

13-769

To Be Argued By:
RAHUL KALE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 13-769

—
UNITED STATES OF AMERICA,
Appellee,

-vs-

WILLIAM A. TRUDEAU, JR.,
Defendant-Appellant.

—
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 district court (Janet C. Hall, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on February 15, 2013. Joint Appendix (“JA”)22. On February 25, 2013, the defendant, William Trudeau, Jr. (“Trudeau”), filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). JA283. This Court has appellate jurisdiction over Trudeau’s challenge to his sentence pursuant to 18 U.S.C. § 3742(a).

**Statement of Issue
Presented for Review**

Whether the district court's 188-month below-Guideline sentence was procedurally and substantively reasonable and, in particular, whether the court erred in considering all of the facts underlying the conspiracy and wire fraud convictions even though those facts were also relevant to acquitted counts?¹

¹ Although Trudeau breaks his brief into five issues, each issue essentially relates to the same underlying claim, *i.e.*, that the district court should not have considered facts beyond Trudeau's mere theft of \$50,000 from James Agah because that conduct specifically related to the sole wire fraud conviction in Count Nine of the Indictment.

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-vs-

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Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Beginning in 2004, after being sentenced to 22 months in federal prison sentence for mortgage-related wire fraud, and ending in November 2010, Trudeau conspired and schemed to defraud banks, mortgage lenders and private lenders of millions of dollars. On October 9, 2012, a jury returned guilty verdicts on one count of conspiracy to commit bank, mail and wire fraud and one count of wire fraud, and not-guilty verdicts

on eight counts of bank, mail and wire fraud. On February 12, 2013, the district court sentenced Trudeau to concurrent terms of 188 months' incarceration on his two convictions, which was below the 210 to 262 month Guideline range.

On appeal, Trudeau challenges the procedural and substantive reasonableness of his sentence. He claims that the district court erred in its loss calculation under the Guidelines because, in making that calculation, it employed the wrong standard of proof and considered acquitted conduct. He argues that the reliance on acquitted conduct did not comport with the Guidelines and also violated his constitutional rights. He also maintains that the 188-month sentence was disproportionately high. In asserting these points, he asks for remand to a different district judge. In addition, the National Association of Criminal Defense Lawyers ("Amicus") submitted a brief as Amicus Curiae on the issue of whether this Court should revisit its acquitted-conduct jurisprudence because the consideration of such conduct at sentencing undermines a jury's verdict.

For the reasons that follow, none of these claims has merit.

Statement of the Case

On November 18, 2010, a federal grand jury in Bridgeport, Connecticut indicted Trudeau on

one count of conspiracy to commit bank, mail and wire fraud, in violation of 18 U.S.C. § 1349, two counts of bank fraud, in violation of 18 U.S.C. § 1344, three counts of mail fraud, in violation of 18 U.S.C. § 1341, and three counts of wire fraud, in violation of 18 U.S.C. § 1343. JA26-JA41. On March 22, 2012, the district court (Janet C. Hall, J.) revoked Trudeau's bond and ordered him detained pending trial. JA13. Trial began on September 27, 2012, and, on October 9, 2012, the jury convicted Trudeau of one count of conspiracy to commit bank, mail and wire fraud and one count of wire fraud. JA43, JA278. The jury acquitted him of two counts of bank fraud, three counts of mail fraud and two counts of wire fraud. JA282. On February 12, 2013, the district court (Janet C. Hall, J.) sentenced Trudeau to concurrent terms of 188 months in prison on the conspiracy and wire fraud convictions. JA278. On February 25, 2013, Trudeau filed a timely notice of appeal. JA283.

Trudeau is currently serving his federal sentence.

Statement of Facts and Proceedings Relevant to this Appeal

A. Background

On February 15, 2013, the district court sentenced Trudeau to 188 months' imprisonment for his two federal felony convictions involving con-

spiracy to commit fraud and substantive wire fraud, both thirty year counts. JA278. Having handled all aspects of the case, including Trudeau's pre-trial bond revocation hearing, JA243-JA244, the guilty pleas of Trudeau's four partners, Pre-Sentence Report ("PSR") ¶ 3, and Trudeau's week-long jury trial which involved the admission of significant evidence of Trudeau's crimes (the sufficiency of which is not contested in this appeal), the court had developed a detailed understanding of the criminal conduct and Trudeau's personal characteristics.

The court also was well versed in Trudeau's lengthy prior history of fraud, dating back approximately eighteen years. JA272. Trudeau owned and ran a small heating oil business in the 1990s. PSR ¶¶ 15, 67. From 1995 to 1999, he was convicted on twelve separate fraud-related charges, ranging from issuing bad checks to stealing from customers. PSR ¶¶ 54-66. During this same time, he stole money from employees by keeping income tax withholdings he was required to pay to the IRS and by submitting fraudulent filings with the IRS to conceal the theft. PSR ¶ 67. In 1999, he also stole from a local bank by forging his uncle's signature on a loan application to secure a \$153,000 cash-out refinance on a property in Newtown, Connecticut in which his uncle had held an interest. PSR ¶ 67.

The fraud on the IRS relating to the employee withholdings and the fraud on the bank drew the attention of the federal authorities, and, in 2003, Trudeau pleaded guilty to tax fraud and wire fraud relating to that conduct. PSR ¶ 67. He was sentenced to a prison term of 22 months. PSR ¶ 67. The district court also ordered him to pay \$458,312 in restitution. PSR ¶ 67. As conditions of supervised release, the court prohibited Trudeau from incurring new credit charges or opening additional lines of credit without prior approval from the Probation Office and required Trudeau to release “all of his financial information” to the Probation Office. PSR ¶ 6.

B. The indicted conspiracy and substantive offenses

Trudeau was hardly deterred by the prospect his federal sentence. PSR ¶ 6. As he left for prison in 2004, he directed a longtime friend and attorney Joseph Kriz, whose practice involved real estate work, to form a company called Aspetuck Building & Development (“Aspetuck”) and list Kriz as the principal. PSR ¶ 6. In 2001, Trudeau had formed a company called Huntington South Associates (“Huntington South”) and named Heather Bliss, his wife, as its principal. PSR ¶ 8. He, Kriz and Bliss would use both of these entities extensively to commit the ensuing fraud. PSR ¶¶ 9-34.

Upon his release from prison in 2005, Trudeau had no money and owed a large restitution

payment. JA26. In order to obtain financing to purchase, develop and flip properties, Trudeau and Kriz had to find straw buyers with sufficiently good credit to purchase properties for them. PSR ¶¶ 6, 9. They turned to Bliss, a co-conspirator, and Steve Merrick, a young man who had agreed to work for Aspetuck, and an unwitting participant, to fill the roles of straw buyers. PSR ¶¶ 6, 9. Trudeau, Kriz and Bliss were assisted in the scheme by Fred Stevens, a local Westport mortgage broker who was the middleman between most of the lenders providing financing; John Bryk, a local real estate lawyer, and Tom Preston, an appraiser. PSR ¶¶ 9, 10, 23, 26.

The conspiracy charged in Count One spanned from February 2004 to April 2010, and involved all manner of steps taken to defraud a series of lenders into financing the purchase and/or refinance of various properties under development. JA26-JA39. In addition, the wire fraud charged in Count Nine encompassed the same broad course of conduct from February 2004 through April 2010, but included the element that Trudeau had caused an email to be sent in furtherance of the scheme. JA41-JA42.

C. The conspiracy and scheme to defraud

In 2004, after Trudeau went to federal prison, he and Kriz formed Aspetuck as a corporation to, among other things, provide an ostensibly established company to purchase real estate and to

satisfy Trudeau's condition of supervised release that he have employment. PSR ¶ 6. Trudeau directed Kriz, who became the named principal of Aspetuck, to employ Bliss as a paralegal in Kriz's legal practice. PSR ¶ 6. Bliss also served as the named principal of Huntington South, an entity Trudeau had formed in 2001. PSR ¶ 8. Following Trudeau's release in 2005, Kriz and Trudeau recruited Merrick to join Aspetuck as a "trainee," but in fact only used him as a front man to sign certain mortgage documents they could not. PSR ¶¶ 6-7.

In early 2005, Bliss and Trudeau learned from Stevens that his wife could get a business income loan using the Huntington South bank statements. PSR ¶ 9. To qualify, Huntington South needed to show 12 months of business deposits. PSR ¶ 9. By hand writing checks from Aspetuck to Huntington South, Trudeau diverted monies from Aspetuck to Huntington South to create the illusion of business income for Huntington South. PSR ¶ 9. Trudeau additionally learned from Stevens that a credit agency does not learn about a mortgage until the first mortgage is paid, which is generally 60 to 90 days from the loan's closing. PSR ¶ 12. Accordingly, if Bliss applied to different lenders and did not disclose her other property purchases, she could purchase multiple properties within that 60 to 90 day window without her credit report reflecting any property purchase. PSR ¶ 12. Trudeau

entered into negotiations for the purchase of multiple properties simultaneously. PSR ¶¶ 13, 15.

Based on Huntington South's inflated deposits, Bliss used fraudulently obtained mortgages to purchase: (1) 6 Sylvan Road on April 26, 2006 from Long Beach Mortgage, (2) 91 Saugatuck Avenue on June 1, 2006 from Fremont Lending, (3) 95 Saugatuck Avenue on June 1, 2006 from Fremont Lending and (4) 9 Fragrant Pines on June 6, 2006 from New Century Mortgage Corp. PSR ¶¶ 10, 14, 18. On each of the four mortgage applications, Bliss claimed she rented 6 Sylvan Road and omitted reference to the other purchases, thus significantly understating her indebtedness. PSR ¶¶ 12, 16. Additionally, at the closings, which Trudeau attended, Attorney Bryk's closing statements on the properties did not disclose that Bliss had no money for the down payments. PSR¶¶ 10, 26.

At the same time, Aspetuck had secured, for \$20,000 a month, the right to buy a property at 35 Prospect Road, Westport. PSR ¶ 20. Unable to keep up with the payments, Trudeau and Kriz sought Stevens's help in obtaining a conventional mortgage. PSR ¶ 20. Stevens helped Trudeau and Kriz fraudulently obtain financing for 35 Prospect Road in the amount of \$2 million in Merrick's name from IndyMac Bank. PSR ¶ 23. Among the frauds used to secure the mortgage from IndyMac, Trudeau and Kriz negotiated

with Scott Garrett, a hard money lender, both in person and by e-mail, for a \$300,000 loan to give the appearance that Merrick had assets. PSR ¶ 24. Trudeau also directed Preston to prepare a property appraisal for 35 Prospect Road that falsely represented that the house had a finished attic, and therefore 900 additional square feet, to justify the application for a larger loan amount. PSR ¶ 23. Trudeau assured Preston that the false appraisal would never be discovered because Trudeau planned to demolish the structure at 35 Prospect Road soon after the purchase was completed. PSR ¶ 23. A month after the IndyMac loan closed, Trudeau and Kriz had Merrick obtain a home equity line of credit from Citibank for an additional \$200,000, once again using the false appraisal as the basis for the additional credit. PSR ¶ 23. When the line of credit was approved, Merrick provided the \$200,000 check to Trudeau. JA95-JA96.

Trudeau and Kriz used the 35 Prospect Road loan proceeds to pay off hard-money lenders to whom Aspetuck was obligated. PSR ¶ 24. To pay off a client of Bryk's, Trudeau had Bliss apply for a second mortgage on 6 Sylvan Road South for \$200,000 from Chase on January 26, 2007. PSR ¶ 25. Relying on the fact that the second mortgage would not appear on Bliss's credit report for 60 to 90 days, Trudeau negotiated the purchase of 87 Saugatuck Avenue, Westport, which was adjacent to 91 and 95 Saugatuck Avenue. PSR

¶ 26. On February 2, 2007, Bliss used a fraudulently obtained mortgage from Argent, a mortgage lender, to purchase 87 Saugatuck Avenue. PSR ¶ 26. In addition to omitting the \$200,000 second mortgage on 6 Sylvan Road South, Trudeau directed Bryk not to report on the closing HUD-1 that Coyle was providing a seller-financed mortgage for the balance of the closing price. PSR ¶ 26. At the closing for 87 Saugatuck Avenue, Trudeau and Bliss walked away with cash as the total of the two loans exceeded the purchase price. JA55.

As Trudeau's and Kriz's debt obligations continued to build, Kriz dipped into his IOLTA account to cover expenses. PSR ¶ 28. When a client hired him to close a real estate sale or sought to refinance an existing mortgage, Kriz simply did not repay the money due from the sale or the refinancing to the primary mortgage holder and continued to make the monthly mortgage payments as if the sale or refinancing had never occurred. PSR ¶ 28. The money that should have been used to pay off the original mortgage was instead used to pay Aspetuck-related obligations and invest in risky stock market gambles. PSR ¶ 28. In total, Kriz stole approximately \$3.5 million from his clients. JA309. Of that amount, Kriz wrote checks totaling \$1,298,856.40 from his IOLTA account to the Huntington South account between June 30, 2006 and December 12, 2007. PSR ¶ 28. Almost all the checks were de-

posited along with deposit slips which were handwritten by Trudeau. PSR ¶ 28.

Trudeau even targeted his mother, Barbara Trudeau, as part of the scheme. He caused her to apply to IndyMac Bank for refinancing of the mortgage for 88 Riverside Road, knowing that he would divert the funds intended to pay off the original mortgage. PSR ¶ 29. Instead of paying the original lender, Trudeau caused these funds to be deposited in the Huntington South account (1) to give the appearance of further income and (2) to pay Trudeau's obligations. PSR ¶ 29; JA286. Specifically, in June 2008, when IndyMac refinanced the \$398,312.09 mortgage and provided \$50,000 in cash out, Trudeau deposited all of the money in the Huntington South account. PSR ¶ 29, JA286.

