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Elder Justice

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Introduction

Matthew G. Whitaker

Acting Attorney General of the United States

Elder abuse is a serious crime against some of the most decent and trusting people in our society—and it is all too common today. It is widely estimated that one in ten seniors in the United States is abused.¹ That abuse can be physical, but often it is psychological or financial.² Each year, an estimated \$3 billion is stolen or defrauded from millions of American seniors through “grandparent scams,” fake prizes, romance scams, fraudulent IRS refunds, and even outright extortion.³

Unfortunately, such crimes pose a special challenge in rural communities like the one where I grew up, in which law enforcement agencies can be spread thin and where there often are fewer support services available.

Exploiting seniors is a despicable crime, and under this Administration, the Department has taken sweeping action to stop it. In 2018, the Department took a series of new steps to enhance its Elder Justice program. For example, we mandated that each of the 94 United States Attorneys’ offices appoint an Elder Justice Coordinator to be responsible for formulating and leading their District’s Elder Justice strategy. Second, we partnered with the United States Department of Agriculture to amplify the Department’s education and outreach to seniors in rural America. Third, we announced the largest coordinated sweep of elder fraud cases in history, with cases involving more than 250 defendants from around the globe who victimized more than a million Americans, most of whom were elderly. The cases include criminal, civil, and forfeiture actions across more than 50 federal districts, with losses exceeding \$500 million. Fourth, we ordered more training and resource guides for Elder Justice Coordinators, including residential training at the

¹ *Elder Abuse Prevention*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/features/elderabuse/index.html> (last visited Dec. 14, 2018).

² *See id.*

³ Press Release, Fed. Bureau of Investigation, FBI Tech Tuesday—Building a Digital Defense Against Elder Fraud (Mar. 27, 2018).

National Advocacy Center and this issue of the DOJ Journal. That was only the beginning.

In November, I attended the Department's Rural and Tribal Elder Justice Summit in Des Moines, Iowa, which explored the unique challenges and opportunities associated with addressing elder abuse in rural and tribal communities. At the Summit, I announced that over the next 11 months, our Office for Victims of Crime will provide nearly \$18 million to help seniors who are victims of crime. Additionally, I unveiled the Money Mule Initiative, which is a coordinated effort against the transnational criminal organizations who are defrauding our seniors.

I am grateful to the Executive Office for United States Attorneys' Office of Legal Education for compiling this outstanding Journal, and I thank each of the writers, reviewers, and editors who contributed to it. This will be a helpful resource to those of you committed to investigating and prosecuting these challenging cases.

Our goal is to reduce crime and protect America's seniors. I am confident that if we work together, we can help seniors and others have the security and the peace of mind that they deserve.

The United States Department of Justice's Elder Abuse Initiatives

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I. Introduction

The mission of the United States Department of Justice is “to enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans.”¹ As part of its mission, the Department of Justice has engaged in a wide array of activities to combat, prevent, and expand our understanding of elder abuse, neglect, and financial exploitation. In this article, we will highlight three of the Department of Justice’s programmatic efforts in the area of elder abuse. First, we will highlight the range of research, statistics, and evaluation projects that have been funded by the National Institute of Justice (NIJ). Second, we will highlight the Bureau of Justice Statistics (BJS), the research and statistics arms of the Department of Justice. Finally, we will highlight the Office for Victims of Crime (OVC) and their programs and initiatives to support elder abuse victims as well as elder justice professionals.

¹ *About DOJ*, U.S. DEP’T OF JUST., <http://www.justice.gov/about> (last visited Oct. 15, 2018).

A. Overview

The Department of Justice is the chief enforcer of our nation's federal laws. Given its broad array of responsibilities, the Department of Justice is divided into various divisions and offices.² The Department of Justice's litigating components are organized into divisions, including the Criminal, Civil, and Civil Rights Divisions. In addition to enforcing the nation's federal laws, the Department of Justice provides federal leadership and support to state, local, and tribal communities through a wide array of programs. The Department of Justice's Office of Justice Programs (OJP), for example, "provides innovative leadership . . . [through] disseminating state-of-the-art knowledge and practices across America, and providing grants for the implementation of these crime fighting strategies."³ In addition to supporting law enforcement efforts through research, statistics, and evaluations, OJP oversees a wide array of programs on topics ranging from juvenile justice to substance abuse. Several components within OJP have dedicated resources to expand our understanding of elder abuse, neglect, and financial exploitation. For example, the Bureau of Justice Statistics (BJS) within OJP "collects, analyzes, . . . and disseminates [data] . . . on criminal offenders, crime victims, and criminal justice operations."⁴ Moreover, the National Institute of Justice (NIJ) is committed to "research, development, and evaluation of crime control and justice issues."⁵ Another key component within OJP is the OVC, which is "committed to enhancing the [N]ation's [sic] capacity to assist crime victims and to providing leadership [to] chang[e] attitudes, policies, and practices to promote justice and healing for all victims of crime."⁶ Along with OJP, "[t]he Office on Violence Against Women (OVW) provides federal leadership in developing [our] nation[s] capacity to reduce violence

² See *Organizational Chart, Agencies*, U.S. DEP'T OF JUST., <http://www.justice.gov/agencies/chart> (last visited Oct. 24, 2018).

³ *About Us*, OFF. OF JUST. PROGRAMS, <https://ojp.gov/about/about.htm> (last visited Oct. 15, 2018).

⁴ *Bureau of Justice Statistics*, OFF. OF JUST. PROGRAMS, <https://ojp.gov/about/offices/bjs.htm> (last visited Oct. 15, 2018).

⁵ *National Institute of Justice*, OFF. OF JUST. PROGRAMS, <https://ojp.gov/about/offices/nij.htm> (last visited Oct. 15, 2018).

