

# 13-3541

*To Be Argued By:*  
DAVID J. SHELDON

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**United States Court of Appeals**

**FOR THE SECOND CIRCUIT**

**Docket No. 13-3541**

—  
UNITED STATES OF AMERICA,  
*Appellee,*

-vs-

SAMIR ZAKY,  
*Defendant-Appellant.*

—  
ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF CONNECTICUT

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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## Table of Contents

Table of Authorities .....	v
Statement of Jurisdiction .....	xi
Statement of Issue Presented for Review.....	xii
Preliminary Statement .....	1
Statement of the Case .....	2
A. The evidence at trial .....	3
1. Nail avulsions and billing procedures .....	3
2. Zaky's billing of Medicare for nail avul- sions that were not performed.....	7
3. Zaky's defense and government rebuttal .....	9
B. Relevant procedural history .....	11
Summary of Argument .....	11
Argument.....	13
I. The evidence was sufficient to support Zaky's conviction of health care fraud and false statements relating to a health care matter .....	13

A. Relevant facts.....	13
B. Governing law and standard of review ....	13
C. Discussion.....	15
II. Because the evidence at trial clearly distinguished a partial nail avulsion from a matrixectomy procedure, there was no constructive amendment of the indictment, nor was there any variance in the government’s proof. ....	20
A. Relevant facts.....	20
B. Governing law and standard of review.....	24
C. Discussion.....	27
III. Zaky’s convictions do not implicate or violate the Equal Protection Clause .....	31
A. Relevant Facts .....	31
B. Governing law and standard of review .....	36
C. Discussion.....	37
IV. Zaky has failed to establish perjury by Dr. Feldman .....	41
A. Relevant facts.....	41

B. Governing law and standard of review.....	47
C. Discussion.....	47
V. The district court properly calculated the guideline range when it calculated the intended loss amount and applied enhancements for obstruction of justice and abuse of a position of trust.....	50
A. The sentencing court did not clearly err in finding that the loss under the guidelines was between \$120,000 and \$200,000. ....	50
1. Relevant facts.....	50
2. Governing law and standard of review.....	53
3. The district court did nto clearly err in determining the guideline loss amount.....	56
B. The district court did not abuse its discretion in applying an enhancement for obstruction .....	58
1. Relevant facts.....	58
2. Governing law and standard of.....	61
3. Discussion .....	62

C. The district court properly applied the enhancement for abuse of a position of trust .....	65
Conclusion .....	67
Federal Rule of Appellate Procedure 32(a)(7)(C)	
Addendum	

## Table of Authorities

Pursuant to “Blue Book” rule 10.7, the Government’s citation of cases does not include “certiorari denied” dispositions that are more than two years old.

### Cases

<i>Am. Prairie Const. Co. v. Hoich</i> , 560 F.3d 780 (8th Cir. 2009) .....	38
<i>Int’l Star Class Yacht Racing Ass’n v. Tommy Hilfiger, Inc.</i> , 146 F.3d 66 (2d Cir. 1998) .....	38
<i>United States v. Agrawal</i> , 726 F.3d 235 (2d Cir. 2013) .....	25
<i>United States v. Agudelo</i> , 414 F.3d 345 (2d Cir. 2005) .....	62
<i>United States v. Alameh</i> , 341 F.3d 167 (2d Cir. 2003) .....	36
<i>United States v. Ansaldi</i> , 372 F.2d 118 (2d Cir. 2004) .....	25
<i>United States v. Aulicino</i> , 44 F.3d 1102 (2d Cir. 1995) .....	14
<i>United States v. Bahel</i> , 662 F.3d 610 (2d Cir. 2011) .....	56

<i>United States v. Booker</i> , 543 U.S. 220 (2005) .....	53
<i>United States v. Bryant</i> , 128 F.3d 74 (1997) (per curiam).....	55, 57
<i>United States v. Canova</i> , 412 F.3d 331 (2d Cir. 2005).....	54
<i>United States v. Cavera</i> , 550 F.3d 180 (2d Cir. 2008) (en banc) .....	53
<i>United States v. Clemente</i> , 22 F.3d 477 (2d Cir. 1994).....	24
<i>United States v. D'Amelio</i> , 683 F.3d 412 (2d Cir. 2012).....	20, 26
<i>United States v. Dupre</i> , 462 F.3d 131 (2d Cir. 2006).....	25, 26, 30
<i>United States v. Ferguson</i> , 676 F.3d 260 (2d Cir. 2011).....	26, 37, 47
<i>United States v. Fiore</i> , 381 F.3d 89 (2d Cir. 2004).....	64
<i>United States v. Frampton</i> , 382 F.3d 213 (2d Cir. 2004).....	19

<i>United States v. Friedman</i> , 998 F.2d 53 (2d Cir. 1993).....	14
<i>United States v. Guadagna</i> , 183 F.3d 122 (2d Cir. 1999).....	14
<i>United States v. Hamilton</i> , 334 F.3d 170 (2d Cir. 2003).....	19
<i>United States v. Jackson</i> , 335 F.3d 170 (2d Cir. 2003).....	14
<i>United States v. Josephberg</i> , 562 F.3d 478 (2d Cir. 2009).....	14, 19, 47
<i>United States v. Lauersen</i> , 348 F.3d 329 (2d Cir. 2003) <i>vacated on other grounds</i> , 543 U.S. 220 (2005).....	65
<i>United States v. Maurer</i> , 226 F.3d 150 (2d Cir. 2000) (per curiam) .....	55
<i>United States v. McGovern</i> , 329 F.3d 247 (1st Cir. 2003).....	64
<i>United States v. Morrison</i> , 153 F.3d 34 (2d Cir. 1998).....	61
<i>United States v. Natale</i> , 719 F.3d 719 (7th Cir. 2013) .....	15

<i>United States v. Ntshona</i> , 156 F.3d 318 (2d Cir. 1998) (per curiam) .....	65
<i>United States v. Pui Kan Lam</i> , 483 F.2d 1202 (2d Cir. 1973).....	14
<i>United States v. Refert</i> , 519 F.3d 752, (8th Cir. 2008) .....	15
<i>United States v. Reifler</i> , 446 F.3d 65 (2d Cir. 2006).....	13
<i>United States v. Sabhnani</i> , 599 F.3d 215 (2d Cir. 2010).....	14, 15
<i>United States v. Savoca</i> , 596 F.3d 154 (2d Cir. 2010).....	62
<i>United States v. Silkowski</i> , 32 F.3d 682 (2d Cir. 1994).....	54
<i>United States v. Singh</i> , 390 F.3d 168 (2d Cir. 2004).....	16, 57
<i>United States v. Snype</i> , 441 F.3d 119 (2d Cir. 2006).....	41
<i>United States v. Stanley</i> , 928 F.2d 575 (2d Cir. 1991).....	15

*United States v. Stephenson*,  
183 F.3d 110 (2d Cir. 1999)..... 47

*United States v. Stewart*,  
590 F.3d 93 (2d Cir. 2009)..... 36, 41

*United States v. Sutton*,  
13 F.3d 595 (2d Cir. 1994)..... 55

*United States v. Taylor*,  
562 F.2d 1345 (2d Cir. 1977)..... 41

*United States v. Uddin*,  
551 F.3d 176 (2d Cir. 2009)..... 55

*United States v. Vilar*,  
729 F.3d 62 (2d Cir. 2013)..... 26

*United States v. Watkins*,  
667 F.3d 254 (2d Cir. 2012).....56

## Statutes

18 U.S.C. § 24.....	15
18 U.S.C. § 1035.....	2, 15
18 U.S.C. § 1347.....	2, 15, 29
18 U.S.C. § 3231.....	x
18 U.S.C. § 3742.....	x
28 U.S.C. § 1291.....	x

## Rules

Fed. R. App. P. 4 .....	x
Fed. R. Crim. P. 12.....	41

## Guidelines

U.S.S.G. § 1B1.3.....	54
U.S.S.G. § 2B1.1.....	50, 54, 56
U.S.S.G. § 3B1.3.....	65
U.S.S.G. § 3C1.1.....	<i>passim</i>

## **Statement of Jurisdiction**

The United States District Court for the District of Connecticut (Covello, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Final judgment entered on September 20, 2013. Government Appendix (“GA\_\_”) 9. On September 19, 2013, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). GA9. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

**Statement of Issues  
Presented for Review**

- I. Was there sufficient evidence to support the defendant's convictions of health care fraud and false statements relating to health care matters when the government introduced evidence that the defendant billed for procedures that he had not performed?
- II. Is there any plain error showing that the government's proof constructively amended the indictment or varied from the allegations of the indictment when the indictment alleged that the defendant had not performed certain surgical procedures and the government presented evidence to that effect, while briefly referring to a different procedure to distinguish that different procedure from the procedure at issue in the case?
- III. Is there a plain error showing that Zaky's convictions violated his rights under the Equal Protection Clause based on an administrative law judge determination in an unrelated case that was not admitted into evidence?
- IV. Is there a plain error showing that a government witness submitted perjured testimony when the witness accurately described the evolution of the Medicare policy defining avulsions?

- V. Did the district court clearly err in calculating the defendant's offense level under the Guidelines when it determined the loss amount to be between \$120,000 and \$200,000, applied a 2-level enhancement for obstruction of justice, and applied a 2-level enhancement for abuse of a position of trust?

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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## **Preliminary Statement**

On fourteen separate occasions in 2010 and 2011, defendant-appellant Samir Zaky, a podiatrist, billed Medicare for having performed a surgical procedure known as a partial nail avulsion on each of fourteen patients. Trial evidence, including expert testimony, established, however, that Zaky could not have performed the avulsions because the patients' nails were still intact shortly after the alleged procedure. The expert

opined that, at most, Zaky had only clipped or trimmed the patients' nails.

Following a five-day trial, a jury found Zaky guilty of fourteen counts of health care fraud and fourteen counts of false statements relating to health care matters. On appeal, Zaky challenges the sufficiency of the evidence against him, and asserts for the first time claims based on a constructive amendment of the indictment or variance of proof, an accusation that a government witness committed perjury, and an equal protection claim. He also claims the district court erred in calculating the loss caused by his conduct under the sentencing guidelines, and erred in applying two sentencing enhancements in determining his offense level. As explained below, all of Zaky's claims are unavailing. The district court's judgment should be affirmed.