Trudeau also continuously solicited loans from private individuals to ensure that the scheme would succeed. PSR ¶¶ 10, 13, 24, 26. For example, Trudeau negotiated with Bryk to obtain loans from his clients which served as the "down payment," which Bliss claimed to have provided in her purchases of 6 Sylvan Road South and 87 Saugatuck Avenue. PSR ¶¶ 10, 13, 24, 26; JA53-JA55, JA61-JA62. In addition, Trudeau used Bliss's fraudulently purchased properties as collateral to secure loans from private lenders to keep the scheme afloat. PSR ¶ 21; JA47, JA74, JA134, JA140-JA141. With Kriz, Stevens and Preston facing federal charges

for their roles in the scheme, Trudeau sought to create a new source of business revenue income for Bliss by cashing Huntington South checks at a check cashing business owned by James Costenbader and depositing the cash in the Huntington South account before the checks cleared. PSR ¶ 34. When the filing of a CTR revealed this part of the scheme, Trudeau simply kept the money from the cashed checks, and Costenbader was left holding approximately \$170,000 in worthless Huntington South checks. PSR ¶ 34. When Costenbader threatened to contact law enforcement, Trudeau provided him with mortgages on 6 Sylvan Road, 87, 91, and 95 Saugatuck Avenue, and 9 Fragrant Pines as collateral for the checks. PSR ¶ 34.

And finally, in March 2010, Trudeau approached James Agah, the father of his daughter's pre-school classmate, and asked him for \$50,000. PSR ¶ 35. Specifically, Trudeau told Agah that he was in contract to sell 9 Fragrant Pines, but needed a loan to complete the renovation of the property. PSR ¶ 35. He said he would repay Agah from the sale proceeds. PSR ¶ 35. As he did with Costenbader, Trudeau offered a blanket mortgage on all the Bliss properties without advising Agah that the properties were in foreclosure. PSR ¶ 35. On April 13, 2010, Trudeau sent an e-mail to Agah claiming he had a signed sales contract (even though he did not) and providing an unsigned contract as proof.

PSR ¶ 35. Based on the e-mail, Agah wired Trudeau \$50,000. PSR ¶ 35. Trudeau used Agah's money to cover a \$10,000 check to pay Bliss's criminal lawyer and a \$13,000 check to pay for a two-week rental of a cottage on Nantucket for Trudeau's family. PSR ¶ 35.

D. Post-release conduct

Trudeau was arrested November 22, 2010, but was released on bail, with several conditions. JA5-JA6. On April 28, 2011, the Government moved to detain Trudeau because, earlier that month, he had falsely represented to another individual ("VV") that he had an ownership interest in a property at 91 Saugatuck Avenue in Westport (one of the properties on which the indictment alleged Trudeau had committed fraud). Government's Appendix ("GA")1-GA5. On May 2, 2011, Trudeau responded that he had not violated his conditions of release because, though his wife owned the property at 91 Saugatuck Avenue, he was a sublessor landlord of that property and his representations to VV were consistent with that status. GA21-GA23. On May 3, 2011, after conducting a hearing on the motion, the court (Holly B. Fitzsimmons, J.) took it under advisement and requested additional information as to the truthfulness of Trudeau's financial disclosure to the Probation Department.

On August 4, 2011, the Government filed a supplemental motion to revoke bond, alleging that Trudeau had engaged in additional fraudu-

lent conduct by (1) enrolling his child in the Westport, Connecticut public schools even though he resided in Norwalk; (2) changing his address with the Connecticut Department of Motor Vehicles (“DMV”) to reflect a Westport address even though he resided in Norwalk; (3) leasing a car in his mother’s name without reporting it to the Probation Department; and (4) bouncing a personal check used to secure the car. GA35-GA40. After conducting an evidentiary hearing on August 9, 2011, during which the Government called six witnesses and Trudeau called one, the court revoked its previous order granting pre-trial release. GA188. The court found that Trudeau had violated two conditions of his release: (1) he had failed to disclose to his probation officer a significant debt he owed to a check-cashing business and the fact that he had leased an automobile with a bounced check; and (2) he had changed his address without informing the court and had done so to enroll his daughter in a school district where he did not reside. GA42-GA43. The court found that Trudeau “posed a danger to the community by virtue of his history of defrauding members of the public for financial gain.” GA44.

On March 22, 2012, the district court (Janet C. Hall, J.) held a hearing on Trudeau’s motion to review the detention order and ultimately concluded that detention was appropriate under 18 U.S.C. § 3148. GA198. In particular, the court

found probable cause to believe that Trudeau had (1) knowingly issued a bad check, in violation of Conn. Gen. Stat. § 53a-128(c)(1); (2) knowingly filed a false claim for a public benefit and accepted that benefit, in violation of Conn. Gen. Stat. § 53a-1196(6); (3) knowingly produced a false identification document, in violation of 18 U.S.C. §§ 1028(a)(1) and 2, by submitting a false change of address form to the DMV; and (4) committed felony larceny, in violation of Conn. Gen. Stat. §§ 53a-119 and 124(a)(2), by leasing an apartment on Saugatuck Avenue for \$20,000 after already having contracted away the right to occupy the premise for the majority of the period of the lease. GA304-GA310. Trudeau appealed the district court's bond decision, and this Court affirmed the decision in an unpublished summary order. *United States v. Trudeau*, 471 Fed. Appx. 66 (2d Cir. June 11, 2012) (unpublished summary order) (holding that "the district court acted within its discretion when it found that a person who apparently had committed four additional crimes while on bail posed a danger to the community.").

E. Trial

Trial began on September 27, 2012. JA43. The evidence at trial showed Trudeau's direct, hands-on involvement with participating in the conspiracy by setting up Aspetuck and finding straw purchasers of properties Trudeau wanted. Although Trudeau did not personally submit the

fraudulent mortgage applications or obtain the mortgages in his own name, the evidence showed how Trudeau (1) negotiated property purchases that his wife or Merrick ultimately made, JA44-JA45, JA133-JA134; (2) believed he was entitled to sixty percent of Aspetuck's profits, JA85; (3) directly borrowed monies from hard money lenders to provide down payments or purchase monies for the properties, JA58-JA59, JA134, JA314-JA315, JA317; and (4) personally sent a fraudulent e-mail to Agah to obtain \$50,000 in financing, using the fraudulently obtained properties as collateral, JA140-JA141. Additionally, the evidence showed Trudeau's direct involvement in stealing \$450,000 from the refinance of his mother's property and in depositing nearly \$1.3 million of Kriz's clients' funds into the Huntington South account, much of which was used to further the conspiracy's interests. JA124, JA284-JA286.

The trial evidence also showed Trudeau's behind-the-scene's role in obtaining financing from lenders by: (1) handwriting summaries of Bliss's bank statements for Stevens to include in fraudulent mortgage applications, JA355; (2) asking appraiser Tom Preston to lie in an appraisal for 35 Prospect Street and assuring Preston that his false appraisal would never be discovered because Trudeau would demolish the structure as soon as the purchase was completed, JA327; (3) selecting the straw purchaser most likely to

qualify for a mortgage to purchase a property, JA65; (4) soliciting Garrett for a \$300,000 loan to make it appear that Merrick had sufficient unencumbered funds to overcome IndyMac's concerns about Merrick's application for a \$2 million mortgage, JA74, JA318; (5) offering his mother's house as collateral for that loan from Garrett, JA319; (6) using the proceeds of the fraudulent mortgages to repay Bryk's clients JA64; (7) hiring and encouraging Bryk to omit information about secondary financing from HUD-1's to prevent lending institutions from learning the existence of the secondary financing, JA53-JA55, JA61; and (8) using the properties obtained through fraudulent mortgages as collateral to secure loans from private lenders to keep the scheme afloat, JA74, JA134; PSR ¶¶ 34-35.

On October 9, 2012, the jury convicted Trudeau of the multi-year conspiracy charged in Count One and the wire fraud charged in Count Nine, which spanned the same time period as the conspiracy. JA278. Trudeau was acquitted of two counts of bank fraud, where Trudeau had not directly dealt with the specific lender, and with the five counts of mail and wire fraud where Trudeau was not directly involved in the mailings or wirings. JA282.

F. The PSR's Guidelines calculation

The PSR grouped Counts One and Nine and determined that the base offense level for both

counts was 7 under U.S.S.G. § 2B1.1(a)(1). PSR ¶¶ 42-43. It then added 20 levels under § 2B1.1(b)(1)(K) because the loss from Trudeau's crime exceeded \$7 million, but was not more than \$20 million. PSR ¶ 44. Two more levels were added under § 2B1.1(b)(2)(A), as the offense involved 10 or more victims, followed by an additional two levels under § 2B1.1(b)(15) because Trudeau derived more than \$1 million in gross receipts from one or more financial institutions. PSR ¶¶ 45-46. Trudeau received a four-level upward adjustment for his role in the offense, as he "was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." PSR ¶ 48. And two levels were added as an adjustment for obstruction of justice since "the defendant provided materially false information to the probation officer in respect to the ongoing investigation of his financial condition while on bond." PSR ¶ 49.

From 1995 through 2008, Trudeau sustained fifteen separate convictions for charges ranging from larceny, forgery, writing bad checks and tax and wire fraud. PSR ¶¶ 55-69. He committed numerous offenses while under pre-trial or post-conviction court supervision. PSR ¶¶ 55-69. And he sustained convictions in federal court for tax evasion and wire fraud. PSR ¶ 67. Despite his extensive record, he only accumulated seven criminal history points for his prior convictions

because some of them were considered related and others did not result in sufficiently long sentences, as only a maximum of four one-point convictions count under U.S.S.G. § 4A1.1(c). PSR ¶ 70. With two points added under § 4A1.1(d) for commission of this offense while on supervised release, Trudeau fell into Criminal History Category IV. PSR ¶¶ 71-72.

A total offense level of 37 and a Criminal History Category of IV resulted in a Guideline imprisonment range of 292-365 months, with a maximum statutory term of imprisonment of 360 months on each of Counts One and Nine, pursuant to 18 U.S.C. §§ 1343 and 1349. PSR ¶¶ 101-102.

G. Trudeau's sentencing memorandum

Trudeau submitted several objections to the PSR in his sentencing memorandum. JA192-JA241. He argued that the loss amount was overstated because it took into account the losses stemming from Counts Two through Eight, for which he was acquitted. JA206. He claimed that these specific loss amounts had to be eliminated from consideration because, under U.S.S.G. § 1B1.2(d), the district court could not overturn the jury's determination that Trudeau had not committed the objects of the conspiracy charged in Counts Two through Eight unless it found, by proof beyond a reasonable doubt, that he had conspired to commit each of those offenses. JA206. As a result, Trudeau argued that the

loss described in ¶ 37 of the PSR as “Total Loss on Properties” should be reduced from \$2,060,352 to \$490,652. JA206. He would later argue that the actual loss was really \$0. JA240-JA241.

Second, Trudeau objected to the PSR’s inclusion of other losses as relevant conduct in determining the loss amount. JA208. More specifically, he stated that, because the counts of conviction related only conspiracy to the Agah transaction, which did not occur until March 2010, the losses stemming from Incerto, Costenbater, the 88 Riverside Road transaction, the 91 Saugatuck Avenue transaction, and the conduct by Kriz, Febbraio, and Garrett could not be considered as part of relevant conduct. JA208-JA216.

For similar reasons, Trudeau objected to many of the other enhancements. He objected to the two-level increase for the number of victims because the Agah transaction did not involve ten or more victims. JA217. He objected to the two-level enhancement for deriving over \$1 million from one or more financial institutions because the jury acquitted him of all substantive offenses relating to a financial institution, and there was no evidence that he individually derived more than \$1 million from a financial institution. JA218. He argued against a role enhancement because, “when the losses that the government and the probation officer have attempted to pile

on are actually calculated, none of it, under the law, can be attributed to Mr. Trudeau.” JA219. He also objected to the criminal history calculation, maintaining that some of his prior convictions should have been grouped together as related and others should not have counted because they were too old. JA220.

Ultimately, Trudeau argued that his total offense level should have been 7, his criminal history category should have been III, and his Guideline range should have been four to ten months in prison. JA221, JA240.

As part of his sentencing argument, Trudeau maintained that any reliance on acquitted conduct in calculating the Guideline range violated his right to a jury trial and his right to a sentence authorized by the jury’s verdict. JA221-JA223. He also maintained that the Sentencing Reform Act prohibited the use of acquitted conduct at sentencing because Congress intended sentencing judges to focus primarily upon conduct for which defendants have been found guilty, and enhancements based on acquitted conduct disserve the statutory purposes of punishment under 18 U.S.C. § 3553(a). JA233-JA240.

H. The Government’s sentencing memorandum

The Government’s sentencing memorandum summarized the offense conduct underlying both

the conspiracy and the wire fraud convictions. GA320-GA338. It then argued that the Guideline calculations in the PSR were correct and maintained that Trudeau should receive an upward departure because his criminal history score substantially underrepresented his risk of recidivism. GA338-GA355. The Government highlighted the staggering loss amount, as well as the way in which Trudeau benefitted from Kriz's IOLTA thefts, using the proceeds of his crime to pay for housing, transportation, communication, food, and home furnishings. GA341-GA344.

As to the specific Guideline enhancements, the Government delineated the ten victims of the crime and explained how he had derived more than \$1 million in gross receipts from one or more financial institutions. GA345-GA351. Furthermore, the Government argued that Trudeau should receive a four-level role enhancement because he recruited Kriz, Bliss, Stevens, Bryk and Preston into a criminal enterprise which involved extensive planning and millions of dollars in fraud. GA351-GA352. The Government also explained how Trudeau had repeatedly lied to the Probation Office, thus warranting a four-level enhancement for obstruction of justice. GA352-GA353.