⁶ *Victims of Crime*, OFF. OF JUST. PROGRAMS, <http://ojp.gov/programs/victims.htm> (last visited Oct. 15, 2018).

against women”⁷ Since its inception in 1995, OVW has awarded over \$7 billion in grants and cooperative agreements to help communities develop programs, policies, and practices to end domestic violence, dating violence, sexual assault, and stalking, while providing services to victims of these crimes.⁸ As will be discussed below, preventing and addressing elder abuse, neglect, and exploitation is a priority that cuts across many of the Department of Justice’s components.

II. Research, evaluation, statistics, and services at the Department of Justice

NIJ and BJS fund research, data, and evaluation projects that contribute to our understanding of elder abuse and neglect. This section highlights the contributions of both BJS and NIJ to the elder justice field.

A. NIJ research and development in elder justice

NIJ is the research, development, and evaluation agency of the Department of Justice, with a mission of “improving knowledge and understanding of crime and justice issues through science.”⁹ NIJ’s research in the area of elder abuse has been organized around six research themes—research on forensic markers; evaluation of interventions; research on prevalence, risk factors, and consequences; tool development for practitioners; financial exploitation; and elder mistreatment in residential care facilities.¹⁰

NIJ has also adopted the National Research Council’s definition for elder abuse: “(a) intentional actions that cause harm or create a serious risk of harm to a vulnerable elder by a caregiver or other person who stands in a trust relationship to the elder, or (b) failure by a caregiver to satisfy the elder’s basic needs or to protect the elder

⁷ *About the Office, Office on Violence Against Women*, U.S. DEP’T OF JUST., <https://www.justice.gov/ovw/about-office> (last visited Oct. 24, 2018).

⁸ *Id.*

⁹ *About the National Institute of Justice, National Institute of Justice*, OFF. OF JUST. PROGRAMS, <http://www.nij.gov/about/pages/welcome.aspx> (last visited Oct. 24, 2018).

¹⁰ *See generally Awards Related to: Elderly (65+)*, OFF. OF JUSTICE PROGRAMS, [https://www.nij.gov/funding/awards/Pages/awards-list.aspx?tags=Elderly\(65+\)](https://www.nij.gov/funding/awards/Pages/awards-list.aspx?tags=Elderly(65+)) (last visited Oct. 31, 2018).

from harm.”¹¹ This definition, which appears on NIJ’s elder abuse home page, includes financial exploitation, physical abuse, and neglect.¹²

Historically, elder abuse was viewed as a social problem rather than a criminal problem, with most states not establishing adult protective services units until the mid-1980s. As recognized by the National Academies’ Committee on National Statistics in 2002, there is a dearth of research on physical abuse, sexual abuse, and neglect of the elderly that results in a widespread inability to effectively prevent, detect, intervene in, or prosecute the problem. Scholars in the field claim that research on elder abuse and neglect lags behind research on child maltreatment and violence against women by two decades.¹³ The results of the NIJ-funded National Elder Mistreatment Study indicated that 11% of elders reported experiencing at least one form of mistreatment—emotional, physical, sexual, or potential neglect—in the past year.¹⁴ Financial exploitation by a family member was reported by 5% of elders.¹⁵

In the United States, the issue of elder abuse is garnering attention of the law enforcement, medical, and research communities as demographic trends indicate that more people are living longer than they have in any previous time in our nation’s history. This trend is expected to increase, as the U.S. Census Bureau reports that 47.8 million Americans were 65 and older in 2015, accounting for approximately 15% of the population, and projects that 94.7 million

¹¹ *Elder Abuse*, National Institute of Justice, OFF. OF JUST. PROGRAMS, <https://www.nij.gov/topics/crime/elder-abuse/Pages/welcome.aspx> (last visited Oct. 24, 2018); NAT’L RES. COUNCIL, ELDER MISTREATMENT: ABUSE, NEGLECT, AND EXPLOITATION IN AN AGING AMERICA (Richard J. Bonnie & Robert B. Wallace eds., 2003).

¹² *Elder Abuse*, National Institute of Justice, OFF. OF JUST. PROGRAMS, <https://www.nij.gov/topics/crime/elder-abuse/Pages/welcome.aspx> (last visited Oct. 30, 2018).

¹³ David A. Wolfe, *Elder Abuse Intervention: Lessons from Child Abuse and Domestic Violence Initiatives*, in ELDER MISTREATMENT: ABUSE, NEGLECT, AND EXPLOITATION IN AN AGING AMERICA (Richard J. Bonnie & Robert B. Wallace eds., 2003).

¹⁴ Ron Acierno et al., *Prevalence and Correlates of Emotional, Physical, Sexual, and Financial Abuse and Potential Neglect in the United States: The National Elder Mistreatment Study*, 100 AM. J. PUB. HEALTH 292, 293 (2010).

¹⁵ *Id.* at 294.

Americans will be aged 65 years or older in 2060, accounting for nearly 23.5% of the population.¹⁶ The number of Americans aged 85 years or older is expected to be 19.7 million in 2060.¹⁷ These aging members of our population will likely require more care and protection than what is currently available or possible to provide. Most importantly, every individual is entitled to equal protection from neglect, abuse, and exploitation, regardless of age or infirmity. For these reasons, NIJ has established a research program that specifically focuses on the issue of elder abuse to assist the field in its response to the current and emerging needs of the elderly population.