### **Statement of the Case**

On November 27, 2012, a grand jury indicted Zaky on fourteen counts of health care fraud, in violation of 18 U.S.C. § 1347, and fourteen counts of false statements relating to a health care matter, in violation of 18 U.S.C. § 1035. GA3. The indictment alleged that Zaky was a podiatrist practicing in Connecticut, and that on fourteen separate occasions in 2010 and 2011, Zaky submitted claims to the Medicare program for a surgical procedure known as a partial or complete avulsion of a single nail plate, when in

fact Zaky had merely performed routine foot care, such as clipping the patients' toenails, and had not performed a partial or complete avulsion. GA16-19.

Trial began on June 10, 2013, and on June 14, 2013, the jury found Zaky guilty of all twenty-eight counts. GA6. On September 10, 2013, the district court (Covello, J.) sentenced Zaky to a 41-month term of imprisonment followed by one year of supervised release, and ordered Zaky to pay \$134,139.60 in restitution to Medicare. GA11-12. Zaky is currently incarcerated serving his sentence.

## **A. The evidence at trial**

### **1. Nail avulsions and billing procedures**

Dr. Michael Trepal, a board-certified podiatrist who is Dean and a professor of podiatric surgery at the New York College of Podiatric Medicine, explained the basic anatomy of toes and nail plates, commonly referred to as the toe nails. GA46-47. Trepal identified anatomical features, including the distal or outer edge of the nail; the proximal nail fold, which is the skin at the bottom of the nail; the eponychium, which is the cuticle at the base or proximal edge of the nail; and the lateral nail folds, which are the folds of skin along the sides of the nail. Gov. Exh. 401, GA422; Gov. Exh. 402, GA423; GA48-49. Trepal also explained the nail matrix, which is the area below (or proximal) to the eponychi-

um, where the nail is generated; and the nail bed, which is the soft tissue directly under the nail that adheres to the nail plate. GA49-50; GA422-23.

Trepal explained that like other health care providers, podiatrists use 5-digit codes known as “CPT codes” to bill insurance companies for their services, and briefly described various podiatric procedures. GA50-53. Trepal explained in detail the Medicare program’s definition of a partial nail avulsion, CPT code 11730, which was set forth in a document known as a Local Coverage Determination, or “LCD.”<sup>1</sup> GA53-59; Gov. Exh. 501. The LCD in effect in Connecticut since 2008 included the following language to describe a partial nail avulsion:

Avulsion of a nail (CPT codes 11730/11732) involves the separation and removal of a border of, or the entire nail, from the nail bed to the eponychium. In order for this procedure to be considered a nail avulsion, it must be performed using an injectable anesthesia except in the instances in which a patient is devoid of sensation or there are extenuating circumstances in which injectable anesthesia is

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<sup>1</sup> Medicare contracts with private companies to process claims and to issue program coverage rules, including LCDs, within their jurisdictions. GA77-84; GA87-92.

not required or is medically contraindicated. Part or all of one nail plate is removed or avulsed in this procedure. . . .

For partial nail avulsion, the proximal nail fold is freed from the portion of the nail to be removed. An elevator is placed between the nail fold and the nail plate and the two structures are separated. A nail splitter is inserted under the nail to split it from the distal edge to the area under the nail fold. The portion to be avulsed is separated from the nail bed with a rolling action and then removed with a hemostat.

\* \* \*

Regrowth of the nail and recurrence of ingrowth will require four months, though with appropriate surgical management and instruction for proper shoes and nail care, the problem of ingrowing nails should not occur.

Gov. Exh. 501 at 3, GA426.

Thus, in order to perform an avulsion as described by Medicare, a podiatrist would administer an injected anesthesia, then use a surgical implement known as an elevator to pry the nail loose from the proximal nail fold. GA53-56. This step would be very painful to a patient unless an injectable anesthetic were used, except in cases where a patient had lost sensation in his feet.

GA54-55. The amount of anesthetic to be injected varies, but is typically about 3 cc's. GA62. The podiatrist would then use a nail splitter, which is a sharp scissor-like device, to split the nail its entire length, down below the proximal nail fold. GA56-57. The portion of the nail to be avulsed (or "torn away") would then be removed with a hemostat. GA54; GA57. After an avulsion had been performed, it would typically take four months for the nail to grow back to its original length; in elderly patients, it could take six to eight months for the nail to reach its original length.<sup>2</sup> GA57; GA134.

The LCD also contained a significant limitation further distinguishing avulsions from other procedures:

Limitations: Treatment of simple [ingrown toenail] with removal of the offending wing or spicule of the nail is considered to be routine foot care in the absence of infection or inflammation. Trimming, cutting, clipping, or debriding of a nail, distal to the eponychium, will be regarded as routine foot care. These services should be regarded under the nail trimming/debridement HCPCS code G0127 and CPT codes 11719-11721. It is not appropriate to report CPT

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<sup>2</sup> Trepal narrated and explained two brief videos of a partial nail avulsion being performed. GA59-62.

codes 11730/11732 when performing these services.

Gov. Exh. 501 at 4, GA427. Trepal explained that this language meant that a podiatrist removing a portion of the nail away from the eponychium would be performing routine foot care, and would use a CPT code different from the code for avulsions. GA58-59.

## **2. Zaky's billing of Medicare for nail avulsions that were not performed**

On various dates in 2010 and 2011, Zaky billed Medicare for having performed the fourteen avulsions charged in the indictment, using CPT code 11730. Each claim identified the particular toe on which the avulsion was purportedly performed. Medicare paid Zaky for all fourteen claims. GA110-15; Gov. Exhs. 1-14.

A second podiatrist, Dr. Alan Feldman, testified for the government about the patients Zaky had treated. Feldman had examined and photographed the feet of the fourteen patients for which Zaky had billed the partial nail avulsions charged in the indictment, within approximately two weeks after the day on which Zaky had purportedly performed the avulsion on each of them. GA29-32; GA134-35. Describing the photographs of each of the patients, Feldman explained that a partial nail avulsion could not have been performed on the date Zaky claimed, because the nail structures were intact, and the nails would

not have grown back so quickly. *E.g.*, GA136-37; GA139-42. At most, it appeared Zaky had clipped or trimmed the patients' nails. GA137; GA141-43; GA145-46.

Testimony from Zaky's patients corroborated this information. A patient of Zaky's whose initials are J.B testified that Zaky did not remove the border of one of J.B.'s toenails in 2010 or 2011. GA127-28. Zaky did not give J.B. an injection of anesthetic during that time, nor did J.B. tell Zaky that J.B. wanted a topical anesthetic in lieu of an injection. GA127-28.

Similarly, J.E., the wife of a deceased patient whose initials are F.E., testified that she was F.E.'s primary caregiver in 2010-2011, and Zaky was F.E.'s podiatrist. GA76. F.E. had his nails cut every six weeks, and did not have surgery or part of his toenail removed during that time. GA76.

In addition to this evidence about the care provided to the relevant patients, the government introduced certain evidence seized during a search of the home office and computer in Zaky's home. GA35; GA38-42. Among the items seized was a red binder marked "Medicare," which contained a "Podiatry Billing Guide" that stated as follows:

Avulsion of a nail plate (procedure codes 11730 and 11732) is, generally, performed under local anesthesia and involves the

separation and removal of a border of, or the entire nail from, the nail bed to the eponychium. The trimming, cutting or clipping or debriding of a nail, distal to the eponychium, is considered routine foot care. Routine foot care should be reported using the procedure codes G0127, 11719-11721.

Gov. Exh. 213 at 9; GA40-41; GA170; GA92. Also found on Zaky's computer were draft LCDs issued in 2008 concerning podiatric procedures; listserve communications from Medicare advising podiatrists of educational and other professional education; and other communications concerning how to obtain information from Medicare. GA121-24; Gov. Exhs. 301, 302, 304, 306-19.

### **3. Zaky's defense and government rebuttal**

Zaky was the sole witness for the defense. He testified that he had in fact performed the avulsions he had billed. GA166. He testified that he had not used injectable anesthesia for any of the avulsions on the patients charged in the indictment because they were considered to be at-risk patients. Zaky stated that the term "local anesthesia" in his notes could mean either injectable or topical anesthetic, and that patients had requested a topical anesthetic be used for the avulsions. GA161; GA163-65; GA172. He said the

term “eponychium” referred to the cuticle that went “up the sides of the nail.” GA163; GA165; GA170; GA175.

On cross-examination, Zaky agreed that the photographs taken by Dr. Feldman accurately depicted the patients’ conditions. GA167. Zaky admitted that in identifying the nails on which he had performed avulsions on direct examination, he had pointed to the wrong foot for two of the patients. GA173-74. Although Medicare was about ninety-nine percent of his billing, he did not remember having the LCD or listserve information on his computer. GA168-70. He stated that he had “been doing partial nail avulsions for more than 12 years. I’ve been doing it the same way for 12 years.” GA168.

Zaky admitted that trimming, cutting, or clipping a nail distal to the eponychium constituted routine foot care under Medicare, but claimed, “If I’m going down to the matrix, that’s a matrixectomy. I wouldn’t be doing an avulsion.” GA169; GA175.

In rebuttal to Zaky’s testimony, the government recalled Dr. Feldman. GA178-180. Feldman disagreed with Zaky’s description of the eponychium as going up the sides of the nail. GA179. Feldman also disagreed with Zaky’s statement that removal of a nail to the matrix constituted a matrixectomy. GA180.

## **B. Relevant procedural history**

The evidence, summations, and jury charge lasted three days. The jury deliberated all day on Thursday, June 13, and the next day returned a verdict finding Zaky guilty of all twenty-eight counts in the indictment. GA6-7; GA204-05.

Following the jury verdict, Zaky filed a motion for judgment of acquittal, which was denied. GA236; GA8. At sentencing, Zaky objected to the Presentence Report's calculation of the loss under the guidelines, and argued that he was not subject to enhancements for obstruction of justice and abuse of a position of trust. GA258; GA297. After a hearing on September 10, 2013, Judge Covello overruled Zaky's objections, and imposed a sentence principally of 41 months incarceration. GA232-35.

Additional facts relevant to particular arguments are set forth below.