In addition, the Government discussed why it opposed any downward departure from the Guidelines in this case, and why the 18 U.S.C.

§ 3553(a) factors supported a substantial jail sentence. GA359-GA366. In light of Trudeau's extensive criminal record and his incredibly high risk of recidivism, the Government asked for a substantial sentence close to the Guideline range. GA363. The Government specifically highlighted the egregious nature and circumstances of the offense in light of the loss inflicted and the extent and length of the conspiracy, as well as Trudeau's individual characteristics, having made thievery and fraud his career. GA362-GA366.

Ultimately, the Government recommended a sentence of more than 15 years in prison. GA367.

I. The sentencing proceeding

At sentencing on February 12, 2013, the district court first addressed Trudeau's objections to the PSR. JA244-JA251. The court initially asked defense counsel if it would "be a fair statement to say that . . . almost everything you argued . . . in objection to the guideline calculations . . . stems from your view of grouping which is related as well to your argument about acquitted conduct," to which defense counsel agreed. JA244.

Defense counsel argued that, before the court could apply U.S.S.G. §§ 3D1.2 and 1B1.2(d) and the application notes to determine the actual loss, it "has to determine beyond a reasonable

doubt whether or not those objects and the various facts of the substantive nature were proven beyond a reasonable doubt.” JA244-JA245. In making this argument, he recognized that, although, under § 1B1.2(d), “[a] conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each count that the defendant conspired to commit,” application note 4 of § 1B1.2(d) cautions that “[p]articular care must be taken” where the verdict “does not establish which offense(s) was the object of the conspiracy.” U.S.S.G. § 1B1.2(d), comment. (n.4); JA245. According to defense counsel, § 1B1.2(d) should only be applied here if the district court would have convicted Trudeau of conspiring to commit each object of the offense. JA245.

The court disagreed, noting that, under § 1B1.2(d), comment. (n.4), “[I]f the object offenses specified in the conspiracy count would be grouped together under 3D1.2(d) . . . [i]t is not necessary to engage in the foregoing, *i.e.*, beyond a reasonable doubt analysis that you just described because 1B1.3(a)(2) governs consideration of the defendant’s conduct.” JA245. Defense counsel maintained that the objects of the charged conspiracy would not be grouped under § 3D1.2(d), JA245-JA246, because “when you have a multi object conspiracy . . . you are not grouping under [(d)] . . .” JA248.

The district court was not persuaded. Section 3D1.2(b) did not apply because each object involved “a different victim,” and § 3D1.2(c) appeared only to apply when a person was convicted of both a conspiracy and a substantive count relating to the same conduct. JA245-JA246. Defense counsel argued that subsection (c) applied because “every other amount that the government is trying to allege and the PSR is trying to allege is attributable to Mr. Trudeau under the conspiracy is a specific offense characteristic or an adjustment to Count One” JA248. The court disagreed and found that, since the offense level was “largely determined by the total amount of loss,” subsection (d) applied. JA246.

At that point, defense counsel turned to his argument that the court should not consider acquitted conduct in its sentencing decision. JA249. In response, the court noted that there were “cases, very recent cases in the Second Circuit that stand against you.” JA249. Counsel replied that the court was “not mandated to consider the acquitted conduct” and “shouldn’t.” JA249. He also stated that the Second Circuit cases regarding the use of acquitted conduct at sentencing did not go “as far as everyone thinks they did,” and there were “cases around the country” concluding that acquitted conduct should not be considered. JA249.

The court then set out its findings as to the Guideline calculation. It found that the analysis

began with the fraud Guidelines under § 2B1.1. In addition, it applied § 1B1.2, which states “that a conviction on conspiracy should be treated as, in effect, a count of conviction for each offense in the conspiracy.” JA250. Moreover, the court determined that Trudeau’s offenses were grouped under U.S.S.G. § 3D1.2(d), so that it was “not necessary . . . to determine beyond a reasonable doubt whether Mr. Trudeau committed all of the objects of the conspiracy as offenses of conviction . . . for purposes of the guideline analysis.” JA250.

The court came to this “conclusion for a variety of reasons.” JA250. First, § 2B1.1 is specifically listed as one of the Guideline sections governed by § 3D1.2(d). JA250. Second, “the offense level is going to be driven almost principally . . . by the total amount of harm or loss.” JA250. Third, “subsection [(d)] likely will be used with the greatest frequency” and applies to “most property crime[.]” JA251.

Thus, the court applied U.S.S.G. § 1B1.3(a)(2) and considered, in its Guideline calculation, “all acts and commissions . . . that were part of the same course of conduct, common scheme or plan as the offense of conviction.” JA250. In particular, the court stated:

The Court finds by a preponderance of the evidence that the various other acts of Mr. Trudeau as alleged in the indictment . . . were committed by him. I find that by a

preponderance of the evidence and that I find they were part of the same course of conduct or common scheme or plan as the offense of conviction which principally for these purposes, looking at the conspiracy conviction.

JA250.

The court next addressed Trudeau's argument that acquitted conduct should not be considered and found that it was "bound by the clear precedence from the Second Circuit and Supreme Court that consideration of the acquitted conduct is permitted at sentencing and obviously it is permitted if the Court finds it to have occurred by a preponderance of the evidence." JA251. The court explicitly stated that the reasons for its conclusion "are that under Section 1B1.3 of the Guidelines, consideration of relevant conduct is appropriate to determine the range." JA251. Moreover, because an acquittal simply means that "the government failed to prove an essential element of the offense beyond a reasonable doubt[,] . . . [it] does not preclude the government from relitigating the issue which is presented in subsequent action governed by a lower standard of proof." JA251.

Ultimately, the court adopted paragraphs 1 through 36 of the PSR as the court's findings of fact. JA256. Specifically, the court determined:

[B]ased upon what I have heard in connection with and seen in connection with various pretrial proceedings . . . , based upon evidence and both testimony and documentary that I have seen and heard and reviewed in connection with the trial, based also on other evidence that's come before the Court in connection with the preparation for sentencing and otherwise, the Court concludes that there was a conspiracy and that Mr. Trudeau was a member of that conspiracy and was a leader of that conspiracy, that was formed likely while he was still incarcerated and certainly while he was on supervised release and that the conspiracy's objective was to defraud both lending institutions, both financial insured institutions and mortgage companies as well as individuals in connection with a series of real estate transactions that are most particularly detailed in the Presentence Report and that it, in effect, became in my view a house of cards likely due to a falling of the present real estate market but also due to the fraud perpetrated. In many respects, one act of fraud led to another [act] of fraud in order to cover up the first [act] of fraud. All of the while Mr. Trudeau and others were enjoying the fruits of this fraud in the form of residing in a \$1.6 million home, going on vacations and other things and supporting

himself in effect and his family from the proceeds of the fraud, that took the form of multiple mortgages on single property, lies replete throughout mortgage applications, failures to disclose replete throughout mortgage applications, the obtaining of monies from individuals as the house of cards began to be a bit shaky. The pressure put upon a bank teller at a bank, the checks that were fraudulently negotiated with Mr. Costenbader, then the various lies and mortgages on properties in foreclosure that were given to him to stave off his efforts to collect the money. The approach to Mr. Agah, to obtain monies. All of this was part and parcel of a common scheme or plan, in effect, to benefit Mr. Trudeau and others through fraud, pure and simple and multiple.

JA256-JA257.

Turning to the loss amount, the court determined that the losses on 91 Saugatuck Avenue (\$38,700), 5 Saugatuck Avenue (\$0), 9 Fragrant Pines (\$0), 35 Prospect Road (\$1.2 million), 87 Saugatuck Avenue (\$238,500), 88 Riverside (\$451,952), as well as the losses to Thomas Febraio (\$100,000), James Costenbader (\$132,000), Scott Garrett (\$800,000), and the money diverted from Kriz's attorney trust account to Huntington South (\$1.298 million) were all losses attributable "in connection with the common

scheme or plan.” JA257. The total loss attributable to Trudeau was \$4,260,008.40, JA273, which was within the range of \$2.5 to \$7 million, adding 18 levels to the base offense level. JA257.

Next, the court determined that there were at least 12 victims: Chase, Citibank, Washington Mutual, and IndyMac were victimized financial institutions; New Century and Argent were victimized mortgage companies; and Coyle, Agah, Febbraio, Costenbader, and Garrett were victimized individuals. JA257. The court also determined that Trudeau received “gross receipts in excess of a million dollars” because he resided at, and rented out as the true owner, a property with a \$1.2 million loan from a financial institution. JA258.

Turning to the role adjustment, the court determined:

I find by a preponderance of the evidence that Mr. Trudeau . . . was engaged with at least Mr. Kriz, Ms. Bliss, Mr. Stevens and John Byrk. There are others that were also brought in the conspiracy I can think of Mr. Merrick, for example[.] . . . That’s certainly five or more. The organization was also otherwise extensive in terms of the number of properties, the number of mortgage applications, the various victims that were drawn in to keep this thing going and so the only thing re-

maining is whether Mr. Trudeau is in this Court's view the organizer or leader. It is crystal clear to me that Mr. Trudeau was. The fact that his name doesn't appear on papers does not keep his fingerprints from being all over this fraud. I heard testimony. I have seen documents. I have got victim letters which I credit that in almost every instance it is Mr. Trudeau that was the person involved in the negotiating with, seeking to solicit money fraudulently from other people, and while others are culpable, while others were used by Mr. Trudeau, it is this Court's conclusion that Mr. Trudeau was the organizer and the leader of the conspiracy.

JA258. Additionally, the court noted:

Mr. Trudeau selected the properties that became the subject or objects of the mortgage fraud. That he also told I believe Mr. Merrick that he, Mr. Trudeau, had a claimed right to 60 percent of the Aspetuck profits that gives him a larger share of the fruits of the crime. That's another factor to be considered, and even after Mr. Kriz turned himself into authorities, Mr. Trudeau continued to keep the [il]legal conduct going by engaging in check cashing fraud against Mr. Costenbader, wire fraud against Mr. Agah and various other conduct.

JA258.

The court then considered the obstruction of justice enhancement. Although the court found that there was no “question that he, using his lawyer and himself, misrepresented information to the probation office, therefore, to the court,” JA260, the court declined to apply the enhancement because Trudeau had not testified falsely in court and had not impeded the investigation in this case. JA259-JA260. And he had not “prevent[ed] the Court from determining the appropriate sentence.” JA259. Though “Mr. Trudeau’s conduct certainly frustrated the heck out of both probation and the Court with respect to his pre-trial release. I don’t know how it affected my trying to get to the proper sentence today.” JA259.

The court also declined Trudeau’s request for a reduction for acceptance of responsibility, as follows:

[T]here’s no truthful admission of the conduct arising out of the offense of conviction. There’s no voluntary determination of the withdrawal. There’s no voluntary payment of restitution. There’s no surrender. There’s not any assistance. There’s no resignation from the position he held in the sense of being the leader of this. I don’t find there’s in any way he qualifies.

JA261.

With regard to Trudeau's criminal history, the court rejected his argument that some of the convictions that received points were related to each other and adopted the PSR's conclusion that Trudeau had accumulated seven points from prior convictions and two points from committing this offense while on supervised release, warranting placement in Criminal History Category IV. JA262. With a total offense level of 33, the resulting Guideline incarceration range was 188 to 235 months. JA262.

Before turning to the Government's argument for an upward departure due to understatement of criminal history, the court heard from Trudeau on his claim that a downward departure was appropriate because "acquitted conduct has to count for something." JA268. "[W]e cannot lose sight of the fact that the jury acquitted Mr. Trudeau [of] seven of nine counts." JA268. Counsel maintained that, at some point in the future, the "use of acquitted conduct will be outlawed." JA268.

The court disagreed, stating that Trudeau was "convicted of conspiracy to commit a number of crimes and . . . the law in this country is you don't have to have done them to be guilty." JA269. "[T]his is not a case where he was charged with eight counts on mail fraud and acquitted of seven, and I'm going to count the conduct in the seven against him. I absolutely could under my view of the law right now. But that

isn't even the case today. The case he was convicted by a jury of conspiracy to commit numerous bad acts and he doesn't have to have done those bad acts himself to be chargeable under this count which carries a thirty year maximum penalty." JA269. Defense counsel replied, "My point is that if you just sentence him the way that you have calculated the guidelines, you are not giving the juror's service any respect, any credibility." JA269. The court replied, "I disagree. . . . He wasn't acquitted of conspiracy. . . . He was in the conspiracy to commit all of those acts but somebody else commits the substantive crime, doesn't make him any less culpable under conspiracy." JA269. Defense counsel argued that the jury "only convicted on the Agah count. They are really saying that none of the stuff was proven." JA269. The court responded, "No they are not," and added, "He was convicted of conspiracy. . . . You may have had an entirely different argument and a firmer ground to stand on had he been acquitted of Count One. Okay." JA269.

Defense counsel complained, "[R]eally he's being sentenced as if the government proved everything and they didn't," to which the court responded, "He's being sentenced as if they proved the conspiracy they charged." JA270. Defense counsel stated, "Something has to be factored in there for the fact that the jury came back and said not everything was proven. There has to be something in there for that. There has to be a

credit for that somewhere.” JA269. The court “decline[d] to depart to the extent it could to reflect the fact that Mr. Trudeau was acquitted on seven of the counts, yes, he was acquitted but in this case, I don’t even have to reach the point of the case law that I have already cited in sentencing I may consider even acquitted conduct [because] [h]ere he was convicted of the conspiracy [count][, and] . . . sentencing would be driven by the acts charged in that conspiracy count of conviction.” JA270.

