

12-2314(L)

To Be Argued By:
DAVID E. NOVICK

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 12-2314(L)
12-2454(CON)
12-2650(CON)

UNITED STATES OF AMERICA,
Appellee,

-vs-

SHEIKERA WILLIAMS, MICHAEL JOHNSON,
JERMAINE JONES
Defendants-Appellants.

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

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The United States District Court for the District of Connecticut (Vanessa L. Bryant, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231.

Judgment entered against Williams on June 19, 2012. Williams' Appendix ("WA") 12. On June 27, 2012, Williams filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). WA12, WA46. Judgments entered against Jones and Johnson on June 7, 2012. Michael Johnson's Appendix ("MJA") 16, Jermaine Jones' Appendix ("JJA") 8, JJA161-JJA163. Johnson filed a timely notice of appeal on June 15, 2012, MJA17, MJA158; Jones filed a timely notice of appeal on May 31, 2012, JJA8, JJA165. *See* Fed. R. App. P. 4(b)(1) & (2).

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**

1. Whether the trial evidence, viewed in the light most favorable to the guilty verdict, was sufficient to support the jury's finding that Jermaine Jones participated in the charged criminal scheme and conspiracy, where five witnesses named Jones as a central participant in the scheme, Jones was located by law enforcement three times engaging in fraud-related activity with other conspirators, and travel and other records corroborated Jones' travel with the other conspirators.
2. Whether the district court committed procedural error in its application of the Sentencing Guidelines, specifically:
 - a. As to all defendants, whether the court clearly erred in extrapolating a loss estimate of greater than \$2.5 million based upon known information.
 - b. With regard to Jones and Michael Johnson, whether the district court properly counted as "victims" individuals whose cars were burglarized by the defendants, whose identities were stolen, and who expended time and money in repairing their cars,

replacing valuables, closing bank accounts, and cancelling credit cards.

- c. With regard to Jones and Johnson, whether the defendants' scheme, which exploited vulnerabilities in the banking system, utilized stolen social security numbers, and continued over several jurisdictions across the country, used "sophisticated means."
 - d. Whether the district court properly labeled Jones a manager or supervisor of the criminal scheme, where Jones recruited and managed at least three other participants.
3. Whether the district court's sentences of each defendant were substantively reasonable in light of the several guidelines enhancements.
 4. Whether the district court's refusal to recommend Sheikera Williams for a treatment program run by the Bureau of Prisons is reviewable by this Court, and if so, whether the district court reasonably declined to make the recommendation.

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

For more than two years, the defendants in this case organized and led a conspiracy to defraud banks out of millions of dollars. The defendants broke into cars, stole checks and identification documents, and then recruited drug-addicted women (“cashers”) to impersonate the break-in victims. The cashers were directed to

various banks, where they would purport to be the true account holder from one of the stolen identities. The cashier would then present other victims' stolen checks to be cashed. The proceeds would be split between the cashier and the defendants. The defendants repeated this scheme all over the United States—from Florida to Arizona to Connecticut, where they were ultimately charged and convicted.

While Sheikera Williams pleaded guilty to bank fraud, conspiracy to commit bank fraud, and aggravated identity theft, Michael Johnson and Jermaine Jones went to trial. A jury convicted both Jones and Johnson of seven counts of bank fraud, one count of conspiracy to commit bank fraud, and seven counts of aggravated identity theft. Williams was sentenced to a total of 109 months' imprisonment; Johnson was sentenced to 264 months' imprisonment; and Jones was sentenced to 240 months' imprisonment.

On appeal, Jones first challenges the sufficiency of the evidence against him, primarily arguing that there was insufficient evidence to connect him to the criminal scheme and conspiracy. As set forth below, the record was replete with evidence supporting the guilty verdicts, including the testimony of five cooperating witnesses that named Jones as a central participant in the fraud.

The defendants also challenge several aspects of the district court's guidelines calculation: (1)

all three defendants claim that the district court erred in extrapolating a loss of greater than \$2.5 million, and thereby applying an 18-point guidelines enhancement; (2) Jones and Johnson claim that the district court erred in applying a two-point guidelines enhancement for sophisticated means; (3) Jones and Johnson likewise claim that the district court erred in applying a two-point guidelines enhancement for more than fifty victims; and (4) Jones claims that the district court erred in applying a three-point enhancement for his role as a manager or supervisor in an offense involving five or more participants.

As to all of these claims, the district court correctly applied these enhancements, and at any rate would have imposed the same sentences even if the guidelines calculation had been different.

All three defendants challenge the substantive reasonableness of their respective sentences, claiming in large part that the district court did not consider the overlapping effect of the applicable guidelines enhancements. As explained below, the below-guidelines sentences imposed in this case were well within reason for this far-reaching fraud scheme, and each enhancement properly accounted for a different aspect of the scheme.

Finally, Williams claims that the district court abused its discretion in refusing to recommend to the Bureau of Prisons that Williams be

permitted to participate in a residential treatment program. As explained below, the decision to make such a recommendation is not reviewable, and at any rate the district court reasonably declined to make such a recommendation in this case.

Statement of the Case

On April 1, 2010, a federal grand jury returned an indictment charging Williams, Johnson and Jones with 70 counts of bank fraud, in violation of 18 U.S.C. § 1344; one count of conspiracy to commit bank fraud, in violation of 18 U.S.C. § 1349; and three counts of aggravated identity theft, in violation of 18 U.S.C. § 1028A(a)(1). WA3, WA15-WA41. On October 3, 2011, Williams pleaded guilty to Counts Twelve (bank fraud), Seventy-One (conspiracy to commit bank fraud), and Seventy-Two (aggravated identity theft) of the indictment. WA8, WA42, GA1930-GA1942. On June 13, 2012, the district court sentenced Williams principally to 109 months' imprisonment. WA12, WA42, Williams Sealed Appendix ("WSA") 78. Judgment entered on June 19, 2012. WA12, WA42-WA44. On June 27, 2012, Williams filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). WA12, WA46.

On October 11, 2011, a federal grand jury returned a superseding indictment charging Johnson and Jones with seven counts of bank fraud; one count of conspiracy to commit bank fraud;

and three counts of aggravated identity theft. MJA10, JJA5, JJA26-JJA37. A trial on the superseding indictment was held beginning on November 2, 2011, and a jury returned a guilty verdict on all counts against both Johnson and Jones on November 17, 2011. MJA13-MJA14, JJA6-JJA7. On May 16, 2012, the district court sentenced Jones principally to 240 months' imprisonment. JJA8, JJA144, JJA161. On May 30, 2012, the district court sentenced Johnson principally to 264 months' imprisonment. MJA16, MJA147, MJA154. On May 31, 2012, Jones filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). JJA8, JJA165. Judgment entered in both Jones' and Johnson's cases on June 7, 2012. JJA8, JJA161-JJA163, MJA16, MJA154-MJA56. On June 15, 2012, Johnson filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). MJA17, MJA158.

**Statement of Facts and Proceedings
Relevant to this Appeal**

A. Summary of scheme¹

Between at least August 2007 and May 2010, the defendants devised and executed a scheme to defraud banks across the country out of millions of dollars. The scheme worked as follows: Johnson and/or Jones, or occasionally someone else

¹ The offense conduct is primarily taken from the defendants' PSR's. Relevant citations to the trial testimony will be provided as necessary below.

working with the defendants, broke into cars parked in lots adjacent to gyms, sporting events, trail heads, or other similar places. Williams frequently acted as a lookout for these burglaries. They then collected pieces of identification, bank cards, and checkbooks, from the items taken from the cars. Johnson or Jones, or another co-conspirator, recruited one or more female accomplices (“cashers”) to attempt to cash one or more of the stolen checks. Jermaine Jones’ Presentence Report (“JJPSR”) ¶¶6-7, Michael Johnson’s Presentence Report (“MJPSR”) ¶¶6-7, Sheikera Williams’ Presentence Report (“WPSR”) ¶¶11-12.

While vehicle burglaries typically occurred in the early morning or in the evening, business hours were devoted to the execution of the fraud. The defendants would send the casher to a bank where one of the theft victims had an account, and would provide the casher with the theft victim’s photo identification and bank card. The defendants selected the particular photo identification such that the casher was similar in appearance to the photo. One of the defendants, often Williams, would provide the casher with a wig and/or other elements of disguise in order to cover up any apparent differences. WPSR ¶13, MJPSR ¶8, JJPSR ¶7.

The defendants would provide the casher with a rental car and tell her to approach the bank via the farthest drive-thru teller window.

The cashier would then present a check drawn from an account of a different victim and drawn from a different bank than the one the cashier approached. The checks were always filled out in advance by one of the defendants, typically Williams, who often also provided the cashier a “cheat sheet” so that the cashier would be able to recite back the details of the stolen identity if asked by a teller. One of the defendants, typically Williams, would also often call the bank in advance to ensure that there were sufficient funds in the account, because banks generally require that the account holder’s account have sufficient funds before they will agree to cash a check from a different bank, and do not immediately contact the bank from which the check is written. WPSR ¶14, MJPSR ¶9, JJPSR ¶8.

In cases where the bank approved the transaction—because it believed that the cashier was the account holder, and there were sufficient funds in the account to cover the check—the bank provided the money to the cashier, who then drove away and gave the money to the defendants. The cashier would receive a designated share of the money she obtained. The remainder of the money was divided among the defendants—typically, a larger share went to the person who had stolen the identity or check, and Williams got a cut for her role as well, since she did not participate in the thefts. WPSR ¶15, MJPSR ¶10, JJPSR ¶9.

The defendants repeated the scheme in various places around the country. They often flew between locations, rented cars for the purpose of executing the scheme, and stayed in hotels during the course of the scheme. The defendants typically recruited as cashers women with substance abuse issues in need of money. Williams would often provide wigs and other disguises to help the cashers pass as the account holders. WPSR ¶16, MJPSR ¶11, JJPSR ¶10.

B. Cooperating cashers

Five cashers testified at trial: Rebecca Souve, Mallory Markovic, Megan Fox, Deeneen Johnson, and Ashley Dunn. Following is a brief summary of some of the evidence as to the five testifying cashers:

1. Rebecca Souve

Souve, then a heroin addict, was active as a casher in the scheme in October-November 2008. Beginning in early October 2008, Souve was flown to New Jersey twice. The first time she worked with Jones and Williams, and the second time she worked with Johnson, Jones and Williams. During these trips, Souve cashed numerous stolen checks while working at the instruction of the defendants. The second trip ended in her arrest with the defendants, following an attempted cashing in Morris Plains, New Jersey. As they were being stopped by police, Souve saw

Johnson and Williams secreting several stolen checks and identity cards in the headliner of their rental vehicle.

Souve was held in jail, and the defendants were released on bond. When Souve got out of jail, she went back to Florida and reconnected with Williams. She made another cashing attempt in Florida on November 20, 2008. This time Williams and Jones brought her the check and identity card. Souve was again arrested.

Souve's testimony was corroborated by her arrest with the defendants in Morris Plains; the testimony of Williams; surveillance photos from victim banks; the stolen items recovered from the rental vehicle; and flight records that show Souve flying between New Jersey and Florida with Johnson and Williams. WPSR ¶17a, MJPSR 12b, JJPSR ¶11a, GA1175-GA1229.

2. Megan Fox

On December 18, 2008, Jones called Fox, who was then a crack/cocaine addict living in Pennsylvania and working as a stripper. Fox knew Jones from her time working as a stripper in Florida. Jones picked Fox up from her strip club. The following day, they drove Jones' rental car (a red SUV) to New Jersey. Along the way, Jones described the scheme to Fox, and that she could make up to \$1000. They drove to a hotel across from the Newark airport, where Fox saw Williams for the first time.

The following day Fox took the red SUV, with Jones following in a white van, to multiple banks. Fox successfully cashed checks at least at one bank in Woodbridge, New Jersey, but later was arrested following an attempt in Metuchen. After her arrest, Fox identified Jones and Williams in photos. She also recalled a third participant, who had gold teeth; however, she did not identify Johnson in a photo array. Williams confirmed in her testimony that Johnson was present for Fox's involvement. Fox's testimony was also corroborated by her phone records, which document calls with Jones, Johnson, and Williams on the day that Fox was working. WPSR ¶17b, MJPSR ¶12b, JJPSR ¶11b, GA1256-GA1309.

3. Mallory Markovic

Markovic first became involved in the scheme in the summer of 2008. Markovic was introduced to the scheme by a co-conspirator "Moochie," and cashed her first stolen check in Florida, with the assistance of Williams, "Leelie," and possibly Jones. Markovic received the stolen checks—usually two per bank—and identification cards from Williams.

From Florida, they traveled to, and cashed checks in, several other states, ending with Arizona. Leelie and Moochie went on the trip with Williams, Jones, and Markovic. Jones and Leelie "popped" car windows in order to steal identity

cards and checks. Williams filled out and gave Markovic nearly all the checks she used. Markovic's share was \$200-\$300 per check. Evidence showed that the car they used for the trip was rented by Johnson, though Johnson did not go on this first trip to Arizona. From Arizona, Markovic flew back to Florida on a trip booked by Williams. Markovic took a second trip to Arizona that summer, with the defendants and Williams' sister.

