). "The defendant shoulders the burden of showing substantive unreasonableness." *United States v. Woodard*, 638 F.3d 506, 510 (6th Cir. 2011). Contesting the length of imprisonment "is a tall order, particularly when a defendant challenges a sentence that does not exceed the guidelines range." *United States v. Bradley*, 897 F.3d 779, 786 (6th Cir. 2018). The question is not whether the district court "could" have given a lower sentence, but rather whether the court "must" have done so. *United States v. Smith*, 516 F.3d 473, 478 (6th Cir. 2008). The Court presumes a within-guidelines sentence is substantively reasonable. *United States v. Vonner*, 516 F.3d 382, 389 (6th Cir. 2008) (en banc).

McKinnon did not present the data cited in her brief at sentencing. Nevertheless, the district court addressed § 3553(a)(6), noting that it did not "believe that to impose a sentence within the guideline range in this case would be an unwarranted sentencing disparity among defendants with similar records who have been found guilty of similar conduct." [R. 235: Court, TR (Sentencing) at 2398.] It was not error for the district court not to consult the cited sentencing data, particularly when McKinnon did not ask it to. *Axline*, 93 F.4th at 1012 ("Without specific arguments before it, the district court was not required to provide expansive explanation for this factor alone, particularly considering its detailed explanation related to other § 3553(a) factors."); *Hymes*, 19 F.4th at 936 ("expressly reject[ing] imposing" a "requirement" for district courts to "consider national sentencing statistics"). "Any other approach seemingly would elevate the Commission's statistical data over the text of the Guidelines themselves." *Hymes*, 19 F.4th at 936. "[T]he Guidelines, not statistical reports, are [the] barometer for promoting nationwide sentencing uniformity." *Id.* Indeed, "the Guidelines themselves represent the best indication of national sentencing practices." *United States v. Houston*, 529 F.3d 743, 752 (6th Cir. 2008). "The point of the guidelines is to decrease sentencing disparities, an objective *furthered* by a within-guidelines sentence, as opposed to a sentence that varies above or below the advisory guidelines range." *United States v. Swafford*, 639 F.3d 265, 270 (6th Cir. 2011).

"[E]ven on its own terms, [McKinnon]'s argument is not convincing." *Hymes*, 19 F.4th at 937. Her data "is not as forceful as [s]he contends." *Id.* She "fails to account for differences among offenders." *Id.* As a few examples, she, foundationally, compares the wrong guideline; § 2S1.1, not § 2B1.1, governed. [R. 208: Presentence Report at ¶¶ 47-56.] Even analyzing the incorrect guideline, § 2B1.1 covers a wide range of crimes—many others, and many less serious, than multiple counts of wire fraud and separate wire fraud and money laundering conspiracies. McKinnon's analysis, further, did not purport to account for the significant loss enhancement, the substantial-financial-hardship enhancement, the sophisticated-means enhancement, the abuse-of-trust enhancement, the obstruction-of-justice enhancement, or the absence of an acceptance-of-responsibility reduction (not to mention the § 2S1.1(b)(2)(B) enhancement that did not enter her calculus). *See Hymes*, 19 F.4th at 937 ("[I]t seems unlikely that many other category-VI-crack defendants received an enhancement for obstruction of justice."). Her analysis, further still, ignores the facts and circumstances of her life and her case, making no attempt to compare or contrast the severity and extent of her crimes and the harms she caused to any other case composing part of the cited statistics. *See Axline*, 93 F.4th at 1013 ("[T]he . . . data provided on appeal does not necessarily illuminate the differences among offenders."); *United States v. Mullet*, 822 F.3d 842, 854 (6th Cir. 2016) ("[G]eneral statistics that cover

a multitude of other crimes committed in a multitude of other ways do not create an 'unwarranted' disparity."). Instead of comparing "apples to apples," McKinnon unpersuasively compared "an apple to all fruits." *Hymes*, 19 F.4th at 937-38. "Further, [the § 3553(a)(6)] factor is one among many, and the district court did not abuse its discretion in relying on" it as well as "other factors to impose" the chosen sentence. *Axline*, 93 F.4th at 1013.

McKinnon also appears to attempt an undeveloped argument that the district court "gave an unreasonable amount of weight" to the loss amount. McKinnon's Brief at 61-62. The Court need only read the district court's multi-factorial § 3553(a) analysis to see that this is wrong. [R. 235: Court, TR (Sentencing) at 2395-400.] Regardless, the argument "ultimately boils down to an assertion that the district court should have balanced the § 3553(a) factors differently, which is simply beyond the scope of this [C]ourt's appellate review." *United States v. Frei*, 995 F.3d 561, 567-68 (6th Cir. 2021).

CONCLUSION

This Court should affirm Douglas William Vance's and Molly Irene McKinnon's convictions and sentences.

Respectfully submitted,

CARLTON S. SHIER, IV
UNITED STATES ATTORNEY

CHARLES P. WISDOM JR.
CHIEF, APPELLATE DIVISION

By: s/ James T. Chapman
Assistant United States Attorney
260 W. Vine Street, Suite 300
Lexington, Kentucky 40507-1612
(859) 685-4804
James.Chapman2@usdoj.gov

CERTIFICATE REGARDING COMPLIANCE

The United States has filed a motion to file an oversize brief because this brief does not comply with the type-limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). According to a computer count, the principal brief contains 25,070 words.

s/ James T. Chapman
Assistant United States Attorney

CERTIFICATE OF SERVICE

On May 2, 2024, I electronically filed this brief through the ECF system, which will send the notice of docket activity to:

Matthew M. Robinson
Attorney for Douglas William Vance

Gregory A. Napolitano
Attorney for Molly Irene McKinnon

s/ James T. Chapman
Assistant United States Attorney

APPELLEE'S DESIGNATION OF DISTRICT COURT DOCUMENTS

Record Entry	Description of Document	Page ID#
1	Indictment	1-12
131	Jury Instructions	434-83
133	Verdict	485-88
174	Trial Day 1 Transcript	726-890
175	Trial Day 2 Transcript	891-1104
176	Trial Day 3 Transcript	1105-321
177	Trial Day 4 Transcript	1322-532
178	Trial Day 5 Transcript	1533-760
179	Trial Day 6 Transcript	1761-903
200	Judgment	1971-77
201	Judgment	1978-84
202	Notice of Appeal	1985-86
204	Notice of Appeal	1993
208	Presentence Report	—
210	Presentence Report	—
219	Evidentiary Hearing Transcript	2120-223
220	Sentencing Transcript	2224-60
235	Sentencing Transcript	2349-406
240	Notice	2440-42
244	Response	2449-55
249	Notice and Order	2470-72
262	Notice	2522-3178
263	Notice	3179-82