Next, the court considered whether an upward departure was appropriate based on the alleged underrepresentation of Trudeau’s criminal history. JA270. The Government argued that Trudeau’s criminal history score did not reflect that he was “incredibly likely to [] recidivate.” JA270. Defense counsel countered that, because Trudeau was a 50-year-old man, his “risk of recidivism drops precipitously.” JA271.

The court observed that the “point of criminal history is to really measure and get at the guts of the likelihood [to] recidivate.” JA271. The court noted that “[i]t is rare that a white collar criminal comes back in front of the Court. . . . I mean I think this is 12 or 13 convictions. If we had a career offender for white collar criminals, Mr. Trudeau would qualify. He has three major convictions that are thefts for fraud.” JA271. The court continued:

Going from a series of bad checks to forgery, to small larceny, not small to the victims, \$3,000, \$4,000 larcenies, many, many larcenies, bad checks, finally gets caught up in mortgage fraud and a failure to pay trust fund taxes in federal court and gets . . . less than a guideline sentence. And yet, while maybe as the government argues, while in prison, certainly while on supervision for that crime, he commits these crimes. I can't imagine what his next crime will be, Attorney Filan. If I look at his history, it is petty when he starts but he's graduated. He's at the Ph.D. level right now. I'm not sure what the next level is. If the point of criminal history is to estimate the likelihood of recidivism, Mr. Trudeau is weighing in that he's pretty heavy, he's likely to recidivate.

JA272.

The court ruled that there was an understatement of criminal history "for a number of different reasons. One is that two of the single point convictions aren't counted because there's more than four. Six of his convictions are not counted because they are aged out. In addition there's uncharged conduct, in particular, the pretrial conduct that the Court is aware of from the testimony I heard and the findings I had made in that regard." The court explained:

Lastly, I think that the nature of his prior convictions which are already counted, but the nature of them, both ones counted and not suggest recidivism inclination on the part of Mr. Trudeau that a category four just understates. I mean if he were a drug dealer, we would be looking at career offender status so the Court is going to find that there is a basis for upward departure and will exercise its discretion to upwardly depart one level to a category five which places Mr. Trudeau in a range of 210 to 262 months.

JA274.

Noting that the Guidelines were “not the end of the Court’s consideration of the appropriate sentence,” the court pointed out the need “to address all of the factors set forth in statute at 3553(a).” Turning to the seriousness of the offense, the court said, “[Y]ou didn’t hurt anyone in sense of a physical harm, but certainly with respect to the individual victims of your fraud scheme, you caused serious harm to them, to their well being, to their economic security.” JA274. The court believed that “a defendant who presents as having caused a loss of say two and a half million dollars to one victim on one occasion is a different defendant than someone who like yourself over a course of years with one victim after another sort of looking for the next victim to keep the house of cards up from the

victims that you have already sucked dry. That's a more serious offense." JA274. The court stated, "This is like your way of living is to defraud people and you must be very good at it." JA274.

Turning to the issue of deterrence, the court noted that the prior federal sentence of 22 months had not deterred Trudeau and that he had committed offenses both while on supervised release and on pretrial release. JA275. As a result, the court explained, "I'm really challenged to think of a sentence that would deter you." JA275. As a result, the court viewed the length of the sentence here as something that would "protect the public from further crimes [as] opposed to whether I can accomplish deterrence." JA275.

With regard to the nature and circumstances of the offense, the court stated that "this was a complex mortgage scheme [t]his idea that you could get two mortgages on one property because there's a delay in the mortgage company getting a report that the first mortgage exists before you go and apply for the second, that's really incredible. I don't know what the word to describe it is, Mr. Trudeau. Clever. Deceitful." JA275. The court found that Trudeau "caused a very large loss to many victims. It resulted from really conniving, misleading, enticing sort of fraudster scheme. I think you in many respects used and [to] some extent destroyed other people." JA275. Quoting one of the victims, the court

stated, “I think one of the victims put it best when he said, quote, you were a master at being dishonest and deceitful which explains why you were able to keep this house of cards going for as long as you did, resulting in as many victims as there are.” JA275.

The court characterized the Guidelines as a “good starting point” but recognized that “they don’t take into account things that I should take into account under 3553(a)[.]” JA275.

Turning to Trudeau’s history and characteristics, the court observed, “I have perhaps sounded extremely negative about you today and the fact that you have done many bad things. You are more than that. And it would be wrong of me to just not pause and . . . reflect upon what are the other things that can be said about you.” JA275. The court noted that Trudeau had opened his home to his wife’s sisters, which “showed a generosity of spirit that is positive.” JA275. The court further noted that his “family circumstances . . . certainly are challenging” and that he “overcame an addiction” and has “been sober now for quite a long time.” JA275. On the other hand, the court pointed out Trudeau’s extensive criminal record and the fact that Trudeau had failed to pay restitution for his prior federal crime. JA275-JA276.

The court concluded by stating that its sentence was “principally” motivated by a “consideration of the guideline range, the seriousness of

Mr. Trudeau’s offense, including the nature and circumstances, the need to deter him and protect the public, while also considering . . . the parsimony clause” JA276. Based on these factors, the court sentenced Trudeau to concurrent incarceration terms of 188 months on each of the two counts, as well as five years of supervised release, restitution in the amount of \$4,260,008.40, and a special assessment of \$200. JA276. The court stated that its sentence was a “nonguideline sentence.” JA277-JA278.

Summary of Argument

The district court’s non-Guideline sentence was procedurally and substantively reasonable and did not violate Trudeau’s constitutional rights. In light of the extent of Trudeau’s criminal conduct and his high likelihood of recidivism, as demonstrated by his lengthy criminal history (which included prior federal convictions for tax and wire fraud) and his post-indictment violation of bond, the district court did not abuse its discretion in sentencing him to 188 months’ imprisonment.

Trudeau’s various arguments that the district court erred in its loss calculation have no merit. The court properly determined that Trudeau’s offenses should be grouped according to their aggregate harm under U.S.S.G. § 3D1.2(d) and, therefore, it was entirely unnecessary under the plain language of § 1B1.2 (and its application

notes) to apply a heightened standard of proof to determine total loss. Contrary to Trudeau's constitutional challenge, raised for the first time on appeal, a long line of Supreme Court precedent, starting with *Apprendi* and ending with its most recent decision in *Alleyne*, establish that a sentencing court may make factual findings by a preponderance of the evidence, provided that the findings only impact a Guideline range and not a statutory penalty. Moreover, the fact that the charged conspiracy was so specific rendered application of § 1B1.2 unnecessary in any event because the district court knew what conduct formed the basis of the jury's conviction on the conspiracy count. And, to the extent that the district court erred in its loss calculation as to the conspiracy conviction, that error was harmless because the same exact loss calculation applied to the wire fraud conviction, which, despite its reliance on one particular wiring, was based on the same wide ranging fraudulent scheme as the conspiracy conviction.

Nor did the length of the sentence depend on acquitted conduct. The two counts of which Trudeau was convicted – conspiracy and wire fraud – covered all the conduct brought out at trial. That Trudeau was acquitted of certain counts, which were in fact less broad in scope than the counts of which he was convicted, only demonstrates that the jury rejected the particular theory of criminal liability charged in the acquitted

counts; it cannot be read as a rejection of facts. Even, assuming *arguendo*, that the district court relied on acquitted conduct in determining its sentence, however, this was permissible under both this Court's and the Supreme Court's decisions. A district court may base a Guideline determination on acquitted conduct because, under *Booker*, basic advisory Guideline determinations do not implicate the Sixth Amendment. In the end, Trudeau wants "[s]omething . . . to be factored in . . . for the fact that the jury came back and said not everything was proven." JA269. He maintains that "[t]here has to be a credit for that somewhere." JA269. Under the particular facts of this case, however, which involve two convictions for a lengthy, extensive and sophisticated mortgage fraud scheme by a repeat and unrepentant offender, no such credit is available or appropriate.

Argument

I. The district court’s 188-month below-Guideline sentence was procedurally and substantively reasonable

A. Relevant facts

The facts pertinent to consideration of this issue are set forth in the “Statement of Facts” above.

B. Governing law and standard of review

1. Reviewing a sentence for reasonableness

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 famil-

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

With regard to substantive reasonableness, the standard of review is deferential and focuses “primarily on the sentencing court’s compliance with its statutory obligation to consider the factors detailed in 18 U.S.C. § 3553(a).” *United States v. Canova*, 412 F.3d 331, 350 (2d Cir. 2005). The § 3553(a) factors include: (1) “the nature and circumstances of the offense and history and characteristics of the defendant”; (2) the need for the sentence to serve various goals of the criminal justice system, including (a) “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment,” (b) to accomplish specific and general deterrence, (c) to protect the public from the defendant, and (d) “to provide the defendant with

needed educational or vocational training, medical care, or other correctional treatment in the most effective manner”; (3) the kinds of sentences available; (4) the sentencing range set forth in the Guidelines; (5) policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution to victims. *See* 18 U.S.C. § 3553(a).

The Supreme Court has reaffirmed that the reasonableness standard requires review of sentencing challenges under an abuse-of-discretion standard. *See Gall*, 552 U.S. at 46. Although this Court has declined to adopt a formal presumption that a within-Guidelines 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.

Further, the 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).

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).

2. Guideline calculations for conspiracy offenses

U.S.S.G. § 1B1.2(d) states that “[a] conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.” The commentary adds, in pertinent part, that:

Subsection (d) provides that a conviction on a conspiracy count charging conspiracy to commit more than one offense is treated as if the defendant had been convicted of a separate conspiracy count for each offense that he conspired to commit. For example, where a conviction on a single count of conspiracy establishes that the defendant conspired to commit three robberies, the guidelines are to be applied as if the defendant had been convicted on one count of conspiracy to commit the first robbery, one count of conspiracy to commit the second robbery, and one count of conspiracy to commit the third robbery.

Id., comment. (n.3).

In addition, the commentary cautions a sentencing court to take greater care when considering a multi-object conspiracy case:

Particular care must be taken in applying subsection (d) because there are cases in which the verdict or plea does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense. Note, however, if the object offenses specified in the conspiracy count would be

grouped together under § 3D1.2(d)(e.g., a conspiracy to steal three government checks) it is not necessary to engage in the foregoing analysis, because § 1B1.3(a)(2) governs consideration of the defendant's conduct.

U.S.S.G. § 1B1.2, comment. (n.4).

U.S.S.G. § 1B1.3(a)(1) provides that, in determining the total offense level for a crime, a district court may take into account "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured or willfully caused by the defendant," and, "in the case of a jointly undertaken criminal activity, . . . all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." *Id.*

3. Rules for grouping closely related counts

U.S.S.G. § 3D1.2 describes four categories of counts which involve "substantially the same harm" that must be grouped together into a single group. The first category is when "counts involve the same victims and the same act or transaction." *Id.*, § 3D1.2(a). The second category is when "counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan." *Id.*, § 3D1.2(b). The third category occurs when "one of the

counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.” *Id.*, § 3D1.2(c). The final category is when “the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.” *Id.*, § 3D1.2(d).

Notably, the commentary to this Guideline states that “[s]ubsection (d) likely will be used with the greatest frequency. It provides that *most property crimes* (except robbery, burglary, extortion and the like), drug offenses, firearms offenses and other crimes where the guidelines are based primarily on quantity or contemplate continuing behavior are to be grouped together.” U.S.S.G. § 3D1.2, comment. (n.6) (emphasis added).

The commentary to § 3D1.2 also instructs that:

a defendant may be convicted of conspiring to commit several substantive offenses and also of committing one or more of the substantive offenses. In such cases, treat the conspiracy count as if it were several counts, each charging conspiracy to commit one of the substantive offenses. *See* § 1B1.2(d) and accompanying commentary.

Then apply the ordinary grouping rules to determine the combined offense level based upon the substantive counts of which the defendant is convicted and the various acts cited by the conspiracy count that would constitute behavior of a substantive nature. *Example:* The defendant is convicted of two counts: conspiring to commit offenses A, B, and C, and committing offense A. Treat this as if the defendant was convicted of (1) committing offense A; (2) conspiracy to commit offense A; (3) conspiracy to commit offense B; and (4) conspiracy to commit offense C. Count (1) and count (2) are grouped together under § 3D1.2(b). Group the remaining counts, including the various acts cited by the conspiracy count that would constitute behavior of a substantive nature, according to the rules in this section.

Id., § 3D1.2, comment. (n.8).

4. Plain error and harmless error

Where 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, 207-208 (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)); see also *Wagner-Dano*, 679 F.3d at 94. “[T]he burden of establishing entitlement to relief for plain error is on the defendant claiming it” *Wagner-Dano*, 679 F.3d at 94 (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004)).

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) (quoting *Cavera*, 550 F.3d at 197).

C. Discussion

1. Trudeau's sentence was entirely reasonable.

In light of Trudeau's extensive malfeasance, his long criminal history, and the public's need for protection from him, his 188-month sentence was entirely reasonable. Perhaps recognizing this fact, Trudeau chooses only to attack the substantive reasonableness of his sentence in a passing footnote (Def.'s Br. at 37 n.8). The record establishes that the district court fully complied with its sentencing obligations and, as discussed above, engaged in a thorough discussion of the § 3553(a) factors.

