No. 15-1935

In the
United States Court of Appeals
for the Sixth Circuit

United States of America,

Plaintiff-Appellee,

v.

Farid Fata,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Michigan
No. 2:13-cr-20600 (Hon. Paul D. Borman)

Brief for the United States

Leslie R. Caldwell
Assistant Attorney General

Barbara L. McQuade
United States Attorney

Catherine K. Dick
Trial Attorney, Criminal Division
1301 New York Ave, NW, Ste. 700
Washington, D.C. 20530
Phone: (202) 538-4049
catherine.dick@usdoj.gov

Sarah Resnick Cohen
Assistant United States Attorney
211 West Fort Street, Suite 2001
Detroit, MI 48226
Phone: (313) 226-9637
sarah.cohen@usdoj.gov

Table of Contents

Table of Authorities

Cases

Cases

Statutes

Rules

Other Authorities

Waiver of Oral Argument

Because the issues are straightforward and adequately presented in the briefs and record, this appeal should be decided without oral argument.

Introduction

Farid Fata was a doctor who poisoned his patients for profit. He falsely diagnosed them with cancer and other maladies, then administered—and billed for—chemotherapy, cancer treatments, intravenous iron, and other dangerous chemicals they did not need. His scheme caused hundreds, and perhaps thousands, of patients to suffer permanent damage to their bodies. And he ultimately pleaded guilty, admitting that he victimized 553 individuals and four insurers and that he took over $17 million in fraudulent payments.

This Court should affirm Fata's convictions and deservedly lengthy 45-year sentence. *First*, Fata stipulated that his conduct involved an abuse of a trust, and the record establishes—in agonizing detail—how Fata abused patients' and insurers' trusts by administering chemotherapy and other dangerous treatments to people who did not need them. The sentencing guidelines therefore permitted the district court to apply both the two-level adjustment in U.S.S.G. § 3B1.3 and the aggravating role adjustment in U.S.S.G. § 3B1.1. *Second*, the district court appropriately received written and oral statements from Fata's patients and their family members during the sentencing

process. Any of the confirmed victims had a right to be heard under the Crime Victims' Rights Act, and the district court was permitted to hear from any other patients under 18 U.S.C. § 3661. Nor can Fata show any prejudice given the district court's ruling that it would not base Fata's sentence on the statements. *Third*, because the full record supports Fata's guilt on the money laundering counts, Fata cannot show plain error from the factual basis on those counts.

Issues Presented

I. Did the district court clearly err in enhancing Fata's sentence for abusing a position of trust under U.S.S.G. § 3B1.3, where patients and insurers trusted him to administer and bill for only medically necessary oncology and hematology treatments?

II. Is a remand necessary to allow Fata to counter the statements submitted at sentencing by his patients and their family members, given that the district court was permitted to receive those statements, Fata presented rebuttal, and the court declined to rely on them when imposing sentencing?

III. Were sufficient facts presented to the district court prior to entry of judgment to support Fata's guilt on two counts of promotional money laundering?

Statement of the Case

1. Overview

Farid Fata was a doctor who owned and operated a medical practice called Michigan Hematology Oncology. (PSR ¶ 28). Between 2005 and 2013, the practice grew to seven locations and treated approximately 17,000 patients. (*Id.* ¶¶ 28, 57). Fata eventually expanded his businesses to include a pharmacy (Vital Pharmacare) and a diagnostic testing facility (United Diagnostics). (*Id.* ¶¶ 29-30).

Fata used his businesses to perpetrate an almost unthinkable scheme of dosing patients with unnecessary medications, just so he could bill for them. As he later admitted, Fata engaged in numerous types of patient mistreatment, including:

- Unnecessary chemotherapy and other cancer treatment drugs given to patients without cancer or in remission;
- Aggressive, dangerous chemotherapy given in the office (where Fata could bill) instead of the appropriate hospital setting;
- Unnecessary "supportive" treatments, such as human growth factors, intravenous immunoglobulin, and anti-nausea medication;
- Unnecessary intravenous iron given to patients who were not iron-deficient; and

- Unnecessary positronic emission test (PET) scans, which involve the injection of radioactive material into patients.

2. Unnecessary Chemotherapy and Zometa for Deliberately Misdiagnosed Multiple Myeloma Patients

Fata deliberately misdiagnosed more than a few of his patients with multiple myeloma (a type of cancer), so that he could administer chemotherapy to them. (PSR ¶¶ 35-36; R. 169: Tr., 2678-79; U.S. Sentencing Exhibit ("U.S. Sent. Ex.") 11, Sealed App'x at 307). These patients received hundreds of unnecessary chemotherapy doses, in addition to other drugs given as part of a pattern of mistreatment. (United States' 5/27/15 Sealed Sentencing Memorandum ("U.S. Sent. Memo."), Ex. B3 ¶ 1, Sealed App'x at 231; U.S. Sent. Ex. 11, Sealed App'x at 307).

One of those patients was M.F. (*Id.*). M.F. did not have cancer. (PSR ¶ 36; U.S. Sent. Memo., Ex. B1 ¶ 26, Sealed App'x at 223; R. 169: Tr., 2677). But Fata diagnosed her with it and began administering chemotherapy. (PSR ¶ 36). By sheer luck, Fata's lies were uncovered on the very first day of M.F.'s chemotherapy, when she was admitted to the hospital after breaking her leg. (U.S. Sent. Memo., Ex. A INT-1183 ¶ 2, Sealed App'x at 194). While there, M.F. underwent a pre-operative bone

marrow biopsy that did not show any indication of cancer. (*Id.*). Then, one of Fata's doctors (whose complaints later triggered Fata's arrest) reviewed M.F.'s records while rounding at the hospital. He told M.F. that she did not have cancer and that she should "run" from Fata. (U.S. Sent. Memo., Ex. A INT-1183 ¶¶ 3, 5; INT-0075 ¶ 1, Sealed App'x at 194, 116). Because of that intervention, M.F. received only one dose of chemotherapy. (U.S. Sent. Ex. 11, Sealed App'x at 307).

J.M. was not so lucky. Like M.F., J.M. did not have cancer, but Fata diagnosed him with it and began treating him with chemotherapy. (PSR ¶ 36). In total, J.M. received approximately 28 unnecessary treatments of chemotherapy (U.S. Sent Ex. 11, Sealed App'x at 307), and his false diagnosis was not discovered until after Fata's arrest. (U.S. Sent. Memo., Ex. A INT-1154 ¶ 10, INT-1155 ¶ 1, Sealed App'x at 190-91). Before chemotherapy, J.M. was in good health, walking two miles several times each week, and regularly bowling. (U.S. Sent. Memo., Ex. A, INT-1154 ¶ 3, Sealed App'x at 190). After chemotherapy began, J.M.'s health deteriorated significantly, resulting in at least ten hospitalizations for congestive heart failure (a known side effect of chemotherapy), kidney dysfunction, and blood clots. (*Id.* ¶¶ 4, 5, Sealed

App'x at 190). J.M.'s doctor believes the chemotherapy may have contributed to his congestive heart failure; his heart now functions at only 25% of its capacity. (U.S. Sealed Sentencing Memo, Ex. A, INT-1155 ¶ 3, Sealed App'x at 191; R. 169: Tr., 2683).