After Arizona, Markovic recalled going with the defendants to commit the fraud about once a month. She met Johnson on later trips, and also saw him breaking into cars. In addition to Florida, Texas, Georgia, and Arizona, Markovic worked with the defendants in Washington, D.C., New York, New Jersey, and Connecticut.

Markovic also recalled a trip to Georgia with Johnson and Williams, which was corroborated by surveillance video of Markovic cashing stolen checks at several banks in February 2009. Markovic abused cocaine and Xanax at the time she was recruited into this scheme. WPSR ¶17c, MJPSR ¶12c, JJPSR ¶11c, GA919-GA971.

4. Deeneen Johnson

Deeneen² was living in Atlanta, in February 2008, at a “trap,” which tended to house drug addicts, prostitutes, and fraudsters—Deeneen was all three—when she was approached by Johnson. She immediately began working as a cashier. She traveled with the defendants from Florida, through several states, ending with her arrest in Denton, Texas. After she was released, she went back to Atlanta, where she reconnected with the defendants. After that, she worked with the defendants in Florida, Georgia, and several states in the northeast, including Connecticut.

Deeneen testified at trial pursuant to a cooperation agreement, signed after she pleaded guilty to her own conduct in this case. Deeneen testified extensively regarding the criminal activity of the defendants, including numerous car burglaries by Johnson and Jones, with herself and Williams as lookouts. WPSR ¶17d, MJPSR ¶12d, JJPSR ¶11d, GA519-GA746, GA754-GA806.

5. Ashley Dunn

Dunn was originally recruited by Johnson in Florida in January 2008, while she was working as a prostitute and abusing crack/cocaine. The

² To avoid confusion with defendant Johnson, the Government will refer to Deeneen by her first name in this brief.

day after the initial meeting, Johnson and Williams picked Dunn up and took her to a store, where Williams purchased wigs and clothes for her. Shortly thereafter, Williams and Johnson took Dunn to a bank in Stuart, Florida. Dunn's cashing attempt was unsuccessful, and Dunn left the bank and picked up Johnson and Williams. The police stopped them a short distance away, and arrested all three. Dunn went to jail for several months, while Johnson and Williams made their bond.

Around May 2008, after being released from jail, Dunn again was located by Johnson on the streets of Lauderhill, Florida. Johnson and other co-conspirators took Dunn to commit the fraud in several states, ending in Kansas, where Dunn was again arrested on June 4, 2008. Dunn served approximately 20 months in jail. WPSR ¶17e, MJPSR ¶12e, JJPSR ¶11e, GA1069-GA1112.

C. Chronology of significant events

Although impossible to recite exactly what happened every day of the scheme, which continued mostly unabated for nearly three years, the following is a synopsis of some of the significant events or trips during the course of the defendants' fraud. WPSR ¶31, MJPSR ¶26, JJPSR ¶25.

1. August 2007

Williams testified that she found stolen identities in Johnson's pants while doing his laundry. She confronted him about these, but he did not at that point explain the scheme. Shortly thereafter, Johnson and James Whittaker explained the basics of their criminal scheme, though Williams testified that she did not yet join. WPSR ¶32, MJPSR ¶27, JJPSR ¶26.

2. September 2007

On September 6, 2007, Johnson, Williams, and Christine Martin were arrested in Butts County, Georgia in the course of a traffic stop, when officers recovered stolen identification documents, ATM cards, personal checks, and social security cards from the trunk and headliner of the car. WPSR ¶19, MJPSR ¶14, JJPSR ¶13.

According to Williams, she had agreed to go with Johnson on a trip to Georgia with a woman she knew as "Frenchie." Williams testified that Johnson did not explain the nature of the trip at that point, and that Williams was intending to visit her family in Georgia.

Williams testified that after the arrest, she was bonded out within a short time, with money from her family, but she did not have enough money to make the bond for Johnson. Williams returned to Florida, where she contacted Jones, to whom she had been introduced by Johnson a

short time before the arrest. She and Jones began to work together in the fraud, using a cashier that Jones recruited in the Palm Beach area, in order to make money for themselves and to pay Johnson's bond. They continued to work at the fraud consistently even after Johnson was bonded out, notwithstanding Jones' arrest described below (Jones was released after one night). WPSR ¶33, MJPSR ¶28, JJPSR ¶27.

On September 29, 2007, Jones was arrested with Richard Williams in Palm Beach Gardens, Florida, after Jones was observed looking into several vehicles and attempting to open the doors. In Jones' bag, officers discovered numerous stolen identification documents and credit cards. Williams testified that Richard Williams (unrelated) was an occasional co-conspirator of the defendants. WPSR ¶20, MJPSR ¶15, JJPSR ¶14.

3. January 2008

On January 30, 2008, Williams, Johnson, and Dunn were arrested in Stuart, Florida after Dunn attempted to negotiate a stolen check using a stolen driver license. WPSR ¶21, MJPSR ¶16, JJPSR ¶15. The arrest occurred shortly after Johnson had recruited Dunn into the scheme. Williams and Johnson bonded out immediately, but left Dunn in jail. WPSR ¶34, MJPSR ¶29, JJPSR ¶28.

4. February-May 2008

In February 2008, Johnson recruited Deeneen from a drug den outside Atlanta. After working briefly in Georgia and Florida, Williams, Johnson, Deeneen, and other co-conspirators embarked on a multi-state trip to continue the fraud. Jones flew in and met them during the trip, somewhere in the Midwest. The trip continued to Texas, where Deeneen was arrested, as described below. WPSR ¶35, MJPSR ¶30, JJPSR ¶29.

On May 6, 2009, Deeneen and Phillip Everette were arrested in Denton, Texas after a traffic stop, while driving Williams' overdue rental car. Police recovered several of the above-described "cheat sheets" in the course of the arrest. Following Deeneen's arrest, a phone registered to Johnson placed several phone calls to the Denton County Jail. WPSR ¶22, MJPSR ¶17, JJPSR ¶16.

Around the same time, Williams was arrested on a failure-to-appear warrant from the Stuart, Florida case, and Johnson was arrested in Orange, Texas, as explained herein. WPSR ¶35, MJPSR ¶30, JJPSR ¶29.

According to police testimony, Johnson, Ronald Campbell, and Kerri Kegley were arrested in Orange, Texas on May 13, 2009. Orange County Sheriff's deputies stopped Johnson's vehicle for traffic violations, and during a consent

search of the vehicle, the deputies located multiple state identification cards, driver licenses, credit cards, debit cards, and personal checks belonging to females who were victims of burglaries in Texas, Florida, and Georgia. WPSR ¶23, MJPSR ¶18, JJPSR ¶17.

Johnson bonded out quickly and returned to Florida. Williams was in jail until sometime in June, first in Texas, and then in Florida. WPSR ¶35, MJPSR ¶30, JJPSR ¶29.

5. May-July 2008

Upon his return from Texas, Johnson recruited Dunn in Florida, and took her through several states to commit this fraud, ending in Kansas. WPSR ¶36, MJPSR ¶31, JJPSR ¶30.

On June 4, 2008, Dunn was arrested following the attempted cashing of two stolen checks at a bank in Prairie Village, Kansas. One of the stolen checks belonged to a victim whose checks were also recovered from Johnson's vehicle in Orange, Texas on May 13. The rental agreement for the car driven by Dunn was in the name of Johnson. WPSR ¶24, MJPSR ¶19, JJPSR ¶18.

Two fraud trips to Arizona were taken, the first in late June and the second July 12-17. The first trip involved Markovic, Jones, and Williams, and the second involved Jones, Johnson, Williams, Williams' sister, and Markovic. Oth-

erwise, the defendants continued the fraud in Florida. WPSR ¶37, MJPSR ¶32, JJPSR ¶31.

One July 15, 2008, Williams, Jones, and her sister were detained in connection with the attempted cashing of stolen checks by Markovic at a bank in Gilbert, Arizona. They were recognized by bank personnel from an earlier similar incident on June 28, 2008 at the same location. The checks and identification documents were recovered, but Markovic got away, and so no charges were filed in Gilbert. WPSR ¶25, MJPSR ¶20, JJPSR ¶19.

6. September 2008

The defendants started to focus on the Northeast, beginning in September 2008 and ending in January 2009. The first cashier they employed in the Northeast was a woman named “Chat” who later died of a drug overdose. The second was Souve, who took over after Chat. WPSR ¶38, MJPSR ¶33, JJPSR ¶32.

On October 16, 2008, Jones, Johnson, Williams, and Souve were arrested in Morris Plains, New Jersey after Souve attempted to cash two checks totaling \$4,400. Souve, Jones, Johnson, and Williams were arrested in a white Ford Explorer rented by Jones. As noted above, during trial Souve testified that Johnson and Williams secreted checks and identity documents in the car’s headliner. Government investigators located the rental vehicle during trial—it had been

sold off by Budget and was owned by a family in Virginia. Virginia State Police searched the car, and located the stolen items. WPSR ¶26, MJPSR ¶21, JJPSR ¶20.

After the Morris Plains arrest, the defendants returned to Florida after spending one night in jail. WPSR ¶38, MJPSR ¶33, JJPSR ¶32.

7. November 2008

Johnson and Williams were heading towards Morris Plains, New Jersey, for a court appearance, and at the same time committing fraud. They were traveling with co-conspirator Larry Bowman and an unidentified cashier. The cashier was arrested on a warrant following a car stop in Maryland, and the car was impounded. Williams, Bowman, and Johnson were driven to a hotel in Perryville, Maryland, where they stayed overnight. The next morning, when Williams and Bowman accompanied Johnson to rent a new car, hotel maids discovered a stack of stolen identities in their room. The hotel called the police, who arrested Williams, Bowman, and Johnson. There were also stolen checks in the vehicle rented by Johnson. WPSR ¶39, MJPSR ¶34, JJPSR ¶33.

Investigation revealed these items had been stolen in separate incidents in multiple states, and that many had been used in the fraud. WPSR ¶27, MJPSR ¶22, JJPSR ¶21.

8. December 2008

Meanwhile, Deeneen, having finally been released from Denton, Texas, made her way back to Atlanta and was picked up by the defendants and brought back to Florida. On December 10-11, she flew with Williams and Johnson to White Plains, New York. They met up with Jones on December 12th in New York, and drove to Connecticut. WPSR ¶40, MJPSR ¶35, JJPSR ¶34.

On December 12, 2008, Johnson dropped his wallet outside a car that he burglarized in Bloomfield, Connecticut, and the wallet was turned over to the police. Police contacted Williams (whose number was in Johnson's wallet) and Johnson later went to the police station to retrieve his wallet. Johnson claimed his wallet had been stolen. WPSR ¶28, MJPSR ¶23, JJPSR ¶22.

Between December 12 and 17, 2008, the defendants and Deeneen used several stolen identities to defraud banks in Connecticut, New York, and New Jersey, until Deeneen and Johnson got into an argument and Johnson kicked Deeneen out of their hotel. WPSR ¶40, MJPSR ¶35, JJPSR ¶34.

After losing Deeneen, Jones recruited Fox, who worked for one day. WPSR ¶41, MJPSR ¶36, JJPSR ¶34. On December 20, 2008, Fox was arrested after she attempted to cash a stolen check at a bank in Metuchen, New Jersey.

Fox was located driving a Toyota RAV4 that had been rented by Williams. WPSR ¶29, MJPSR ¶24, JJPSR ¶23.

The group flew back to Florida and returned the day after Christmas to the Northeast. They reacquired Deeneen, and defrauded several banks in Connecticut, New York, and New Jersey until New Year's Day, when the defendants returned to Florida. WPSR ¶41, MJPSR ¶36, JJPSR ¶34.

9. January 2009

On January 7, 2009, when Williams and Johnson went to court for their Perryville, Maryland case, Jones and Deeneen met them in the area, and they traveled north to banks in Pennsylvania, New York, and New Jersey. The defendants flew back to Florida in the middle of the month, and only Jones and Williams returned to work with Deeneen and, for a short time, Markovic. WPSR ¶42, MJPSR ¶37, JJPSR ¶36.

On January 30, 2009, Deeneen was arrested after attempting to cash stolen checks in Wallingford, Connecticut. She was found in a car that had been rented by Williams, with Jones as a second authorized driver. WPSR ¶30, MJPSR ¶25, JJPSR ¶24.

10. February 2009

Johnson and Williams traveled to Georgia with Markovic to commit fraud between February 9th and 12th. Jones was not present for this February 2009 trip to Georgia, even though identities he stole were being utilized. Jones was taken into custody on February 13 on state charges, and remained in custody until arrested in this case. WPSR ¶43, MJPSR ¶38, JJPSR ¶37.