To begin, the district court found Trudeau to be a leader and organizer of extensive and long lasting fraud that continued even after his co-conspirators had turned themselves in to authorities. JA258. The loss attributable to Trudeau's conduct exceeded \$4 million. JA273. In describing the seriousness of the offense conduct, the court told Trudeau, "[Y]ou didn't hurt anyone in sense of a physical harm, but certainly with respect to the individual victims of your fraud scheme, you caused serious harm to them, to their well being, to their economic security." JA274. The court accurately described Trudeau as someone who was "[c]lever" and "[d]eceitful"

and preyed on victims' trust in him, someone who survived through fraud. JA275. The court found that Trudeau "caused a very large loss to many victims. It resulted from really conniving, misleading, enticing sort of fraudster scheme. I think you in many respects used and [to] some extent destroyed other people." JA275.

The court also expressed frustration due to Trudeau's extensive and troubling criminal record. In analogizing him to a career offender, the court doubted whether any sentence could adequately deter him. After committing well over ten offenses in state court, Trudeau had been prosecuted in federal court and sentenced to 22 months in jail. This sentence did nothing to deter him. He immediately returned to engaging in fraud, violating both the terms of his supervised release in the prior case and the terms of his pretrial release in this case. As a result, the court's primary concern in imposing a sentence of over 15 years in jail was to protect the public from Trudeau's pervasive fraudulent conduct. And despite its concerns about Trudeau's extensive record, his repeated violations of court orders, and his multi-decade history of committing various forms of fraud, the court decided to impose a sentence below the 210 to 262 month Guideline range, to account for his positive steps, including the fact that he had opened his home to his wife's sisters and "overcame an addiction." JA275.

In short, the district court considered all the sentencing factors described in 18 U.S.C. § 3553(a) and imposed a non-Guidelines sentence that was eminently reasonable in light of the foreseeable consequences of Trudeau's extensive scheme. Trudeau's argument that his sentence was "disproportionate to his offense of conviction" (Def.'s Br. at 37) ignores the seriousness of Trudeau's fraudulent conduct, his extensive criminal history, and the need for the public to be protected from him.

2. The court properly determined that the heightened standard of proof for multi-object conspiracy cases under section 1B1.2 did not apply to the loss calculation for Trudeau's conspiracy conviction.

a. Grouping was proper under section 3D1.2(d).

Trudeau attacks the district court's analysis of the grouping rules and its decision that it could determine the loss attributable to Trudeau under a preponderance of the evidence standard rather than by proof beyond a reasonable doubt. Def.'s Br. at 26. The court's decision was correct and properly applied U.S.S.G. § 1B1.2.

As set forth above, the instructions for applying the grouping rules to a multi-object conspiracy are spread primarily between two Guideline sections. U.S.S.G. § 1B1.2(d) states that "[a]

conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.” The commentary (note 4) warns, however, that “[p]articular care must be taken in applying subsection (d) because there are cases in which the verdict or plea does not establish which offense(s) was the object of the conspiracy.” *Id.*, comment. (n.4). In those cases, the district court should only apply subsection (d) where it would conclude, beyond a reasonable doubt, that the defendant committed that object offense. *Id.* But this “analysis” is “not necessary” where “the object offenses specified in the conspiracy count would be grouped together under § 3D1.2(d)” *Id.*

Turning to § 3D1.2, it describes four categories of counts which involve “substantially the same harm” that must be grouped together into a single group. The first category is when “counts involve the same victims and the same act or transaction.” *Id.*, § 3D1.2(a). The second category is when “counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.” *Id.*, § 3D1.2(b). The third category occurs when “one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another

of the counts.” *Id.*, § 3D1.2(c). The final category is when “the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.” *Id.*, § 3D1.2(d). “Subsection (d) likely will be used with the greatest frequency. It provides that *most property crimes* (except robbery, burglary, extortion and the like), drug offenses, firearms offenses and other crimes where the guidelines are based primarily on quantity or contemplate continuing behavior are to be grouped together.” *Id.*, § 3D1.2, comment. (n.6) (emphasis added). In addition, where a defendant is “convicted of conspiring to commit several substantive offenses and also of committing one or more of the substantive offenses[,] . . . treat the conspiracy count as if it were several counts, each charging conspiracy to commit one of the substantive offenses.” *Id.*, § 3D1.2, comment. (n.8). And the ordinary grouping rules would then apply. *Id.*

Thus, where various objects of a conspiracy would be grouped together under § 3D1.2(d), the portion of § 1B1.2 suggesting a higher standard of proof is simply inapplicable. Under such circumstances, the usual § 1B1.3(a)(2) analysis can take place using a preponderance of the evidence standard, provided that the enhancement does

not increase a statutory mandatory minimum or cause the sentence to go above the statutory maximum. *Alleyne v. United States*, 133 S. Ct. 2151, 2163 (2013); *United States v. Garcia*, 413 F.3d 201, 220 n.15 (2d Cir. 2005). That is what occurred here.

Here, each of the three fraud crimes detailed in Count One related to one type of harm, *i.e.*, the deprivation of property.² See *United States v. Szur*, 289 F.3d 200, 215 (2d Cir. 2005) (“As a general rule, the victims of fraud counts are those persons who have lost money or property as a direct result of the fraud”) (internal quotation marks omitted). Under U.S.S.G. § 2B1.1, the offense level for fraud is determined largely on the basis of the total amount of loss, thus placing the grouping of the three fraud offenses under § 3D1.2(d). Any doubt as to the proper application of the grouping rules, and, in particular § 3D1.2(d), is erased by the third example provided in application note 6 to that Guideline: “The defendant is convicted of five counts of mail fraud and ten counts of wire fraud. Although the counts arise from various schemes, each involves a monetary objective. All fifteen counts are to be grouped together.” *Id.*, comment. (n.6). In this case, as noted above, the three fraud offenses set forth in the conspiracy count all arose from one single scheme. Accordingly, the district court

² The mail and wire fraud charges did not allege the deprivation of honest services.

properly grouped these offenses and aggregated the losses that arose from each offense.

Once it is apparent that the objects of the conspiracy, *i.e.*, the bank, mail and wire fraud offenses, are grouped under § 3D1.2(d), the Guidelines are explicit that “it is not necessary” to apply a beyond a reasonable doubt standard to the determination of loss for these offenses. *See* U.S.S.G. § 1B1.2, comment. (n.4). At that point, § 1B1.3(a)(2) governs consideration of Trudeau’s conduct and allows any relevant conduct found by a preponderance of the evidence to be factored into his sentence. That is what occurred here.

Recognizing that the application of the grouping rules and § 1B1.2 to this case support the district court’s loss calculation, Trudeau seeks to defeat application note 4 of § 1B1.2 by labeling it as unconstitutional. *See* Def.’s Br. at 32-36. He did not make this argument below, so it now must be reviewed for plain error. He relies almost exclusively on an Eleventh Circuit decision, *United States v. Bradley*, 644 F.3d 1213 (11th Cir.), *cert. denied*, 132 S. Ct. 2375 (2012). According to Trudeau, *Bradley* stands for the proposition that the distinction drawn by U.S.S.G. § 1B1.2 between grouping pursuant to U.S.S.G. § 3D1.2(a)-(c), which require an object to be proven beyond a reasonable doubt, and grouping pursuant to U.S.S.G. § 3D1.2(d), which requires an ob-

ject to be proven by a preponderance of the evidence, “offends due process.” Def.’s Br. at 35.

In *Bradley*, the defendant was convicted by a general guilty verdict of violating RICO and of engaging a conspiracy to commit five separate instances of money laundering. *Id.* at 1300. The defendant challenged his 225-month sentence on the money laundering conspiracy conviction because the “district court failed to find beyond a reasonable doubt which offense(s) he conspired to commit.” *Id.* The government responded that, because grouping of money laundering should occur under U.S.S.G. § 3D1.2(d), no error occurred. *Id.* at 1301. The court disagreed with the government and found that the “district court erred in failing to make the necessary finding.” *Id.* The court offered little justification for its holding, stating only that “[t]hough § 3D1.2(d) does allow all of the object offenses in [the conspiracy count] to be grouped together . . . for purposes of calculating the total offense level, that provision does not obviate the district court’s core responsibility to identify beyond a reasonable doubt the object offense that drove the conviction.” *Id.* In making this statement, the court relied on its previous decisions in *United States v. Ross*, 131 F.3d 970, 989-94 (11th Cir. 1997) (addressing the constitutionality of § 1B1.2 in a pre-*Booker*, mandatory Guidelines sentencing regime), and *United States v. Venske*, 296 F.3d 1284, 1294 (11th Cir. 2002) (finding er-

ror where district court failed to determine, under the reasonable doubt standard, which money laundering offense formed the basis of a conspiracy conviction).

But neither *Ross*, nor *Venske*, both of which were decided before the Guidelines became advisory, addressed or explained the additional language in application note 4 indicating that “the foregoing analysis,” *i.e.*, the determination of the object under the reasonable doubt standard, is “not necessary” where the “object offenses specified in the conspiracy would be grouped together under § 3D1.2(d).” Indeed, neither court even recognized the existence of that language in the application note. It is even unclear whether money laundering offenses should be grouped under § 3D1.2(d), which would explain why these cases did not discuss the portion of the application note referencing § 3D1.2(d). *See, e.g., United States v. Kneeland*, 148 F.3d 6, 15-16 (1st Cir. 1998)(“[T]he offense level for money laundering was not based on aggregate harm and thus does not fall within the purview of subsection (d)”); *United States v. Napoli*, 179 F.3d 1, 13 (2d Cir. 1999) (“Because the guidelines for fraud and money laundering measure different types of harms and measure them in different ways, and because grouping these crimes would permit unintended results in many circumstances, we find that Napoli’s fraud and money laundering counts are not of the ‘same general type’ and

should not be grouped together under subsection (d).”). Thus, because these Eleventh Circuit decisions utterly ignore the plain language of application note 4, which explicitly states that the heightened standard of proof is not necessary for any offenses grouped under § 3D1.2(d), they have little value here.

And, though the *Bradley* Court cited *Apprendi v. New Jersey*, 530 U.S. 466 (2000), for the proposition that “facts that increase a sentence [must] be found beyond a reasonable doubt.” *Bradley*, 644 F.3d at 1301, the Supreme Court recently made clear in *Alleyne*, 133 S. Ct. at 2163, that *Apprendi* and its progeny do not require that a sentencing court find, beyond a reasonable doubt, any fact that could increase a sentence. As the Court explained,

In holding that facts that increase mandatory minimum sentences must be submitted to the jury, we take care to note what our holding does not entail. Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment.

Id. Even in *Apprendi*, the Court recognized that it is permissible “for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in impos-

ing a judgment within the range prescribed by statute” and to do so by making factual findings under a preponderance of the evidence standard. *Id.*, 530 U.S. at 481. This is especially true since the Guidelines were made advisory by *Booker*. See *United States v. Brown*, 514 F.3d 256, 269 (2d Cir. 2008) (“Judicial authority to find facts relevant to sentencing by a preponderance of the evidence survives *Booker*.”) (internal quotation marks omitted).

Additionally, *Bradley* is simply not good law in this Circuit. Indeed, this Court has specifically upheld as constitutional application note 4 to § 1B1.2(d). See *United States v. Malpeso*, 115 F.3d 155, 167 (2d Cir. 1997). In *Malpeso*, the Court found that this Guideline section and application note involve “valid sentencing considerations and not the violation of any Sixth Amendment guarantee.” *Id.* at 168. The Court explained, “The sentencing court’s determinations of the objects of a multi-object conspiracy do not constitute criminal verdicts, such that a defendant’s Sixth Amendment rights are violated.” *Id.* In reaching this decision, the Court relied on reasoning from a Third Circuit case that had reached the same conclusion: “[I]f it were constitutionally impermissible to treat the object of a multi-object conspiracy indictment as a sentencing factor rather than as an element of the crime, then it is difficult to understand how the *Griffin* court, consistent[] with the requirement

that the government prove every element of a crime beyond a reasonable doubt, could have permitted a conspiracy conviction to stand when there was insufficient evidence to support a conviction for one of the objects.” *Id.* (quoting *United States v. Conley*, 92 F.3d 157, 166 (3d Cir. 1996) (internal brackets omitted); *see also United States v. Mancuso*, 428 Fed. Appx. 73, 81-82 (2d Cir. June 30, 2011) (unpublished summary order) (recognizing that the reasonable doubt analysis for multi-object conspiracies “may be avoided” if the objects are grouped under § 3D1.2(d)).

For these same reasons, there is no merit to Trudeau’s argument that “a judicial determination that a defendant has committed a particular crime” violates the Sixth Amendment. *See* Def.’s Br. at 31. Even ignoring that a jury in this case *did* determine that Trudeau was guilty of a well-noticed and detailed conspiracy, this Court has made plain that “with the mandatory use of the Guidelines excised, the traditional authority of a sentencing judge to find all facts relevant will encounter no Sixth Amendment objection. Thus, the sentencing judge will be entitled to find all of the facts that the Guidelines make relevant to the determination of a Guidelines sentence and all of the facts relevant to the determination of a non-Guidelines sentence.” *United States v. Crosby*, 397 F.3d 103, 112 (2d Cir. 2005).