### **Summary of Argument**

I. The evidence amply supported Zaky's convictions of health care fraud and false statements relating to health care matters. The photographs of the patients clearly showed that Zaky could not have rendered the avulsions for which he billed Medicare, and the evidence established that Zaky was aware of Medicare's definition of a partial nail avulsion. Zaky's chal-

lenge to the sufficiency of the evidence is based entirely on Zaky's own testimony that he performed the avulsions, which the jury plainly found not to be credible when they convicted him on all counts.

II. Zaky's unpreserved claims that the government's proof constructively amended the indictment or varied from the indictment fail to demonstrate error, much less plain error. The government's evidence focused on nail avulsions and the corresponding CPT code, 11730, charged in the indictment. The brief references to a matrixectomy, a separate and distinct procedure from avulsions, were made to distinguish avulsions from that procedure. The distinction was necessary in order to rebut Zaky's claim that the government's definition of an avulsion was inaccurate. As a result, Zaky's claim that the jury convicted him of fraudulent billing for matrixectomies rather than the avulsions charged in the indictment is meritless.

III. Zaky's unpreserved claim that his conviction violated his rights under the Equal Protection Clause has no legal or factual support. His argument relies entirely on the decision of an administrative law judge in a different case that was not admitted into evidence. The administrative case involved a different podiatrist, different facts, and a different jurisdiction. There is no evidence that Zaky was aware of or relied on

the administrative decision. The administrative decision thus has no bearing on this case.

IV. Zaky's unpreserved claim that a government witness committed perjury fails plain error review. The record makes plain that the witness accurately described the evolution of Medicare's description of a partial nail avulsion, and did not commit perjury.

V. Finally, the district court did not clearly err in calculating Zaky's guideline range. The court reasonably estimated the loss under the guidelines, and correctly imposed enhancements for Zaky's obstruction of justice and his abuse of a position of trust.

## **Argument**

### **I. The evidence was sufficient to support Zaky's conviction of health care fraud and false statements relating to a health care matter.**

#### **A. Relevant facts**

The relevant facts are set forth in the 'Statement of the Case' above.

#### **B. Governing law and standard of review**

This Court has described the burden that a defendant faces when challenging the sufficiency of the evidence as a "heavy" one. *United States v. Reifler*, 446 F.3d 65, 94 (2d Cir. 2006). In review-

ing a conviction for sufficiency of the evidence, the Court “view[s] the evidence in the light most favorable to the government, drawing all inferences in the government’s favor and deferring to the jury’s assessments of the witnesses’ credibility.” *United States v. Sabhnani*, 599 F.3d 215, 241 (2d Cir. 2010) (internal quotation omitted). A reviewing court applies this sufficiency test “to the totality of the government’s case and not to each element, as each fact may gain color from others.” *United States v. Guadagna*, 183 F.3d 122, 130 (2d Cir. 1999). “[I]t is the task of the jury, not the court, to choose among competing inferences that can be drawn from the evidence.” *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003). The conviction must be upheld if ‘any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *United States v. Josephberg*, 562 F.3d 478, 488 (2d Cir. 2009) (citation omitted).

When a defendant testifies or offers evidence in his defense, he “waives any claim as to the sufficiency of the Government’s case considered alone.” *United States v. Pui Kan Lam*, 483 F.2d 1202, 1208 n.7 (2d Cir. 1973); *United States v. Aulicino*, 44 F.3d 1102, 1114 (2d Cir. 1995). The jury is “entitled to conclude that [the defendant’s] version of the events was false and thereby infer [the defendant’s] guilt.” *United States v. Friedman*, 998 F.2d 53, 57 (2d Cir. 1993). In other words, the jury can use the defendant’s testi-

mony to “supplement” the government’s case. *United States v. Stanley*, 928 F.2d 575, 577 (2d Cir. 1991).

A conviction of health care fraud requires that (1) the defendant knowingly and willfully (2) executed or attempted to execute a scheme to defraud a health care benefit program (3) in connection with the delivery of or payment for health care benefits, items, or services. 18 U.S.C. § 1347; see *United States v. Refert*, 519 F.3d 752, 758 (8th Cir. 2008). A conviction under 18 U.S.C. § 1035 requires that the government prove (1) a false, fictitious, or fraudulent statement or representation (2) that is material, (3) knowingly and willfully made, and (4) done in connection with the delivery of health care benefits, items, or services, (5) in a matter involving a health care benefit program as defined in 18 U.S.C. § 24(b). 18 U.S.C. § 1035; see *United States v. Natale*, 719 F.3d 719, 732-42 (7th Cir.), *pet’n for cert. filed*, No. 13-744 (Dec. 20, 2013).

This Court reviews *de novo* the district court’s assessment of the sufficiency of the evidence. *Sabhnani*, 599 F.3d at 241.

### **C. Discussion**

The evidence was plainly sufficient to support Zaky’s convictions of health care fraud. The photographs of the patients established that Zaky could not have performed the partial nail avulsions for which he billed Medicare. The borders

of the patients' nails were intact, as were the proximal nail folds. As Dr. Feldman explained, at best, all Zaky had done was trim or clip the nails of most of the patients. Having seen two videos of actual avulsions being performed, the jury was able to review the photographs and properly conclude that Zaky had not performed the avulsions a week or two earlier.

The Medicare guidance, LCD, and listserve information found in Zaky's office and on his computer established that Zaky was fully aware of Medicare billing requirements. *See United States v. Singh*, 390 F.3d 168, 188 (2d Cir. 2004) (CPT Guidebook and billing manual kept in defendant's office supported conclusion by jury that defendant was fully aware of billing rules). Similarly, Zaky's detailed instructions to his billing company concerning the codes to be used to bill Medicare demonstrated a sophisticated understanding of the podiatric codes. GA103-109; *see Singh*, 390 F.3d at 188 (defendant's discussions with his employees revealed detailed knowledge of billing requirements and provided significant circumstantial evidence of fraudulent intent).

Significantly, Zaky's own patient notes established that he knew the elements of a partial nail avulsion. Although the photographs showed that Zaky had only trimmed the patients' nails, his progress notes described the "application of local anesthesia (3cc's total of 1% Lidocaine plain . . .)", which indicated the use of injected anes-

thetic as required by Medicare. *E.g.*, Gov. Exh. 1D, 2D; GA62; GA66; GA138; GA157. The notes also stated that the patients' nails were "prepped and draped in a sterile fashion/manner, via Betadine prep;" that Zaky had used a "freer elevator," a tool used to separate the nail from the proximal nail fold; and that the nails were then "dressed" using a "dry sterile dressing." GA138-40. The fact that Zaky's notes used pre-printed, adhesive labels that essentially repeated the same language with little variation was consistent with an intent to deceive. Tellingly, after the government had executed a search warrant at Zaky's home office, Zaky began adding a hand-written notation to the stickers stating that the patients had "requested local anesthesia." GA147; GA171-72; *see, e.g.*, Gov. Exh. 7E at 2; Gov. Exh. 8E at 2. The testimony of the two podiatrists called by the government clearly established that topical anesthesia would not be sufficient for healthy patients to tolerate receiving a partial nail avulsion.

By convicting Zaky of all of the charged counts, the jury plainly did not believe Zaky's testimony. His bizarre definition of "eponychium" was not credible, nor was his assertion that any time a procedure caused bleeding, the podiatrist had implicated the eponychium. His definition of "local" anesthesia as including a topical anesthesia was directly contradicted by the testimony of Doctors Trepal and Feldman, and ig-

nored the LCD's requirement of an injected anesthesia. The fact that Zaky pointed to the wrong feet for two patients in identifying the toes on which he had performed the avulsion further and fatally undercut his credibility. GA173-74. In sum, the jury could and plainly did reject Zaky's testimony in determining that Zaky had deliberately intended to defraud Medicare when he submitted the false claims for avulsions.

The evidence also amply supported Zaky's conviction for false statements relating to health care matters. The claims Zaky submitted to Medicare were statements that he had performed avulsions on each of the patients and that he was entitled to payment. The photographs of the patients, however, showed these statements were false. The false statements were plainly material to Medicare, which would not have paid the claims had it known that the services were not rendered. GA115. The false and misleading patient progress notes Zaky created establish that he knew how Medicare defined a partial avulsion, and he knew that he had not performed that procedure.

Zaky's challenge to the sufficiency of the evidence is based entirely on his own testimony. Defendant's Brief (DB\_\_\_) at 12-13. This argument patently ignores the fact that by convicting Zaky, the jury found his testimony not to be credible and rejected his claim that he had per-

formed the procedures and billed Medicare correctly.

“It is well-established that the evaluation of witness credibility is a function of the jury, and necessarily encompasses the prerogative to wholly reject any testimony by a witness deemed untruthful.” *United States v. Frampton*, 382 F.3d 213, 221 (2d Cir. 2004) (internal citation omitted). “[W]here there are conflicts in the testimony, [this Court] must defer to the jury’s resolution of the weight of the evidence and the credibility of the witnesses.” *Josephberg*, 562 F.3d at 487 (internal quotation omitted).

Having had the issue of credibility resolved against him, Zaky cannot now claim that the evidence was insufficient based on his own testimony that he did not commit the crimes alleged in the indictment. “The weight of the evidence is a matter for argument to the jury, not a ground for reversal on appeal.” *Josephberg*, 562 F.3d at 488 (quoting *United States v. Hamilton*, 334 F.3d 170, 179 (2d Cir. 2003)). His challenge to the sufficiency of the evidence therefore fails.

**II. Because the evidence at trial clearly distinguished a partial nail avulsion from a matrixectomy procedure, there was no constructive amendment of the indictment, nor was there any variance in the government’s proof.**

Before this Court, Zaky argues that the government “spent the trial attempting to prove that Defendant Zaky fraudulently billed for CPT code 11750,” which corresponds to a matrixectomy, a different procedure from a partial nail avulsion. This argument is the basis for his challenge to his convictions based on a constructive amendment of the indictment, and likewise is the basis for his challenge based on a variance of proof. DB at 17-23, 24-25. Because these issues overlap, the government addresses these issues jointly in this section. *See United States v. D’Amelio*, 683 F.3d 412, 417 (2d Cir. 2012) (analyses of constructive amendment and variance in proof differ to an extent, but constitutional concerns underlying both are similar). As the record establishes, however, Zaky’s claims based on the evidence concerning matrixectomies are meritless.