Fata also administered a drug called Zometa to patient R.S. (PSR ¶ 52). Zometa is intended to support weakened bones in patients with active myeloma. (*Id.*; U.S. Sent. Memo., Ex. B1 ¶ 25, Sealed App'x at 223). R.S. did not have active myeloma. *(Id.*; R. 169: Tr., 2672-73). But Fata told R.S. that he had both myeloma and metastatic bone cancer and would have to be on Zometa for life. (U.S. Sent. Memo., Ex. E, Sealed App'x at 248). Fata then began R.S. on a monthly regimen of Zometa. (PSR ¶ 52; R. 168: Tr. 2614).

The most well-known and feared side effect of Zometa is osteonecrosis of the jaw (death of the jaw bone). (U.S. Sent. Memo., Ex. B1 ¶ 25, Sealed App'x at 223; R. 169: Tr., 2673-74). Zometa should be stopped if osteonecrosis occurs. (U.S. Sent. Memo., Ex. B1 ¶ 25, Sealed App'x at 223). And after starting Zometa, R.S.'s teeth began to hurt. (U.S. Sent. Memo., Ex. A INT-1013 ¶ 2, Sealed App'x at 180). Nevertheless, Fata continued R.S. on Zometa for over two years, during

which he received approximately 25 doses. (PSR ¶ 52; U.S. Sent. Memo., Ex. B1 ¶ 25, Sealed App'x at 223; R. 168: Tr., 2614).

All but one of R.S's teeth fell out. (R. 168: Tr., 2614; U.S. Sent. Memo., Ex. A, INT-1013 ¶ 3, Sealed App'x at 180). The roots of his teeth fell out as well, and osteonecrosis left a hole in his gums that surgeons had to cover with a piece of skin from his cheek. (*Id.*). R.S. lost his job and required daily morphine and OxyContin for his extreme ongoing pain. (U.S. Sent. Memo., Ex. A, INT-1014 ¶¶ 1-2, Sealed App'x at 181).

3. Unnecessary Chemotherapy for Deliberately Misdiagnosed Myelodysplastic Syndrome Patients

Myelodysplastic syndrome is a deadly form of cancer that can also develop into leukemia. (R. 169: Tr., 2686-87). Fata misdiagnosed patients with myelodysplastic syndrome, so that he could give them medically unnecessary chemotherapies and other drugs. (U.S. Sent. Memo., Ex. B1 ¶¶ 28-29, Ex. B2 ¶ 10, Ex. B3 ¶ 2, Sealed App'x at 224-26, 228-29, 231-32). Fata treated some individuals who did not clearly have myelodysplastic syndrome. (U.S. Sent. Ex. 10, Sealed App'x at 306; R. 169: Tr., 2687). Others actually had it, but they should have only been observed (not given chemotherapy) because of their relatively lower risk from the disease. (*Id.*). One expert's review of approximately

100 patient files (out of 17,000 total patients) turned up mistreatment of 22 myelodysplastic syndrome patients, who were all dosed unnecessarily with chemotherapy or other harmful or unnecessary medications. (U.S. Sent. Ex. 12, Sealed App'x at 308-09; R. 169: Tr. 2664-65). Those 22 patients received 2770 unnecessary doses of chemotherapy, along with thousands of doses of other unnecessary infusions and injections. (U.S. Sent. Ex. 12, Sealed App'x at 308-09).

Patient W.W. came to Fata as a lower-risk patient. (PSR ¶ 51; U.S. Sent. Memo., Ex. B1, ¶ 29, Sealed App'x at 225-26). He was observed for a time. But eventually, despite no apparent change in W.W.'s condition, Fata started him on infusions of chemotherapy. (*Id.*). Fata then ordered 155 doses of chemotherapy for W.W. over the next three years. (*Id.*). Fata had no medical justification for beginning the chemotherapy—and certainly not for continuing it for three years. (*Id.*; R. 169: Tr., 2694). And when W.W. independently researched and discovered stem cell transplants, the only known cure for myelodysplastic syndrome, Fata lied and told W.W. that he was too old for a stem cell transplant. (U.S. Sent. Memo., Ex. A, INT-0917 ¶ 3, Sealed App'x at 177; R. 169: Tr., 2725-26).

After Fata's arrest, W.W. was initially taken off treatment, but later went into decline, which his new physician believed might be due to the unnecessary chemotherapy. (U.S. Sent. Memo., Ex. A, INT-1350 ¶ 1, Sealed App'x at 208). W.W.'s physician determined that he was an outstanding transplant candidate and well within the appropriate age range. (U.S. Sent. Memo., Ex. A, INT-1350 ¶ 3, Sealed App'x at 208). All along, W.W. had a perfect match donor: his fraternal twin brother. (*Id.*). W.W. successfully received a stem cell transplant from his brother in 2014. (R. 168: Tr., 2564).

Fata also started another patient, W.D., on medically unnecessary chemotherapy. W.D. received 21 injections of chemotherapy over three months, and Fata told W.D. that he would need chemotherapy for the rest of his life. (U.S. Sent. Memo., Ex. A, INT-0183 ¶ 4, Sealed App'x at 134). W.D.'s new physician stopped treatment after Fata's arrest. (U.S. Sent. Memo., Ex. A, INT-0184 ¶ 1, Sealed App'x at 135).

4. Underdosed Chemotherapy for Myelodysplastic Syndrome Patients Who Actually Needed It

Fata did not just overprescribe chemotherapy; he also underprescribed it—if it saved him money. (U.S. Sent. Memo., Ex. B3 ¶¶ 3, 4, Ex. B8, Sealed App'x at 232, 246-47; R. 169: Tr., 2689-2692).

Some of Fata's myelodysplastic syndrome patients actually needed chemotherapy. (R. 169: Tr., 2689). If Fata had dosed them properly, according to their body mass, they would have been given one vial of chemotherapy plus a portion of a second vial. (*Id.* at 2691; U.S. Sent. Memo., Ex. B8, Sealed App'x at 246-47). But the unused portion of the second vial must be discarded, and Medicare would not reimburse Fata for that portion. (R. 169: Tr., 2692). So Fata only gave his patients only one vial (or a portion of one vial), maximizing his profit margin while shortchanging the patients of the medicine they needed. (*Id.* at 2689).

5. Mistreatment of Acute Myeloid Leukemia Patients

Fata also mistreated many of his acute myeloid leukemia patients. Myelodysplastic syndrome can develop into acute myeloid leukemia. (R. 169: Tr., 2711). Proper treatment for acute myeloid leukemia involves four to six weeks of inpatient treatment at a hospital, beginning with intensive around-the-clock infusions of chemotherapy for seven days. (R. 169: Tr., 2712-13; U.S. Sent. Memo., Ex. B2 ¶ 13, Sealed App'x at 229-30). Taking breaks limits the treatment's effectiveness, and the intense chemotherapy puts patients at risk for infection and other

complications that can only be safely managed in a hospital setting. (R. 169: Tr., 2713-14).

But Fata often did not send his leukemia patients to a hospital for this treatment. (U.S. Sent. Memo., Ex. B2 ¶ 13, Sealed App'x at 229-30; R. 169: Tr., 2716). Instead, he infused them with chemotherapy at his office—where he could bill for it. (U.S. Sent. Memo., Ex. B2 ¶ 13, Sealed App'x at 229-30; R. 169: Tr., 2716-25).