Many of the priorities identified in prior NIJ solicitations for research on elder abuse have come from the National Research Council's 2003 landmark publication *Elder Mistreatment: Abuse, Neglect and Exploitation in an Aging America* and subsequent interdisciplinary meetings with researchers and practitioners in the field. In particular, the 2008 *NIJ Elder Abuse Workshop* and the National Institute of Aging hosted *Meeting on Research Issues in Elder Mistreatment and Abuse and Financial Fraud* in 2010 and the Department of Justice-funded *Elder Justice Roadmap* project (2014), which were influential in shaping NIJ's research agenda over the past several years. More recently, the Department of Justice funded a survey of leading researchers in the field of elder abuse and financial exploitation in order to prioritize the most salient research gaps in the elder abuse field. The three most pressing research priorities identified through that survey were: (1) "the need for psychometrically sound and consistent measurement of elder abuse," (2) the need for research to identify effective "interventions to prevent the reoccurrence . . . of elder [abuse]," and (3) research on the causes and consequences of the various forms of elder abuse.¹⁸

NIJ, in collaboration with the Civil Division of the Department of Justice, has made nearly three dozen grant awards from 2005–2017 in response to the needs identified in the field.¹⁹ These projects are

¹⁶ U.S. CENSUS BUREAU, ECON. & STAT. ADMIN., U.S. DEPT. OF COMMERCE, AN AGING NATION: PROJECTED NUMBER OF CHILDREN AND OLDER ADULTS (2018).

¹⁷ *Id.*

¹⁸ SIDNEY M. STAHL, U.S. DEP'T OF JUSTICE, BUILDING CONSENSUS ON RESEARCH PRIORITIES IN ELDER MISTREATMENT 3–4 (2015).

¹⁹ *Awards Related to: Elderly (65+), National Institute of Justice, OFF. OF JUST. PROGRAMS,*

examining diverse elder mistreatment issues, including the identification of victimization risk factors; measurement of incidence and prevalence of abuse, including resident-on-resident abuse; the financial, health, and mental health consequences of elder abuse; exploration of residential care systems' mechanisms for responding to abuse; examination of bruising and pressure ulcers as they relate to abuse, neglect, and care; examination of forensic technologies in the detection of elder abuse; exploration of the factors that contribute to or are associated with the financial abuse of the elderly, as well as the factors that promote reporting and facilitate investigation of such abuse; evaluation of the forensic center model; and production of screening and assessment tools for financial exploitation and abuse of the elderly.

1. Findings from key NIJ studies

In this section we present key research findings from NIJ funded research across the six areas mentioned above—research on prevalence, risk factors, and consequences; research on forensic markers; evaluation of interventions; tool development for researchers and practitioners; financial exploitation; and elder mistreatment in residential care facilities—keeping in mind that many studies do not fit cleanly in one category. At the end of each section, we will also discuss some of the research challenges associated with each category.

Research on incidence, prevalence, and risk factors for elder abuse

The largest, most comprehensive, and most commonly cited statistics on the prevalence of elder mistreatment experienced by elderly individuals living in the community comes from the NIJ-funded National Elder Mistreatment Study (NEMS), a nationally representative study of 5,777 U.S. residents ages 60 and older.²⁰ Participants who were determined to have either little or no cognitive impairment were interviewed on the phone in either English or Spanish about physical, sexual, and emotional abuse, neglect, and financial exploitation. Proxy interviews were also conducted with a sample of participants with more severe cognitive impairment.²¹ The

[https://www.nij.gov/funding/awards/Pages/awards-list.aspx?tags=Elderly\(65+\)](https://www.nij.gov/funding/awards/Pages/awards-list.aspx?tags=Elderly(65+)) (last visited Oct. 30, 2018).

²⁰ Acierno et al., *supra* note 13, at 292; RON ACIERNO ET AL., NAT'L INST. OF JUSTICE, NATIONAL ELDER MISTREATMENT STUDY 1, 4 (2009).

²¹ Acierno et al., *supra* note 14, at 293.

proxy interviews were determined to be unreliable for identifying most forms of abuse. Among the community dwelling elders who answered the questions for themselves, the researchers reported past-year prevalence of 4.6% for emotional mistreatment, 1.6% for physical mistreatment, 0.6% for sexual mistreatment, 5.2% for financial exploitation by a family member, and 5.1% for potential neglect.²² In addition to questions about abuse, participants were asked a number of questions about health, social support, and demographics. Risk factors for elder mistreatment in this sample included low household income, unemployment or retirement, self-reported poor health, experience of a prior traumatic event, and low levels of social support.²³

In 2016, an eight-year follow-up was conducted with 183 of the original victims identified in the 2008 NEMS study, plus a comparison sample of 591 participants who did not report any past year victimization in the original NEMS study.²⁴ The follow-up study examined differences in physical and mental health symptoms for those individuals who were abused compared to those who were not. Not surprisingly, in the eight-year follow-up, victims reported significantly higher rates of depression, anxiety, post-traumatic stress disorder (PTSD), and poorer self-reported health than non-victims.²⁵ Interestingly, with the exception of PTSD, strong social support systems at the time of the follow-up interview “appeared to inoculate older adults against negative effects of mistreatment,” which has important implications for planning interventions with abused elders.²⁶ Reporting to police was extremely uncommon for victims who experienced emotional (89.9% did not report) or financial (87.5% did not report) abuse at the hands of a friend or family member.²⁷ The number of physical and sexual abuse victims in the follow-up sample

²² *Id.* at 294.

²³ *Id.*

²⁴ Ron Acierno et al., *The National Elder Mistreatment Study: An 8-year Longitudinal Study of Outcomes*, 29 J. ELDER ABUSE & NEGLECT 254, 257.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Ron Acierno et al., *Relevance of Perpetrator Identity to Reporting Elder Financial and Emotional Mistreatment*, 00(0) J. OF APPLIED GERONTOLOGY 1, 5–6 (2018); see also RON ACIERNO, OFFICE OF JUSTICE PROGRAMS, NATIONAL ELDER MISTREATMENT SURVEY: 5 YEAR FOLLOW-UP OF VICTIMS AND MATCHED NON-VICTIMS (2018).

was too small to allow for exploration of reporting to police within those groups.