Nor is Trudeau aided by his interpretation of *United States v. Macklin*, 927 F.2d 1272, 1280 (2d Cir. 1991), which discusses application note 4 of § 1B1.2 and notes that, for a multi-object conspiracy, “the trial court must find that a defendant conspired to commit each alleged object of the conspiracy beyond a reasonable doubt.” *Id.* Def.’s Br. at 26. The *Macklin* Court, like the *Ross* and *Venske* courts, simply failed to discuss the rest of the application note, the portion which makes clear that the heightened standard of proof is not necessary for offense grouped based on aggregate harm or loss.³

³ Equally misplaced is Trudeau’s reliance on the Tenth Circuit decision of *United States v. Bush*, 70 F.3d 557, 561 (10th Cir. 1995). *See* Def.’s Br. at 27. In *Bush*, the court found that application note 5 (which has since been moved to application note 4) was unconstitutional “because the object of a conspiracy is an element of the offense,” especially where the indictment contains ambiguous language. *Bush*, 70 F.3d at 561-562. But the court went on to observe that such a constitutional problem “can be avoided if the language of the indictment is clear.” *Id.* at 557. Here, as noted above, the pleaded language in Count One was abundantly clear: Trudeau was accused of a conspiracy to commit mail, wire and bank fraud, pure and simple. And, as Trudeau concedes, this Court rejected *Bush*’s constitutional concern with application note 4 in *Malpeso*, 115 F.3d at 168.

Finally, Trudeau argues, also for the first time on appeal, that the district court should have used a heightened standard of proof because so many enhancements, proven only by a preponderance of the evidence, increased his sentence. *See* Def.'s Br. at 37-43. In making this argument, he relies on *United States v. Gigante*, 94 F.3d 53, 56 (2d Cir. 1996), wherein this Court explained that a downward departure might be warranted in a case where multiple upward adjustments were applied based only on factual findings by a preponderance of the evidence.

The decision in *Gigante*, however, has little application here. The *Gigante* decision came about in a mandatory Guidelines regime. At that time, a district court had no authority to vary from the Guideline range unless it exercised its discretion by departing downward, and this Court was concerned that a downward departure should be available where the Guideline range increased exponentially based on various factual findings and adjustments. In the post-*Booker* era, the concerns articulated in *Gigante* are far less pervasive. Now, if a district court believes that various upward adjustments cause the Guideline range to overstate the seriousness of an offense, it can impose a non-Guideline sentence. Indeed, this Court in *United States v. Dorvee*, 616 F.3d 174, 186-187 (2d Cir. 2010), made it clear that, in certain circumstances, a blind application of certain Guideline enhance-

ments for child pornography offenses results in an unreasonable sentence.

Trudeau argues that his “sentence is a Chihuahua with the tail of a Great Dane” because his conviction of Count Nine was “based on a misrepresentation that Mr. Trudeau and his wife made to a friend of theirs to obtain a short-term loan.” *See* Def.’s Br. at 40. As noted above, to reach that conclusion, the jury would have had to ignore the broad language of the wire fraud charge in Count Nine as well as the detailed and far reaching conspiracy charge in Count One. Moreover, the fact that the court here imposed a non-Guideline sentence below the 210-262 month range shows that the concerns expressed in *Gigante* have no application here.

Nor was there any reason to doubt the district court’s Guideline determination as to loss. Though Trudeau speculates that the jury must have acquitted him of all conduct save his \$50,000 fraud on Agah, he never asked the district court to provide the jury with a special verdict form. And, at no time either at trial or on appeal did Trudeau argue that the losses attributable to the conspiracy did not occur. He simply argues that he must have been acquitted of all the losses except for Agah’s. *See* Def.’s Br. at 15. But the losses resulting from the conspiracy were tied directly to Trudeau. Coyle, Febraio, Garrett, Costenbader, and Agah, negotiat-

ed directly with Trudeau. JA44-JA45, JA58-JA59, JA133-JA134, JA314-JA315, JA317. Stevens, Kriz, Preston, and Bryk testified about Trudeau's role in pushing forward the fraudulent mortgage applications and in urging Kriz to steal from his clients. JA53-JA55, JA61, JA124, JA284-JA286, JA327, JA355. Having seen the eyewitness testimony, the district court did not err in determining that Trudeau was responsible for \$4,260,008.40 in losses from the scheme. JA276.

In the end, the district court properly applied the plain language of § 1B1.2 and the grouping rules under § 3D1.2. To the extent, however, that Trudeau's first-time constitutional challenges to § 1B1.2 have merit, he has failed to establish that the error affected his substantial rights, or "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Marcus*, 130 S. Ct. at 2164. As set forth below, the court would have been justified in reaching the exact same Guideline calculation based on the wire fraud conviction, since that count realleged all of same facts underlying the conspiracy charge.

b. The specificity of the charged conspiracy obviated the need to apply U.S.S.G. § 1B1.2.

Even if Trudeau's various arguments regarding the application of § 1B1.2 have merit, he still cannot prevail on his underlying claim that the

district court should have applied a heightened standard of proof. This Court's decision in *United States v. Robles*, 562 F.3d 451, 455-56 (2d Cir. 2009) (per curiam) is particularly instructive in determining when a sentencing court has to apply a beyond a reasonable doubt standard to a multi-object conspiracy and when a preponderance-of-the-evidence standard will suffice. In *Robles*, the appellant Marte was charged under the Hobbs Act with one count of conspiracy to commit robbery and two substantive counts of robbery related to a specific incident at 92 Pinehurst Avenue and another specific incident at 161st Street, and two counts of using a firearm in relation to a crime of violence. *Id.* at 453. Marte was convicted of the Hobbs Act conspiracy, but was acquitted of the 92 Pinehurst Avenue robbery, the 161st Street robbery and the two counts of using a firearm in relation to a crime of violence. *Id.*

At sentencing on the conspiracy count, the district court found that the Pinehurst and 161st Street robberies were the objects of the Hobbs Act conspiracy, even though neither robbery was specified within the Hobbs Act charge. *Id.* Finding, for purposes of sentencing, that the Government had proven beyond a reasonable doubt that Marte had conspired to commit the Pinehurst and 161st Street robberies, the district court took both robberies into account and, accordingly, sentenced Marte principally to a 78-

month term of imprisonment, within his calculated Guidelines range. *Id.*

On appeal, Marte argued that, because the Pinehurst Avenue and 161st Street robberies were not specified in the Hobbs Act conspiracy count of which he was convicted, those robberies could not be considered objects of the conspiracy, especially since he was acquitted of the substantive counts that charged those robberies. *Id.* at 454. In analyzing the merits of Marte’s argument, this Court examined U.S.S.G. § 1B1.2 and application note 4. *Id.* at 455.

This Court observed:

[T]he language of Application Note 4 appears to address itself to just such a situation as the one we encounter here, recommending “particular care,” exercised in the form of a higher standard of proof, in “cases in which the verdict . . . does not establish which offense(s) was the object of the conspiracy.” U.S.S.G. § 1B1.2(d) cmt. n. 4. If Application Note 4 required that the objects of a conspiracy be specifically named in the conspiracy count of an indictment, it would be difficult to imagine the reason for this comment’s existence. *A verdict of guilty on the conspiracy count in such a situation would establish with precision the offenses a judge could “permissibly” consider at sentencing,* and there would be

no occasion warranting the “particular care” recommended by Application Note 4.

Id. (emphasis added).

Put another way, when the charged conspiracy of which a defendant is convicted *does* contain the particular objects, a sentencing court need not find the objects of a multi-object conspiracy beyond a reasonable doubt, and application note 4 is inapplicable. Under *Robles*, when faced with a verdict of guilty on a specifically defined multi-object conspiracy, a sentencing judge may use the less rigorous preponderance standard. This makes particular sense where, as here, Trudeau chose not to seek a special verdict on the detailed conspiracy.

The conspiracy count in this case is a perfect example of the type of conspiracy count on which the *Robles* Court determined that application note 4 had no bearing. To be sure, the grand jury in this case was under no obligation to charge a detailed conspiracy replete with overt acts. *Compare* 18 U.S.C. § 1349 (no requirement of overt act) *with* 18 U.S.C. § 371 (requiring that “one or more of such persons do any act to effect the object of the conspiracy”); *cf.* *United States v. Shabani*, 513 U.S. 10, 15-16 (1994) (holding that there was no overt act requirement to nearly identically worded drug conspiracy statute). Nonetheless, in methodical and chronological fashion covering 54 paragraphs, the conspiracy count here detailed Trudeau’s agreement with

his co-conspirators to commit mortgage fraud related to (1) 6 Sylvan Road, South, Westport; (2) 95 Saugatuck Avenue, Westport; (3) 91 Saugatuck Avenue, Westport; (4) 9 Fragrant Pines Court, Westport; (5) 171 Weston Road, Weston; (6) 35 Prospect Road, Westport; (7) 6 Sylvan Road South, Westport (Second Mortgage); (8) 87 Saugatuck Avenue, Westport; and (9) 9 Fragrant Pines Court, Westport (Private Lending). In the face of such detailed pleadings, the jury's verdict of guilt "establish[ed] with precision the offenses a judge could 'permissibly' consider at sentencing, and there w[as] no occasion warranting the 'particular care' recommended by Application Note 4." *Id.* Thus, aside from the fact that the district court applied the proper standard of proof under § 1B1.2, its use of a preponderance standard to determine the existence of each of the objects of the detailed multi-object conspiracy was also correct under *Robles*. JA250.

c. Even if U.S.S.G. § 1B1.2(d) was improperly applied, Trudeau's attack on his sentence for conspiracy would have no bearing on his sentence for wire fraud.

In attacking the validity of his sentence for the multi-object conspiracy, Trudeau ignores the fact that he was sentenced to a concurrent term of 188 months on his conviction for wire fraud. Even if Trudeau's sentence for the conspiracy were remanded as having involved a misapplica-

tion of U.S.S.G. § 1B1.2(d), Trudeau would still have to face the 188 month concurrent sentence on his conviction for wire fraud.

Notably, wire fraud, in violation of 18 U.S.C. § 1343, carries the same maximum penalty as a conspiracy charged pursuant to 18 U.S.C. § 1349. *See* 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 by the offense”). Trudeau never objected to the district court’s sentence for wire fraud, choosing instead to argue exclusively that the determination of the Guidelines for his multi-object conspiracy was erroneous or unconstitutional.⁴ Under such circumstances, any challenge to his 188 month sentence for wire fraud would only be reviewable on appeal for plain error under Rule 52(b). Under a plain error standard, Trudeau’s sentence must stand.

Indeed, this case is on all fours with *United States v. Rivera*, 282 F.3d 74 (2d Cir. 2000) (*per curiam*). In that case, the defendant had been convicted and sentenced to life imprisonment on

⁴ Nor could his arguments as to the Guidelines for conspiracy have applied to the Guidelines for wire fraud. Wire fraud, in contrast to a multi-object conspiracy, does not rely on U.S.S.G. § 1B1.2, but on U.S.S.G. § 1B1.3, which requires only a finding by a preponderance of the evidence that relevant conduct be established.

three counts, including (1) illegally possessing drugs, (2) participating in a continuing criminal enterprise (“CCE”), and (3) possessing a firearm in connection with a drug offense. The defendant challenged his sentence on the grounds that the district court’s findings about the quantity of drugs involved in the narcotics offense violated the Sixth Amendment, under *Apprendi*.

The Court rejected this contention, because the statutory maximum on the CCE count was life in prison, so that judicial factfinding did not increase the maximum punishment to which the defendant was exposed. *Rivera*, 282 F.3d at 76-77. The Court also rejected any claimed defects in the sentences on the drug and gun counts as “certainly harmless.” *Id.* at 77. “Because [the defendant] could properly be sentenced to life imprisonment on the CCE count, a concurrent sentence on other counts is irrelevant to the time he will serve in prison, and we can think of no collateral consequences from such erroneous concurrent sentences that would justify vacating them.” *Id.* at 77-78.

“[A]n erroneous sentence on one count of a multiple-count conviction does not affect substantial rights where the total term of imprisonment remains unaffected” *United States v. Outen*, 286 F.3d 622, 640 (2d Cir. 2002). The Court enforced this rule in *Outen* even though that case involved an error that was at least

nominally more serious than the one alleged here.

In *Outen*, the defendant had been convicted of two drug possession counts and one drug conspiracy count. The district court sentenced him to 60 months for each of the possession counts and 110 months for the conspiracy count. *Id.* at 639. This Court concluded that the conspiracy count carried a 60-month statutory maximum, and that the 110-month sentence therefore violated the Sixth Amendment. Nevertheless, resentencing was not warranted because the sentences would have been stacked to achieve the same overall punishment. *Id.* at 639-40. *See also United States v. McLean*, 287 F.3d 127, 135-37 (2d Cir. 2002) (declining to remand or modify judgment where defendant failed to preserve *Apprendi* claim that sentence on each individual count exceed statutory maximum and because total effective sentence could have been imposed by running shorter sentences on each count consecutively).

This Court applied the same principles in *United States v. Quinones*, 511 F.3d 289 (2d Cir. 2007), where it decided not to grant a *Crosby* remand on several counts of conviction because the defendants faced a valid life sentence pursuant to 21 U.S.C. § 848. *See id.* at 323 n.24 (applying plain-error analysis). “[A]ny resentencing on those counts would not change the fact that de-

fendants will spend the rest of their lives imprisoned” on the remaining count. *Id.*

The result in *Quinones* followed *a fortiori* from cases like *Outen*. In *Outen*, the Court affirmed notwithstanding an error that indisputably increased the sentence on one count of conviction. In *Quinones*, the Court affirmed notwithstanding a different error (mandatory application of the Guidelines) which may or may not have had an impact on the sentence for a count of conviction. Here, Trudeau’s case is weaker still because he can point only to a claimed error in the grouping analysis for the conspiracy count which would have had no impact on the Guideline calculation and the sentence for the wire fraud count.

3. Trudeau’s sentence was not based on acquitted conduct.

Trudeau and Amicus both insist that Trudeau was sentenced on the basis of acquitted conduct. But Trudeau was convicted under Count One of a broad conspiracy to commit bank, mail and wire fraud, and under Count Nine of a broad wire fraud scheme. Although he was acquitted of Counts Two through Eight, a review of the indictment demonstrates that the acquittals speak not to a rejection of liability, but to a rejection of particular theories of liability.