L.B. was one of Fata's patients in need of real care. (R. 169: Tr., 2720). When L.B. first began receiving treatment, he had myelodysplastic syndrome—and Fata gave him underdosed chemotherapy. (*Id.*). Then, when L.B. developed acute myeloid leukemia, Fata inappropriately treated him as an outpatient. (*Id.* at 2721). L.B. developed one of the known side effects of that chemotherapy, tumor lysis syndrome, and he soon suffered kidney failure as a result. (*Id.* at 2714, 2721). After L.B. was hospitalized and put on dialysis for his kidney failure, Fata continued to dose him with intensive chemotherapy, putting him in further danger. (*Id.* at 2722). He died only three months after he had been first diagnosed with acute

myeloid leukemia. (*Id.* at 2721). If L.B. had received no treatment at all, his prognosis would have been three to six months. (*Id.* at 2721-22).

6. Unnecessary Immunosuppressant Infusions for Lymphoma Patients in Remission and Non-Cancer Patients

Fata also gave patients unnecessary rituximab, a powerful antibody. (PSR ¶ 41). Rituximab (also known as Rituxan) is also an immunosuppressant, increasing a patient's risk of infection, as well as potentially reactivating latent viruses, or causing a generally fatal disease of the nervous system. (*Id.;* U.S. Sent. Memo., Ex. B5, ¶ 5, Sealed App'x at 235; R. 156: Tr., 2322-23; U.S. Sent. Ex. 1B, Sealed App'x at 304). Each dose is very potent (and very costly), and even patients who need it should receive a limited number of doses. (PSR ¶¶ 41, 60). Fata administered huge quantities of the drug, in one instance giving a patient 94 doses where the maximum justifiable would have been eight doses. (R. 156: Tr., 2309; U.S. Sent. Ex. 2A, Sealed App'x at 305). The billing records showed why Fata did it: he received over $6.2 million for his patients' unnecessary rituximab treatments. (PSR ¶ 60).

D.M. was one of Fata's patients who was treated with rituximab. At first, D.M. received medically appropriate rituximab to treat his diffuse large B cell lymphoma. (PSR ¶ 45). But after D.M. went into

remission, Fata continued to administer rituximab 23 more times. (*Id.*). Fata referred to this treatment as "maintenance," and he told D.M. that, without two years of rituximab, his lymphoma could return. (*Id.*). This was a lie; there are no medical studies to support rituximab's use as a maintenance therapy. (PSR ¶ 45; R. 156: Tr., 2306-2307). But when Fata's staff confronted him about it, Fata invented a "European" or "French" study as his justification. (U.S. Sent. Memo., Ex. A INT-0111 ¶ 5, INT-0123 ¶ 8, INT-0124 ¶ 1, INT-0133 ¶ 5, INT-0820 ¶ 3, INT-0821 ¶ 1, INT-1464, Sealed App'x at 123, 127, 128, 131, 167, 168, 215).

Patient T.H. had liver cirrhosis—not something that is appropriately treated with rituximab. (U.S. Sent. Memo., Ex. B5 ¶12, Sealed App'x at 237). But Fata diagnosed him with a different condition and began administering rituximab. (PSR ¶ 44). Although T.H.'s condition never responded to the drug, Fata continued to administer it 12 times for over a year. (*Id.*; R. 156: Tr., 2315-17). When T.H. could not afford the expensive co-pays, Fata's office assisted him in applying to a charitable foundation that pays for treatments. (U.S. Sent. Memo., Ex. A INT-1246 ¶ 7, 1247 ¶ 1, Ex. G, Sealed App'x at 199, 200, 250-53). When Fata discovered that the foundation had run out of grant money

for people with T.H.'s diagnosis, Fata lied and changed the diagnosis to lymphoma. (*Id.*, U.S. Sent. Memo., Ex. F, Sealed App'x at 249).

7. Unnecessary Supportive Treatments: Human Growth Factor Injections, Intravenous Immunoglobulin, and Antiemetics

Human growth factor injections are used to increase white blood cell or red blood cell counts. (U.S. Sent. Memo., Ex. B1, ¶¶ 20, 23, Sealed App'x at 221-22). Fata ordered those injections unnecessarily for many patients, including for patient W.D. (PSR ¶ 46; U.S. Sent. Memo., Ex. B1, ¶ 28, Sealed App'x at 224-25; R. 169: Tr., 2692). White blood cell growth factors can cause ruptured spleens, rashes, fevers, muscle aches, and bone aches. (U.S. Sent. Memo., Ex. B1, ¶ 20, Sealed App'x at 221-22; R. 169: Tr., 2702-03, 2705-06). When used outside of medical guidelines, red blood cell growth factors can shorten remission time and survival time in patients with certain types of cancer. (U.S. Sent. Memo., Ex. B1, ¶ 23, Sealed App'x at 222).

Another one of Fata's unnecessary supportive treatments was intravenous immunoglobulin. (PSR ¶¶ 48-49). Intravenous immunoglobulin is primarily used to treat severe immune deficiencies, and it carries the risk of allergic reactions, thrombosis (blood clots),

anaphylactic shock, acute renal failure, and death. (PSR ¶ 48; U.S. Sent. Memo., Ex. B1 ¶ 21, Sealed App'x at 222; R. 156: Tr., 2326, 2329, 2333-37). Fata unnecessarily infused numerous patients with intravenous immunoglobulin, and he received over $1.6 million for it. (PSR ¶ 62). To justify the treatments, Fata falsified medical records by stating that the patients had recurrent infections. (PSR ¶ 49; U.S. Sent. Memo., INT-0467 ¶ 2, Sealed App'x at 156).

Antiemetics were another supportive therapy that Fata ordered unnecessarily. Antiemetics are intended to prevent nausea and vomiting associated with chemotherapy. (PSR ¶ 61: U.S. Sent. Memo., Ex. B1 ¶ 24, Sealed App'x at 222-23). They can have significant side effects, including severe pain, severe constipation, bowel obstructions, and bowel perforations. (U.S. Sent. Memo., Ex. B6, Sealed App'x at 239-41; R. 156: Tr. 2343-44; United States' 6/30/15 Under Seal Response to Defendant's Sentencing Memorandum ("U.S. Sent. Resp."), Ex. A INT-1675-1676 ¶¶ 1-10, Sealed App'x at 301-02). And although some antiemetics are inexpensive, Fata often ordered the most expensive ones, totaling over $660,000 of unnecessary antiemetics for his patients. (PSR ¶ 61).

8. Unnecessary Iron and Hydration Infusions

Iron is toxic, and sustained iron overload can cause organ failure. (PSR ¶ 39; U.S. Sent. Memo.; Ex. B5 ¶ 10, Sealed App'x at 236; R. 169: Tr., 2701; R. 156: Tr., 2365, 2370-71; U.S. Sent. Ex. 1B, Sealed App'x at 304). Even if a patient is iron-deficient, the appropriate first-line treatment is inexpensive iron pills, not expensive infusions. (PSR ¶ 38; U.S. Sent. Memo., Ex. B5 ¶ 9, Sealed App'x at 236; R. 156: Tr., 2356).