**A. Relevant facts**

The indictment alleged that Zaky submitted fourteen fraudulent claims to Medicare for partial nail avulsions using the CPT code 11730, and cited code 11730 in each of the twenty-eight

counts. GA16-19. The government's evidence at trial concerned nail avulsions and CPT code 11730. GA53-63 (Trepal describing an avulsion, CPT code 11730, and narrating two avulsion videos); GA131-34 (Feldman explaining avulsion and CPT code 11730). Dr. Feldman explained that his photographs and examinations of the patients established that Zaky had not performed the partial nail avulsions for which Zaky billed Medicare.

The first mention of the matrixectomy procedure occurred when Dr. Trepal briefly explained the difference between a partial nail avulsion and a matrixectomy in order to distinguish between the two procedures.<sup>3</sup> The first video of a partial nail avulsion was stopped at the point the avulsion was complete. GA61. The video then briefly displayed a vial of phenol, and showed the introduction of phenol using an eye dropper. Trepal explained that this step was part of a matrixectomy, not an avulsion. GA61. Defense counsel then objected, stating that Tre-

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<sup>3</sup> A matrixectomy is a procedure in which a chemical agent such as phenol is used to cauterize or kill the cells of the nail matrix or root of the nail to make a permanent correction to the width of the nail. GA61; GA64; GA73; GA180. This procedure is sometimes done after a partial nail avulsion is performed, but is not part of a partial nail avulsion procedure. GA61; GA64. A podiatrist would bill matrixectomy using CPT code 11750. *Id.*

pal “already testified this part is not part of the procedure. This is a matrixectomy he’s showing us. It’s got nothing to do with this case.” GA61. The government agreed to stop the video at that point. GA61.

On cross-examination, however, defense counsel asked Trepal to define a matrixectomy, which Trepal did. GA64. When asked whether the first video showed a matrixectomy, Trepal reiterated that the video showed an avulsion, and that “following the avulsion the surgeon has the option to do the matrixectomy or not, and then if he does the matrixectomy, that would be another code.” GA64. As Trepal explained, the removal of the nail border constituted an avulsion, and when the phenol was introduced, “that’s the matrixectomy portion,” but a matrixectomy need not be performed as part of an avulsion. GA64. On re-direct examination, when asked “what distinguishes a matrixectomy from an avulsion,” Trepal explained that “matrixectomy is a procedure which is performed after the avulsion is accomplished by some chemical thermalizer to destroy the nail matrix of the nail root.” GA73. A podiatrist would perform a matrixectomy to destroy the nail root, so that the border of the nail would not grow back, and the nail would be thinner, thereby removing the need to perform avulsions in the future. GA73.

The next mention of matrixectomies occurred during Zaky’s testimony on direct examination.

Under questioning, Zaky stated that the government's videos of avulsions were "trying to mislead the jury into a different procedure." GA165. On cross-examination, Zaky asserted that if a podiatrist were cutting down to the nail matrix, that constituted a matrixectomy, not an avulsion; according to Zaky, as soon as the matrix was touched, that was a matrixectomy. GA175. When asked if what distinguishes an avulsion from a matrixectomy was the application of a chemical agent to kill that portion of the matrix, Zaky replied, "Not true. If you're down to the matrix and you pull the nail out, you're pulling out matrix with it, so you've performed a matrixectomy." GA175. When asked if that was how Medicare defined the procedure, Zaky answered, "That's the way I was trained, sir." GA175.

After the defense had rested, the government recalled Dr. Feldman to rebut several portions of Zaky's testimony. GA178-80. Feldman directly disagreed with Zaky's testimony that cutting a nail border back under the eponychium or proximal nail fold constituted a matrixectomy, explaining:

Matrixectomy is the deliberate destruction of the matrix cells which are found there. It can be done mechanically, it can be done chemically, it can be done through radio frequency or heat treatment, but it has to be a separate destructive action that destroys those cells that cause the nail to

grow. So you first perform the avulsion, and then separately you must perform another procedure, like I said either chemical or mechanical or electrical, to destroy the matrix cells that reside there.

GA180.

Zaky did not raise a constructive amendment claim or a variance claim in any motion before the district court. At sentencing, Zaky gave an extended statement to the court in which at times he contended that the government's definition of an avulsion improperly incorporated elements of a matrixectomy, as part of an assertion that he had in fact performed the procedures for which he had billed Medicare. GA230-32.

### **B. Governing law and standard of review**

Under the Fifth Amendment to the U.S. Constitution, “a defendant has the right to be tried only on charges contained in an indictment returned by a grand jury.” *United States v. Clemente*, 22 F.3d 477, 482 (2d Cir. 1994). “An unconstitutional amendment of the indictment occurs when the charging terms are altered, either literally or constructively. *Id.* “A constructive amendment of an indictment occurs when the presentation of evidence and jury instructions modify essential elements of the offense charged to the point that there is a substantial likelihood that the defendant may have been

convicted of an offense other than the one charged by the grand jury.” *Id.* “Although constructive amendment is viewed as a *per se* violation of the Grand Jury Clause, sufficient to secure relief without any showing of prejudice, this court has proceeded cautiously in identifying such error, consistently permitting significant flexibility in proof, provided that the defendant was given *notice* of the *core of criminality* to be proven at trial.” *United States v. Agrawal*, 726 F.3d 235, 259-60 (2d Cir. 2013) (internal quotations omitted), *cert. denied*, 2014 WL 414166 (Mar. 10, 2014); *see United States v. Ansal di*, 372 F.2d 118, 126-27 (2d Cir. 2004). To prevail on a constructive amendment claim, “a defendant must demonstrate that either the proof at trial or the trial court’s jury instructions so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury’s indictment.” *Agrawal*, 726 F.3d at 259 (citation omitted); *United States v. Dupre*, 462 F.3d 131, 140 (2d Cir. 2006).

“By contrast to constructive amendment, ‘variance’ . . . occurs when the charging terms of an indictment are unaltered, but the trial evidence proves facts materially different from those alleged in the indictment.” *Agrawal*, 726 F.3d at 260 (citation omitted). “A variance raises constitutional concerns only if it deprives a defendant of the notice and double jeopardy protections of

an indictment, which prejudice the defendant must establish to secure relief on appeal.” *Id.* (internal citations omitted); *Dupre*, 462 F.3d at 140 (in contrast to constructive amendment, a defendant demonstrating a variance must prove prejudice to prevail on his claim). This Court determines “whether a variance between an indictment and the proof at trial is prejudicial, and thus ‘fatal to the prosecution,’ by determining whether the variance infringes on the ‘substantial rights’ that an indictment exists to protect— ‘to inform an accused of the charges against him so that he may prepare his defense and avoid double jeopardy.’” *Dupre*, 462 F.3d at 140 (citation omitted); *D’Amelio*, 683 F.3d at 417.

A defendant who fails to raise a claim in the district court has forfeited that claim. *United States v. Ferguson*, 676 F.3d 260, 282 (2d Cir. 2011). Where a defendant raises a claim for the first time on appeal, this Court limits its review “to curing plain error. This standard is met when (1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant’s substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings.” *United States v. Vilar*, 729 F.3d 62, 70 (2d Cir. 2013) (citations and quotations omitted).

### C. Discussion

A review of the record reveals that the government's proof focused entirely on its allegation that Zaky billed for partial nail avulsions, CPT code 11730, when he had not in fact performed that service. The government established the elements of a partial nail avulsion as defined by Medicare, and showed that Zaky had not performed that procedure. *See* Statement of the Case, Part A.2.

The brief mention of a matrixectomy during Dr. Trepal's testimony distinguished that procedure from an avulsion, in correct anticipation that Zaky would attempt to argue that the government and Medicare's definition of an avulsion was inaccurate. GA61, GA64. After the defense had raised the issue, Trepal and Feldman each clearly defined a matrixectomy and distinguished that procedure from the nail avulsion procedure charged in the indictment. GA64; GA73; GA180. Trepal explained that matrixectomies would be billed under a different code, CPT code 11750. GA61. The fact that the testimony consistently and clearly distinguished the avulsion procedure charged in the indictment from the different matrixectomy procedure left no possibility that the jury was confused between the procedures, or that the government had not correctly defined the procedure Zaky had billed for and not performed.

In the face of the record, Zaky argues for the first time on appeal<sup>4</sup> that although “[t]he Government, in convicting Zaky, charged him with fraud relating to CPT code 11730,” DB at 17, “all of the Government’s evidence, including its video evidence, experts, and their several interpretations of the LCD and its codes focused on CPT code 11750.” *Id.* at 18. He provides no support in the record for this assertion, and is unable to do so. The limited references to a matrixectomy during the trial clearly distinguished that procedure from the avulsions charged in the indictment.

Zaky acknowledges that “[t]he indictment is very specific” as to how he violated the statutes charged in the indictment, and that “[t]hrough its very specific allegations, the government held itself to proving that” Zaky violated the statutes alleged. DB at 21. Indeed, the indictment identifies each of the fourteen claims and the particular CPT code, 11730, submitted in the claim. GA17-19. Because the government’s proof fo-

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<sup>4</sup> Zaky’s post-verdict challenge to the sufficiency of the evidence contained a bare bones recitation of the elements of the crimes charged and a statement that the government failed to prove these elements, with no further argument or analysis. GA236-37. His claim that a motion that did not mention, let alone brief, the issues of constructive amendment and variance was sufficient to preserve the issues on appeal is wholly without merit.

cused entirely on avulsions and mentioned a matrixectomy only to distinguish the additional steps necessary to constitute that procedure, Zaky has no support for his claim that the proof at trial altered the charges to the degree that “it is uncertain whether the defendant was convicted of the conduct” charged in the indictment. DB at 23. The record makes plain that the government’s proof did not modify essential elements of the charged offenses.

Zaky’s constructive amendment claim rests entirely on his testimony concerning his interpretation of avulsions and matrixectomies. Once again, this argument ignores the fact that Zaky’s testimony was clearly rejected by the jury. Similar to his claim challenging the sufficiency of the evidence, his constructive amendment claim on appeal is foreclosed by the jury’s finding that his testimony was not credible.