There does seem to be a consensus developing around the extent of victimization experienced by elderly individuals who are not cognitively impaired and who reside in the community. However, it has not been possible to include residents of long-term care facilities or individuals who are not able to respond to telephone surveys in the national prevalence numbers. NIJ has funded some research on the extent of abuse in residential care facilities (see section below) and others have funded smaller scale studies to estimate the extent of abuse experienced by elderly individuals with cognitive impairment. Although it would be ideal, at this point, coming up with a national estimate of elder abuse prevalence that includes all elderly individuals is not possible.

Data on the prevalence of elder abuse, neglect, and financial exploitation perpetration does not exist. In other areas of family and community violence, research participants are often asked about their experiences as victims and as perpetrators. This is not the standard in elder abuse research. Until recently, we knew very little about perpetrators, with the exception of their characteristics as reported by the victims. A team of researchers used data collected from an NIJ study of 336 Adult Protective Services cases in Chicago to create four profiles of elder abuse perpetrators—*Caregiver*, *Temperamental*, *Dependent Caregiver*, or *Dangerous*.²⁸ Those with the highest risk behaviors, *Dangerous*, make up about a quarter of the perpetrators and are more likely to be aggressive, be financially dependent, and have mental health or substance abuse problems.²⁹ This group also perpetrates the highest rates of emotional and physical abuse and the second highest rates of financial exploitation. These findings suggest that interventions may not work equally across all types of abusers and that finite criminal justice resources may best be targeted toward the *Dangerous* profile perpetrators.

Research on forensic markers of elder abuse

Research to assist law enforcement, geriatricians, social service workers, and medical examiners to identify cases of elder abuse is a

²⁸ Marguerite DeLiema et al., *Using Latent Class Analysis to Identify Profiles of Elder Abuse Perpetrators*, 73 J. GERONTOLOGY: SERIES B e49–e58 (2017).

²⁹ *Id.*

critical need in the field. This is also an area where NIJ has devoted a considerable amount of resources in large part because of the importance of forensic marker research to practitioners in the criminal justice system. Early NIJ-funded research on forensic markers documented normal bruising patterns among the elderly population and found that: (1) “accidental bruises occur in a predictable pattern”; (2) most accidental large bruises are on the extremities; (3) “the initial color” and appearance of bruises “change over time” and “is less predictable” than previously thought; and (4) individuals who are on medications known to make bruising more severe and those with compromised functional ability are “more likely to have multiple bruises.”³⁰ The study included 101 participants with an average age of 83.³¹ Nurses examined any bruises that developed during the two week study window and documented the progression of the bruises for up to six weeks.³² In addition to collecting data on the color, location, and size of each bruise, demographic information along with medical conditions, medication, and functional and cognitive status was collected.³³ Participants were also asked what “caused the bruise.”³⁴

A follow-up study designed to characterize bruising patterns in elderly individuals who are confirmed victims of elder abuse found that: (1) abused elders were far more likely to be able to explain the cause of their bruises than non-abused elders; (2) over half of the abused elders had a large bruise (>5 cm), which is much higher than the percent of non-abused elders from the previous study with a large bruise (7%); and (3) abused elders were more likely than non-abused elders to have bruises on the head, neck or torso.³⁵ Participants included 67 adults aged 65 and older who were reported to APS for suspected physical abuse.³⁶ An expert panel was used to confirm that the participants in the study were physically abused.³⁷ A total of

³⁰ Laura Mosqueda et al., *The Life Cycle of Bruises in Older Adults*, 53 J. AM. GERIATRICS SOC'Y 1339, 1342 (2005).

³¹ *Id.* at 1339.

³² *See id.*

³³ *See id.* at 1343.

³⁴ *Id.* at 1340.

³⁵ Aileen Wiglesworth et al., *Bruising as a Marker of Physical Elder Abuse*, 57 J. AM. GERIATRICS SOC'Y 1191, 1194 (2009).

³⁶ *Id.* at 1191.

³⁷ *Id.* at 1192.

155 bruises were documented on the bodies of participants and the measures used were similar to those in the previous bruising study.³⁸

In addition to bruises, medical and criminal justice practitioners are often called upon to determine when a pressure ulcer is a forensic marker of neglect, especially in long-term care settings.³⁹ Scientific evidence is needed to assist practitioners in making these determinations. In a study supported by NIJ, investigators explored the question of whether full-thickness pressure ulcers developed in long-term care patients who were receiving high quality care.⁴⁰ The investigators had cooperation from 63 top-performing skilled nursing facilities in three large urban areas, yet there were only 24 elderly residents who were confirmed to have received excellent or very good care and developed full-thickness pressure ulcers that began at the facility. Based on examination of the 24 pressure ulcers, Liao and colleagues determined that a single full-thickness pressure ulcer could occur under conditions of excellent care.⁴¹

Another 2018 NIJ-funded forensic marker project, which is anticipated to be published, compared injury characteristics observed among adults aged 65 or older who were reported to APS as victims of physical abuse (N=61) to a matched sample of non-abused older adults who visited an outpatient geriatric clinic (N=107) to document a broad spectrum of injuries.⁴² Findings from this study largely confirm the results from the prior study. Specifically, the APS victim sample had more injuries, larger injuries, more tenderness, and were more likely to have injuries to the head, neck, and face than the matched clinic controls. However, a sizable minority of confirmed victims of physical abuse had no visible injuries present. Detectives and prosecutors were also interviewed as part of the study. As expected, they said that injury documentation was one component used to corroborate accounts of abuse and that having the location and characteristics of the injury be congruent with the victim's account of abuse provided

³⁸ *Id.* at 1193.

³⁹ Solomon Liao et al., *A Multi-Site Study to Characterize Pressure Ulcers in Long-term Care Under Best Practices* 1–54 (U.S. DEP'T OF JUSTICE 2010).