Fata repeatedly administered intravenous iron to patients who did not need it, sometimes to toxic levels that can cause iron overload. (U.S. Sent. Memo., Ex. B5 ¶ 11, Ex. B6, Ex. B7 ¶ 2, Sealed App'x at 236-37, 239-41, 243; R. 156: Tr., 2357, 2365; R. 169: Tr., 2693). And sometimes, after ordering iron infusions, he even ordered phlebotomies—a procedure to drain blood from his patients and reduce the iron in their bodies—just so he could order more iron infusions. (U.S. Sent. Memo., Ex. A INT-0466 ¶ 2, Sealed App'x at 155).

The treatment of W.V. demonstrates Fata's commitment to billing unnecessary iron infusions. The last time W.V. went to Fata's office for an unnecessary iron infusion, he hit his head and was knocked out for several minutes. (PSR ¶ 39; U.S. Sent. Memo., Ex. A INT-0289 ¶ 9, Ex.

B6, Sealed App'x at 145; R. 156: Tr., 2359-61, 2372). Individuals in the waiting area and the clinic's staff rushed to his aid and called paramedics, but Fata instructed his staff to put W.V. in an infusion chair. (PSR ¶ 39). Fata then ordered a nurse to give W.V. an unnecessary iron infusion before allowing him to go to the emergency room. (*Id.*; R. 156: Tr., 2372-73). Paramedics had to wait approximately 30 minutes for the infusion to conclude. (PSR ¶ 39). After W.V.'s admission to the hospital, a CAT scan showed bleeding in the right back of the brain. (*Id.*). W.V. passed away several weeks later. (*Id.*).

Fata also ordered unnecessary hydration infusions—often when simply drinking water would have sufficed. (R. 156: Tr., 2348-49, 2354). Hydration infusions can be harmful in older patients who are not dehydrated, causing complications like heart arrhythmia that can and did lead to hospitalizations. (U.S. Sent. Memo., Ex. B7 ¶ 4, Sealed App'x at 243; R. 156: Tr., 2349-55). Fata ordered them frequently, directing patients to return to his clinic for hydration infusions on days they had off from chemotherapy. (R. 156: Tr., 2347-48). Then, he billed for the additional infusion time.

9. Concealing the Fraud at Michigan Hematology Oncology

In his own words, Fata ran a "kingdom" and an "empire." (U.S. Sent. Memo., Ex. A, INT-0314 ¶ 7, INT-1242 ¶ 3, Sealed App'x at 150, 197). As the king, he exerted his control over every aspect of Michigan Hematology Oncology and its patients. He controlled access to the patients' medical information, setting down an unusual policy that patient files could only be released with his personal approval. (U.S. Sent. Memo., Ex. A, INT-0063 ¶ 3, INT-0212 ¶¶ 2, 3, INT-0755 ¶ 2, Sealed App'x at 112, 139, 159). He often refused to release files, released only parts of files, or tried to convince patients they should not leave his practice when they requested their files. (U.S. Sent. Memo., Ex. A, INT-0212 ¶ 3, Sealed App'x at 139). Fata also never relinquished decision-making control to the other doctors in his practice, even if other physicians were seeing his patients in the hospital. (U.S. Sent. Memo., Ex. A, INT-0754 ¶ 3, INT-0755 ¶1, INT 819 ¶ 3, Sealed App'x at 157, 158, 166).

10. PET Scan Fraud and Money Laundering at United Diagnostics

United Diagnostics was a testing facility that Fata opened to commit another type of fraud: cancer-testing fraud. When Fata incorporated United Diagnostics in December 2012, it had no staff, physical location, or equipment. (U.S. Sent. Memo., Ex. A, INT-1367 ¶ 2, Sealed App'x at 212). After incorporating United Diagnostics, Fata dramatically increased the percentage of patients for whom he ordered PET scans, a test that requires injection of radioactive material into the patient. (U.S. Sent. Memo., Ex. A INT-0210 ¶ 2, Ex. B1 ¶ 19, Sealed App'x at 137, 221). Fata also ordered his staff to schedule all PET scans for April 2013—when United Diagnostics was scheduled to open—rather than earlier at a hospital or other location. (U.S. Sent. Memo., Ex. A INT-0085 ¶ 2, Sealed App'x at 120; PSR ¶ 67).

When April came around, United Diagnostics was still not ready to open. (PSR ¶ 67). Rather than send his patients to other facilities, Fata ordered his staff to reschedule all the tests. (*Id.*). Patients became concerned about the wait, because they believed a medically necessary test to detect cancer was being delayed by months. (*Id.*). But when they asked about the delay, Fata resisted sending them to another facility.

(*Id.*). He ordered his staff to lie and say that the patient did not need the scan yet, his machine was more high tech, or the patient's insurance would not cover the test elsewhere. (U.S. Sent. Memo, Ex. A, INT-0211 ¶ 2, INT-1316 ¶ 22, Sealed App'x at 138, 205).

While this was happening, Fata began funding United Diagnostics with money from the infusion fraud at Michigan Hematology Oncology. (PSR ¶ 69). He wrote two checks drawn on the bank account for Michigan Hematology Oncology funded by the infusion fraud, depositing the funds into the account for United Diagnostics. (*Id.*). The first check was for $100,000 and was deposited on May 3, 2013. (*Id.*). The second check was also for $100,000 and was deposited on July 2, 2013. (*Id.*).

Within days of that second check, United Diagnostics finally opened its doors and began performing unnecessary tests. (PSR ¶¶ 67-68). As Fata later admitted, one such unnecessary test was performed on patient M.C. on July 11, 2013, only nine days after Fata had funded United Diagnostics with money from Michigan Hematology Oncology. (R. 111: Tr., 1126; U.S. Sent. Memo., Ex. A, INT-0780 ¶ 5, Ex. B2 ¶ 5,

Sealed App'x at 163, 228). Ultimately, United Diagnostics performed tests for a little over a month before Fata's arrest. (PSR ¶ 67).

11. Fata's Guilty Plea and Sentencing

Fata pleaded guilty to 13 counts of health care fraud (counts 3-6, 9-17), one count of conspiracy to pay and receive kickbacks (count 20), and two counts of promotional money laundering (counts 22-23). (R. 111: Tr., 1112-31; R. 66: Fourth Superseding Indictment, 738-758). He did not have a written plea agreement.

Before sentencing, the parties initially contested most of Fata's guideline calculation, but they ultimately resolved most of the disputes. (6/16/05 Defendant's Sealed Sentencing Memorandum ("Def. Sent. Memo."), Ex. A, Sealed App'x at 382-84). One of the remaining disputes was the applicability of the adjustment in U.S.S.G. § 3B1.3 for abuse of trust or use of a special skill, along with the related question of whether Fata could receive an aggravating role adjustment under U.S.S.G. § 3B1.1. (Def. Sent. Memo. at 15-16, Sealed App'x at 329-30). After hearing from both parties, the district court found that Fata's conduct was most appropriately characterized as an abuse of trust, rather than as using a special skill. (R. 170: Tr., 2936). The district court's finding

meant that it could (and did) apply both the two-level adjustment in U.S.S.G. § 3B1.3 and an aggravating role adjustment in U.S.S.G. § 3B1.1. (*Id.*). After applying those adjustments, the district court calculated a total offense level of 42 and a guideline range of 360 months to life. (R. 170: Tr., 2937-38).