Trudeau's claim that his sentence was based on acquitted conduct requires a convoluted construct. First, Trudeau argues that his conviction on Count Nine was based on a single transaction, *i.e.*, "a misrepresentation that Mr. Trudeau and his wife made to a friend of theirs to obtain a short-term loan." Def.'s Br. at 40. In so arguing, Trudeau seeks to reduce the wire fraud of which he was convicted to a single transaction predicated by an e-mail Trudeau sent to procure \$50,000 from James Agah on April 13, 2010. Since Trudeau repaid Agah when he learned of his pending indictment, Trudeau believes that there was no loss amount, so his Guidelines offense level must be reduced to 7, with a corresponding sentence range of 8-14 months. *See* Def.'s Br. at 17. While Trudeau no doubt wishes that Count Nine reflected a single fraudulent transaction, such an aspiration simply ignores the plain language of the count as charged.

Contrary to Trudeau's belief, the Government's theory was that the wire to Agah was near the end of a single continuous scheme to defraud banks, mortgage lenders and individuals. That single scheme resulted in foreseeable losses to Fremont Lending, IndyMac, Argent, Coyle, Febbraio, Costenbader, Garrett, and to clients of co-conspirator Kriz, which totaled well in excess of \$4,000,000. This theory was evident from the indictment and through the closing arguments.

Count Nine specifically alleged a scheme to defraud from “February 2004 through in or about April 2010” that reincorporated all of the allegations from paragraphs 1 through 10 and 12 through 35 of the indictment. JA40. Those paragraphs contain multiple allegations of fraud. JA33-JA38. Thus, though Count Nine certainly relied on the last wire charged in the scheme, it related to an ongoing and broad scheme to defraud, not to a single fraudulent transaction. Having been convicted of Count Nine, Trudeau was responsible for the over \$4,000,000 of fraud loss that resulted from the conduct outlined in the count.

Nor could the Government’s conduct at trial have led Trudeau to believe that Count Nine was limited to a single transaction. In closing, the Government spoke of Trudeau’s “scheme and conspiracy,” never referring to multiple schemes. JA158; *see also* JA155 (describing a “scheme to deprive mortgage lenders, private lenders, through false pretenses using interstate wires”); JA157 (“the evidence shows that Bill Trudeau devised a scheme to defraud Fremont, that’s 95 Saugatuck Avenue. Mortgage lender Argent, that’s the 87 Saugatuck Avenue lender, and James Agah and willfully executed that scheme”).

The Government’s theory that Trudeau’s conduct was part of an ongoing and continuous scheme was certainly apparent to the district

court. At sentencing, the court, after overseeing the lengthy trial, described a “house of cards” and observed how all of Trudeau’s actions, including the “approach to Mr. Agah, to obtain monies. All of this was part and parcel of a common scheme or plan, in effect, to benefit Mr. Trudeau and others through fraud, pure and simple and multiple.” JA256-JA257. Trudeau’s e-mail to Agah in an effort to secure more funds was essential to keep afloat the fraud Trudeau had been committing. *See United States v. Slevin*, 106 F.3d 1086, 1091 (2d Cir. 1996) (“Where the frauds are not isolated or unrelated swindles, postfraud mailing . . . may further the scheme by, for example, lulling the victims into believing they received the services fraudulently promised, or by helping to keep the scheme in operation by preserving a needed business relationship between a fraud victim and a defendant”)(citations omitted); *see also United States v. Schmuck*, 489 U.S. 712-14 (1989) (where the defendant fraudulently sold altered cars to dealers and the dealers resold the cars, mailing title application forms to state in process, mailing of title application by innocent dealers was “an essential step” in the fraud even though the mailing took place at the temporal end of the fraud and after the defendant fraudulently sold the cars). Trudeau’s attempt to characterize his wire fraud conviction as relating to an isolated instance of fraud is simply incorrect.

Although Trudeau was acquitted of aiding and abetting bank fraud in Counts Two and Three; of aiding and abetting mail fraud in Counts Four, Five, and Six; and of aiding and abetting wire fraud in Counts Seven and Eight, JA269, for each of these counts, a co-conspirator was responsible for the submission to the bank, or for the mailing or wiring. For example, Bryk's office express mailed Bliss's closing HUD-1 documents to mortgage lenders, as charged in Counts Four (JA62), Five (JA72), and Six (JA64-JA65), and faxed the wire related to Count Eight (JA57). Stevens's office chose IndyMac (JA350) and Chase (JA354-356) and sent in Merrick's and Bliss's fraudulent mortgage applications, as charged in Counts Two and Three. In marked contrast, Trudeau personally sent the e-mail described in Count Nine. PSR ¶ 35; JA40-JA41; JA160.⁵ That the jury convicted Trudeau on the count in which Trudeau himself took action to create federal jurisdiction is hardly a reason to believe that the conviction was related only to that particular fraudulent act, especially when that wire was in furtherance of the entire scheme as charged.

Thus, each substantive count in the indictment related to the same ongoing scheme

⁵ Notably, the government conceded in closing argument that the direct e-mail from Trudeau to James Agah was the only "writing" in the scheme that could be attributed directly to Trudeau. JA169-JA170.

charged in Count Nine, but had a different basis for federal jurisdiction. Put another way, the wire fraud in Count Nine based on Trudeau's sending an e-mail on April 13, 2010 from Virginia to New York, was simply an alternative theory of liability regarding the scheme to defraud banks, mortgage lenders and individuals of millions of dollars. Having been convicted under an alternative theory, that covered the entire scheme to defraud, Trudeau cannot claim that he was acquitted of parts of the scheme.

Trudeau argues that "Count 9 shared virtually no factual overlap with the remaining substantive counts" and states that "[t]he evidence as to Count 9 revolved around a separate and distinct core of facts, which transpired more than two years after the mortgage fraud scheme allegedly ended." Def.'s Br. at 10. Trudeau completely miscomprehends the meaning of "reincorporated" paragraphs in an indictment. As discussed above, neither the Government, nor the district court viewed the defrauding of Agah as a distinct scheme to defraud that was separate from the actions taken against the banks, mortgage lenders and other individuals described in the rest of the Indictment. JA256-JA257. The theft of \$50,000 from Agah was simply part of Trudeau's effort to keep the scheme afloat. That it involved a fraudulent loan related to 9 Fragrant Pines and involved Trudeau's provision of mortgages on all the Bliss properties to Agah

demonstrated the continuing nature of the crime.

Amicus, too, argues that the jury's verdict "plainly did not" authorize the sentencing range the district court adopted. *See* Amicus Br. at 14. Even if the district court had imposed a Guidelines sentence, which it did not, the jury's verdict on Count One and Count Nine – the only two counts which covered the entire period and conduct with which Trudeau was charged – fully authorized the sentence imposed. Having been charged and convicted of Counts One and Nine, which counts encompassed all of the actions the district court took into account at sentencing, Trudeau's argument that his sentence was based on acquitted conduct is without merit.

4. Even if Trudeau's sentence was based on acquitted conduct, the use of acquitted conduct in determining his sentence was proper.

Even if this Court were to find that the district court considered acquitted conduct in determining the Guideline range, use of such conduct was proper. In *United States v. Watts*, 519 U.S. 148 (1997), the Supreme Court held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *Id.* at 157. The Court reasoned that an acquittal means only that conduct was

not proved beyond a reasonable doubt. *Id.* at 155. An acquittal did not foreclose a sentencing authority from finding the same conduct proved by a preponderance-of-the-evidence standard that applies at sentencing. *Id.* at 156.

Though *Watts* pre-dated both the mandatory period of the Guidelines, and the advisory Guidelines put into place by *Booker*, the Supreme Court has made clear since *Booker* that judicial fact-finding does not violate the Sixth Amendment when it results in the imposition of a sentence that does not exceed the statutory maximum for the offense of conviction. See *Alleyne*, 133 S. Ct. at 2163. “[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.” *Booker*, 543 U.S. at 233. In fact, the *Booker* Court cited *Watts* for the proposition that “a sentencing judge could rely for sentencing purposes upon a fact that jury found unproved (beyond a reasonable doubt).” *Id.* at 251.

Since *Booker*, the Supreme Court has repeatedly reaffirmed that principle. In *Cunningham v. California*, 549 U.S. 270 (2007), the Court found “no disagreement among the Justices” that judicial fact-finding under the Sentencing Guidelines “would not implicate the Sixth Amendment” under the advisory Guidelines. *Id.* at 285. In *Rita v. United States*, 551 U.S. 338

(2007), the Court again confirmed that its “Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence.” *Id.* at 350-53. And in *Alleyne*, the Court reiterated its “long recognized” rule “that broad sentencing discretion, informed by judicial factfinding does not violate the Sixth Amendment.” *Id.*, 133 S. Ct. at 2163.

Trudeau and Amicus argue that *Alleyne* “strongly suggests” that *Watts* is incorrect because the district court in *Alleyne* relied on acquitted conduct – that the defendant brandished a gun – to raise the defendant’s sentence above the statutory maximum for the crime of which the defendant was convicted. *See* Def.’s Br. at 45; Amicus Br. at 17. But *Alleyne* has no relevance to a simple Guidelines determination in which a mandatory minimum is not augmented due to conduct found by a judge. Indeed, none of the conduct which Trudeau describes as “acquitted” either created a mandatory minimum sentence, augmented one, or altered the permissible maximum statutory sentence to which he was subject.

Equally misplaced is Trudeau’s argument that *Alleyne*’s reference to “elements” instructs that “every aspect of a crime that must be proven by the government is an element, regardless of whether it alters the resulting punishment[, a]nd every element is subject to the jury right.”

Def.'s Br. at 46. Not surprisingly, Trudeau's preferred definition of "elements" goes far beyond that of the *Alleyne* court. After all, in *Alleyne*, the Court held that "[w]hen a finding of fact alters the *legally prescribed punishment so as to aggravate it*, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." *Id.*, 133 S. Ct at 2162 (emphasis added). Of course, the actual loss to a victim of wire fraud does not aggravate the legally prescribed punishment. In fact, there is no way in which to view loss as an element of wire fraud. *See, e.g., United States v. Novak*, 443 F.3d 150, 156 (2d Cir. 2006) (the element of fraudulent intent does not require "the government to prove that the victims of the fraud were *actually* injured") (emphasis in original). Here, since the district court only used the claimed "acquitted conduct" to determine the total loss, and not to determine an element, such as whether Trudeau had a fraudulent intent, Trudeau's interpretation of *Alleyne* is irrelevant to the district court's Guidelines calculation. Simply put, the Supreme Court's recent case law does nothing to alter *Watts*, which remains good law.

Further reason to doubt Trudeau's argument that *Alleyne* alters *Watts* can be found in the Supreme Court's recent decision not to grant review of this Court's holding in *United States v. Pica*, 692 F.3d 79, 88-89 (2d Cir. 2012), *cert. denied sub nom., Antico v. United States*, 133 S. Ct.

1582 (2013). In *Pica*, this Court, citing *Watts*, held that a “district court may treat acquitted conduct as relevant conduct at sentencing, provided that it finds by a preponderance of the evidence that the defendant committed the conduct.” *Id.*, 692 F.3d at 88. Had the Supreme Court wanted “this Court to reevaluate its acquitted conduct jurisprudence in light of recent Supreme Court cases,” Def.’s Br. at 43, as Trudeau urges, surely the Supreme Court would not have declined to review the issue.

Nor is there a circuit split that would entice the Supreme Court to revisit this issue. Indeed, every court of appeals, including this Court, has confirmed that a district court may consider acquitted conduct at sentencing. *See, e.g., United States v. Dorcelly*, 454 F.3d 366, 371-372 (D.C. Cir. 2006); *United States v. Gobbi*, 471 F.3d 302, 314 (1st Cir. 2006); *United States v. Jiminez*, 513 F.3d 62, 88 (3d Cir. 2008); *United States v. Grubbs*, 585 F.3d 793, 798-99 (4th Cir. 2009); *United States v. Farias*, 469 F.3d 393, 399 & n.17 (5th Cir. 2006); *United States v. Hurn*, 496 F.3d 785, 788 (7th Cir. 2007); *United States v. High Elk*, 442 F.3d 622, 626 (8th Cir. 2006); *United States v. Mercado*, 474 F.3d 654, 656-58 (9th Cir. 2007); *United States v. Magallanez*, 408 F.3d 672, 684-85 (10th Cir. 2005); *United States v. Duncan*, 400 F.3d 1297, 1304-1305 (11th Cir. 2005). Under such circumstances, Trudeau’s ar-

gument that recent Supreme Court precedence has altered *Watts* should be rejected.

Amicus argues that a sentence based on acquitted conduct ignores the jury's role and will "induc[e] defendants to accept unjust plea bargains because . . . a conviction on any count (and even a far lesser one, as occurred here) will allow a court to sentence on all counts." Amicus Br. at 20. That argument makes little sense here. Trudeau's wire fraud conviction was hardly a lesser offense. It covered the time period from February 2004 to April 2010 and all of the fraud alleged in the Indictment. A jury's acquittal means only that a defendant may not be retried on that particular count. *See, e.g., Evans v. Michigan*, 133 S. Ct. 1069, 1080 (2013). An acquittal on a count does not mean that a person cannot be held responsible for the charged act if it is proven at sentencing by a preponderance of the evidence. *See One Lot of Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 235 (1972) ("The acquittal of the criminal charges may have only represented 'an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused . . . it does not constitute an adjudication on the preponderance-of-the-evidence burden . . .").