For the same reasons, Zaky’s unpreserved claim that the evidence at trial proved facts different from those alleged in the indictment is similarly meritless. His argument that he “could still be subject to further prosecution on the same counts,” DB at 25, is belied by his own concession that the “indictment is very specific as to how Defendant Zaky” violated the statutes charged in the indictment, and that “[t]hrough its very specific allegations, the government held itself to proving that Defendant Zaky had submitted claims for CPT Code 11730 in violation of

18 U.S.C. §§ 1347, 1035(a)(2), and 2.” *Id.* at 21. Because the indictment provided Zaky notice of the precise nature of the government’s allegations, he was fully informed “of the charges against him so that he [could] prepare his defense and avoid double jeopardy.” *Dupre*, 462 F.3d at 140. Similarly, there is no danger that Zaky’s double jeopardy rights will be violated. Zaky cannot be retried on charges of health care fraud or false statements based on the fourteen claims for avulsions charged in the indictment.

Moreover, the issue of the matrixectomy procedure was introduced by Zaky during his cross-examination of Dr. Trepal. GA64. The government then took steps to clarify the difference between the two procedures. GA73. When Zaky testified that what the government was calling an avulsion was actually a matrixectomy, the government again clarified the difference between the two procedures through Dr. Feldman’s rebuttal testimony, which was consistent with Trepal’s description of the procedures. GA180. Having introduced the issue, Zaky cannot now accuse the government of varying its proof by distinguishing between the two procedures.

In sum, the government’s proof focused on the elements of a partial avulsion as defined by Medicare, and established that Zaky had not rendered that procedure for the counts charged in the indictment. Zaky has failed to show any con-

structive amendment or variance of proof, and therefore failed to establish plain error.

### **III. Zaky's convictions do not implicate or violate the Equal Protection Clause.**

Zaky raises for the first time on appeal a claim that the government violated his rights under the Equal Protection Clause, claiming that he was unconstitutionally prosecuted for conduct that would be a violation of the law in one state, yet legal in another state. DB at 26. This claim is without merit.

#### **A. Relevant facts**

During the cross-examination of Dr. Trepal, defense counsel asked the district court to take judicial notice of Defendant's Exhibit A, which was a November 7, 2011 Administrative Law Judge ("ALJ") decision overturning a 2008 determination by the Medicare contractor in Massachusetts that a podiatrist had been paid for partial nail avulsions that were not performed. GA67; Defendant's Appendix ("DA\_\_") 23-33. The court stated, "It's noted." GA67. Over the government's objection on relevance grounds, defense counsel read from the ALJ decision in which the administrative judge stated that the podiatrist in that case applied adequate topical anesthetic before each procedure, and asked whether Trepal agreed with that statement. GA67. Trepal disagreed, stating, "Local anes-

thetic means injection . . . When we're talking about administering local anesthetic, we're talking about injection." GA67. Over government objection, defense counsel read an additional passage from the ALJ decision, in which the judge found that the podiatrist in that case had submitted an affidavit from another podiatrist stating that the records in the case supported the service provided and billed, and that the use of topical anesthetic was appropriate for at-risk elderly patients. GA67-68. Again, defense counsel asked whether Dr. Trepal agreed with the administrative judge. GA68. The objection was overruled, and Trepal stated, "I haven't reviewed the medical records so I have no idea what the extenuating circumstances were, but I can guarantee everybody sitting in this room, that not too many of you would want me to avulse your nail without anesthesia. I guarantee you that." GA68. Trepal further explained that the circumstances where an avulsion could be performed without anesthesia "are very few and far between" and that he "would assume that there's something lacking in the doctor's humanity if he's avulsing nails without anesthesia." GA68.

On re-direct, the government inquired about language in the ALJ decision indicating that unlike other Medicare contractors, the contractor in Massachusetts had not developed language in its coverage determination that required injected anesthesia as part of the partial nail avulsion

procedure. GA71. Trepal further testified that the statements from the podiatrist in the ALJ decision that every time he performed an avulsion he removed the offending nail portion “entirely beyond the involved eponychium” and “never use[d] CPT code 11730 when merely trimming the corner of the nail” were consistent with the LCD that applied in Connecticut after 2008. GA71. Trepal later reiterated that the only time that local anesthesia is not used for an avulsion “would be when the patient is neuropathic or doesn’t feel anything. Or the patient’s a masochist and likes pain.” GA72. On re-cross, Trepal reiterated that he “absolutely” disagreed with the ALJ’s conclusions as to when topical anesthesia would be appropriate. GA74.

Before trial resumed the next day, the district court advised the parties that the parties should not read from the ALJ opinion:

Yesterday there were mistakes made and we’re not going to repeat them today, and there will be no reading from any documents that are not in evidence, and there will be no reading of any legal opinion in the presence of the jury, and at the conclusion of the trial we’ll have our customary editorial group in which we will together form an appropriate legal statement to make to the jury.

So further, there will be no questions through any witness formulated on the content of any legal opinions . . . .

GA86.

The following day, defense counsel sought to cross-examine Dr. Feldman using the document identified as Defendant’s Exhibit A, the ALJ decision. GA150-51. The government objected “to this line of questioning concerning this document.” GA151. In response to an inquiry from the court, the parties indicated that they believed the document had been admitted as a full exhibit, over the government’s objection on relevancy grounds. GA151. The district court explained, “Judicial notice does not entitle something to be admitted. I have no recollection of—I took judicial notice of it, but that does not authorize it to be an exhibit.” GA151. Defense counsel argued that the parties and the court clerk believed the document was in evidence. GA151. The government responded, “To the extent it’s being offered now again I object on the same grounds I asserted previously.” GA151. The court replied, “Let’s keep going,” and told defense counsel “Go ahead,” and counsel formulated questions based on the ALJ decision. GA151. In response, Feldman stated that the use of topical lidocaine would be “[n]ot ideal and not practical” for an avulsion, and would be “below the standard of care.” GA152.

After the government had rested and the defense indicated Zaky would testify, the court advised the parties as follows:

And the Court wants to correct the record here with respect to this alleged Defendant's Exhibit A. I have examined the transcript that was made, examined what in fact happened. Counsel asked that the Court take judicial notice that an opinion exists, and all that does is acknowledge that the opinion exists, but it does not become admissible to establish whatever is in the opinion, facts or law, and that is all that the Court has said with respect to that opinion, just that it took judicial notice. Somehow that has gotten onto the record as constituting this being designated as an exhibit, and I'm asking the clerk to correct that, and exceptions may be noted.

GA159. The defense then sought to introduce the ALJ decision into evidence, and the government objected on grounds of relevance and hearsay. GA159. The court reiterated that its ruling excluding Exhibit A from evidence stood. GA159. Zaky did not refer to or mention the ALJ decision in his testimony. He has not raised in the district court or on appeal any claim challenging the district court's ruling excluding Exhibit A from evidence.

## **B. Governing law and standard of review**

As this Court has noted, “the decision as to whether to prosecute generally rests within the broad discretion of the prosecutor.’ This broad discretion is proper because ‘the decision to prosecute is particularly ill-suited to judicial review.’ Of course, this discretion cannot be exercised in extra-legal fashion, and it is properly ‘subject to constitutional constraints.” *United States v. Alameh*, 341 F.3d 167, 173 (2d Cir. 2003) (internal citations and quotations omitted). “The equal protection component of the Fifth Amendment is one of the most important of these constraints, and thus ‘the decision whether to prosecute may not be based on an unjustifiable standard such as race, religion, or other arbitrary classification.” *Id.* (citation omitted). A claim for violation of equal protection requires that a defendant establish that he was “treated differently from other similarly situated individuals and that such differential treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure [him].” *United States v. Stewart*, 590 F.3d 93, 121 (2d Cir. 2009) (internal quotations omitted).

Federal Rule of Evidence 201 provides in relevant part:

**(b) Kinds of Facts That May Be Judicially Noticed.** The court may judicially

notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

Zaky did not raise any equal protection claim in the district court. As a result, this forfeited issue is reviewed for plain error. *Ferguson*, 676 at 282.

### **C. Discussion**

Zaky argues that his conviction “is a clear violation of the Equal Protection Clause of the Fifth Amendment and must be overturned.” DB at 32-33. His claim relies exclusively on the ALJ decision he unsuccessfully sought to have admitted as evidence at trial, from which he extrapolates that “Defendant Zaky performed exactly as the appellant in the ALJ opinion in regards to his treatment of patients and use of topical, local anesthetic,” and that he was wrongly criminally prosecuted for that conduct. *Id.* at 30. This claim fails widely on several grounds.

First, the ALJ decision was not admitted into evidence at trial. The descriptions of the facts and the conclusions of the administrative law judge are not facts in the record before this

Court.<sup>5</sup> “A court may take judicial notice of a document filed in another court ‘not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.’ . . . Facts adjudicated in a prior case do not meet either test of indisputability contained in Rule 201(b): they are not usually common knowledge, nor are they derived from an unimpeachable source.” *Int’l Star Class Yacht Racing Ass’n v. Tommy Hilfiger, Inc.*, 146 F.3d 66, 70 (2d Cir. 1998) (internal citations and quotations omitted); see *Am. Prairie Const. Co. v. Hoich*, 560 F.3d 780, 797 (8th Cir. 2009) (“Caution must also be taken to avoid admitting evidence, through the use of judicial notice, in contravention of the relevancy, foundation, and hearsay rules.”).

Second, the ALJ decision is irrelevant to Zaky’s case: there is nothing in the record indicating that Zaky was aware of the ALJ decision or relied on it in any fashion when he was performing and billing for the procedures alleged in the indictment. Third, the definition of an avulsion and the conduct of the podiatrist in the ALJ decision is very different from Zaky’s description

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<sup>5</sup> It is true that the defense used the ALJ decision to cross-examine the government’s two podiatrist witnesses. Each of them, however, stated his clear disagreement with either specific statements defense counsel described as the ALJ’s conclusions, or with counsel’s interpretation of those conclusions.

of own conduct.<sup>6</sup> In short, the ALJ decision has no legal effect to support Zaky's claims in the district court or on appeal.