The district court then sentenced Fata within that guideline range—to 45 years in prison. (R. 161: Tr., 2503). Fata timely appealed. (R. 165: Notice of Appeal, 2513).

Summary of the Argument

The district court did not clearly err in finding that Fata qualified for the adjustment in U.S.S.G. § 3B1.3 based on his abuse of trust. Fata violated the trust of his patients and insurers, and he even stipulated that § 3B1.3 could be justifiably applied to him based on his abuse of trust. And the plain language of the guidelines forecloses the rest of Fata's argument. The guidelines permit a district court to apply an aggravating role adjustment under U.S.S.G. § 3B1.1 in any case where an adjustment under § 3B1.3 is based, in whole or in part, on an abuse of trust—even where the defendant might also have used a special skill. *See* U.S.S.G. § 3B1.3.

The district court also did not abuse its discretion in receiving the written and oral statements that Fata's patients (or their family members) submitted during the sentencing proceedings. The confirmed victims had a right to submit statements under the Crime Victims' Rights Act, 18 U.S.C. § 3771, and the district court was permitted to hear from any other patients—even patients who had not been confirmed as victims—under 18 U.S.C. § 3661. The district court also permitted Fata to submit substantial rebuttal to those statements. And

Fata simply cannot demonstrate any prejudice here given the district court's ruling that it would not rely on the statements in determining Fata's sentence.

Finally, Fata cannot show plain error from the factual basis supporting his guilty pleas to the two money laundering counts. The district court received ample facts to support Fata's guilt prior to the entry of judgment—most notably, the timing of Fata's two checks to United Diagnostics while he was setting up the PET scan fraud there. Fata's plain error argument also fails because he only claims to want a "resentencing," not to withdraw his guilty pleas and go to trial. Because Fata has not even argued—much less proven—that "he would not have entered [his] plea[s]," he cannot show plain error. *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004).

Argument

I. The district court did not clearly err in applying the § 3B1.3 adjustment based on Fata's abuse of trust.

This Court reviews a district court's legal conclusions de novo and its factual findings only for clear error. *United States v. Bolds,* 511 F.3d 568, 579 (6th Cir. 2007). Here, the district court did not clearly err—or even err at all—in finding that Fata abused the trust of his patients and insurers. And based on that finding, the district court correctly determined that the guidelines permitted both the two-level adjustment in U.S.S.G. § 3B1.3 and the aggravating role adjustment in U.S.S.G. § 3B1.1.

Under § 3B1.3, a defendant's guideline range is increased by two levels if he either "abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense." U.S.S.G. § 3B1.3. Where this two-level adjustment "is based *solely* on the use of a special skill, it may not be employed in addition to an adjustment under § 3B1.1 (Aggravating Role)." U.S.S.G. § 3B1.3 (emphasis added). Thus, by implication, where the adjustment in § 3B1.3 is based on either (1) abuse of trust alone, or (2) both abuse of trust and the use of a special skill, the district court

may apply the two-level adjustment in § 3B1.3 in addition to the aggravating role adjustment in § 3B1.1. *Id.*

Here, the district court did not err, much less clearly err, in finding that Fata engaged in an abuse of trust under § 3B1.3. Fata has consistently agreed that his scheme involved an abuse of trust. He even stipulated to it: "The parties agree that the government could prove, by a preponderance of the evidence, that Fata's offense involved the abuse of a position of trust." (Def. Sent. Memo, Ex. A ¶ 6, Sealed App'x at 383). He made a similar concession at the sentencing hearing. (R. 170: Tr., 2915 ("[O]ne could argue in this case the abuse of trust and that such an argument wouldn't be without merit")). He also reiterated it in his appeal brief. (Fata Br. at 19 ("[O]ne could certainly make a case for the proposition that Dr. Fata may have abused positions of trust with both insurers and patients.")).

Fata's conduct supported those concessions. Fata violated his patients' trust in the most egregious possible manner. He violated every part of the Hippocratic Oath: acting for his own good, doing harm, prescribing deadly drugs for his own gain, giving advice that could hasten death, and entering his patients' lives with corrupt purpose.

Those patients trusted Fata with their lives—and he poisoned them. That conduct, even standing alone, more than supported the district court's finding here. *See United States v. Singh*, 54 F.3d 1182, 1193 & n.7 (4th Cir. 1995) (explaining that the abuse-of-trust component of § 3B1.3 encompasses a doctor who "abuse[s] the unique relationship between [himself] and his patient").

Fata also abused the trust of the insurers he defrauded. Physicians who defraud their insurers are accountable under § 3B1.3 for abusing that trust as well. *See United States v. Hoogenboom*, 209 F.3d 665, 671 (7th Cir. 2000); *United States v. Adam*, 70 F.3d 776, 782 (4th Cir. 1995). Insurers entrust physicians with considerable discretion in exercising their professional responsibilities, and they expect physicians to ensure the integrity of their claims. *See Hoogenboom*, 209 F.3d at 671; *Adam*, 70 F.3d at 782. As this Court has explained, "[a] practicing physician enjoys perhaps the highest level of discretion afforded any professional." *United States v. McCollister*, 96 F. App'x 974, 976 (6th Cir. 2004). Fata violated that trust, submitting fraudulent claims for chemotherapy and other dangerous treatments that his patients simply did not need.

Fata's primary argument on appeal, moreover, rests on a misreading of the guidelines. He appears to argue that where both "use of a special skill" and "abuse of trust" apply to a defendant's conduct, the district court is required to pick the best rationale before applying § 3B1.3. (Fata Br. at 19). Nothing in the guidelines supports that reading. Rather, where both rationales apply, the district court simply applies § 3B1.3 and increases the defendant's guideline calculation by two levels. *See* U.S.S.G. § 3B1.3; *United States v. Sawaf*, 129 F. App'x 136, 145 (6th Cir. 2005) (noting that the district court applied the two-level increase under § 3B1.3 where the defendant both abused a position of trust and used a special skill). The only limitation is that if the adjustment in § 3B1.3 is based "solely" on the use of a special skill, the aggravating role adjustment in U.S.S.G. § 3B1.1 cannot also be imposed. U.S.S.G. § 3B1.3. And here, by Fata's own admission, the adjustment in § 3B1.3 was not based "solely" on the use of a special skill. The district court therefore did not err in applying both the two-level adjustment in § 3B1.3 and the aggravating role adjustment in § 3B1.1.

Moreover, even if the district court were required to "choose" between the two rationales in § 3B1.3, it did not clearly err in finding that "abuse of trust [was] more appropriate given the testimony in this case, the facts of this case in terms of the trusting role." (R. 170: Tr., 2936). If there was ever a case that involved an abuse of trust, it was Fata's. Fata violated the trust of his patients, diagnosing them with deadly diseases they did not have. He violated their trust again by poisoning them with treatments they did not need. And he violated their insurers' trust by billing for it. Fata's guideline calculation should—and did—reflect that reality.

II. The district court properly accepted statements from Fata's patients and their family members, and Fata cannot demonstrate any prejudice that would justify a resentencing.