11. Post-February 2009 activity

Although records are less detailed for the period of time after February 2009, there was evidence of the continuation of the conspiracy. First, Williams testified that the conspiracy continued up until Johnson's arrest in May 2010. Second, stolen identities were recovered from the room shared by Johnson and Williams following Williams' arrest, and those identities had been used to commit fraud in March 2010. Third, there is independent evidence of the scheme in August 2009 in Texas. Bank records show that the stolen identity of Darlene Dunn, a Connecticut resident, was being fraudulently used to cash stolen checks in Texas in August 2009. Dunn's identity had been stolen in Connecticut as part of the scheme in January 2009, at a time when only Jones and Williams were present. Dunn's checks were fraudulently cashed by Deeneen, also in January 2009. Then, at the same time

Dunn's identity was being used later in August, records show that Williams was sending sizable MoneyGrams from Texas to Johnson, with the proceeds of the crime. WPSR ¶44, MJPSR ¶39, JJPSR ¶38.

Additional relevant facts are discussed below.

Summary of Argument

I. Jones' claim, that the evidence at trial was insufficient to support the verdict as to his involvement in the criminal scheme and conspiracy, belies a record replete with evidence that Jones was not only a participant, but also a principal part and a supervisor of the conspiracy. The evidence against Jones consisted principally of five co-conspirators who testified as to Jones' centrality in this scheme; law enforcement testimony regarding Jones' fraud-related activity with other members of the conspiracy; and records and other evidence that corroborated Jones' involvement in the scheme.

II. The district court properly applied the Sentencing Guidelines. Specifically:

- a) The district court correctly enhanced each defendant's offense level by 18, pursuant to U.S.S.G. § 2B1.1(b)(1)(J), because the loss incurred by the offense exceeded \$2.5 million. Although the loss amount could not be determined with precision, the district court employed a well-reasoned anal-

ysis, based upon known data, to fashion a conservative estimate that was fair to the defendants.

- b) The district court correctly enhanced Johnson's and Jones' offense levels by 4 under U.S.S.G. § 2B1.1(b)(2), because the offense involved 50 or more victims. Although the fraud loss was principally borne by banks, there were more than 100 victims of the defendants' car break-ins who suffered monetary loss.
- c) The district court correctly enhanced Johnson's and Jones' offense levels by 2, pursuant to U.S.S.G. § 2B1.1(b)(9)(C), because "the offense otherwise involved sophisticated means." Even if the individual pieces of the scheme were not elaborate, taken together they were carefully designed to exploit different systems in a coordinated way.
- d) The district court correctly enhanced Jones' offense level by 3, pursuant to U.S.S.G. § 3B1.1(b), because he was a "manager or supervisor" of criminal activity that involved five or more participants. The evidence showed that Jones recruited at least three others into the scheme, and supervised those and other conspirators in executing the fraud.

III. The district court's sentences were substantively reasonable. Each sentence was well below the guidelines ranges for the respective defendants. Moreover, contrary to the defendants' arguments, the several applicable guidelines enhancements did not overlap or overstate the seriousness of the offense conduct.

IV. The district court's refusal to recommend to the Bureau of Prisons that Williams be placed into a drug treatment program is not reviewable, and in any event, was not improper. A district court is forbidden from considering the participation in such a treatment program as part of a criminal sentence, and therefore failure to recommend participation it is not subject to abuse-of-discretion review.

Argument

I. There was sufficient evidence, viewed in a light most favorable to the Government, to support Jones' convictions.

A. Relevant facts

On November 15, 2011, following the Government's evidence, defendants Johnson and Jones moved the district court for an order of acquittal. GA1898-GA1899. The district court denied the motion. GA1899.

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 reviewing 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.” *United States v. Sabhnani*, 599 F.3d 215, 241 (2d Cir. 2010). 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 evidence must be viewed in conjunction, not in isolation; and its weight and the credibility of the witnesses is a matter for argument to the jury, not a ground for legal reversal. *See United States v. Best*, 219 F.3d 192, 200 (2d Cir. 2000). “The ultimate question is not whether we believe the evidence adduced at trial established defendant’s guilt beyond a reasonable doubt, but whether any rational trier of fact could so find.” *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998).

To sustain a bank fraud conviction, “the government must prove that defendant (1) engaged in a course of conduct designed to deceive a federally chartered or insured institution into releasing property; and (2) possessed an intent to victimize the institution by exposing it to actual or potential loss.” *United States v. Crisci*, 273 F.3d 235, 239-40 (2d Cir. 2001) (internal quotation omitted).

Where aggravated identity theft is charged in conjunction with bank fraud, the government must prove that the defendant, “during and in relation to [bank fraud,] knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall.” 18 U.S.C. § 1028A(a)(1). The Government must “show that the defendant knew that the means of identification at issue belonged to another person.” *United States v. Flores-Figueroa*, 566 U.S. 646, 657 (2009).

Both bank fraud and aggravated identity theft may be proved through 18 U.S.C. § 2(a), that is, one who aids or abets an offense may be punished as a principal. “Under 18 U.S.C. § 2, a defendant may be convicted of aiding and abetting a given crime where the government proves that the underlying crime was committed by a person other than the defendant, that the defendant knew of the crime, and that the defendant acted with the intent to contribute to the

success of the underlying crime.” *United States v. Hamilton*, 334 F.3d 170, 180 (2d Cir. 2003).

Moreover, under 18 U.S.C. § 1349, “any person who . . . conspires to commit [bank fraud] shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.” To sustain a conspiracy conviction, the government must “present some evidence from which it can reasonably be inferred that the person charged with conspiracy knew of the existence of the scheme alleged in the indictment and knowingly joined and participated in it.” *United States v. Rodriguez*, 392 F.3d 539, 545 (2d Cir. 2004) (internal quotation marks omitted). In this context, “deference to the jury’s findings is especially important . . . because a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon’s scalpel.” *United States v. Santos*, 541 F.3d 63, 70 (2d Cir. 2008) (internal quotation marks omitted). The “government need not prove that the defendant knew the details of the conspiratorial scheme or the identities of all of the conspirators.” *United States v. Hawkins*, 547 F.3d 66, 71 (2d Cir. 2008) (internal quotation marks and alterations omitted).

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 record was replete with evidence that Jones “knew of the [substantive offenses], and...acted with the intent to contribute to the success of the underlying crime,” *Hamilton*, 334 F.3d at 180, and, with regard to the conspiracy, that he “knew of the existence of the scheme alleged in the indictment and knowingly joined and participated in it.” *Rodriguez*, 392 F.3d at 545.

The evidence against Jones fell into three categories: the testimony of co-conspirators; evidence related to Jones’ interactions with law enforcement during the course of the scheme; and corroborating records and physical evidence.

1. Co-conspirator testimony

Five co-conspirators specifically named Jones as having a central role in the conspiracy: Williams, Deeneen, Fox, Souve, and Markovic.

Williams testified that Jones was a central participant in the fraud, along with herself and Johnson. GA1389. In fact, she testified that her first foray into the bank fraud scheme in this case was with Jones. When Williams needed to make money to bail Johnson out of jail, Jones provided the stolen identities, GA1382, recruited “Shannon” to cash stolen checks, GA1411, and accompanied them over several days through Florida and Georgia. GA1413-GA1414. Williams

testified that Jones participated in several other fraud-related trips with other co-conspirators, including Johnson. GA1445-GA1446 (Texas), GA1456-GA1457 (Arizona), GA1463-GA1464 (New Jersey), GA1483-GA1518 (New York, New Jersey, Connecticut). Williams testified regarding Jones' involvement in the fraud, to include recruiting cashers, assisting in driving cashers to banks, breaking into cars, and researching banks. GA1466-GA1474, GA1485-GA1498. In addition to Shannon, mentioned above, Williams testified regarding two other check cashers recruited into the fraud by Jones, "Chat" and Fox. GA1464, GA1494.

Deeneen and Markovic both echoed Williams' testimony that one of Jones' primary responsibilities was to break into cars and steal checks and identities. GA555, GA933. Souve testified that Jones and Williams picked her up from the airport when she was first recruited into the scheme, GA183-GA185, that Jones would occasionally "chime in" when Williams was answering questions about the fraud, GA1192, and that Jones would accompany Souve, Johnson, and Williams on fraud trips, though Souve would drop the others off just before driving into the bank, GA1196.

Deeneen, who was with the scheme longer than any other cashier, also testified expansively regarding Jones' involvement. Like Williams, Deeneen identified Jones, Johnson, and Wil-

liams as the three primary participants in the fraud scheme. GA553. Deeneen discussed the mechanics of the scheme, and identified Jones and Johnson as primarily responsible for breaking into cars. GA555, GA564. Deeneen testified that she was introduced to Jones by Williams in Florida, shortly after she was recruited. Jones told Deeneen that he “had some pieces that he wanted [her] to run, meaning take a run and go to a couple banks and use up the account.” GA567. Deeneen proceeded with Williams and Jones to several banks, and Jones broke into several cars. GA570.

Deeneen also testified about several fraud-related trips in which Jones participated—across the Midwest to Texas, GA575-GA581; New York, Connecticut, and New Jersey, GA618-GA635; New York and Connecticut, GA636-GA640; Maryland to New York and Connecticut, GA646-GA648; and Connecticut, GA650-GA667.

Finally, Fox also discussed her interactions with Jones in several places throughout her testimony. Jones recruited Fox into the scheme in December 2008, while Fox was working as a stripper in Pennsylvania. GA1265. Jones explained the scheme to Fox and drove Fox to New Jersey to join the fraud. GA1267-GA1268. Jones directed Fox’s cashing of stolen checks at three banks, culminating in Fox’s arrest. GA1272-GA1279. Fox testified that it was Jones who handed her the checks before she left for the

bank, and that 90% of her interactions were with Jones. GA1293, GA1302.

2. Law enforcement evidence

Several interactions between the defendants, including Jones, and law enforcement, are abridged in the Summary of Facts section above. With regard specifically to Jones, there was testimony from law enforcement regarding three encounters:

- Officer David Dowling and Officer Jason Sharon testified regarding Jones' arrest in Palm Beach Gardens, Florida on September 29, 2007. Dowling saw an individual, determined to be Jones, attempting to break into cars in a parking lot in a city park. GA1750-GA1751. Sharon later testified regarding a bag of identity documents and checks recovered from the car, behind the passenger seat where Jones was sitting, that also contained property with Jones' name on it. GA1757-GA1758.
- Officer Thomas Keane of Morris Plains, New Jersey testified regarding the arrest of Jones, along with Williams, Johnson, and Souve, on October 16, 2008, directly following a failed attempt by Souve to cash a stolen check. Keane introduced the registration from the vehicle in which the defendants were arrested, which was later

determined to have been rented by Jones. GA1246-GA1247, GA1995-GA1997.

- Sergeant Joe Amaya and Officer Patrick Buvala testified regarding a July 15, 2008 stop of a car occupied by Jones, Williams, and Williams' sister, Clarina Warren, in Gilbert, Arizona, following a report that the car had been assisting another car in attempting to cash a stolen check. GA992-GA1002, GA1002-GA1007.

3. Other evidence

Also presented at trial were various business records and other physical evidence, some of which related specifically to Jones, including bank account and travel-related records. GA1955-GA1991. Both Williams and Deeneen identified themselves with Jones in surveillance video from the Comfort Inn and Budget Rental Car offices in Connecticut in late January 2009. GA689-GA700, GA1514-1516. Government Exhibit 211B is a Bradley Airport Budget car rental agreement from January 28, 2009, in Williams' name, with Jones as a second driver. This was the vehicle that Deeneen was driving when she was arrested on January 31, 2009. GA95, GA509.

There are numerous other records related to Jones in the evidence introduced at trial. These are summarized in Government Exhibits 304 (rental cars), 305 (hotels), and 306 (airlines).

GA2044-GA2050. These records corroborated the other evidence connecting Jones to the conspiracy, including evidence of trips by Jones to Arizona and the Northeast. Government Exhibit 210N (GA1996-GA1997) is the record for Jones' rental of the car in which he was arrested with Souve and his co-defendants in New Jersey in October 2008, and from which the stolen checks and identities were later recovered in Virginia.

In sum, this may be the "rare case" in which the evidence truly does "[lay] bare" the conspiracy "with the precision of a surgeon's scalpel." *Santos*, 541 F.3d at 70. Jones arguments to the contrary, which amount to nothing more than general demurrers ungrounded in the evidence (e.g., "there was no competent evidence to suggest that [Jones] knew who some of the co-conspirators were," Jones Br. 12), wilt under the pressure of five cooperators, law enforcement evidence, and reams of business records and related evidence, all of which point inexorably to Jones as a central participant in this fraud scheme.

II. The district court properly calculated the guideline ranges, and at any rate, any errors did not affect the sentences imposed.

A. Relevant facts

1. Sheikera Williams

On October 3, 2011, Williams pleaded guilty to one count each of bank fraud, conspiracy to commit bank fraud and aggravated identity theft. WA14-WA42.

Williams' PSR calculated the intended loss from the offense using not just the loss documented by bank records, but also extrapolating from witness testimony and other evidence to reach a range of between \$2,500,000 and \$7,000,000, resulting in a guidelines enhancement of 18 under U.S.S.G. § 2B1.1(b)(1)(J). WPSR ¶¶45-53, 59. The loss calculation extrapolated was based upon assumptions taken from the evidence, including: a time span from May 6, 2007 (the Butts County, Georgia arrest) until May 7, 2010 (Williams' federal arrest); an average of three days of fraud per week; an average of five banks per day; and an average of \$2,000 from each bank. WPSR ¶¶51-52. This was the more conservative estimate of two suggestions made by the Government. WPSR ¶51.