Thus, even if the district court used acquitted conduct to determine Trudeau's Guidelines for wire fraud and conspiracy, the use of such conduct did not constitute a procedural error. *See*

Pica, 692 F.3d at 88-89 (use of “acquitted conduct as relevant conduct at sentencing, provided that it finds by a preponderance of the evidence that defendant committed the conduct” ensures that sentence is procedurally reasonable).

5. If remand is warranted, the case should return to the same district judge.

Although for the reasons outlined above, there is no reason Trudeau should prevail in his claim that his case should be remanded for resentencing, if this Court determines that resentencing is warranted, the case should be remanded to the same district judge. After all, a “judge who has presided over a lengthy trial often gains an intimate insight into the circumstances of the defendant’s crime, which may prove uniquely useful in determining the sentence to be imposed, whereas no such reason would normally exist upon sentencing after a guilty plea.” *United States v. Robin*, 553 F.3d 8, 11 (2d Cir. 1977).

Trudeau argues that, because the district court relied “on evidence that the government was not able to put before the jury,” it somehow became biased. *See* Def.’s Br. at 55-56. Of course, Trudeau fails to demonstrate why a different sentencing judge would not be able to take that same evidence into account at sentencing hearing. Trudeau also fails to demonstrate exactly how the district court here became biased.

Equally baseless is Trudeau's claim that the district court increased his criminal history level "based on her disapproval of legitimate legal positions taken on arguments made by defense counsel." Def.'s Br. at 56. There is absolutely no evidence that the district court was biased or increased Trudeau's sentence because he proceeded to trial. In fact, when defense counsel at one point said, "Please don't take my misstatement out on Mr. Trudeau," the district court was quick to respond, "I'm not going to." JA269.

In determining that there "is an understatement of criminal history here," the district court delineated concrete reasons – reasons any sentencing judge would be free to consider – for making that determination. JA274. The district court noted that: (1) single points of conviction were not counted because there were more than four; (2) there was "pretrial conduct that the Court is aware of from testimony I heard and the findings I made in that regard;" and (3) the "nature of his prior convictions" "suggest recidivism inclination on the part of Mr. Trudeau" JA274. All those are legitimate grounds for upwardly departing on a defendant's criminal history score. *See, e.g., United States v. Morris*, 350 F.3d 32, 38 (2d Cir. 2003) (upholding upward departure due to finding of increased likelihood of recidivism based on uncharged criminal conduct); *United States v. Agard*, 77 F.3d 22, 26 (2d Cir. 1996) (affirming upward departure that fol-

lowed probation violation); *United States v. Bernhardt*, 905 F.2d 343, 345-46 (10th Cir. 1990) (upholding upward departure from category VI where defendant had been “defrauding people nearly his entire adult life”); *United States v. Christoph*, 904 F.2d 1036, 1038, 1041-42 (6th Cir. 1990) (permitting upward departure from category VI where defendant had long criminal history mostly involving credit card fraud); *United States v. Brown*, 899 F.2d 94, 96-98 (1st Cir. 1990) (affirming upward departure from category VI where defendant demonstrated long history of theft, criminal mischief and disorderly conduct).

Nor is Trudeau aided by his reliance on *Cullen v. United States*, 194 F.3d 401 (2d Cir. 1999). In *Cullen* after a magistrate judge held a hearing and determined that the defendant’s lawyer had provided ineffective assistance of counsel, the district court, without holding any hearing of its own, refused to vacate the sentence it had previously imposed. *Id.* at 403. This Court remanded to a different judge, noting the need to “preserve the appearance of justice” because the public “would wonder whether the Judge had permitted his prior ruling to influence his second decision.” *Id.* at 408. Here, there is simply no “second decision,” nor any reason to believe that, should this Court remand for resentencing, the district court would not abide by the dictates of the mandate. Thus, should this Court determine

that a remand for resentencing is necessary, the case should be remanded to the same district judge.

Conclusion

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

Dated: November 8, 2013

Respectfully submitted,

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ACTING U.S. ATTORNEY
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A handwritten signature in black ink, appearing to read 'Rahul Kale', written in a cursive style.

RAHUL KALE
ASSISTANT U.S. ATTORNEY

Robert M. Spector
Assistant United States Attorney (of counsel)

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

This is to certify that on November 1, 2013, the government filed an unopposed motion seeking permission to file an oversized brief of no more than 20,000 words, pursuant to Local Rule 27.1. The Court granted that motion on November 5, 2013. This brief contains fewer than the requested number of words, in that the brief is calculated by the word processing program to contain approximately 19,878 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.



RAHUL KALE
ASSISTANT U.S. ATTORNEY

ADDENDUM

U.S.S.G. § 1B1.2 – Applicable Guidelines

- (a) Determine the offense guideline section in Chapter Two (Offense Conduct) applicable to the offense of conviction (*i.e.*, the offense conduct charged in the count of indictment or information of which the defendant was convicted). However, in the case of a plea agreement (written or made orally on the record) containing a stipulation that specifically establishes a more serious offense than the offense of conviction, determine the offense guideline section in Chapter Two applicable to the stipulated offense.

Refer to the Statutory Index (Appendix A) to determine the Chapter Two offense guideline, referenced to the Statutory Index for the offense of conviction. If the offense involved a conspiracy, attempt, or solicitation, refer to §2X1.1 (Attempt, Solicitation, or Conspiracy) as well as the guideline referenced in the Statutory Index for the substantive offense. For statutory provisions not listed in the Statutory Index, use the most analogous guideline. See §2X5.1 (Other Offenses). The guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or infraction. See §1B1.9 (Class B or C Misdemeanors and Infractions).

- (b) After determining the appropriate offense guideline section pursuant to subsection (a) of this section determine the applicable guideline range in accordance with §1B1.3 (Relevant Conduct).
- (c) A plea agreement (written or made orally on the record) containing a stipulation that specifically establishes the commission of additional offense(s) shall be treated as if the defendant had been convicted of additional count(s) charging those offense(s).
- (d) A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.

* * *

Application Note 3:

- 3. Subsection (c) and (d) address circumstances in which the provisions of Chapter Three, Part D (Multiple Counts) are to be applied although there may be only one count of conviction. Subsection (c) provides that in the case of a stipulation to the commission of additional offense(s), the guidelines are to be applied as if the defendant had been convicted of an addi-

tional count for each of the offenses stipulated. For example, if the defendant is convicted of one count of robbery but, as part of a plea agreement, admits to having committed two additional robberies, the guidelines are applied as if the defendant had been convicted of three counts of robbery. Subsection (d) provides that a conviction on a conspiracy count charging conspiracy to commit more than one offense is treated as if the defendant had been convicted of a separate conspiracy count for each offense that he conspired to commit. For example, where a conviction on a single count of conspiracy establishes that the defendant conspired to commit three robberies, the guidelines are to be applied as if the defendant had been convicted on one count of conspiracy to commit the first robbery, one count of conspiracy to commit the second robbery, and one count of conspiracy to commit the third robbery.

Application Note 4:

4. Particular care must be taken in applying subsection (d) because there are cases in which the verdict or plea does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy

count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense. Note, however, if the object offenses specified in the conspiracy count would be grouped together under § 3D1.2(d)(e.g., a conspiracy to steal three government checks) it is not necessary to engage in the foregoing analysis, because § 1B1.3(a)(2) governs consideration of the defendant's conduct.

U.S.S.G. § 1B1.3 – Relevant Conduct (Factors that Determine the Guideline Range)

(a) *Chapters Two (Offense Conduct) and Three (Adjustments)*. Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for

that offense, or in the course of attempting to avoid detection or responsibility for that offense;

- (2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;
 - (3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and
 - (4) any other information specified in the applicable guideline.
- (b) *Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence)*. Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

U.S.S.G. § 3D1.2 - Groups of Closely Related Counts

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

- (a) When counts involve the same victim and the same act or transaction.
- (b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.
- (c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.
- (d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are to be grouped under this subsection:

§2A3.5;
§§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1,
2B5.3, 2B6.1;
§§2C1.1, 2C1.2, 2C1.8;
§§2D1.1, 2D1.2, 2D1.5, 2D1.11,
2D1.13;
§§2E4.1, 2E5.1;
§§2G2.2, 2G3.1;
§2K2.1;
§§2L1.1, 2L2.1;
§2N3.1;
§2Q2.1;
§2R1.1;
§§2S1.1, 2S1.3;
§§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9,
2T2.1, 2T3.1.

Specifically excluded from the operation of
this subsection are:

all offenses in Chapter Two, Part A
(except §2A3.5);
§§2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3;
§2C1.5;
§§2D2.1, 2D2.2, 2D2.3;
§§2E1.3, 2E1.4, 2E2.1;
§§2G1.1, 2G2.1;
§§2H1.1, 2H2.1, 2H4.1;
§§2L2.2, 2L2.5;
§§2M2.1, 2M2.3, 2M3.1, 2M3.2,
2M3.3, 2M3.4, 2M3.5, 2M3.9;
§§2P1.1, 2P1.2, 2P1.3;
§2X6.1.

For multiple counts of offenses that are not listed, grouping under this subsection may or may not be appropriate; a case-by-case determination must be made based upon the facts of the case and the applicable guidelines (including specific offense characteristics and other adjustments) used to determine the offense level.

Exclusion of an offense from grouping under this subsection does not necessarily preclude grouping under another subsection.

* * *

Application Note 6

6. Subsection (d) likely will be used with the greatest frequency. It provides that most property crimes (except robbery, burglary, extortion and the like), drug offenses, firearms offenses, and other crimes where the guidelines are based primarily on quantity or contemplate continuing behavior are to be grouped together. The list of instances in which this subsection should be applied is not exhaustive. Note, however, that certain guidelines are specifically excluded from the operation of subsection (d).

A conspiracy, attempt, or solicitation to commit an offense is covered under subsection (d) if the offense that is the object

of the conspiracy, attempt, or solicitation is covered under subsection (d).

Counts involving offenses to which different offense guidelines apply are grouped together under subsection (d) if the offenses are of the same general type and otherwise meet the criteria for grouping under this subsection. In such cases, the offense guideline that results in the highest offense level is used; *see* §3D1.3(b). The “same general type” of offense is to be construed broadly.

Examples: (1) The defendant is convicted of five counts of embezzling money from a bank. The five counts are to be grouped together. (2) The defendant is convicted of two counts of theft of social security checks and three counts of theft from the mail, each from a different victim. All five counts are to be grouped together. (3) The defendant is convicted of five counts of mail fraud and ten counts of wire fraud. Although the counts arise from various schemes, each involves a monetary objective. All fifteen counts are to be grouped together. (4) The defendant is convicted of three counts of unlicensed dealing in firearms. All three counts are to be grouped together. (5) The defendant is convicted of one count of selling heroin, one count of

selling PCP, and one count of selling cocaine. The counts are to be grouped together. The Commentary to §2D1.1 provides rules for combining (adding) quantities of different drugs to determine a single combined offense level. (6) The defendant is convicted of three counts of tax evasion. The counts are to be grouped together. (7) The defendant is convicted of three counts of discharging toxic substances from a single facility. The counts are to be grouped together. (8) The defendant is convicted on two counts of check forgery and one count of uttering the first of the forged checks. All three counts are to be grouped together. Note, however, that the uttering count is first grouped with the first forgery count under subsection (a) of this guideline, so that the monetary amount of that check counts only once when the rule in §3D1.3(b) is applied. But: (9) The defendant is convicted of three counts of bank robbery. The counts are not to be grouped together, nor are the amounts of money involved to be added.

* * *

Application Note 8

8. A defendant may be convicted of conspiring to commit several substantive offenses and also of committing one or more of the

substantive offenses. In such cases, treat the conspiracy count as if it were several counts, each charging conspiracy to commit one of the substantive offenses. See §1B1.2(d) and accompanying commentary. Then apply the ordinary grouping rules to determine the combined offense level based upon the substantive counts of which the defendant is convicted and the various acts cited by the conspiracy count that would constitute behavior of a substantive nature. *Example:* The defendant is convicted of two counts: conspiring to commit offenses A, B, and C, and committing offense A. Treat this as if the defendant was convicted of (1) committing offense A; (2) conspiracy to commit offense A; (3) conspiracy to commit offense B; and (4) conspiracy to commit offense C. Count (1) and count (2) are grouped together under § 3D1.2(b). Group the remaining counts, including the various acts cited by the conspiracy count that would constitute behavior of a substantive nature, according to the rules in this section.

Background: Ordinarily, the first step in determining the combined offense level in a case involving multiple counts is to identify those counts that are sufficiently related to be placed in the same Group of Closely Related Counts (“Group”). This

section specifies four situations in which counts are to be grouped together. Although it appears last for conceptual reasons, subsection (d) probably will be used most frequently.

A primary consideration in this section is whether the offenses involve different victims. For example, a defendant may stab three prison guards in a single escape attempt. Some would argue that all counts arising out of a single transaction or occurrence should be grouped together even when there are distinct victims. Although such a proposal was considered, it was rejected because it probably would require departure in many cases in order to capture adequately the criminal behavior. Cases involving injury to distinct victims are sufficiently comparable, whether or not the injuries are inflicted in distinct transactions, so that each such count should be treated separately rather than grouped together. Counts involving different victims (or societal harms in the case of “victimless” crimes) are grouped together only as provided in subsection (c) or (d).

Even if counts involve a single victim, the decision as to whether to group them together may not always be clear cut. For example, how contemporaneous must two

assaults on the same victim be in order to warrant grouping together as constituting a single transaction or occurrence? Existing case law may provide some guidance as to what constitutes distinct offenses, but such decisions often turn on the technical language of the statute and cannot be controlling. In interpreting this Part and resolving ambiguities, the court should look to the underlying policy of this Part as stated in the Introductory Commentary.