For two independent reasons, Fata's case should not be remanded for resentencing based on his patients' written and oral statements at sentencing. First, those statements were properly submitted to the district court under both the Crime Victims' Rights Act and 18 U.S.C. § 3661. Second, the district court expressly stated that it was not considering those statements in determining Fata's sentence. Fata's sentence should therefore be affirmed.

A. The district court was permitted to hear the patients' statements under the Crimes Victims' Rights Act and 18 U.S.C. § 3661.

Government investigators and medical experts were able to confirm—and Fata stipulated—that his mistreatments involved 553 individual patient victims. (U.S. Sent. Memo. at 56, Sealed App'x at 66). Because of the sheer breadth of Fata's scheme, and because more than 17,000 patients were treated at his offices, there will always remain an unconfirmed number of additional victims. (PSR ¶¶ 57, 58). As a result, the government sought to permit Fata's patients (or their family members) to tell the district court about their experiences, even if they were not one of the 553 "confirmed" victims specifically identified during the investigation. Patients and family members were permitted to submit written statements prior to sentencing. The government then forwarded copies of the statements to defense counsel and the district court. (R. 171: Tr., 2974-75).

Although the district court accepted all of the statements written by Fata's patients and their family members, it explained that it would filter and screen them according to the evidence presented during the sentencing proceedings: "So basically, I'm going to be receiving the

statements which I have already received, plus the testimony and will look through the prism of indicia of reliability." (R. 171: Tr., 2972; *see also id.* at 2986, 2988-89, 2992-93). To assist the court, the government submitted a spreadsheet that listed the name of the person writing each statement, the name of the patient identified in the statement, whether the patient was a "confirmed" victim of the investigation, and, if so, how the patient had been confirmed as a victim. (Victim Spreadsheet (Written Statements), Sealed App'x at 310-13).

Before the sentencing hearing, the district court also addressed Fata's arguments concerning the reliability of the statements, and the court explained how it would review them. The court stated that it would hear any statements under its traditional discretion to receive evidence at sentencing, but that it would also subject the statements to the minimum standard of reliability under *Townsend v. United States*, 334 U.S. 736, 741 (1948), so that Fata's sentence would not be founded on "misinformation of a constitutional magnitude." (R. 156: Tr., 2292-95).

Most of Fata's five-day sentencing hearing involved expert testimony, guideline disputes, and arguments from the attorneys. But

on one of those days, the district court also spent several hours hearing oral statements from Fata's patients. (R. 168: Tr., 2528-2615). Twenty were individual patients or their relatives, and one was the representative of victim Blue Cross Blue Shield. (*Id.*). At the court's request, the government specified whether or not each speaker was the victim in a count to which Fata pleaded guilty. (R. 168: Tr., 2522-23, 2526). Only two of the oral statements came from family members who were not confirmed as victims by the government or told by a second opinion doctor that the patient's treatments were inappropriate. (Victim Spreadsheet (Oral Statements), Sealed App'x at 314).

The district court appropriately received all of those written and oral statements under the Crime Victims' Rights Act or 18 U.S.C. § 3661. The Crime Victims' Rights Act guarantees that crime victims are accorded certain rights, including:

- "The right to be reasonably heard at any public proceeding in the district court involving . . . sentencing . . .";
- "The right to proceedings free from unreasonable delay"; and
- "The right to be treated with fairness and with respect for the victim's dignity and privacy."

18 U.S.C. § 3771(a)(4), (7), (8). The government is obligated under the Act to ensure that victims are accorded those rights. 18 U.S.C. § 3771(c)(1). And any of Fata's confirmed victims were allowed to make statements under that Act.

In addition, under 18 U.S.C. § 3661, a district court faces "[n]o limitation" on the information that it may consider at sentencing:

> No limitation shall be placed on the information concerning the background character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

18 U.S.C. § 3661.

The Crime Victims' Rights Act does not cabin a district court's broad discretion under § 3661. *United States v. Leach*, 206 F. App'x. 432, 434-35 (6th Cir. 2006); *see also United States v. Griggs*, 241 F. App'x 153, 155 (4th Cir. 2007). It simply identifies a certain class of people—victims—who have the *right* to speak at sentencing. *Leach*, 206 F. App'x at 435; 18 U.S.C. § 3771(a). But even where a speaker does not qualify as a victim—and therefore does not have the right to speak under the Crime Victims' Rights Act—"the Act [does] not alter (or, more importantly, limit) a district court's traditionally broad discretion to

consider 'a wide variety of factors' at sentencing." *Leach*, 206 F. App'x at 435 (quoting *Wisconsin v. Mitchell*, 508 U.S. 476, 485 (1993)). Courts of appeals have thus upheld district courts' decisions permitting a non-victim to make a statement against the defendant at sentencing. *See, e.g.*, *United States v. Straw*, 616 F.3d 737, 740-41 (8th Cir. 2010) (finding no error where a non-victim cousin of the defendant provided a statement that the defendant had defrauded their 91-year-old grandmother); *United States v. Spiwak*, 377 F. App'x 319, 323-24 (4th Cir. 2010) (finding no abuse of discretion where the government presented a statement from a woman who alleged that the defendant abused her as a child).

That same reasoning controls here—and permitted the district court to hear from all of Fata's patients (or their families) under 18 U.S.C. § 3661, even where those patients had not been confirmed as victims. Indeed, evaluating the information in those statements was no different than evaluating any other information about a defendant's background, character, and conduct—something district courts do every day. As long as the defendant has notice and an opportunity to be heard, it is well established that the judge has largely unlimited

discretion "either as to the kind of information he may consider, or the source from which it may come." *United States v. Tucker*, 404 U.S. 443, 446 (1972). And here, the district court also asked the government to specify whether each patient had been confirmed as a victim. Those additional precautions assisted the district court in evaluating the reliability of each statement and protected Fata from any potential reliance on erroneous information.

Fata was also afforded sufficient opportunities to rebut the statements. The defense had three months to review the written statements. (R. 171: Tr., 2974-75, 2992 (noting that the defense "had these letters for a long time")). The defense had time to undertake a "random sampling" by its expert, and it submitted an extensive rebuttal that attempted to show that Fata's mistreatment was not as widespread as the statements suggested. (Def. Sent. Memo. at 18-33, Ex. C (Dr. Goldberg Report), Sealed App'x at 332-47, 385-403; R. 171: Tr., 2966, 2991). The defense even made the same argument below that Fata now claims he needs a remand to raise again: that, because his expert approved his treatment of some of the solid tumor patients who wrote statements, the district court should have presumed that the vast

majority of his patients were treated properly for their solid tumor cancers. (Def. Sent. Memo. at 18-33, Sealed App'x at 332-47).

Fata's argument was, and remains, incorrect. He mistreated solid and non-solid tumor patients alike, and his guilty pleas and stipulations contradicted his own expert's previous analysis. (*See* U.S. Sent. Resp. at 14-22, Ex. A, INT-1203 ¶ 3, INT-1205 ¶¶ 1-4, INT-1206 ¶ 1, INT-0445 ¶¶ 2, 5, INT-0446 ¶¶ 1-2, Sealed App'x at 272-80, 297, 299, 300, 295, 296; R. 156: Tr., 2377-2383, 2444). And a different medical expert, who reviewed 100 of Fata's patient files, found that Fata had mistreated every single patient in some fashion. (R. 169: Tr., 2664-65). Nevertheless, and as explained below, Fata's rebuttal and argument may well have had its intended effect: the district court ultimately decided that it would not base Fata's sentence on any statements submitted by his patients or their family members.