Adding in three other enhancements—leadership role, sophisticated means, and more than 50 victims—the PSR recommended an of-

fense level of 35, a reduction of 3 levels for acceptance of responsibility, and Criminal History Category I. WPSR ¶¶60-62, 65-67, 70. This resulted in a range of 121 to 151 months' imprisonment for Williams' bank fraud and conspiracy convictions, and an aggregate range of 145 to 175 months' imprisonment with the 24-month consecutive sentence called for by her aggravated identity theft conviction. WPSR ¶96.

In a sentencing memorandum, Williams conceded that the intended loss was greater than the documented loss, but argued that the PSR's calculation of intended loss was unreasonable. Williams argued that the PSR had overestimated loss, that the loss estimates were incongruous with the number of victims found by the PSR, and that the estimates of loss did not adequately account for the fact that the conspiracy periodically stalled for lack of a check casher or for other reasons. GSA12-GSA13, GSA17-GSA20.

Williams also claimed, in part, that the Government inappropriately relied on her post-cooperation proffers and testimony to calculate loss. GSA19. Williams argued that a more reasonable calculation of loss would be \$2,015,220, and based that argument primarily on the number of victims identified in records and seized evidence. GSA12-GSA13. In addition to arguments regarding loss, and other issues not raised on appeal, Williams argued that, under *United States v. Jackson*, 346 F.2d 22 (2d Cir. 2003), the

district court should account for overlapping enhancements related to role, loss, number of victims, and sophisticated means.

The Government's sentencing memorandum first asked that the court not consider information that came only from Williams, but reminded the court that much of her testimony was corroborative, and the court could still consider the same information from other sources. GSA31-GSA32. The Government later proposed alternative loss calculations, the more conservative of which was adopted by the PSR, that relied upon the testimony and proffered statements of individuals *other than* Williams, as well as other evidence. GSA53-GSA63. The Government again noted that the court should not use Williams' own statements and testimony to estimate loss as those statements were made pursuant to a proffer and/or cooperation agreement. GSA55.

The Government suggested that the start date of Williams' participation in the conspiracy should be set at September 6, 2007, the date of Williams' arrest with Johnson in Butts County, Georgia, in a car containing numerous stolen checks and identities. GSA55. The Government suggested an end date to the conspiracy as May 7, 2010, when Williams was arrested in possession of stolen identity documents. GSA56. The Government also pointed out that the evidence

demonstrated few significant interruptions to the scheme. GSA59.

Williams' sentencing hearing was held on June 13, 2012. Williams' Sealed Appendix ("WSA") 1-WSA88. After resolving one minor issue, the court adopted the facts in the PSR as its findings of fact. WSA5. Defense counsel acknowledged that, aside from the contested sentencing enhancements, Williams had no objection to the guidelines calculation. WSA14.

The court then turned to the Government to make its sentencing arguments. WSA14. As relevant here, the Government first addressed the court regarding the calculation of loss, arguing that Williams could not both rely on her own testimony to argue that her September 6, 2007 arrest was no evidence of her participation in the conspiracy, while at the same time accurately noting that such testimony should otherwise be disregarded by the district court based upon her cooperation agreement. WSA17. The Government also noted that on August 20, 2007, Williams was arrested with another co-conspirator and was in possession stolen identities and a napkin with social security numbers. WSA17-WSA18. The Government argued that this was evidence of Williams' participation in the conspiracy even before the September arrest. WSA18.

Next, the Government countered Williams' argument that an accurate calculation of loss

could be extrapolated from the number of victims identified in the PSR. WSA20. The Government pointed out that this method of figuring loss was flawed, in that an individual could only be deemed a “victim” to the extent that they had suffered some documented economic loss, and that the PSR did not include all the victims who, for logistical reasons, simply could not be located. WSA21.

Third, the Government argued that the loss estimates in the PSR were conservative, and adequately took into account any brief periods of dormancy. WSA22. The Government again emphasized that the district court must put aside Williams’ testimony. WSA25-WSA26.

Counsel for Williams next addressed the court. WSA43-WSA59. In principal part, counsel discussed the distinctions between Williams and her co-defendants, Jones and Johnson. WSA45-WSA48. Counsel limited his discussion of the issue of loss to expressing “some level of concern” that Williams’ statements were being used against her. WSA59. The defendant herself declined to address the district court. WSA59-WSA61.

Next, the district court discussed its guidelines calculation and the other sentencing factors. Before doing so, the district court stated that it was disregarding Williams’ statement made pursuant to her cooperation agreement, but that it believed Williams’ testimony was

“largely corroborative” of the other trial evidence. WSA59-WSA60.

After discussing the seriousness and complexity of Williams’ offense, the district court addressed the issue of loss. The court agreed that it could not “discern exactly” the intended or actual loss, and so it would extrapolate from the evidence. WSA63. Specifically, the court found that “the Government’s more conservative estimate of the loss, based upon the testimony of the cashers, the number and the amounts of the checks that were presented and re-presented, more than amply support the conclusion.” WSA64. The court also cited the many expenses associated with the scheme, and the fact that the defendants had no other source of income. WSA64.

After addressing other factors, the district court then addressed the Government’s substantial assistance motion, acknowledging that Williams’ testimony, while perhaps not necessary for a conviction, “certainly was an aid to the jury and it was an aid to the Government.” WSA71. The district court then completed its own guidelines calculation, resulting in an aggregate range of 145 to 175 months’ imprisonment, as in the PSR. WSA75-WSA76.

The court also made other findings regarding loss, including that the loss figures were “more than foreseeable by Ms. Williams,” WSA73, and that the intended loss figures were actually

much higher than those reached by the court, after conducting its own calculation, WSA77.

The district court then imposed an aggregate sentence of 109 months' imprisonment, followed by five years of supervised release. WSA77-WSA78. The district court ruled that this was a "non-guideline sentence, taking into consideration the Government's motion and the defendant's participation." WSA80. The district court also agreed that it viewed the sentence as appropriate notwithstanding its calculation of the guidelines. WSA81.

2. Michael Johnson

The PSR for Johnson used the same loss calculation as in Williams' PSR, thus finding a loss range of between \$2,500,000 and \$7,000,000, resulting in a Guidelines enhancement of 18 under § 2B1.1(b)(1)(J). MJPSR ¶¶40-48, 54. Adding in three other enhancements—four levels for leadership role, two levels for sophisticated means, and four levels for more than 50 victims—the PSR recommended an offense level of 35 and a Criminal History Category VI. MJPSR ¶¶55-57, 60, 75. This resulted in a range of 292 to 365 months' imprisonment for Johnson's bank fraud and conspiracy convictions. Depending on whether Johnson's aggravated identity theft sentences were run concurrent with or consecutive to each other, the aggregate sentencing range was at least 316 to 389 months' impris-

onment, and as much as 440 to 513 months' imprisonment. MJPSR ¶96.

The Government filed a sentencing memorandum that advocated the same advisory guidelines range as in Johnson's PSR. MJA61-MJA73. The Government suggested loss calculations similar to those for Williams, based upon extrapolations from trial testimony and other evidence, although in this case that evidence could include Williams' testimony. MJA61-MJA65. The Government also advocated enhancements for more than 50 victims, sophisticated means, and role in the offense. MJA69-MJA73.

Johnson filed a sentencing memorandum in which he contested the loss estimates in the PSR, saying they were unreasonable. GA1945-GA1946. However, Johnson did not offer his own method of calculation, and argued that loss should be limited to whatever had been documented by records. Johnson further contested the sophisticated means enhancement, claiming that this was "little more than a 'smash and grab' scheme." GA1946. Johnson also argued that two points was more appropriate for his leadership role, claiming that Williams was more of a leader than Johnson, and that, while the entire conspiracy involved more than five participants, there were usually no more than three or four participants at any one time. GA1946-GA1947. Finally, Johnson "[did] not

contest that the offense involved fifty (50) or more victims.” GA1947.

Johnson’s sentencing hearing was held on May 30, 2012. MJA83-MJA153. The district court adopted the factual findings of the PSR. MJA101. Next, the district court solicited objections to the guidelines calculation, and Johnson’s counsel stated that all of his objections were in his sentencing memorandum. MJA102.

The district court then specifically addressed the issue of loss. As in Williams’ case, the district court found that the more conservative of the two Government calculations was reasonable and supported by a preponderance of the evidence. MJA102. The district court then also worked backwards from the \$2.5 million guidelines threshold, observing that this amount would, based upon the evidence at trial, only require a finding that they defrauded six banks per week. MJA102-MJA103. The district court cited as further evidence of loss the numerous overhead expenses incurred by the scheme, including travel and lodging. MJA103. In light of the evidence, the court opined that the \$2.5 million threshold was “extremely conservative and fair to [Johnson].” MJA103. The district court concluded its discussion of loss by adopting “the facts as stated in the Presentence Investigation Report, including the intended loss amount.” MJA104.

Johnson's counsel primarily claimed that Williams bore greater responsibility for the scheme than Williams. MJA108-MJA118. Counsel did not specifically address a claim of multiple overlapping enhancements. MJA108-MJA118. The defendant then spoke, and claimed that his involvement was limited to renting cars for Williams. MJA118-MJA124.

The Government then addressed the district court. MJA125-MJA136. After refuting the defendant's claims of actual innocence in light of the evidence at trial, MJA125-MJA135, the Government invited the district court to make certain additional factual findings regarding loss and Johnson's leadership role. MJA135-MJA136.

The district court then stated its consideration of the various factors in anticipation of pronouncing sentence. MJA136-MJA143. With regard to sophisticated means, the district court found that "this is obviously a very sophisticated crime in which you engaged, and you used sophisticated means in order to accomplish it, and to evade detection, and to steal well in excess of \$2.5 million." MJA141-MJA142.

The district court proceeded to calculate the sentencing guidelines in the same way as that suggested by the PSR. MJA143-MJA144. Counsel for the defendant clarified that he maintained his objection to the enhancement for sophisticated means. MJA144. The district court then imposed a sentence of a total of 264 months'

imprisonment—well below the 316 to 389 month range calculated by the district court. MJA147.

After imposing a non-guidelines sentence, the court clarified that the sentence imposed was reasonable independent of the guidelines, although the district court did take the guidelines into account. MJA151.

3. Jermaine Jones

Jones' PSR suggested the identical loss calculation, guidelines analysis, criminal history category, and advisory sentencing range as in Johnson's PSR. JJPSR ¶¶39-47, 50-61, 74, 97. As with Johnson, depending on whether Jones' aggravated identity theft sentences were run concurrent with or consecutive to each other, the aggregate sentencing range was at least 316 to 389 months' imprisonment, and as much as 440 to 513 months' imprisonment. JJPSR ¶97.

On April 3, 2012, Jones submitted a letter to the Probation Office with certain objections to the PSR ("JJPSR Letter"). Principally, Jones denied participation in a "wide ranging conspiracy that caused the astronomical losses that the Government claims." JJPSR Letter 1. Jones contested the loss figures in the PSR beyond those based upon bank records introduced at trial. JJPSR Letter 2. Jones claimed that "it is particularly relevant to point out that Mr. Jones was arrested on February 13, 2009, signaling his end to participation in any alleged conspiracy."

JJPSR Letter 2. In addition to the enhancement for loss, Jones also contested enhancements for 50 or more victims, sophisticated means, and leadership. JJPSR Letter 3.

In its sentencing memorandum, the Government suggested loss calculations identical to those suggested for Johnson. JJA67-JJA75. The Government also pointed out that the scope of the criminal activity agreed to by Jones encompassed the entirety of the conspiracy, and that the conduct of his co-conspirators was foreseeable to Jones, thus making Johnson responsible for the whole of the loss caused by the conspiracy. JJA71-JJA73. Additionally, the Government noted that the defendant's incarceration, standing alone, did not constitute withdrawal from the conspiracy, and the evidence did not support a claim of withdrawal. JJA73.

The Government also advocated enhancements for more than 50 victims, based both on the bank victims as well as the individual victims of car burglaries; sophisticated means, based in large part on the complex way in which Jones and his co-conspirators exploited weaknesses in various systems; and four points for leadership, based in part upon Jones' recruitment of other participants and planning of which banks and parking lots to exploit. JJA75-JJA79.

In the defendant's sentencing memorandum, he suggested his own guidelines calculation. He proposed twelve points for loss, based upon only

those figured referenced in the bank records; two points for more than ten victims, because Jones claimed that the conspiracy in which he was involved was narrower than that proved at trial; and two points for leadership. JJA92-JJA93. Jones also argued for no sophisticated means enhancement. JJA93.

Jones' sentencing hearing was held on May 16, 2012. With no objection, the district court adopted the PSR's factual statements as its findings of fact. JJA109-JJA111.