Zaky argues that the issue before the Court is "whether it is unconstitutional for Medicare to cause action in one state to be in violation of the law, yet be legal in another state." DB at 26. This assertion is legally incorrect and factually unsupported. Zaky was convicted of engaging in

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<sup>6</sup> To the extent Zaky has raised the issue, any difference in treatment was not irrational, but rather was based on different facts. According to the ALJ decision, the Massachusetts Medicare policy in 2004 required the use of local anesthetic, rather than the injectable anesthetic required by the Connecticut Medicare contractor in this case. A31-32; *cf.* GA426. The ALJ decision noted that other Medicare contractors explicitly required injected anesthetic. A31; *but see* GA67 (Trepal testifying "local anesthesia means injection"); GA158 (Feldman testifying "the term local anesthesia means it was injected"). The decision also describes the Massachusetts definition of an avulsion as requiring only that at least half the length of the nail needed to be removed. A31. Finally, according to the ALJ decision, the podiatrist in that case stated that every time he performed an avulsion, "the offending nail portion is removed entirely beyond the involved eponychium," and that he "never use[d] CPT Code 11730 when merely trimming the corner of the nail," A26, A32, which is different from Zaky's testimony describing the services Zaky performed.

a scheme to defraud Medicare by billing for services he had not rendered, and for making false statements relating to a health care matters by submitting claims for those services. That conduct is prohibited in all states. When a podiatrist knowingly and willfully engages in a scheme to defraud by billing for a surgical procedure that he did not render, and there is plain evidence that he was aware of the proper definition and elements of the procedure in the jurisdiction where he practices, that conduct violates the law. A different definition of the procedure or a different provider's conduct in a different case in a different jurisdiction is irrelevant unless it pertains to Zaky's intent or knowledge, and there is nothing in the record indicating Zaky was aware of or relied on the ALJ decision.

Zaky's argument that if he engaged in the same conduct in Massachusetts, "he would not have been subject to a civil violation, let alone a criminal indictment and trial," DB at 32, likewise has no basis in fact or in the record. The detailed factual findings in the ALJ decision were not before the district court or this Court and have no legal effect concerning proper podiatric practice or Medicare requirements in this case. The government's witnesses stated their disagreement with defense counsel's descriptions of the findings and conclusions in the ALJ decision. In short, there is no competent evidence that any

aspect of the ALJ decision has any bearing on this case.

In sum, to the extent he has raised an equal protection claim, Zaky is unable to establish that he has been treated differently from any similarly situated defendant based on “an impermissible standard such as race, religion, or other arbitrary classification.” *Stewart*, 590 F.3d at 121. Even were he to make such a claim, it would properly be brought as a claim of selective prosecution that must be raised in a pretrial motion alleging a defect in instituting the prosecution. Fed. R. Crim. P. 12(b)(3)(A); see *United States v. Taylor*, 562 F.2d 1345, 1356 (2d Cir. 1977) (selective prosecution claim must be raised before trial); *United States v. Snype*, 441 F.3d 119, 141 (2d Cir. 2006) (remedy in selective prosecution cases is dismissal of charges improperly filed). Zaky made no such claim in the district court based on an impermissible classification or on his ALJ argument. As a result, he has failed to establish any claim for violation of his right to equal protection, much less failed to establish that plain error relating to such a claim occurred at trial.

#### **IV. Zaky failed to establish perjury by Dr. Feldman.**

##### **A. Relevant facts**

In July 2008, the Medicare contractor for Connecticut first issued the LCD that defined

the elements that a podiatrist must meet in order to bill for a partial nail avulsion. GA84; GA118-19; GA426. On direct examination, Dr. Feldman testified that he had assisted contractors in the development of the definition of an avulsion in Connecticut beginning in the early 1990s. GA131; GA153. The policy concerning ingrown nails and avulsions was a particular concern to Medicare, because it involved common podiatric practice, and the contractors needed to create clear definitions and guidance. GA131; GA153. The language referring to an avulsion involving a separation of the nail to underneath the eponychium, or most proximal portion of the cuticle, began in 1998. GA131-32. The reference to the mandatory use of anesthesia began in the late 1990s. GA132. The language referring to the removal of an offending wing or spicule of a nail is routine foot care begin in the early to mid-1990s. GA133.

On cross-examination the following exchange occurred:

BY MR. WILLIAMS: Would you agree that an avulsion has been defined in the—for purposes of Part B Medicare billing as removing part or all of the toenail through at least half the length of the nail?

MR. SHELDON: Objection.

A [DR. FELDMAN]: No, that's not the current LCD. That's old. We talked about that

definition in the early 1990s, but that's not current.

BY MR. WILLIAMS:

Q: That was the one that you wrote, the one in the early nineties?

A: I assisted in its preparation.

Q: Have you been involved in writing the more recent ones?

A: No, I have not.

Q: So the one that you wrote was—

A: I didn't write it, I assisted.

Q: You helped to write it. I take it it was a team effort by—

A: The medical director of Medicare.

Q: Right. And the definition in which you yourself participated provided that an avulsion was to be defined as removing part or all of the toenail through at least half the length of the nail, isn't that right?

A: That's correct.

Q: So that was your professional opinion at the time you participated in the issuance of that document, isn't that right?

A: Yes.

...

BY MR. WILLIAMS:

Q: Have you changed your professional opinion on that, sir?

A: Yes, I have.

Q: And you've changed your opinion because the Government told you to?

A: No, I did not.

Q: What was it that caused you to change your opinion?

A: I assisted in the preparation of the local policy with the Medicare carrier director because we wanted to make it abundantly clear exactly what this procedure, 11730, entailed. We wanted to make it so clear that no one could question what was that procedure that we call a partial avulsion. So we stated to be a partial avulsion you have to remove the toenail all the way up to the cuticle, and we made it very clear, and I agreed with the medical director at the time that this is the best way we can do it, to put in writing clearly stating that you have to take the nail, and we said at least half, we weren't using this language at that time, so the language got better, and I agreed with the medical director that the language improved when we said removing the nail all the way to the eponychium, and that's my belief.

Q: So it used to be a partial avulsion if you went halfway but it's not anymore?

A: Well, we said at least halfway. Again, the language wasn't clear, so we set out to make the language much more clear so there could be no question.

Q: Well, not to argue with you, Doctor, and with all due respect, at least halfway is pretty clear, isn't it?

A: I don't think it was clear.

Q: Well, if you meant all the way you would have said all the way at the time, so you've changed your mind, haven't you?

A: We've made the definition more clear, is the best way I can state it.

GA153-54.

After the jury verdict, Zaky retained different defense counsel for his sentencing. At sentencing, defense counsel cross-examined the case agent concerning the agent's affidavit in support of the application for the search warrant for Zaky's home office. The agent testified that a statement in his affidavit defining an avulsion as "the removal of a toenail, down to at least half of the nail length" came from information provided to the agent from Dr. Feldman. GA218. The agent stated he received the information from Feldman "[a]t some point. I had worked, previously worked with Dr. Feldman when I

started this job on another podiatry investigation in the late '90s." GA218. The agent also acknowledged that a written report of conversation with Dr. Feldman in May 2010 detailed that Feldman had stated that an avulsion is a very painful procedure where at least half the length of a toenail is removed to treat an ingrown toenail. GA219.

In his arguments to the district court concerning the sentence to be imposed, Zaky's attorney argued that the case agent had spoken to Feldman, and that Feldman's definition of an avulsion at the time did not require "going all the way from the top of the nail to the eponychium. It only requires at least going half way. That's in 2010 from their expert. Yet, when their expert takes the stand at trial he completely contradicts that. Now, let's not forget that Agent Bishop relied on that to get a search warrant in this case." GA227. Similarly, in Zaky's remarks to the court before sentence was imposed, he mentioned the language in the search warrant affidavit concerning half the length of the nail. GA230.

Zaky asserted no claim in the district court that Dr. Feldman's testimony constituted perjury.

## **B. Governing law and standard of review**

“In order to be granted a new trial on the ground that a witness committed perjury, the defendant must show that (i) the witness actually committed perjury; (ii) the alleged perjury was material; (iii) the government knew or should have known of the perjury at [the] time of trial; and (iv) the perjured testimony remained undisclosed during trial.” *Josephberg*, 562 F.3d at 494 (internal quotations and alterations omitted); *cf. Ferguson*, 676 F.3d at 282-83 (discussing different formulation of factors for establishing perjury). Because Zaky did not raise the issue of perjury in the district court, he has forfeited the issue; this Court reviews such a claim for plain error. *Ferguson*, 676 F.3d at 282; *United States v. Stephenson*, 183 F.3d 110, 118 (2d Cir. 1999).

## **C. Discussion**

In his brief, Zaky raises for the first time a claim that the government knowingly permitted a witness to commit perjury, and that the false testimony requires an “automatic reversal.” DB at 34, 36. Zaky contends that because in his August 2010 affidavit supporting the application for the search warrant, the case agent stated that an avulsion was the removal of a toenail down to at least half of the nail length, the government knew that CPT code 11730 only required a removal of half the length of the nail,

“completely contradict[ing] [Dr. Feldman’s] trial testimony.” DB at 34. Zaky claims this establishes that Dr. Feldman testified falsely at trial, and that “there is reasonable likelihood that this false testimony could have affected the judgment of the jury.” *Id.* at 36. Regardless of the standard of review, this claim is without merit.

In his direct testimony, Dr. Feldman explained the development of the Medicare definition of a partial nail avulsion, and how key language in the LCD issued in 2008 included terms that had been used since the late 1990s. As the portion of the trial transcript excerpted above makes clear, on cross-examination, Dr. Feldman acknowledged that a previous definition from the early 1990s defined an avulsion as the removal of at least half the length of the nail, and that at the time that was Dr. Feldman’s opinion. GA153-54. He explained, however, that beginning in the early 1990s he assisted in clarifying the definition of the procedure to include removal of the nail all the way up to the cuticle/eponychium, so that there could be no question concerning what constituted an avulsion. GA153-54. This testimony acknowledged the earlier version of the definition, and explained its subsequent refinement to clarify precisely what constituted an avulsion. Dr. Feldman’s explanation of the evolution of the definition of an avulsion completely refutes Zaky’s claim on appeal that Feldman perjured himself by testifying

to a different definition of avulsion than that described in the agent's affidavit. Contrary to Zaky's claim, there simply was no "direct contradiction" amounting to perjury.