B. Fata cannot show any prejudice given that the district court did not rely on the statements in imposing sentence.

Fata's argument for a remand fails for another, even simpler reason: the district court decided not to rely on the patients' statements in determining Fata's sentence. The district court explained that it was "unnecessary to rely on them," because the expert testimony and Fata's

guilty pleas already "provide[d] a basis for the sentencing." (R. 161: Tr., 2499; *see also* R. 178: Stipulation to Correct the Record (correcting a typo in the original record), 3025; R. 161-1: Errata Sheet, 3026 (same)).

Fata is left, therefore, with the untenable argument that the district court was not capable of disregarding those statements. The Supreme Court has squarely rejected Fata's argument in the analogous context of bench trials: "[J]udges routinely hear inadmissible evidence that they are presumed to ignore when making decisions. It is equally routine for them to instruct juries that no adverse inference may be drawn from [certain types of evidence or lack of evidence]; surely we must presume that they follow their own instructions when they are acting as factfinders." *Harris v. Rivera*, 454 U.S. 339, 346 (1981).

The presumption that judges can, and do, disregard prejudicial information when sitting in judgment of a defendant has been well settled before and after *Harris*. Trial courts are presumed to consider only properly admitted and relevant evidence in rendering their decisions and to give no weight to improper evidence. *United States v. McCarthy*, 470 F.2d 222, 224 (6th Cir. 1986); *see also United States v. Castro*, 413 F.2d 891, 895 n.7 (1st Cir. 1969) ("A jury may have

difficulty in disregarding extrajudicial statements implicating a defendant. We will not presume that a judge suffers from the same disability. Indeed, the presumption is to the contrary."). This Court has recognized a trial judge's ability to "compartmentalize . . . in his mind" co-defendants' confessions implicating one another, holding that *Bruton v. United States*, 391 U.S. 123 (1968), does not apply to bench trials. *Rogers v. McMackin*, 884 F.2d 252, 255 (6th Cir. 1989); *see also Johnson v. Tennis*, 549 F.3d 296, 300 (3d Cir. 2008) (collecting similar cases).

The cases Fata relies upon are distinguishable. In *Griffin*, the government breached a plea agreement, opposing a guideline reduction that it had agreed not to oppose, and the district court then sentenced the defendant without that guideline reduction. *United States v. Griffin*, 510 F.3d 354, 361-66 (2d Cir. 2007). The court of appeals was thus given reason to question the district court's assurances that it had not relied on the government's statements, because the court had sentenced the defendant in accordance with those statements. *Id.* at 366. The same was true in *Reese*, Fata's other case, where the district court gave conflicting statements about whether it had relied on information that

the government had improperly submitted *ex parte* before sentencing. *United States v. Reese*, 775 F.2d 1066, 1078 (9th Cir. 1985).

Here, in contrast, nothing in the record provides any reason to question the district court's assurances. The district court understood well that some of the statements involved patients who were not confirmed as victims, but nevertheless had experiences to share about Fata's character and conduct. The district court also emphasized that it understood how to compartmentalize the different statements:

> It is my job to follow the law and to rely on what I feel is appropriate and to not rely on what I feel is not appropriate . . . every judge throughout the year has motions to suppress where you hear things and then it's a bench trial and you grant the motion to suppress, you don't go in front of another judge, you heard something that shouldn't be heard. We all do this in making rulings. And so . . . I've got a job to do . . . I will put in what I think is appropriate, and I will not utilize what I think is inappropriate . . . You've been saying all along, that it's not possible, but I can. And other judges can. It's not that I'm super judge . . . that's our job and that's what I'll do.

(R. 168: Tr., 2639-2641). Those rulings demonstrated that the district court recognized what it was doing and was fully capable of carrying it out. *See Rogers*, 884 F.2d at 256 (holding *Bruton* does not apply where judge in bench trial "recognized his duty to separate [co-defendants'] statements out" and said "he would be capable of doing so"). And the

district court then made patently clear that it was not relying on the patients' statements as a basis for Fata's sentence. (R. 161: Tr., 2499; *see also* R. 178: Stipulation to Correct the Record (correcting a typo in the original record), 3025; R. 161-1: Errata Sheet, 3026 (same)). So even if this Court were to find or assume that the district court abused its discretion in receiving any of the statements, those statements simply did not affect Fata's sentence.

III. A sufficient factual basis supported each of Fata's pleas to the money laundering charges.

Over one year after his guilty pleas, Fata now claims for the first time that his guilty pleas to promotional money laundering (counts 22 and 23) were not supported by a sufficient factual basis, and he requests a "resentencing" without those counts. (Fata Br. at 45-55). As Fata concedes, he is raising this issue for the first time on appeal, so he must demonstrate reversible plain error. *United States v. Vonn*, 535 U.S. 55, 58-59 (2002); *United States v. Mobley*, 618 F.3d 539, 544 (6th Cir. 2010).

Fata's appeal fails to acknowledge that the Court may consider the entire record, including proceedings that occurred after his plea hearing, to determine whether there was a factual basis. Federal Rule

of Criminal Procedure 11(b)(3) directs the district court to make the factual basis determination "before *entering judgment*." *Mobley*, 618 F.3d at 545 (emphasis added) (quoting Rule 11(b)(3)); *see also United States v. Dominguez Benitez*, 542 U.S. 74, 80 (2004). Thus, a factual basis need not necessarily be established at the plea hearing. *Mobley*, 618 F.3d at 545. Any deficiencies at the plea hearing may be cured by additional facts submitted to the district court, such as those contained in the PSR. *United States v. Bennett*, 291 F.3d 888, 897 (6th Cir. 2002).

To sustain a conviction for money laundering under 18 U.S.C. § 1956(a)(1)(A)(i), the defendant must have (1) conducted a financial transaction, (2) which defendant knew involved proceeds of unlawful activity, (3) with the intent either to promote or further a specified unlawful activity. *United States v. Reed,* 264 F.3d 640, 650 (6th Cir. 2001). Fata challenges only the factual basis for the last element: intent to promote the carrying on of a specified unlawful activity. (Fata Br. at 49).

The case law is clear that this intent may be inferred when a defendant supplies an unlawful activity with funds or supplies to ensure its operations and continuation. *See, e.g.*, *United States v. Haun,*

90 F.3d 1096, 1100-1101 (6th Cir. 2011) (defendant intended to promote unlawful activity when deposits into a bank account supported the past and future unlawful activity), *overruled in part on other grounds by United States v. Cosgrove,* 637 F.3d 646 (6th Cir. 2011); *United States v. Parker*, 364 F.3d 934, 948 (8th Cir. 2004) (intent element met when defendant uses proceeds to purchase supplies that were part and parcel to and would further his scheme); *United States v. Thorn*, 317 F.3d 107, 133 (2d Cir. 2003) (the deposit of laundered funds is made with the intent to promote the specified underlying unlawful activity when it continues the illegal activity or is essential to the completion of the scheme).