⁴⁰ *Id.* at 6.

⁴¹ *Id.* at 6–7.

⁴² Jeanine Yonashiro-Cho et al., Nat'l Inst. of Justice, *Forensic Markers of Physical Elder Abuse: Establishing a Medical Characterization and Identifying the Criminal Justice Approach to Investigation and Prosecution* 1–10 (2018) (forthcoming work).

strong corroboration of the abusive incident. They also noted a preference for having APS contact law enforcement and/or take the victim to a medical facility rather than try to provide forensic documentation themselves.

Multiple challenges have impeded the progress of research on forensic markers of elder abuse. First, most of this research is focused on elder physical abuse, which is one of the least common types of elder mistreatment. Therefore, recruitment of participants in these types of studies has been extremely slow and many studies do not end up recruiting the number of participants originally intended. Another challenge is access to residential care facilities for this type of research. Typically, only the facilities that provide the highest quality care have allowed investigators to conduct research in their facilities. Unfortunately, but understandably, in facilities where there is the greatest chance of finding elders who are suffering from abuse and neglect, there is resistance to participation in research. At NIJ, research on forensic markers of neglect has been limited to a single study of pressure ulcers. There is a need for research that looks at other forensic markers of elder neglect, such as malnutrition, dehydration, and environmental markers (for example, living conditions).

Elder abuse evaluation research

Up until 2016, NIJ repeatedly solicited for rigorous research to test the effectiveness of elder abuse preventive interventions. Although NIJ funded over 30 research projects related to elder abuse—neglect and financial exploitation between 2005 and 2015—only two involved intervention research. In both studies, the research was designed to determine the effectiveness of an intervention model—elder abuse multidisciplinary teams—for addressing the needs of victims of elder abuse.⁴³ By design, these are challenging cases where elder abuse has already been identified.

Despite the proliferation of elder abuse multidisciplinary teams, there has been little research evaluating the effectiveness of this approach on case outcomes. NIJ has funded evaluations of two elder

⁴³ KATHLEEN WILBER ET AL., NAT'L INST. OF JUSTICE, EVALUATING THE ELDER ABUSE FORENSIC CENTER MODEL 3 (2014); The Impact of a Forensic Collaborative for Older Adults on Criminal Justice and Victim Outcomes: A Randomized-Control, Longitudinal Design (forthcoming work).

Forensic Centers (FC)—the Los Angeles County Elder Abuse Forensic Center (Los Angeles FC) and the new Forensic Collaborative in Denver, which is an ongoing randomized control trial. The completed evaluation of the Los Angeles FC examined outcomes related to prosecution of financial elder abuse cases and protection of vulnerable older adults. Using propensity score matching, the researchers compared outcomes of two groups: those who received the usual APS care *plus* assistance from the Los Angeles FC and those who received only the usual APS care.⁴⁴ They found that significantly more cases reviewed by the FC were submitted to the District Attorney's Office (22.0%) compared with APS-only cases (3.0%) and that significantly more FC cases were referred to the Office of the Public Guardian (30.6%) compared with APS-only cases (5.9%).⁴⁵

NIJ funded a team of scientists, which included some of the evaluators from the original Los Angeles FC study, to examine the cost-effectiveness of the model.⁴⁶ Using a quasi-experimental design, the researchers compared the estimated average costs of pursuing a case at the Los Angeles FC with the estimated average costs of a case in the usual care APS system.⁴⁷ They found that cases heard by the Los Angeles FC took on longer average (just over 10 hours) than usual care APS cases (just under 4 hours).⁴⁸ Factoring in staff and team member costs of \$674.25 and a facility cost of \$306.77 per case, the mean FC case processing cost was significantly higher than the mean case processing cost for usual care APS cases (\$1,408.58 vs. \$153.30).⁴⁹

When the Los Angeles FC model is adopted, the investigators estimate the average additional cost per case submitted to the District Attorney's Office with criminal charges filed to be \$7,346.⁵⁰ Additional

⁴⁴ Adria E. Navarro et al., *Holding Abusers Accountable: An Elder Abuse Forensic Center Increases Criminal Prosecution of Financial Exploitation*, 53 THE GERONTOLOGIST 303–312 (2013).

⁴⁵ Adria E. Navarro et al., at 309; Zachary D. Gassoumis, *Protecting Victims of Elder Financial Exploitation: The Role of an Elder Abuse Forensic Center in Referring Victims for Conservatorship*, 19 AGING & MENTAL HEALTH 790, 794 (2015).

⁴⁶ Michael B. Nichol et al., *Evaluating the Cost Effectiveness of the Elder Abuse Forensic Center Model* (U.S. DEPT OF JUSTICE 2015).

⁴⁷ *Id.* at 4.

⁴⁸ *Id.* at 7.

⁴⁹ *Id.*

⁵⁰ *Id.* at 1.

costs for successful prosecution (\$8,731.40), referral to the Public Guardian (\$4,485.97), and referral to the Public Guardian resulting in conservatorship (\$6,691.93) are also estimated.⁵¹ The Los Angeles FC may be considered cost effective if society is willing to pay these additional costs per case, which is a value judgment, rather than a scientific question.⁵²

No rigorous research has been conducted to determine the effectiveness of a program designed to prevent elder abuse either in the general population of elders (universal or primary prevention) or among an at-risk population of elders (selected or secondary prevention). As such, between 2016 and 2018, NIJ has dedicated most of its research efforts and financial support to the planning and piloting of two preventive interventions. One of the competitively awarded demonstration projects, is designed to test the effectiveness of a 12-week home visiting program for elderly individuals through the Area Agency on Aging in Maricopa County, Arizona.⁵³ The intervention modules were designed to build resilience in the older adults that will make the individuals less susceptible to abuse. The other awarded demonstration project is focused on caregivers. Patients who are part of the Kaiser Permanente Los Angeles Medical Center health care system and who meet eligibility criteria will be recruited to participate in a study of a home visiting program that seeks to educate, support, and link caregivers with services and support.⁵⁴ Randomized control trials piloting the two interventions are scheduled to begin in January 2019.