Moreover, the defense's cross-examination of Feldman addressed the issue of any alleged inconsistency between the various definitions of an avulsion. Feldman's acknowledgment that he "changed his professional opinion" to reflect a more accurate description of an avulsion clearly shows that Dr. Feldman did not commit the perjury Zaky alleges on appeal.

To the extent Zaky couches his attempt to raise a claim of perjury on appeal as arising from newly discovered evidence, *see* DB at 33, he cannot support any claim that the information in the search warrant affidavit concerning an earlier definition of an avulsion is "newly discovered," as it was provided to the defense during discovery, well in advance of trial, and his attorney cross-examined Feldman on this point. Defense counsel then raised the issue of Feldman's alleged inconsistency at sentencing without making any claim that Feldman had committed perjury. Having failed to raise this issue before the district court, Zaky must meet the standard for plain error review. Under any standard of review, however, Zaky's perjury claim fails because he has failed to establish that any perjury occurred. His claim on this issue is therefore without merit.

**V. The district court properly calculated the guideline range when it calculated the intended loss amount and applied enhancements for obstruction of justice and abuse of a position of trust.**

**A. The sentencing court did not clearly err in finding that the loss under the guidelines was between \$120,000 and \$200,000.**

**1. Relevant facts**

At sentencing, the government argued that the intended loss caused by Zaky's conduct under § 2B1.1 of the sentencing guidelines was between \$120,000 and \$200,000. GA302-08. The Presentence Report reached the same conclusion. PSR ¶¶22-33.

In support of its position, the government relied on the evidence adduced at trial and at sentencing submitted an affidavit and additional testimony from the case agent. GA326-31; GA212-15. In his affidavit, the agent stated that the criminal investigation involved interviews of approximately 37 of Zaky's patients. GA326. Virtually without exception, the patients stated that Zaky clipped or trimmed their toenails, and did not perform any surgical procedures. GA326; GA208. Those patients who said they might have had ingrown toenails stated that Zaky treated those conditions by trimming the corner of the nails. GA327.

Only four of the 37 patients stated that Zaky had performed an avulsion on them, and one of the four stated that she had had two of her toenails completely removed. GA327; GA212-13. Based on these interviews, Zaky had performed a total number of 5 avulsions on the 37 patients. From August 1, 2008 through the date of the indictment, however, Zaky billed for having performed a total of 198 avulsions for these 37 patients. *Id.* From January 1, 2005 through the date of the indictment, Zaky billed for having performed 292 avulsions on these 37 patients. *Id.*

Contained within the 37 patients were the fourteen patients charged in the indictment. *Id.* Although all fourteen stated that Zaky had not performed an avulsion on them at any time before the indictment, Zaky billed for having performed a total of 118 avulsions for these patients between January 1, 2005 and the day the indictment was issued. *Id.*

The government noted that Zaky's scheme clearly began prior to August 1, 2008. Zaky himself testified that he had been performing avulsions in the same manner for all twelve years that he practiced in Connecticut. GA168. All of Zaky's patient progress notes before August 1, 2008 used the same type of preprinted labels he used to record the fraudulent avulsions charged in the indictment, and therefore Zaky was plainly falsely documenting the use of injectable anes-

thetia for services well before August 1, 2008. GA303; GA306.

From January 1, 2005 to the date of the indictment, Zaky received a total of \$149,044 in payment from Medicare for avulsion procedures. GA305-06. If 90% of the avulsions Zaky billed were fraudulent, the intended loss figure is over \$120,000. GA306. Indeed, anything above an 80% fraud percentage resulted in a loss over \$120,000. GA306. The government therefore agreed with the PSR that a loss figure between \$120,000 and \$200,000 was the most accurate estimate of the intended loss for Guideline purposes. GA306.

In his sentencing memorandum, Zaky argued the government failed to prove any loss amount. GA264-69. His argument essentially asserted that he did not commit the crimes of which he was convicted, and relied on the ALJ decision. Alternatively, Zaky argued that the loss amount was limited to the losses arising from the fourteen patients charged in the indictment. GA269-74.

The sentencing court found that the loss amount calculated by the government and the PSR was appropriate. After discussing the applicable burdens of proof and standards for determining loss, the court found “that the intended loss was more than \$120,000 dollars,” based “on the inferences from the evidence presented at trial, the factual findings adopted in the presen-

tence report, the testimony here today, and the attachments to the government's sentencing memorandum." GA232-33. Based on the interviews of the 37 patients, the court found, "[t]he resulting fraud rate, based on examination of the records of these 37 patients, is 98 percent. Accordingly, The Court finds that the defendant's fraud rate over the entire course of this scheme was at least 90 percent." GA233. Applying the 90% rate to the \$149,044 Zaky billed for nail avulsions between 2005 and 2012, the court concluded, "the total intended loss thereby is \$134,139 dollars. Accordingly, therefore, The Court will apply the ten level increase to the base offense level because the loss was more than \$120,000 dollars." GA233.

## **2. Governing law and standard of review**

On appeal, a district court's sentencing decision is reviewed for reasonableness. *See United States v. Booker*, 543 U.S. 220, 260-62 (2005). This reasonableness review consists of two components: procedural and substantive review. *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc). As relevant here, "[a] district court commits procedural error where it fails to calculate the Guidelines range (unless omission of the calculation is justified), makes a mistake in its Guidelines calculation, or treats the Guidelines as mandatory." *Id.* at 190 (citations omitted).

For the offenses of conviction in this case, Section 2B1.1 of the guidelines provides for determination of the offense level based on the greater of the actual or intended loss caused by the defendant's conduct. U.S.S.G. § 2B1.1, cmt. n.3. The Sentencing Commission has "long recognized that the calculation of exact loss amounts in individual cases is no easy task. Accordingly, it instructs that, in applying the Sentencing Guidelines, loss need not be determined with precision; a sentencing court need only make a reasonable estimate of the loss, given the available information." *United States v. Canova*, 412 F.3d 331, 352 (2d Cir. 2005) (citations and quotations omitted); U.S.S.G. § 2B1.1 cmt. n.3(C).

"The Guidelines expressly provide for consideration of 'relevant conduct' in determining the base offense level applicable in a case where the conduct is 'part of the same course of conduct or common scheme or plan as the offense of conviction.'" *United States v. Silkowski*, 32 F.3d 682, 687 (2d Cir. 1994) (quoting U.S.S.G. § 1B1.3(a)(2)). Furthermore, "criminal acts constituting the 'same course of conduct' need not be part of a common scheme or plan." *Id.* (citation omitted).

The "relevant conduct" provision of the Guidelines "is to be interpreted broadly to include: conduct for which the defendant was acquitted; conduct related to dismissed counts of

an indictment; conduct that predates that charged in the indictment; and conduct not charged in the indictment.” *Id.* at 688 (internal citations omitted). In addition, a sentencing court may rely on conduct committed outside the statute of limitations as “relevant conduct” in calculating the Guideline range. *Id.* (citation omitted).

A sentencing court may estimate the loss resulting from the offense “by extrapolating the average amount of loss from known data and applying that average to transactions where the exact amount of loss is unknown.” *United States v. Bryant*, 128 F.3d 74, 76 (2d Cir. 1997) (per curiam); accord *United States v. Uddin*, 551 F.3d 176, 180 (2d Cir. 2009); *United States v. Sutton*, 13 F.3d 595, 599-600 (2d Cir. 1994) (affirming estimation of loss using average loss amount multiplied by number of fraudulent license applications).

Although the government bears the burden of establishing loss by a preponderance of the evidence, “[t]he procedures used at sentencing are within the discretion of the district court so long as the defendant is given an adequate opportunity to present his position as to matters in dispute.” *United States v. Maurer*, 226 F.3d 150, 151 (2d Cir. 2000) (per curiam).

This Court reviews a district court’s application of the Guidelines *de novo*, while factual determinations underlying a district court’s Guide-

lines calculation are reviewed solely for clear error. *United States v. Watkins*, 667 F.3d 254, 261 (2d Cir. 2012). “Because the sentencing court ‘is in a unique position to assess the evidence and estimate the loss based upon [the] evidence,’” the court’s findings are “entitled to appropriate deference on appeal.” *United States v. Bahel*, 662 F.3d 610, 646 (2d Cir. 2011) (quoting U.S.S.G. § 2B1.1. cmt. n. 3(C)).

**3. The district court did not clearly err in determining the guideline loss amount.**

The district court’s determination that the loss for guidelines purposes was in the \$120,000-\$200,000 range was amply supported by the evidence at trial and sentencing. Zaky had been performing the same services and billing them as avulsions for, in Zaky’s words, “the same way for twelve years.” GA168. His progress notes for all of his patients were nearly identical. The conditions of the patients’ feet in the photographs of all fourteen patients charged in the indictment were consistent, and established that an avulsion could not have been performed. As the case agent testified, a patient would remember receiving an avulsion on his or her toes. Zaky had billed for rendering 118 avulsions to the fourteen patients, yet none of them stated that he or she had received an avulsion from Zaky before the indictment was issued. GA326-27. As a result, the district could plainly estimate the in-

tended loss using an extrapolated loss figure that accounted for Zaky's consistently billing for avulsions he had not performed. *See United States v. Singh*, 390 F.3d 168, 192 (2d Cir. 2004); *Bryant*, 128 F.3d at 76.

The court's estimate of the loss was reasonable. Zaky is responsible for all of his fraudulent claims to Medicare. *Singh*, 390 F.3d at 192 (district court correctly found that physician found guilty of health care fraud scheme whose version of events was rejected by the jury was responsible for all claims for services jury found were fraudulently billed). A preponderance of the evidence supports the conclusion that all or virtually all of the avulsions Zaky billed for were not actually performed. Contrary to Zaky's assertion that the court's conclusion was based on "nothing," the loss amount was supported by the facts in the case agent's affidavit and testimony and the evidence at trial. Zaky's proffered loss amount of zero was based solely on his assertion that he had rendered the avulsions for which he billed, which the jury and the sentencing court fully rejected. Zaky's claim that the district court clearly erred in determining the guideline loss is therefore unavailing.