The Government addressed the district court first, primarily with regard to certain 18 U.S.C. § 3553 factors, while relying on its prior submissions regarding the guidelines. JJA112-JJA119. Jones' counsel principally reiterated his earlier arguments that the loss attributed to Jones should be limited to that which was supported by records at trial, and that which occurred before Jones was incarcerated. JJA119-JJA122. In response to the latter argument, the district court pointed out that—among other things—“Mr. Jones did not renounce his participation in the conspiracy,” and he did not stop his co-conspirators from using the identity documents he had stolen. JJA122-JJA123. Counsel claimed that Jones was simply a “car thief,” who acted at the direction of Williams. JJA123. After referencing other sentencing factors, counsel also adopted his earlier arguments regarding the guidelines. JJA128. Following counsel's re-

marks, Jones himself also addressed the district court. JJA129-JJA131.

The district court then explained its consideration of the sentencing factors and its guidelines calculation. The district adopted the Government's lower estimate of loss, based upon the known information. JJA133, JJA141.

The district court calculated the guidelines nearly the same way as in the PSR, except it imposed a three-level enhancement for role. JJA141. The district court found the resulting sentencing range to be 286 to 351 months' imprisonment, if all aggravated identity theft convictions were run concurrent to each other, and 430 to 495 months, if all aggravated identity theft convictions were run consecutive to each other. JJA142.

Finally, near the end of the sentencing hearing, the district court also noted that it considered the guidelines range that would apply if it reduced the loss amount even more, to the range of \$1 million to \$2.5 million. The district court pointed out that even if it halved the loss amount, Jones would still be receiving a guidelines sentence. JJA143. The district court then imposed a non-guidelines sentence of 240 months' imprisonment. JJA144, JJA154. The court indicated that it viewed the sentence as fair and appropriate, regardless of the ultimate calculation of the guidelines. JJA148.

B. Standard of review

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court declared the United States Sentencing Guidelines “effectively advisory.” *Id.* at 245. After *Booker*, a sentencing judge is required to “(1) calculate[] the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) consider[] the calculated Guidelines range, along with the other § 3553(a) factors; and (3) impose[] a reasonable sentence.” *United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006).

On appeal, a district court’s sentencing decision is reviewed for reasonableness, a review akin to abuse of discretion. *See Booker*, 543 U.S. at 260-62; *Gall v. United States*, 552 U.S. 38, 46 (2007); *see also United States v. Watkins*, 667 F.3d 254, 260 (2d Cir. 2012). “It is by now familiar doctrine that this form of appellate scrutiny encompasses two components: procedural review and substantive review.” *Watkins*, 667 F.3d at 260 (quotation marks and citation omitted).

“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.” *United States v. Cavera*, 550 F.3d 180, 190 (2d Cir. 2008) (en banc) (citations omitted). A district court “errs if it fails adequately to explain its chosen sentence, and must include ‘an explana-

tion for any deviation from the Guidelines range.” *Id.* (quoting *Gall*, 552 U.S. at 51).

This Court reviews a district court’s interpretation of the sentencing guidelines *de novo*, and reviews the district court’s findings of fact for clear error. *See United States v. Cossey*, 632 F.3d 82, 86 (2d Cir. 2011) (per curiam). When a district court’s application of the guidelines to the facts is reviewed, this Court takes an “either/or approach,” under which the Court reviews “determinations that primarily involve issues of law” *de novo* and reviews “determinations that primarily involve issues of fact” for clear error. *United States v. Vasquez*, 389 F.3d 65, 74 (2d Cir. 2004). This Court “will overturn [t]he sentencing court’s findings as to the defendant’s role in the offense . . . only if they are clearly erroneous.” *United States v. Batista*, 684 F.3d 333, 345 (2d Cir. 2012) (internal quotations omitted), *cert. denied*, 133 S. Ct. 1458 (2013).

Where, however, the applicability and/or sufficiency of factual findings in support of a guidelines enhancement are raised for the first time on appeal, this Court reviews only for plain error. *See United States v. Villafuerte*, 502 F.3d 204, 207-08 (2d Cir. 2007); *United States v. Wagner-Dano*, 679 F.3d 83, 89, 90-95 (2d Cir. 2012).

Under plain error review, “an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates

that (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 affect[s] the fairness, integrity or public reputation of judicial proceedings.’” *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)).

Finally, even where an error is preserved, it may not require remand. In some cases, a “significant procedural error,” may require a remand to allow the district court to correct its mistake or explain its decision, *see Cavera*, 550 F.3d at 190, but when this Court “identif[ies] procedural error in a sentence, [and] the record indicates clearly that the district court would have imposed the same sentence in any event, the error may be deemed harmless, avoiding the need to vacate the sentence and to remand the case for resentencing.” *United States v. Jass*, 569 F.3d 47, 68 (2d Cir. 2009) (internal quotation omitted).

C. Specific enhancements

1. Loss

a. Governing law

Under U.S.S.G. § 2B1.1(b)(1), a defendant receives an upward adjustment in offense level based upon the amount of “loss.” The application notes explain that, subject to certain exclusions, “loss is the greater of actual loss or intended loss.” U.S.S.G. § 2B1.1 cmt. n. 3(A). “Actual loss” is defined as “the reasonably foreseeable pecuniary harm that resulted from the offense,” while “intended loss” includes “the pecuniary harm that was intended to result from the offense.” U.S.S.G. § 2B1.1 cmt. n. 3(A)(i)-(ii). “Reasonably foreseeable pecuniary harm” is further defined to be the “pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.” U.S.S.G. §2B1.1 cmt. n. 3(A)(iv).

A district court “need not establish the loss with precision but rather need only make a reasonable estimate of the loss, given the available information.” *United States v. Uddin*, 551 F.3d 176, 180 (2d Cir. 2009) (internal quotation marks omitted). To that end, the application notes provide, in relevant part, the following guidance:

The [district] court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess

the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference. *See* 18 U.S.C. § 3742(e) and (f). The estimate of the loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances, factors such as the following: ... (iv) the approximate number of victims multiplied by the average loss to such victim, ... [and] (vi) more general factors, such as the scope and duration of the offense and revenues generated by similar operations.

U.S.S.G. § 2B1.1 cmt. n. 3(C). Determining loss is not a merely arithmetical task of adding together the loss from individual transactions; the court can and should look to the overall pattern of criminal conduct established by the evidence. *See United States v. Wilson*, 11 F.3d 346, 356 (2d Cir. 1993) (“Even if the specific transactions identified in the record do not total five kilograms, they are merely examples of a course of conduct that continued unabated for an entire year”). In making those estimates, it is wholly appropriate for the district court to rely on co-conspirators’ testimony, especially where the defendants “did not produce any evidence contradicting the co-conspirators’ estimates.” *United States v. Germosen*, 139 F.3d 120, 129 (2d Cir. 1998).

This Court has held that “it is permissible for the sentencing court, in calculating a defendant’s offense level, to estimate the loss resulting from his offenses 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) (in tax return fraud case, calculating loss regarding unaudited returns based upon average loss in returns that were audited); *see also United States v. Boesen*, 541 F.3d 838, 850-51 (8th Cir. 2008) (upholding loss figure based on “combining the loss attributable to the charged crimes with extrapolation evidence of other health insurance fraud committed by [the defendant]”). In *Uddin*, 551 F.3d at 180, this Court affirmed the district court’s extrapolation of loss in a food stamp fraud case based upon evidence regarding typical food stamp purchases, the relative decline of the stock at the defendant’s store, and the period of the criminal scheme. Conversely, in *United States v. Coppola*, 671 F.3d 220, 249-50 (2d Cir. 2012), this Court upheld a loss determination of over \$2.5 million by dividing that amount by the length of the criminal enterprise (more than 30 years), and then reasoning that the resulting \$84,000 per year in loss was a conservative estimate of the evidence in the trial record, even if the exact amount of loss was not proven precisely. Ultimately, although “[d]etermining this amount is no easy task[,] . . . some estimate

must be made for Guidelines' [calculation] purposes, or perpetrators of fraud would get a windfall." *United States v. Ebbers*, 458 F.3d 110, 127 (2d Cir. 2006).

The estimation of loss, like other guidelines determinations, need only be made by a preponderance of the evidence. *See Coppola*, 671 F.3d at 250; *United States v. Garcia*, 413 F.3d 201, 220 n.15 (2d Cir. 2005). This Court reviews the district court's factual determination of loss for clear error. *See United States v. Fitzgerald*, 232 F.3d 315, 318 (2d Cir. 2000) (per curiam).

b. Discussion

The district court did not clearly err in assessing each defendant with an 18-level enhancement for loss exceeding \$2.5 million, pursuant to U.S.S.G. § 2B1.1(1)(H).

The loss calculation in this case began with the premise that not all loss, actual or intended, could be accounted for by the records presented at trial. *See* WPSR ¶45, MJPSR ¶40, JJPSR ¶39. Rather, as the Government pointed out to the district court, "unless one of the cashers had been caught at the time of the fraud, as they were on several occasions, there would be no logical way for the bank personnel to find the fraud that was connected back to this scheme." GSA55, MJA62-MJA63, JJA68-JJA69. Indeed, Government Exhibit 302 and PSR Exhibit 1, both summary charts of records related to this fraud,

show that the principal ways in which evidence was located was (1) through recoveries of evidence by law enforcement, thereby allowing investigators to look for fraud related to the owners of those stolen documents; and (2) the identification of known cashers in their surveillance videos. GA2018-GA2043, GSA78-GSA110. Absent those connections, investigators would have no way to tie the vast sea of check fraud to this particular scheme. It was not surprising, then, when Deeneen testified, after having looked at her surveillance photos from a number of different check cashings, that: “that was just a small time frame; that doesn’t even shed a light on how many banks.” GA688.

Thus to limit, as Johnson and Jones suggest, the countable loss to only the bank records introduced at trial would be to understate vastly the scope of the fraud, and give the defendants a “windfall.” *Ebbers*, 458 F.3d at 127. In making its estimate, the district court followed the PSR and principally adopted the more conservative of two suggestions offered by the Government in its sentencing memoranda. GSA58, WSA63-WSA64, MJA64, MJA102, JJA70; JJA133, JJA141.

That lower estimate of loss relied on certain pieces of “known data,” together with estimates based upon the testimony of witnesses and other evidence. *See Bryant*, 128 F.3d at 76. The essential pieces of information involved in the PSR calculation were: beginning and end dates of the

conspiracy, average check amounts, numbers of banks per day, and number of days worked per week. WPSR ¶51, MJPSR ¶46, JJPSR ¶45.

First, the PSR's chose as the conspiracy start date September 6, 2007, the date of the Butts County, Georgia arrest of Johnson and Williams in a car with a woman named "Frenchie" and numerous stolen checks and identities. While Williams testified that she became aware of the conspiracy prior to her arrest, while doing Johnson's laundry, GA1361, this was a conservative date that could be comfortably chosen that excluded Williams' testimony, pursuant to U.S.S.G. § 1B1.8. Moreover, absent Williams' testimony to the contrary, the obvious implication of this arrest was that Williams was already a full partner in the scheme; she should not be able to both argue that her testimony should be ignored, but at the same time attempt to glean a benefit when it is convenient. WSA17.

Williams incorrectly argues that the Government's proposed loss calculation included a three-month period during which Williams was incarcerated. Williams Br. 18. In fact, Williams testified to being in jail for only 32 days; it was Johnson who, according to Williams, was in jail for three months. GA1375. Moreover, just because Williams was in jail for that period does not mean that Jones was not executing the fraud at the same time—indeed, Jones was arrested with stolen identities on September 29, 2007, in

Palm Beach Gardens. WPSR ¶20. Finally, Williams ignores the fact that she also was arrested on August 20, 2007. The Government explained that Williams had been arrested in Florida with Lemoine May, whom Markovic had identified as a co-conspirator, with a bag of stolen identities and, in Williams' purse, a napkin with the Social Security Numbers of two victims. WSA17-WSA18. Thus, independent of Williams' testimony, it is clear that the conspiracy was well under way during September 2007, and the estimate of September 6, 2007 likely underreports the scope of the offense.

The estimate adopted by the district court chose the date of May 7, 2010, as the end date of the conspiracy, when Williams was arrested in possession of stolen identities and a stolen check. WPSR ¶44, MJPSR ¶39, JJPSR ¶38. Johnson had been arrested only four days prior, on May 3, 2010. This estimate was also conservative, particularly as to Williams. During her pretrial release, Williams' conduct was at a minimum suspicious. WPSR ¶7. Specifically, in December 2010, Williams was seen exiting a car that was subsequently discovered to contain wigs, stolen check books, and stolen driver licenses. WPSR ¶7. In June 2011, Williams was arrested in a car that had been rented using a stolen identity. GSA71, WPSR ¶7. Williams claimed at trial that she was not engaging in criminal conduct during these events. GA1525-

GA1530. However, given the nature of the crime charged in this case and its similarity to these pre-trial release violations, her explanation strains credulity. Nonetheless, the Government did not propose extending the loss calculation into this period of supervised release.