One major impediment to conducting intervention research in elder abuse is the limited theoretical work available in the field. Good preventive interventions rely on a solid understanding of why elder

⁵¹ *Id.*

⁵² *See id.* at 8.

⁵³ *See generally* Press Release, U.S. Dep't of Justice, National Institute of Justice Awards Funding to Study Elder Abuse (Oct. 31, 2016); *Awards Made for "Elder Abuse Prevention Demonstration Project: Planning Phase,"* NAT'L INST. OF JUST., <https://external.ojp.usdoj.gov/selector/title?solicitationTitle=Elder%20Abuse%20Prevention%20Demonstration%20Project:%20Planning%20Phase&po=NIJ> (last visited Oct. 31, 2018) (forthcoming work).

⁵⁴ *See* Press Release, U.S. Dep't of Justice, National Institute of Justice Awards Funding to Study Elder Abuse; *Awards Made for "Elder Abuse Prevention Demonstration Project: Planning Phase."*

abuse occurs. More research on the typologies of offenders and situations that lead to elder mistreatment would be beneficial in the development of preventive interventions. In addition, conducting high quality outcome evaluations of interventions is a very expensive endeavor.

Research on tool development for practitioners

The development of tools to assist practitioners in identifying and assessing elder mistreatment has been a long-term goal of NIJ's elder mistreatment research agenda. NIJ-funded researchers have developed and tested actuarial risk assessment tools for use in APS settings, measurement instruments for financial and psychological exploitation, and a tool to assist medical examiners in deciding whether to take jurisdiction in suspicious elder death cases. More recently, NIJ has invested in research to: (1) develop and test screening tools for medical practitioners in emergency departments and 9-1-1 emergency service responders; and (2) develop a set of financial decision-making screening and assessment measures for criminal justice professionals and non-criminal justice professionals to aid in detecting and prosecuting financial exploitation of older adults.⁵⁵

Some examples of NIJ's early efforts in this area were the development of the Older Adult Financial Exploitation Measure (OAFEM)⁵⁶ and the Older Adult Psychological Abuse Measure (OAPAM).⁵⁷ Both measures were developed using a concept mapping method that organizes input from a variety of stakeholders in order to conceptualize the construct of interest—in this case elder financial and psychological abuse. Data was then collected from 227 substantiated elder abuse clients and psychometric analyses were

⁵⁵ See NIJ Award Detail: Development and Validation of a Screening Protocol to Identify Elder Abuse in United States Emergency Departments, Nat'l Inst. of Justice, <https://www.nij.gov/funding/awards/pages/award-detail.aspx?award=2015-IJ-CX-0022> (last visited Oct. 31, 2018); JASON BURNETT ET AL., NAT'L INST. OF JUSTICE, EXPLORING ELDER FINANCIAL EXPLOITATION VICTIMIZATION: IDENTIFYING UNIQUE RISK PROFILES AND FACTORS TO ENHANCE DETECTION, PREVENTION AND INTERVENTION (2017).

⁵⁶ Kendon J. Conrad et al., *Self-Report Measure of Financial Exploitation of Older Adults*, 50 THE GERONTOLOGIST 758 (2010).

⁵⁷ Kendon J. Conrad et al., *Self-Report Measure of Psychological Abuse of Older Adults*, 51 THE GERONTOLOGIST 354 (2010).

conducted using item-response theory and traditional analyses to test for validity.⁵⁸ Both the OAFEM and the OAPAM demonstrated high internal consistency, item reliability, and overall measure validity. The full 79-item OAFEM measure, along with a shortened 30-item version, has been validated and used in numerous research projects and by APS agencies in Illinois.⁵⁹ The 31-item OAPAM is also available in an 18-item short form, but it has not been adopted as widely as has the OAFEM.

The OAFEM and OAPAM are both part of the assessment protocol used by six APS agencies that were part of a recently completed pilot study of the Elder Abuse Decision Support System (EADSS).⁶⁰ This pilot study compared reporting and assessment for the 948 elder abuse cases assessed using the EADSS to the 1,634 cases assessed using the standard APS protocol from the previous year before the EADSS was implemented. The EADSS resulted in higher substantiation rates (60.2%) compared with the standard protocol used by APS (46.6%).⁶¹ The higher substantiation rate is likely due to APS clients getting the full assessment for all types of abuse under the EADSS regardless of the type of abuse that initiated the referral to APS.

Another project was designed to develop a set of new financial decision-making screening measures for criminal justice professionals and non-criminal justice professionals to aid in detecting and prosecuting financial exploitation of older adults. The purpose of the NIJ grant was to establish the essential psychometric characteristics of a set of three new financial decision-making tools for key informants, including reliability, validity, and generalizability. Results confirmed the reliability and validity of the 68-item comprehensive Lichtenberg Financial Decision Rating Scale (LFDRS).⁶² A full scale and short form of the LFDRS are available for

⁵⁸ Kendon J. Conrad et al., *Self-Report Measure of Financial Exploitation of Older Adults*, at 764.

⁵⁹ *Id.* at 766.

⁶⁰ Kendon J. Conrad et al., *Elder Abuse Decision Support System: Field Test Outcomes, Abuse Measure Validation, and Lessons Learned*, 29 J. ELDER ABUSE & NEGLECT 134 (2017).

⁶¹ *Id.* at 148.