The district court here was presented at the plea, as well as after the plea, with more than sufficient facts and circumstantial evidence to show that Fata intended to promote his PET scan fraud when he deposited two checks into the United Diagnostics account, drawn on funds from his infusion fraud at Michigan Hematology Oncology. Fata admitted at his plea hearing that he used United Diagnostics to bill Blue Cross Blue Shield for an unnecessary PET scan on July 11, 2013,

only nine days after depositing the second check from Michigan Hematology Oncology:

> MR. ANDREOFF: Doctor, would you give us a recitation of the facts concerning Count 17.
>
> THE DEFENDANT: I ordered at PET . . . scan for M.C. that was performed by my company, United Diagnostics, July 11th, 2013. I knew that the PET scan was medically unnecessary; therefore, at the time I submitted the claim to the Blue Cross I knew that the claim was false.
>
> THE COURT: Okay. And you billed $4,573; is that correct, sir?
>
> THE DEFENDANT: Correct.

(R. 111: Tr., 1126).

Fata then described his promotional money laundering offenses involving United Diagnostics:

> THE DEFENDANT: As I previously stated in other counts, I submitted claims to various insurance companies and Medicare for unnecessary services and infusions through my company, Michigan Hematology Oncology. In 2013, I incorporated a new company, United Diagnostics, that would perform tests such as PET scan . . . United Diagnostics was funded in part using funds that I had earned through my submission of claims for unnecessary services. I had ordered that Michigan Hematology Oncology, specifically I deposited or caused the deposit of two checks from MHO to United Diagnostics --
>
> THE COURT: From who?

> THE DEFENDANT: Michigan Hematology Oncology to United Diagnostics on May 3rd, 2013 . . . and July 2nd, 2013,
>
> THE COURT: Okay.
>
> THE DEFENDANT: Each written in the amount of $100,000.
>
> THE COURT: Okay.
>
> THE DEFENDANT: After United Diagnostics became operational, I submitted false claims . . . for certain patients for unnecessary PET scans through United Diagnostics.

(R. 111: Tr., 1129-30).

The district court properly found that Fata deposited the checks from Michigan Hematology Oncology with the intent to promote the PET scan fraud at United Diagnostics. The timing alone shows intent. Fata wrote the two checks on May 3, 2013, and July 2, 2013. (*Id.*). During that same time period—both before and after he wrote the checks—Fata was using Michigan Hematology Oncology to commit, and bill for, infusion fraud. (R. 111: Tr., 1112-1126).

The record also shows that, at the same time, Fata already knew that he would be using United Diagnostics to commit PET scan fraud. Months before United Diagnostics opened, Fata dramatically increased the percentage of his patients referred for PET scans, which

demonstrated that he was ordering unnecessary scans. (U.S. Sent. Memo., Ex. A INT-0210 ¶ 2, Sealed App'x at 137). When United Diagnostics had still not opened in April 2013, Fata began rescheduling his patients' tests, rather than sending them to another facility. (PSR ¶ 67; U.S. Sent. Memo., Ex. A INT-0085 ¶ 2, Sealed App'x at 120). He also told his staff to lie to patients about whether they could get the scans elsewhere. (U.S. Sent. Memo., Ex. A INT-0211 ¶ 2, INT-1316 ¶ 22, Sealed App'x at 138, 205).

Then, once United Diagnostics opened in July 2013, Fata instantly began using it to conduct and bill for unnecessary tests. (R. 111: Tr., 1126). M.C.'s unnecessary test, for instance, occurred on July 11, 2013, immediately after United Diagnostics opened its doors and only *nine days* after Fata deposited the second money-laundering check into the United Diagnostics account. (R. 111: Tr., 1126, 1129-30). That timing was no coincidence. It confirmed that Fata not only deposited the checks to get United Diagnostics up and running, but also did so with the intent to use United Diagnostics—and the funds supporting it—to commit PET scan fraud.

The PSR further confirmed that Fata was engaged in promotional money laundering. It stated, without objection, that Fata "admittedly funded [United Diagnostics] with money he fraudulently received from medically unnecessary treatment and/or services provided by [Michigan Hematology Oncology]." (PSR ¶ 69). Having agreed, time and again, that he engaged in money laundering, Fata cannot demonstrate error—much less show plain error—requiring that his money laundering counts be vacated.

Fata's argument must be rejected for another reason as well. To establish reversible plain error under Rule 11, Fata must show a reasonable probability that he would not have pleaded guilty but for the alleged error. *Dominguez Benitez*, 542 U.S. at 83; *United States v. Taylor*, 627 F.3d 1012, 1018 (6th Cir. 2010). Here, Fata never actually asserts that he would not have entered his guilty pleas and would have gone to trial. Instead, he repeats at least three times—in very carefully crafted language—that the appropriate remedy would be to vacate those counts and remand for a "resentencing." (Fata Br. at 14, 55, 56). That is not true: the appropriate remedy would be to remand for a trial or a new plea hearing on the money laundering counts. But Fata does

not ask for that. He just wants his money laundering counts to disappear, without any further court proceedings or mention of them. And because Fata has not even requested a trial on those counts—much less shown that "he would not have entered [his] plea[s]"—he cannot establish reversible plain error. *Dominguez Benitez*, 542 U.S. at 83.

Conclusion

The judgment should be affirmed.

Respectfully submitted,

Leslie R. Caldwell
Assistant Attorney General

/s/ Catherine K. Dick
Catherine K. Dick
Trial Attorney, Criminal Division
1301 New York Ave, NW, Ste. 700
Washington, D.C. 20530
Phone: (202) 538-4049
catherine.dick@usdoj.gov

Barbara L. McQuade
United States Attorney

/s/ Sarah Resnick Cohen
Sarah Resnick Cohen
Assistant United States Attorney
211 West Fort Street, Suite 2001
Detroit, MI 48226
Phone: (313) 226-9637
sarah.cohen@usdoj.gov

Date: January 25, 2016

Certificate of Compliance with Rule 32(a)

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 9,262 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

/s/ Sarah Resnick Cohen
Assistant United States Attorney

Certificate of Service

I certify that on January 25, 2016, I electronically filed this brief for the United States with the Clerk of the United States Court of Appeals for the Sixth Circuit using the ECF system, which will send notification of such filing to the following attorneys for the defendant:

Mark J. Kriger
mkriger@sbcglobal.net

N.C. Deday LaRene
d644@deday.net

/s/ Sarah Resnick Cohen
Assistant United States Attorney

Relevant District Court Documents

Appellee, the United States of America, designates as relevant the following documents available electronically in the district court's record, case number 2:13-cr-20600 in the Eastern District of Michigan:

Record Entry No.	Document Description	PgID
R. 66	Fourth Superseding Indictment	738-758
R. 111	Arraignment/Plea Hearing Tr. 09/16/14	1096-1139
R. 156	Sentencing Tr. 07/06/15	2287-2457
R. 158	Judgment	2459-2468
R. 161	Sentencing Tr. 07/10/15	2472-2508
R. 165	Notice of Appeal	2513-2514
R. 168	Sentencing Tr. 07/07/15	2517-2642
R. 169	Sentencing Tr. 07/08/15	2643-2856
R. 170	Sentencing Tr. 07/09/15	2857-2945
R. 171	Status Conference Tr. 07/01/15	2946-2996
R. 178	Stipulation to Correct the Record	3025
R. 161-1	Errata Sheet	3026
n/a	Presentence Report	