The next piece of information upon which the district court's estimate relied was the number of banks that the conspirators would defraud in a given day. The PSR's indicated that five banks per day was the lowest estimate provided in statements made during the investigation. WPSR ¶52, MJPSR ¶47, JJPSR ¶46. Deeneen, the cashier who was with the defendants for several months, longer than any other cooperating cashier, testified that, if things were "running smoothly," she would get to "seven to ten" banks in a day, and even more "in a very congested area" such as New Jersey or Texas. GA676. However, the Government did not suggest estimates of seven to ten banks; rather, the number five was chosen as a conservative estimate. As the Government later explained during Williams' sentencing, "There [were] statements saying, I believe from Deneen Johnson, saying that in Texas they might go to upwards of 20 banks in a day if they could, from, you know, 8 a.m. in the morning to 6 p.m. at night, but we've taken a conservative estimate to fold in some of that uncertainty, some of that down time." WSA23.

Likewise, in selecting the applicable “work week” for the conspirators, the PSR’s again conservatively suggested three days. This was true despite the fact that there was evidence that the defendants traveled to places where banks were open six or seven days per week. WPSR ¶52, MJPSR ¶47, JJPSR ¶46. Williams testified that she first left Florida because “we realized that Georgia drive-throughs were open on Saturdays,” and that they would be working six days a week. GA1414. Later, in discussing why the defendants went to Texas, Williams explained that there were more banks in Texas and that they were open later. GA1446-47. Deeneen confirmed that they had traveled to Texas because Williams said “there was money there.” GA579. Even without the statements from Williams, it is exceedingly safe to assume a three-day work week for people whose entire livelihood was based upon this fraud. *See* GA1830. Moreover, the district court hardly needed Williams to explain that there are more banks in Texas.

Finally, in selecting the amount of money per incident of fraud, the PSR’s suggested \$2,000 per bank. Again, this was conservative. The PSR’s observed that “the evidence seems to indicate that in most cases the fraud involved a \$1,000 check and a \$2,000 check, though it was sometimes more and sometimes less.” WPSR ¶52, MJPSR ¶47, JJPSR ¶46. This was consistent with witnesses at trial. For example, Deeneen

testified that the checks were “anywhere from two to four thousand; two thousand a piece. It was usually two checks at a time.” GA560. Similarly, cashier Markovic testified that she would typically use two checks a time and that each check was “between one and two thousand.” GA929. This testimony is further buttressed by a review of the available bank records. The summary charts in Government Exhibit 302 and PSR Exhibit 1 both show the overwhelming majority of checks to be in the range of \$1,000 to \$2,000, and that there were typically two checks per incident of fraud. GA2018-2043, GSA78-110. Nonetheless, despite evidence that would support an estimate of \$3,000 per fraud, the PSR again suggested, and the district court adopted, a more conservative estimate of \$2,000.

It was thus reasonable for the district court to extrapolate from these “known facts,” and conservative estimates based on known facts, a calculation of intended loss. That loss calculation simply multiplied the number of “work days,” assuming a 3-day work week, by \$10,000 (5 banks per day, \$2,000 per bank), to reach an estimate of \$4,170,000. WPSR ¶51, MJPSR ¶46, JJPSR ¶45. Since the result is greater than \$2.5 million, the district court correctly applied an enhancement of 18 to the defendants’ respective offense levels. U.S.S.G. § 2B1.1(b)(1)(J).

The district court did not stop there, however. As did the district court in *Coppola*, 671 F.3d at

249-50, the district court here also worked backwards from the \$2.5 million guidelines threshold. At Johnson’s sentencing hearing, the court divided \$2.5 million by the 30 months of the conspiracy, and then again by 4.3 weeks per month, to get to \$19,300 per week. The court then divided that by \$3,000 per bank, to reach an estimate of approximately 6 banks per week. In light of the fact that “we know from the testimony of Deneen Johnson and other of the cashers, that...the conspirators presented multiple checks at several banks each day that they worked, and that each check was made out in the thousands,” the court had no trouble concluding that it was “eminently reasonable” to conclude that the loss was “well in excess of \$2.5 million.” MJA102-MJA104. The district court conducted similarly sound analyses in the “statement of reasons” for each of the defendants. GSA123-GSA146. Similarly, the district court also pointed out that the loss amounts were buttressed by the significant overhead costs incurred by the defendants in travel and lodging. *Id.*

The defendants’ principal claims here—essentially, that the loss estimate by the district court was unsupported by the evidence—are unavailing.

Contrary to Jones and Johnson’s arguments, the evidence at trial showed that the defendants’ scheme rarely lost time to periods of incarceration.

tion, the identification of cashers, the selection of cars to burglarize, travel time, and substance abuse. Johnson Br. 10, Jones Br. 19. First, the evidence showed that periods of incarceration of a single defendant did not impede the others from continuing the fraud—for example, Williams and Jones led the fraud when Johnson was in jail in September 2007; Johnson recruited Dunn while Williams was in jail in June 2008; and Williams and Johnson continued the fraud long after Jones went to jail in February 2009. Second, the conspirators rarely lacked for drug addicts to recruit as cashers. For example, when Deeneen was arrested in May 2008, Johnson picked up Kerri Kegley. When Kegley was arrested shortly thereafter, Johnson re-recruited Dunn in Florida. In December 2008, when Deeneen and Johnson had a falling out, Jones brought in Fox, only to have Deeneen return after Fox was arrested. Nor was the selection of a site to burglarize a time consuming endeavor—this country is replete with parking lots in wealthy areas. As Deeneen testified, “if they seen (sic) the opportunity, they took it.” GA556. In sum, none of these factors raised by the defendants are compelling, and to the extent they are concerns, are accounted for by the conservative estimates by the district court.

Next, contrary to the arguments of all three defendants, it was perfectly reasonable to expect that the Government would fail to secure docu-

mentation of the vast majority of the loss. Williams Br. 17, Johnson Br. 8, Jones Br. 18. Indeed, given the nature of the fraud scheme, it is remarkable that investigators were able to tie together as much loss as they did based upon video surveillance of cashers and the periodic recovery of victims' identity documents by law enforcement.

Moreover, the evidence supported the existence of many cashers for whom the Government simply had no records. For example, in September 2009, flight records show that Williams, Johnson, Cassandra Davis, and Jesika Barnes, flew from Fort Lauderdale to Texas. Barnes was a theft victim in Arizona from July 2008, and the person flying with Williams was not, in fact, Barnes. Williams and "Barnes" also flew from Fort Lauderdale to Atlanta in October 2009. On March 9, 2010, Williams and Johnson flew to San Antonio, and rented two hotel rooms. Later, on March 25, 2010, bank records were located to show fraud at several banks taking place in Texas, using checks in the name of a debit card later recovered from Williams at her federal arrest. GSA28-29. However, it is unclear who the cashers in those instances were, and what other fraud they perpetrated. Williams also testified about numerous other cashers, including "Ronnie," Natalie Gianella, Cassandra Davis, "Chat," "Shannon," and at least one other. GA1407, GA1552, GA1464, GA1411.

In sum, as the district court observed in Johnson’s sentencing, “the only reason why we don’t have an exact amount is because the Defendant did not maintain records.” MJA104. This is precisely why it was so vital for the district court to come to an estimate of loss that was not limited to documented loss.

Next, Williams’ inaptly attempts to recalculate loss based upon the victim list provided to the Probation Office. Williams Br. 17-18. This is patently misleading. The list of 158 victims were the *identified* individuals who were victims of the fraud, based upon the records gathered either through the banks or law enforcement. WPSR ¶50, GSA111-122. As such, Williams’ claim that these were the entire universe of victims is nothing more than another way of arguing that the documented loss was the entire universe of loss. Put differently, Williams incorrectly assumes that the defendants only caused loss to the identified victims. Therefore, Williams’ alternative calculations are unhelpful.

Williams’ argument that the district court “sanctioned a breach of the cooperating (sic) agreement between Williams and the Government” is equally specious. Williams Br. 22. In truth, the Government reminded the court repeatedly to ignore Williams’ statements in determining her sentence, and instead suggested how to marshal the evidence absent Williams’ testimony. GSA31-GSA32; GSA55; WSA25-26.

The district court, in turn, made clear that it “is disregarding any statements that Ms. Williams said that might be harmful to her in this regard.” WSA59.

Williams curiously tries to buttress her claim that the Government breached the cooperation agreement by citing the Government’s reliance on Williams’ statements in its sentencing memoranda for Jones and Johnson. Williams Br. 22-23. This is ironic, since presumably the reason Williams cooperated in the first place was to gain credit for cooperating against Jones and Johnson. Thus it cannot have been a surprise to Williams that the Government cited her statements in filings against Jones and Johnson.

Finally, although certainly Williams was an important witness, she was not, as she claims now, a necessary element of the loss calculation in this case. Williams Br. 23-24. As the district court pointed out, her testimony was “largely corroborative” of other testimony, and “she connected [the] dots and made them more cohesive, but the dots were there, and the Court believes that without her testimony there likely would have been a guilty verdict nonetheless.” WSA66. For example, Williams claims she was solely responsible for the expansion of the conspiracy period in the superseding indictment; while Williams provided information regarding activities in August 2007, the beginning of the conspiracy

in the loss calculation was based upon her arrest in Butts County.

Ultimately, the district court listened to the testimony of the cashers and the other witnesses, reviewed mountains of documentary evidence, reviewed each defendant's PSR, and concluded that \$2.5 million was a "reasonable estimate of the loss, given the available information." *Uddin*, 551 F.3d at 180. This Court should not disturb such a carefully considered determination now. Moreover, the district court made clear in each sentencing that it would have imposed the same sentence no matter the ultimate guideline range. WSA41, MJA151, JJA, 148. The court even noted in Jones' sentencing that halving the estimated loss amount would still lead to a guidelines sentence. JJA143. Thus even if there was error, it was harmless. *Jass*, 569 F.3d at 68.

2. Number of victims

a. Governing law

Under U.S.S.G. § 2B1.1(b)(2)(B), a defendant receives an upward adjustment in offense level if "the offense involved fifty or more victims." U.S.S.G. § 2B1.1(b)(2)(B). "Victim" is defined, in relevant part, as "any person who sustained any part of the actual loss determined under subsection (b)(1)." U.S.S.G. § 2B1.1 cmt. n. 1. In the case of bank fraud cases, where the financial institution may reimburse individual victims, this

Court has held that the individual victims may still be “victims” of the offense if “they suffered (1) an adverse effect (2) as a result of the defendant’s conduct that (3) can be measured in monetary terms.” *United States v. Abiodun*, 536 F.3d 162, 168-69 (2d Cir. 2008). In *Abiodun*, this Court held that the “loss of time” in securing reimbursement from banks or credit card companies is measurable in monetary terms, and therefore qualifies an individual as a victim. *Id.* at 169.

b. Discussion

The district court appropriately counted as victims both the financial institutions and the individual car burglary victims. According to Johnson and Jones’ respective PSR’s, of 158 identifiable individual victims, the Government confirmed that there were at least 100 car burglaries and broken windows. MJPSR ¶45, JJPSR ¶44, GSA111-122. Each PSR assumed a low estimate of \$200 to repair each car window, and that amount was then added to loss. MJPSR ¶45, JJPSR ¶44.

In both Jones’ and Johnson’s sentencings, the district court specifically included in its calculations the losses to these individual victims. *See Abiodun*, 536 F.3d at 169. In Jones’ sentencing, the court commented that “These people were robbed not only of their money, not only of their identity, but of their personal security.” JJA132-

JJA133. Later, the district court confirmed that it included in its loss estimate the monetary value of the individual victims' lost time, replacement of car windows, replacement of pocket-books, and other inconveniences caused by the car burglaries. JJA146. At Johnson's sentencing, after the Government made a similar application, MJA135, the district court confirmed in its sentencing colloquy that: "there were more than 150 victims of this offense who lost money, who lost personal security, who lost time, and who lost financial security." MJA137.

Jones' arguments, that (1) he is innocent, and (2) the existence of 50 victims is speculative are unavailing. First, as was discussed at length in the first section, the evidence connecting Jones to this scheme is overwhelming. The latter argument misapprehends the evidence supporting the finding of 50 victims. Unlike the loss amounts, which are supported by extrapolations from known data, the victims identified in the PSR's are based upon actual checks and identity documents recovered by the Government, and actual information gathered by investigators related to those victims. MJPSR ¶45, JJPSR ¶44.

Finally, although Jones did contest this enhancement during the sentencing process, JJA22, Johnson raised this objection for the first time in his motion to amend his appellate brief. Thus, while Jones is entitled to review for clear error, Johnson's application should be reviewed

only for plain error. In any event, since there is no error here at all, there is no need to distinguish further the analysis to be employed.

3. Sophisticated means

a. Governing law

Under U.S.S.G. § 2B1.1(b)(9)(C), a defendant receives an upward adjustment of two levels where “the offense otherwise involved sophisticated means.” The commentary defines sophisticated means as “especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense.” U.S.S.G. § 2B1.1 cmt. n. 8.