⁶² Peter A. Lichtenberg et al., *Quantifying Risk of Financial Incapacity and Financial Exploitation in Community-dwelling Older Adults: Utility of a*

clinicians to use in financial capacity assessments. An assessment of the 10-item Lichtenberg Financial Decision Screening Scale (LFDSS) was also found to be valid and reliable in screening for financial capacity.⁶³ The Lichtenberg Financial Decision Rating Scale-Friends and Family (LFDRS-FF) was demonstrated to be a useful tool for collecting informant-reports regarding an older adult's ability to make a sentinel financial transaction.⁶⁴ All three scales are freely available with e-training.⁶⁵

An actuarial risk assessment instrument was another tool developed and tested for APS.⁶⁶ Although actuarial risk assessment had not been used previously in APS, child protection agencies use actuarial risk assessment instruments to prioritize clients for intervention.⁶⁷ The tool was developed by collecting retrospective data from 763 APS clients and classifying them based on their likelihood of subsequent maltreatment within a year of the initial APS investigation.⁶⁸ Then the tool was tested prospectively with 1,064 clients to determine the ability of the instrument to predict future mistreatment.⁶⁹ The risk of abuse/neglect “distinguished . . . low-risk . . . [individuals from those at higher risk], but did not . . . [distinguish well between] high- and moderate-risk individuals.”⁷⁰

The primary challenges for tool development research are related to adoption of new tools once they are validated. In every NIJ tool

Scoring System for the Lichtenberg Financial Decision-making Rating Scale, CLINICAL GERONTOLOGIST 1 (2018).

⁶³ Peter A. Lichtenberg et al., *The Lichtenberg Financial Decision Screening Scale (LFDSS): A New Tool for Assessing Financial Decision Making and Preventing Financial Exploitation*, 28 J. ELDER ABUSE & NEGLECT 134–151 (2016); Peter A. Lichtenberg et al., *Reliability and Validity of the Lichtenberg Financial Decision Screening Scale*, 00 INNOVATION IN AGING 1 (2017).

⁶⁴ Peter A. Lichtenberg, *Integrating Improved Assessments of Financial Judgment: Conceptual and Measurement Advance* 1, 8 (U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS 2018).

⁶⁵ See LICHTENBERG OLDER ADULT NEST EGG, www.olderadultnestegg.com (last visited Oct. 25, 2018).

⁶⁶ Kristen Johnson et al., *Developing an Actuarial Risk Assessment to Inform Decisions Made by Adult Protective Services Workers*, (U.S. DEP'T OF JUSTICE 2012).

⁶⁷ *Id.* at i.

⁶⁸ *Id.* at ii.

⁶⁹ *Id.* at 40.

⁷⁰ *Id.* at 46.

development study, the researchers worked closely with the practitioners in developing the tools to try to ensure that the tools would be used. One project involved the development and testing of an Elder Suspicious Death Field Screen (ESDFS) for medical examiners to use in helping them to decide when to take jurisdiction to investigate the suspicious death of an elderly individual.⁷¹ The investigators were not even able to validate the tool because adoption was so poor in the pilot study.⁷² The investigators changed the scope of the project to try to get a better understanding of why coroner and medical examiners (CME) did not cooperate at two of the three sites involved in the pilot study.⁷³ They concluded that CME offices lacked resources to cope with the investigation of elder suspicious deaths. Interviews with reluctant CMEs revealed that: (1) investigators had heavy workloads, so they tended to release cases from their jurisdiction “if there was a likely natural cause [of] death”; (2) the ESDFS was not well integrated with the automated system that was being used by their office; and (3) there was a lack of buy-in about the utility of the study to their work or society as a whole.⁷⁴

Similarly, the EADSS roll out in Illinois was plagued by technological problems and general lack of enthusiasm for using the new system among APS front line staff. And the actuarial risk assessment in New Hampshire was viewed with skepticism by APS front line staff, who indicated that the assessments had not changed practice during the study period.⁷⁵ For the ESDFS, the EADSS, and the actuarial risk assessment, the fidelity with which the instruments and/or systems were implemented varied greatly by APS agency or CME office. The resistance to instrument adoption by the elder abuse practice community clearly indicates a need for more implementation research and a greater emphasis on researcher-practitioner partnerships in the field.

⁷¹ Laura Mosqueda & Aileen Wiglesworth, *Coroner Investigations of Suspicious Elder Deaths* 1, 4 (U.S. DEP’T OF JUSTICE 2012).

⁷² *Id.* at 10.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ KRISTEN JOHNSON ET AL, NAT’L INST. OF JUSTICE, DEVELOPING AN ACTUARIAL RISK ASSESSMENT TO INFORM DECISIONS MADE BY ADULT PROTECTIVE SERVICE WORKERS (2012).

Research on financial exploitation

In the early years of NIJ's involvement in elder abuse research, financial exploitation was considered to be a lower priority than other areas of research. In part, NIJ staff was under the impression that other institutions were funding research on elder financial fraud and would therefore be covering elder financial exploitation. Some research on elder financial fraud and capacity to make financial decisions has been funded by organizations such as the FINRA Investor Education Foundation and by the National Endowment for Financial Education (NEFE), but these organizations typically do not fund research on elder financial exploitation that considers family dynamics and co-occurrence with other types of abuse.⁷⁶

An additional impetus for NIJ's growing interest in financial exploitation was the groundbreaking research conducted by Jackson and Hafemeister.⁷⁷ This NIJ-funded study explored a statewide database of all substantiated cases of elder abuse over a two-year period (N=2,142) to determine the differences between cases where an elderly person was the victim of financial exploitation and those where he or she was the victim of both financial exploitation and neglect or physical abuse, a combination referred to as hybrid financial exploitation.⁷⁸ They found that the 472 victims of financial exploitation alone had a very different set of risk factors than the 162 victims of hybrid financial exploitation.⁷⁹ Victims of financial exploitation tended to be more independent, less likely to be experiencing dementia or confusion, and have abusers who did not feel overburdened in providing support to the elder.⁸⁰ Of particular note, victims of hybrid financial exploitation were 81% more likely to

⁷⁶ See generally FINANCIAL INDUSTRY REGULATORY AUTHORITY (FINRA), <http://www.finra.org/content/finra-investor-education-foundation-investor-protection-campaign-older-investors> (last visited Oct. 31, 2018); *Ongoing Research Projects*, NATIONAL ENDOWMENT FOR FINANCIAL EDUCATION (NEFE),

<https://www.nefe.org/What-We-Provide/Primary-Research/Ongoing-Research-Projects> (last visited Oct. 31, 2018).