**B. The district court did not abuse its discretion in applying an enhancement for obstruction.**

**1. Relevant facts**

In finding that the enhancement for obstructing or impeding the administration of justice under U.S.S.G. § 3C1.1 applied, the district court ruled “there’s ample evidence to support a two-level enhancement for obstruction of justice,” and found three grounds to support this ruling. GA233. *First*, the court found “by clear and convincing evidence that the defendant gave false testimony concerning a material matter with the willful intent to provide false testimony,” stating:

Specifically, [Zaky] testified at trial that he performed avulsions, namely that he had removed their nail all the way down to the eponychium on all of the 14 patients charged in the indictment.

The evidence, however, showed that the jury found that the defendant had not performed an avulsion on any of the patients charged in the indictment.

Further, The Court concludes that the defendant gave this testimony in order to purposefully mislead the jury.

GA233.

*Second*, the district court found that “during the course of the related civil investigation, Dr. Zaky created phony prescriptions in an attempt obfuscate [*sic*] a Medicare audit.” GA233. Although Zaky argued “that this conduct was not part of the investigation, prosecution or sentencing of the instant offense,” the court rejected this argument, finding as follows:

Application note [one to section 3C1.1] of the guidelines states that “Obstructive conduct that occurred prior to the start of the investigation of the instant offense of conviction may be covered by the guidelines if the conduct was purposefully calculated and likely to thwart the investigation or prosecution of the offense of conviction.”

Here the defendant’s use of phony prescriptions was intended to do just that. Specifically, the defendant created fake prescriptions to make it appear as though he had performed the procedures for which he billed Medicare, when, in fact, he had not.

Further, the civil investigation led directly to the investigation and prosecution of the criminal case. Thus, the two-level enhancement for obstructive behavior in the related civil investigation is appropriate.

GA233-34.

As a *third* basis for an enhancement based on obstruction of justice, the district court found that Zaky had confronted an elderly witness who testified against him at trial, noting that:

Before the trial commenced, Judge Fitzsimmons, who had authorized the conditions of his release, issued an order reminding the defendant that he must fully comply with the terms of the release.

At the conclusion of the trial, the defendant's counsel represented to the Court that the defendant fully understood the conditions of his release, and that he had reviewed Judge Fitzsimmons's order with Dr. Zaky. Later that same day the doctor traveled to the home of an elderly witness who had testified against him. The defendant asked the witness why he had testified against him, and that as a result of his conviction he was going to jail.

The witness was so disturbed by this incident that he called the case agent in this case, and the U.S. Marshals Service contacted the Connecticut State Police and asked them to increase the surveillance around the witness's residence.

GA234; *see* GA206-10.

The court concluded that "each of these three actions alone would support a two-level enhancement for obstruction of justice [and that]

. . . taking all three actions together the applicability of the enhancement is clear.” GA234.

## **2. Governing law and standard of review**

Section 3C1.1. of the guidelines provides as follows:

If (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant’s offense of conviction and any relevant conduct; or (B) a closely related offense, increase the offense level by 2 levels.

U.S.S.G. § 3C1.1.

A defendant’s denial of guilt is not a basis for application of the § 3C1.1, except where the denial is “a denial of guilt under oath that constitutes perjury.” U.S.S.G. § 3C1.1, cmt. n.2. It is long-settled that “[a] sentencing enhancement for obstruction of justice is warranted when a defendant testifying under oath ‘gives false testimony concerning a material matter with the willful intent to provide false testimony.’” *United States v. Morrison*, 153 F.3d 34, 52 (2d Cir. 1998) (citation omitted). “The district court must determine by clear and convincing evidence that

the defendant provided false testimony concerning a material matter with the willful intent to provide false testimony.” *United States v. Savoca*, 596 F.3d 154, 159 (2d Cir. 2010) (internal quotations omitted).

“[B]efore applying an obstruction enhancement based on perjury, the sentencing court must find . . . ‘that the defendant 1) willfully 2) and materially 3) committed perjury, which is (a) the intentional (b) giving of false testimony (c) as to a material matter.’” *United States v. Agudelo*, 414 F.3d 345, 349 (2d Cir. 2005) (citation omitted). “In other words, ‘[b]efore imposing the adjustment, the district court must find that the defendant consciously act[ed] with the purpose of obstructing justice.” *Id.* (internal quotations omitted).

### **3. Discussion**

The district court properly exercised its discretion to apply the two-level enhancement for obstruction of justice. Zaky’s argument to the contrary fails for four reasons.

*First*, although the district court found by clear and convincing evidence that Zaky had committed perjury and that this alone would support an enhancement, GA233-34, Zaky fails to address this ground, other than a statement that “Obstruction based on testimony at trial is also not warranted,” and a citation to a comment to § 3C1.1 stating that inaccurate testimony may

result from confusion or mistake. DB at 42. Zaky makes no further claim that his testimony resulted from confusion or mistake, and in fact is unable to do so based on the length and detail of his testimony at trial and sentencing. As perjurious testimony is a recognized basis for a two-level adjustment and Zaky has shown no basis to challenge the district court's finding, his challenge to the enhancement fails on this ground alone.

*Second*, Zaky's claim that the district court abused its discretion in ruling that Zaky's obstruction of the Medicare audit could also support an enhancement is also infirm. His argument that any of his actions related to the Medicare audit "would not be part of [the] investigation, prosecution, or sentencing of the instant offense," ignores the fact that, as the district court ruled, the enhancement comprises "[o]bstructive conduct that occurred prior to the start of the investigation of the instant offense of conviction . . . if the conduct was purposefully calculated, and likely, to thwart the investigation or prosecution of the offense of conviction." GA233-34; U.S.S.G. § 3C1.1, cmt. n.1. As the district court correctly found, Zaky created records "to make it appear as though he had performed the procedures for which he billed Medicare, when in fact, he had not," and the civil investigation and audit led directly to the investigation and prosecution of the criminal case. GA233-34; GA330; *see Unit-*

*ed States v. McGovern*, 329 F.3d 247, 252 (1st Cir. 2003) (obstruction during administrative audits by Medicare and Medicaid supported enhancement where investigation had sufficient connection to offense of conviction).

This enhancement applies to obstruction of civil investigations because “subsequent criminal investigations are often inseparable from prior civil investigations, and [obstruction] in the prior proceeding necessarily obstructs—if successful, by preventing—the subsequent investigation.” *United States v. Fiore*, 381 F.3d 89, 94 (2d Cir. 2004). Moreover, the enhancement expressly includes “producing or attempting to produce a false, altered, or counterfeit document during an official investigation or judicial proceeding,” which is precisely the conduct in which the district court found Zaky had engaged. U.S.S.G. § 3C1.1, cmt. n.4(C).

*Third*, Zaky’s confrontation of an elderly witness who testified against him at trial in violation of Zaky’s conditions of release is plainly an example of “threatening, intimidating, or otherwise unlawfully influencing . . . a witness, . . . directly or indirectly, or attempting to do so,” which is expressly cited as an example of conduct to which § 3C1.1 applies. U.S.S.G. § 3C1.1, cmt. n.4. As a result, the district court correctly ruled that this conduct was a basis for the two-level enhancement.

*Fourth*, Zaky fails to recognize that the district court imposed the enhancement after considering “all three” of Zaky’s actions “together.” The court’s conclusion that Zaky’s perjury, obstruction of the Medicare audit, and intimidation of a witness jointly supported the enhancement was well-supported and not an abuse of discretion. Zaky’s challenge to this enhancement therefore fails.

**C. The district court properly applied the enhancement for abuse of a position of trust.**

Zaky argues that the sentencing court erred by applying a two-level enhancement for abuse of a position of trust under § 3B1.3 of the guidelines. DB at 42-44. This argument is without merit.

It is long-settled law that the abuse of a position of trust enhancement applies to a doctor who defrauds Medicare. In *United States v. Ntshona*, this Court “adopt[ed] the view of the other circuits presented with this issue and [held] that a *doctor* convicted of using her position to commit Medicare fraud is involved in a fiduciary relationship with her patients and the government and hence is subject to an enhancement under § 3B1.3.” 156 F.3d 318, 321 (2d Cir. 1998) (*per curiam*); *see United States v. Larsen*, 348 F.3d 329, 342-43 (abuse of position of trust enhancement applies to physician convict-

ed of fraudulently billing private insurance companies) (2d Cir. 2003), *vacated on other grounds*, 543 U.S. 220 (2005). Zaky’s argument that he “was not in a position of trust with the Medicare program” ignores the consistent precedent to the contrary. His challenge to his sentence on this ground therefore is without merit.

**Conclusion**

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: April 7, 2014

Respectfully submitted,

DEIRDRE M. DALY  
UNITED STATES ATTORNEY  
DISTRICT OF CONNECTICUT

A handwritten signature in black ink, appearing to read "David J. Sheldon". The signature is fluid and cursive, with a long horizontal stroke at the end.

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**Federal Rule of Appellate Procedure  
32(a)(7)(C) Certification**

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,944 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

A handwritten signature in black ink, appearing to read "David J. Sheldon", with a long horizontal flourish extending to the right.

DAVID J. SHELDON  
ASSISTANT U.S. ATTORNEY

## **Addendum**

**§ 1347. Health care fraud**

(a) Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice –

(1) to defraud any health care benefit program; or

(2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program,

in connection with the delivery of or payment for health care benefits, items, and services, shall be fined under this title and imprisoned not more than 10 years, or both. If the violation results in serious bodily injury (as defined in section 1356 of this title), such person shall be fined under this title or imprisoned not more than 20 years, or both; and if the violation results in death, such person shall be fined under this title, or imprisoned for any term of years or for life, or both.

(b) With respect to violations of this section, a person need not have actual knowledge of this section or specific intent to commit a violation of this section.

**§ 24. Definitions relating to Federal health care offense.**

. . . (b) As used in this title, the term “health care benefit program” means any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service under the plan or contract.

**§ 1035. False statements relating to health care matters.**

(a) Whoever, in any matter involving a health care benefit program, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; or

(2) makes any materially false, fictitious, or fraudulent statements or representations, or makes or uses any materially false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry,

in connection with the delivery of, or payment for, health care benefits, items, or services, shall be fined under this title or imprisoned not more than 5 years, or both.

(b) As used in this section, the term “health care benefit program” has the meaning given such term in section 24(b) of this title.