A scheme as a whole may be sophisticated where, even if each individual step is not elaborate, “all the steps were linked together . . . [to] exploit different vulnerabilities in different systems in a coordinated way.” *United States v. Jackson*, 346 F.3d 22, 25 (2d Cir. 2003), vacated on other grounds, *Lauersen v. United States*, 543 U.S. 1097, 1109 (2005); *see also United States v. Jinwright*, 683 F.3d 471, 486 (4th Cir. 2012); *United States v. Halloran*, 415 F.3d 940, 945 (8th Cir. 2005); *United States v. Rettenberger*, 344 F.3d 702, 709 (7th Cir. 2003); *United States v. Wayland*, 549 F.3d 526, 529 (7th Cir. 2008) (“Even if [the defendant’s] individual actions could be characterized as unsophisticated, we would follow the approach of our sister circuits and affirm [his] sentence on the ground that his

overall scheme, which lasted nine years and involved a series of coordinated fraudulent transactions, was complex and sophisticated.”).

In *Jackson*, this Court rejected the argument that something more than “cleverness” is required in order to be “sophisticated,” and found that “Jackson’s use of hotels and courier services to take delivery of fraudulently obtained goods, his use of prepaid phone cards to prevent tracking of his activities, and his manipulations of victims’ credit lines and billing addresses combine to indicate that the enhancement was merited.” 346 F.3d at 25. This Court compared the facts in *Jackson* with the example, provided in the commentary, of a “telemarketing operation that locates its main office in one jurisdiction but conducts operations in another,” finding that the commentary example “[is] not an especially elaborate scheme.” *Id.*

b. Discussion

While arguably no one part of the scheme may have been particularly sophisticated, the scheme was executed in such a way as to exploit multiple systemic weaknesses. *See Jackson*, 346 F.3d at 25. First, Jones and Johnson, and their co-conspirators, exploited an apparent lack of care with which banks verified identities of those cashing checks at the furthest drive-thru lanes and employed disguises. GA1398-GA1399. One bank representative testified that the outside

drive-thru lane is particularly vulnerable because the teller can only see the customer on a surveillance feed, which is not high-definition and can be affected by changes in light, weather, and other conditions. GA42-GA43. Another testified that at some banks there is no live video feed to the teller, so the teller is limited to what he or she can see from the bank window. GA114-GA115. Deeneen confirmed that she “was told to use the lane furthest—the first lane that was open furthest from the teller so they can’t tell that it’s [her] not on the ID.” GA542.

Second, the conspirators knew of, and exploited, bank rules that permitted checks to be cashed before clearance, provided that the person presenting the check was a customer of the bank and had sufficient funds in the account to cover the check. MJPSR ¶¶9-10; JJPSR ¶¶8-9, GA43-GA49, GA109-GA111. Williams explained that, in many cases, a co-conspirator would call the bank in advance in order to make sure there was enough money in the victim’s account to cover the check, and that they would use a GPS in order to locate the closest bank branches. GA1397, GA1398-GA1399.

Third, the conspirators exploited the vulnerabilities of numerous drug-addicted women, whom they knew would be happy to risk arrest in exchange for fast access to money. MJPSR ¶¶11, 12a-e, JJPSR ¶¶10, 11a-e. Williams ex-

plained that “it’s easier to control someone that’s using a drug.” GA1394.

Fourth, in the same vein, the conspirators exploited an apparent weakness in the way local criminal justice systems deal with organized identity fraud; that is, even where the co-conspirators were caught, it was highly unlikely they would spend any significant time in jail. Indeed, one of the features of the scheme was that the casher became the party most likely to face prosecution. *See, e.g.*, MJPSR ¶12e (Dunn), MJPSR ¶12a (Souve), MJPSR ¶12d (Deeneen).

Fifth, the conspirators carefully chose parking lots and burglary victims to exploit those whom they believed would particularly apt to leave purses unattended. JJPSR ¶6, MJPSR ¶6. Deeneen testified that “they would target somebody...in...an area, a higher like economic valued area, nice cars in a gym and a dance hall...it was just really on opportunity.” GA556. Williams added that, in order to find these places, the conspirators used Google and a GPS. GA1393.

Sixth, the conspirators utilized a careful logistics plan that allowed them to terrorize communities for brief periods of time, thereby avoiding (in most cases) arrest or detection. As a rule of thumb, the conspirators waited 30 days before using stolen checks, to allow the flag to be removed from an account, but that rule was not always followed. GA1537. The stolen identities and checks would often be mailed from location

to location, rather than traveling with them. GA1540. Even more significantly, the extensive records of travel show the conspirators moving all over the country, in an effort to further the scheme and to evade detection. As Williams put it, “we heard that—through other groups that it was more money out of town. And the police in our area were on to it.” GA1420.

Finally, witnesses testified that where the conspirators did not have a victim’s social security number, they utilized a connection in order to secure it. Williams testified that Jones and Johnson had a connection in Fort Lauderdale to secure social security numbers. GA1562-GA1564. Similarly, Souve testified that she was told by Williams and Jones that they had a connection in the social security office in Miami. GA1192-GA1193.

In sum, this was not, as Johnson claims, “a garden variety check scheme executed by less than sophisticated people.” Johnson Br. 17. Rather, the scheme involved “careful execution and coordination over an extended period.” *Rettenberger*, 344 F.3d at 709. In discussing sophisticated means during Jones’ sentencing, the district court emphasized the conspirators’ “elaborate understanding of the bank cashing system,” and their obtaining of social security numbers. JJA132. At Johnson’s sentencing, the district court referenced the conspiracy’s use of stolen identities, the use of vulnerable women as

cashers, interstate travel, and the use of rental cars. MJA141.

Moreover, contrary to Jones' argument, it is wholly irrelevant whether or not Jones himself employed sophisticated means personally. Jones Br. 26. Although it is clear from the above evidence that Jones was a full participant in each aspect of the scheme, it is enough that the "offense otherwise involved sophisticated means." U.S.S.G. § 2B1.1(b)(1)(C). The Government need not prove that Jones himself employed such means.

4. Role enhancement

a. Governing law

The adjustment for a defendant's aggravating role in an offense is governed by U.S.S.G. § 3B1.1. Where a defendant is "an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive," the adjusted offense level increases by four levels. § 3B1.1(a). Where the defendant is "a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive," the adjusted offense level increases by three levels. § 3B1.1(b). Where the defendant is "an organizer, leader, manager or supervisor in any criminal activity [involving more than one participant]," the adjusted offense level increases by two levels. § 3B1.1(c). The Government must

prove by a preponderance of the evidence that a defendant qualifies for a role enhancement. *United States v. Molina*, 356 F.3d 269, 274 (2d Cir. 2004).

“A defendant may properly be considered a manager or supervisor if he exercise[d] some degree of control over others involved in the commission of the offense . . . or played a significant role in the decision to recruit or to supervise lower-level participants.” *United States v. Burgos*, 324 F.3d 88, 92 (2d Cir. 2003) (internal quotation omitted). Moreover, to be eligible for this enhancement, “[i]t is enough to manage or supervise a single other participant” *Id.* “The requirements of § 3B1.1(b) are met if the defendant was a manager or supervisor and the criminal activity itself involved at least five participants; the defendant need not be the manager of more than one other person.” *United States v. Payne*, 63 F.3d 1200, 1212 (2d Cir. 1995). This Court has approved a role enhancement based solely on the recruitment of another participant. *See United States v. Al Sadawi*, 432 F.3d 419, 427 (2d Cir. 2005).

“Before imposing a role adjustment, the sentencing court must make specific findings as to why a particular subsection of § 3B1.1 adjustment applies.” *United States v. Ware*, 577 F.3d 442, 452 (2d Cir. 2009). The district court may satisfy this obligation by adopting the factual

findings set forth in the presentence report. *Molina*, 356 F.3d at 276.

In evaluating a decision to impose a role enhancement under § 3B1.1, this Court gives “due deference” to the district court and reviews its factual findings for “clear error.” *United States v. Huerta*, 371 F.3d 88 (2d Cir. 2004).

b. Discussion

Here, the evidence is clear that Jones held, at a minimum, a managerial or supervisory role in a scheme of five or more participants. First, the district court correctly found that the scheme involved more than five participants. JJA147. Aside from the Jones, Johnson, and Williams, the district court heard testimony from five cashers, four of whom were familiar with Jones’ participation on the scheme.

The district court, in finding that Jones was a manager or supervisor, declined the PSR’s suggestion to designate him as a leader or organizer. JJA147. In support of Jones’ supervisory role, the district court specifically cited his recruitment of Fox and supervision of Deeneen. JJA136-JJA137. Indeed, the evidence was clear that Jones recruited Fox, explained the scheme to her, and supervised her during her brief involvement. JJPSR ¶¶11b, 35. Moreover, Williams testified that Jones had also recruited two other cashers that did not testify at trial, drug addicts “Chat” and “Shannon.” GA1411, GA1464.

Jones also exercised some management and supervision over Deeneen—for example, driving her during intrastate trips, GA587, and attempting to direct her during the course of cashing expeditions, GA662.

Jones’ claim that “at most the two-point enhancement should apply,” Jones Br. 26, is self-defeating. If that were the case, Jones would have to concede that he was at least a manager or supervisor, but contend that there were fewer than five participants. Clearly there are many more than five participants. In sum, in light of the fact that, at a minimum, Jones “manage[d] or supervise[d] a single other participant,” *see Burgos*, 324 F.3d at 92, the district court properly applied a three-point enhancement.

III. Substantive reasonableness

A. Governing law

With respect to appellate review of a sentence for substantive reasonableness, this Court has recognized that “[r]easonableness review does not entail the substitution of our judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of discretion. Thus, when we determine whether a sentence is reasonable, we ought to consider whether the sentencing judge ‘exceeded the bounds of allowable discretion[,] . . . committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact.’” *Fernandez*,

443 F.3d at 27 (citations omitted). A sentence is substantively unreasonable only in the “rare case” where the sentence would “damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law.” *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009).

Although this Court has declined to adopt a formal presumption that a within-Guideline sentence is reasonable, it has “recognize[d] that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances.” *Fernandez*, 443 F.3d at 27. This Court will set aside only those “outlier sentences that reflect actual abuse of a district court’s considerable sentencing discretion.” *United States v. Jones*, 531 F.3d 163, 174 (2d Cir. 2008).

B. Discussion

The district court imposed reasonable sentences—well below their respective guidelines ranges—on all three defendants. Jones’ sentence of 240 months was 56 months below the bottom of the lower³ Guideline range calculated by the

³ Under the Guidelines, the district court could have run consecutively Jones and Johnson’s multiple convictions for aggravated identity theft. U.S.S.G. § 2B1.6 cmt. n. 1(B).

district court, JJA142-JJA144; Johnson’s sentence of 264 months was 52 months below the bottom of his lower Guideline range, MJA145-147; and Williams’ sentence of 109 months was 36 months below the bottom of her Guideline range. These sentences are “comfortably within the broad range of sentences that would be reasonable,” given the more than two year span of this scheme, its nationwide reach, the myriad of lives it disrupted, the millions of dollars it stole or intended to steal, and the lives of crime that Jones and Johnson had lived to that point. *Fernandez*, 443 F.3d at 27. Surely the district court did not “exceed[] the bounds of allowable discretion” in sentencing these defendants to terms of imprisonment well below those recommended by the Guidelines. *Id.* Nor is this the “rare case” where the sentence “damage[s] the administration of justice because the sentence imposed was shockingly high . . . or otherwise unsupportable as a matter of law.” *Rigas*, 583 F.3d at 123. These below-guidelines sentences were clearly not “shockingly high” for such an expansive and insidious scheme.

In addition to general “parsimony” claims, each defendant incorrectly invokes *United States v. Lauersen*, 348 F.3d 329, 344 (2d Cir. 2003), and *United States v. Jackson*, 346 F.3d 22, 26 (2d Cir. 2003), for the proposition that each sentence was unreasonable because it did not take into account overlapping guidelines enhance-

ments. See Williams Br. 24-26, Johnson Br. 18-20; and Jones Br. 27-28. These arguments are unavailing.

In *Lauersen*, this Court held that a downward departure is available where “the cumulation of . . . substantially overlapping enhancements, when imposed upon a defendant whose adjusted offense level translates to a high sentencing range, presents a circumstance that is present ‘to a degree’ not adequately considered by the Commission.” 348 F.3d at 344 (quoting 18 U.S.C. § 3553(b)(1)). There, this Court found that a 13-level loss enhancement (for an intended loss amount of \$4.9 million) and a 4-level enhancement for defendant’s conduct having affected a financial institution and having derived more than \$1,000,000 gross receipts were both “significantly trigger[ed]” by “large amount of money involved in the fraud” and therefore were “substantially overlapping.” *Id.* at 343-44. Similarly, in *Jackson*, this Court found that a 10-level loss enhancement, sophisticated means, more than minimal planning, and a 4-level increase for defendant’s leadership role was “little more than different ways of characterizing closely related aspects of Jackson’s fraudulent scheme.” 346 F.3d at 26.

The same panel that decided *Lauersen* explained on rehearing that “not many combinations of enhancements will be substantially overlapping.” *United States v. Lauersen*, 362 F.3d

160, 167 (2d Cir. 2004), *vacated on other grounds*, 543 U.S. 1097 (2005). Moreover, any downward departure based on “substantially overlapping enhancements” is entirely discretionary. *See Lauersen*, 362 F.3d at 167; *United States v. Kilkenny*, 493 F.3d 122, 131 (2d Cir. 2007).

In this case, it is unclear in what context the defendants invoke *Jackson* and *Lauersen*, which concerned downward departures, not substantive reasonableness. *See Jackson*, 346 F.3d at 26; *Lauersen*, 348 F.3d at 344. Neither Jones nor Johnson moved the district court for such a departure, and do not raise the issue in those terms here. Williams did reference *Jackson* below, GSA20-GSA22, but did not specifically ask for a departure, arguing instead that “in keeping with the post-*Booker* (also post-*Jackson*) emphasis on the parsimony principle, the Court should account for this cumulative effect and adjust her sentence accordingly.” As a result, the district court was never asked to pass on whether a *Jackson* departure was appropriate in this case. Even if such a departure had been requested, so long as the district court fully apprehended its authority to depart, its decision not to “downwardly depart is generally not appealable.” *United States v. Stinson*, 465 F.3d 113, 114 (2d Cir. 2006) (per curiam) (quotation marks and citation omitted).

In any event, whether made in support of *Jackson* departures or non-Guidelines sentences, these arguments fail. The amount of loss, the role enhancement, the number of victims and the fact that the crime was carried out through sophisticated means were all triggered by the facts underlying the scheme that these defendants put in motion. For instance, the 18-level loss enhancement showed the magnitude of the crime in dollar terms, but did not reflect the specific and individualized role that each defendant played in the offense, namely, as the leaders and organizers (Williams and Johnson) or manager (Jones) of all facets of the scheme. The role enhancement was based on the defendants' position within the criminal organization and their managerial duties and responsibilities. As the First Circuit has stated:

To be sure, there is an overlap between “scope” and “role.” It stands to reason that the majordomo of a scheme, having set the stage, probably will be saddled with more “relevant conduct” than a bit player. That overlap, however, does not mean that adjusting for a leadership role necessarily portends double counting in a case where the amount of loss influences the offense level. The two enhancements do not march in lockstep and, moreover, serve different purposes in the sentencing calculus.

United States v. Lilly, 13 F.3d 15, 18-19 (1st Cir. 1994).

Similarly, the sheer amount of loss did not adequately reflect the number of victims whose lives were disrupted by the defendants' scheme. Whereas the loss amount primarily reflected the impact to victim banks, the "number of victims" enhancement gave effect to the impact on the burglary victims' lives. The district court was rightly moved by one victim's account of a car burglary that ruined a family vacation scheduled to start the following day. JJA132-JJA133. Moreover, as discussed at length above, the sophisticated means enhancement did not relate directly to the fact there were a large number of transactions—the primary factor driving up the loss amount. Rather, the enhancement reflected other aspects of the fraud, such as the procurement of social security numbers, the nationwide span of the scheme, and the exploitation of flaws in the banking system.

The defendants are correct that the effect of the enhancements in this case significantly increased their respective guidelines ranges. But they were properly subjected to multiple enhancements because of the way they chose to commit their fraud—by initiating, orchestrating and directing an extensive scheme (role in the offense); doing it repeatedly and continuously over two years and thereby obtaining millions of dollars in fraudulent loans (loss); doing so

through the theft of numerous people's identities and checks (more than fifty victims); and using stolen social security numbers, exploiting banking system flaws, and spreading the offense over multiple jurisdictions (sophisticated means).

IV. The district court did not abuse its discretion in refusing to recommend a treatment program for Williams.

A. Relevant facts

At Williams' sentencing, her counsel requested that the court recommend the "federal drug treatment program" to address Williams' alcohol abuse. WSA82-83. Williams' counsel was "not a hundred percent certain" that such treatment program addressed alcohol abuse but, upon the district court's inquiry, the probation officer confirmed that the program treats alcohol abuse on a "case-by-case basis." WSA83.

The district court's initial response was that "it was my impression that she was an abuser, and certainly after the length of this sentence...I tend to think that she wouldn't need a 500-hour program. She likely wouldn't qualify." WSA83. Williams counsel responded by conceding that the district court "can choose to not make the recommendations," and that there is a priority given to inmates addicted to more serious drugs, but nonetheless argued that the "Court's recommendation can make a difference" should space be available. WSA83-84. Counsel reiterat-

ed that Williams had discussed her alcohol abuse in her presentence interview and in prof- fers, but declined to classify her as an “alcohol- ic.” WSA84. Counsel stated that “I think really, the decision about whether she should partici- pate in a program is best left to the Bureau of Prisons, but ultimately, a recommendation from the Court could be helpful, so—and I think it is supported based on the record that we have here.” WSA84.

The district court ultimately agreed with part of counsel’s statement, that is, that “it should be left to the Bureau of Prisons relative to other in- dividuals. I don’t want to say more.” WSA84. In declining to make the recommendation, the court explained that it did not believe the recommen- dation was warranted because, given the limited slots available, Williams had not established a sufficiently severe condition, and there were other programs available through the BOP. WSA85.

B. Governing law and standard of re- view

While 18 U.S.C. § 3553(a)(2)(D) requires a district court to consider “medical care” or “cor- rectional treatment” in pronouncing a sentence, § 3582(a) likewise warns that “imprisonment is not an appropriate means of promoting correc- tion and rehabilitation.” As a result, in *Tapia v. United States*, 131 S. Ct. 2382, (2011), the Su-

preme Court held that 18 U.S.C. § 3582(a) “precludes sentencing courts from imposing or lengthening a prison term to promote an offender’s rehabilitation.” According to the Court, in the Sentencing Reform Act of 1984, codified in part by § 3582(a), Congress did away with rehabilitation as a justification for imprisonment, though leaving it as appropriate for non-jail sentences. *Id.*

Among the bases for concluding that a prison sentence could not be based upon rehabilitation or treatment, the *Tapia* Court explained that:

If Congress had [] meant to allow courts to base prison terms on offenders’ rehabilitative needs, it would have given courts the capacity to ensure that offenders participate in prison correctional programs. But in fact, courts do not have this authority. When a court sentences a federal offender, the BOP has plenary control, subject to statutory constraints, over “the place of the prisoner’s imprisonment,” § 3621(b), and the treatment programs (if any) in which he may participate, §§ 3621(e), (f); § 3624(f). *See also* 28 CFR pt. 544 (2010) (BOP regulations for administering inmate educational, recreational, and vocational programs); 28 CFR pt. 550, subpart F (drug abuse treatment programs).

131 S. Ct. 2390-91.

Nonetheless, the Court allowed that a district court may properly “discuss[] the opportunities for rehabilitation within prison or the benefits of specific treatment or training programs” and make recommendations to the Bureau of Prisons concerning rehabilitation. *Id.* at 2392; *see United States v. Gilliard*, 671 F.3d 255, 259 (2d Cir. 2012). However, while the BOP is required to consider “any statement . . . recommending a type of penal or correctional facility” made by a sentencing judge, such recommendations are “not controlling.” *United States v. Pineyro*, 112 F.3d 43, 45 (2d Cir. 1997). As the *Tapia* Court explained: a “sentencing court can recommend that the BOP place an offender in a particular facility or program. *See* § 3582(a). But decisionmaking authority rests with the BOP.” 131 S. Ct. 2391.

Notwithstanding the ability to make a treatment recommendation, there is no reported case in this Circuit that would make it a reviewable decision. In a related context, however, this Court has held there is no appellate jurisdiction to review recommendations regarding location of confinement. *See Pineyro*, 112 F.3d. at 45; *see also United States v. Yousef*, 327 F.3d 56, 165 (2d Cir. 2003). Instead, the defendant must pursue any challenge to his confinement “through the appropriate administrative and judicial channels.” *Pineyro*, 112 F.3d at 45-46.

C. Discussion

The district court's refusal to recommend the Residential Drug Abuse Treatment Program ("RDAP") is not appealable, and was not error, in any event.

First, Williams incorrectly grounds her challenge on the district court's obligations under 18 U.S.C. § 3552(a)(2)(D). Williams Br. 26. While the district court did not lengthen the sentence based upon the need for treatment, as in *Tapia*, the directive of 18 U.S.C. § 3582(a) nonetheless controls, that is, that the district court may not impose a term of imprisonment to further rehabilitation. Thus the decision to recommend, or not recommend, RDAP cannot be considered a part of the "sentence" for purpose of appellate review.

The only decision cited for an "abuse of discretion" standard of review by the defendant is an unreported pre-*Tapia* Fourth Circuit opinion, *United States v. Sutton*, 33 Fed. Appx. 651, 653 (4th Cir. 2002). However, the *Sutton* court's basis for applying the abuse-of-discretion standard, that the district court must consider treatment under 18 U.S.C. § 3552(a)(2)(D) in imposing a sentence of imprisonment, was effectively overruled by *Tapia*.

Finally, even if this were an appealable decision, the district court properly considered the defendant's request before rejecting it. Williams

unconvincingly claims that the district court's refusal was based upon a "lack of familiarity" with the RDAP program. Williams Br. 28. In truth, the only unfamiliarity exhibited was whether alcohol abuse was a qualifying condition, a question quickly answered by the probation officer. WSA83. Rather, the district court made its decision based upon an assessment of whether Williams' condition was sufficiently severe, whether she would need such a program prior to her release, the existence of other programs at the BOP, and whether there were other inmates who were in greater need of those resources. WSA85. In light of that, the district court properly concluded that Williams' participation "should be left to the Bureau of Prisons relative to other individuals." WSA84.

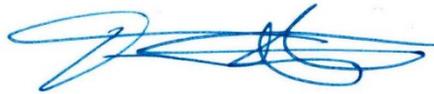
Conclusion

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

Dated: September 19, 2013

Respectfully submitted,

DEIRDRE M. DALY
ACTING U.S. ATTORNEY
DISTRICT OF CONNECTICUT

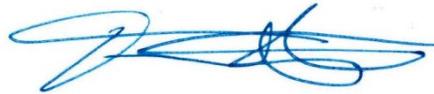


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**Federal Rule of Appellate Procedure
32(a)(7)(C) Certification**

This is to certify that on September 4, 2013, the government filed an unopposed motion seeking permission to file an oversized brief of no more than 21,000 words, pursuant to Local Rule 27.1. On September 11, 2013, the Court granted that motion in part, permitting the Government to file a brief of no more than 19,000 words. This brief contains fewer than the requested number of words, in that the brief is calculated by the word processing program to contain approximately 18,985 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.



DAVID E. NOVICK
ASSISTANT U.S. ATTORNEY

Addendum

18 U.S.C. § 1344

Whoever knowingly executes, or attempts to execute, a scheme or artifice—

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1349

Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

18 U.S.C. § 1028A(a)(1)

(a) Offenses.—

(1) In general.— Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

...

(c) Definition.— For purposes of this section, the term “felony violation enumerated in subsection (c)” means any offense that is a felony violation of—

...

(5)any provision contained in chapter 63 (relating to mail, bank, and wire fraud);

U.S.S.G. § 2B1.1: Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(a) Base Offense Level:

- (1) 7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or

...

(b) Specific Offense Characteristics

- (1) If the loss exceeded \$5,000, increase the offense level as follows:

<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
...	
(I) More than \$1,000,000	add 16
(J) More than \$2,500,000	add 18
(K) More than \$7,000,000	add 20

...

- (2) (Apply the greatest) If the offense—

- (A) (i) involved 10 or more victims; or (ii) was committed through mass-marketing, increase by 2 levels;
- (B) involved 50 or more victims, increase by 4 levels; or involved 250 or more victims, increase by 6 levels.

...

- (10) If ... (C) the offense otherwise involved sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

...

Commentary

Application Notes:

- 1. Definitions.—For purposes of this guideline:

...

"Victim" means (A) any person who sustained any part of the actual loss determined under subsection (b)(1); or (B) any individual who sustained bodily injury as a result of the offense. "Person" includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.

...

- 3. Loss Under Subsection (b)(1).—This application note applies to the determination of loss under subsection (b)(1).

(A) General Rule.—Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.

(i) Actual Loss.—“Actual loss” means the reasonably foreseeable pecuniary harm that resulted from the offense.

(ii) Intended Loss.—“Intended loss” (I) means the pecuniary harm that was intended to result from the offense; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

(iii) Pecuniary Harm.—“Pecuniary harm” means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.

(iv) Reasonably Foreseeable Pecuniary Harm.—For purposes of this guideline, “reasonably foreseeable pecuniary harm” means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.

...

(C) Estimation of Loss.—The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).

The estimate of the loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances, factors such as the following:

(i) The fair market value of the property unlawfully taken, copied, or destroyed; or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property.

(ii) In the case of proprietary information (e.g., trade secrets), the cost of developing that information or the reduction in the value of that information that resulted from the offense.

(iii) The cost of repairs to damaged property.

(iv) The approximate number of victims multiplied by the average loss to each victim.

(v) *The reduction that resulted from the offense in the value of equity securities or other corporate assets.*

(vi) *More general factors, such as the scope and duration of the offense and revenues generated by similar operations.*

...

8. *Sophisticated Means Enhancement under Subsection (b)(10).*—

...

(B) Sophisticated Means Enhancement.—For purposes of subsection (b)(10)(C), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a tele-marketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means.

...

U.S.S.G. 3B1.1: Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.