⁷⁷ Shelly L. Jackson & Thomas L. Hafemeister, *Risk Factors Associated With Elder Abuse: The Importance of Differentiating by Type of Elder Maltreatment*, 26 VIOLENCE & VICTIMS 738–757 (2011).

⁷⁸ *Id.* at 742.

⁷⁹ *Id.*

⁸⁰ *Id.* at 750.

experience hybrid exploitation when the abuser did not provide financial support to the victim, but the victim did provide financial support to the perpetrator.⁸¹ This study paved the way for additional NIJ-funded research on financial exploitation because it highlighted the link between financial exploitation and other forms of abuse.

Another NIJ-funded study expanded on Jackson and Hafemeister's work on characteristics of financial exploitation cases. Researchers used a Texas statewide administrative data set with 8,800 confirmed cases of elder abuse to see if computers could (1) "learn" how to distinguish between financial exploitation and other forms of abuse; and (2) differentiate between "pure" financial exploitation and "hybrid" financial exploitation.⁸² The computer algorithms were able to reliably predict clients who experienced financial exploitation compared with those who experienced other forms of elder abuse.⁸³ In distinguishing between pure financial exploitation and hybrid financial exploitation, the computer algorithms were able to make modest improvements in prediction accuracy. Hybrid financial exploitation cases were more likely to include clients who had an apparent injury, had overburdened caregivers, were facing a foreclosure, and were physically dependent than pure financial exploitation cases.⁸⁴

Research on elder abuse in residential care facilities

Research on the extent of elder abuse in residential care facilities is extremely limited primarily because of the difficulty in accessing residents who live in long-term care facilities. One NIJ-funded study used 832 surveys of nurse aids who were working or had worked within the past three months in an assisted living facility.⁸⁵ One-year prevalence rates were calculated for a number of indicators of resident abuse. The highest rates were for items in the verbal (such as, humiliating remarks, 13%) and psychological abuse (such as critical

⁸¹ *Id.* at 752.

⁸² Jason Burnett et al., *Exploring Elder Financial Exploitation Victimization: Identifying Unique Risk Profiles and Factors to Enhance Detection, Prevention and Intervention* (U.S. DEPT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS 2017).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Nicholas Castle & Scott Beach, *Elder Abuse in Assisted Living*, 32(2) J. OF APPLIED GERONTOLOGY 248, 255 (2013).

remarks, 16%) categories.⁸⁶ Generally, physical abuse, material exploitation, and medication abuse items were less common.⁸⁷ Sexual abuse items were the least common.⁸⁸ Low staffing levels, having residents with dementia or physical limitations, and having an administrator with a shorter tenure and lower education level were factors associated with higher rates of abuse.

Practitioners and researchers are increasingly recognizing resident-to-resident elder mistreatment (R-REM) as a common source of abuse in residential care facilities and trying to develop institutional policies to address high rates of R-REM. The foundational research on R-REM was funded jointly by the National Institute on Aging and NIJ. Lachs and colleagues used a variety of reporting mechanisms to document the prevalence of resident-on-resident abuse in ten nursing homes. Although direct service staff reported an average of 4.3 resident-on-resident abuse incidents over a two week period, none were documented in formal incident or accident reports, indicating a need for better documentation.⁸⁹

There are a number of challenges associated with doing research on elder mistreatment in long-term care facilities, some of which have already been mentioned. The most obvious challenge is the bias associated with gaining access to conduct research, which typically leaves out the residents of facilities where care is likely to be of low quality. Another major obstacle for researchers is working through thorny human subjects' protection concerns, particularly related to privacy of health care records and appropriate and acceptable methods to include participants who may not have the physical or cognitive capacity to participate in standard research protocols. One potential way to ensure that all residents are included in research is to use administrative records. For example, all nursing homes are required to monitor and report on a wide array of patient conditions for their Medicare and Medicaid patients in the Minimum Data Set (MDS) component of the Resident Assessment Instrument. Data collected in the MDS includes information regarding patient activities

⁸⁶ *Id.* at 257.

⁸⁷ *Id.* at 257–258.

⁸⁸ *Id.* at 258.

⁸⁹ MARK LACHS ET AL., NAT'L INST. OF JUSTICE, DOCUMENTATION OF RESIDENT TO RESIDENT ELDER MISTREATMENT IN RESIDENTIAL CARE FACILITIES 1, 4 (2014).

of daily living, mood and behavior, psychosocial well-being, disease diagnoses, and health conditions. While such data are not collected for research purposes, they may nevertheless contain useful information that could be used to better understand risks and consequences of abuse among elderly residents of nursing homes.⁹⁰

2. Additional research activities

In addition to the investment in extramural research on elder mistreatment, NIJ has devoted resources to identifying key research gaps and to disseminating research findings to the field. In February 2008, NIJ brought together approximately 70 researchers, practitioners, and funders for a three-day elder abuse workshop to present ongoing and completed research projects and to identify short and long-term research goals⁹¹. In 2011–2012, NIJ hosted a webinar expert chat series to highlight findings from emerging research studies.⁹² More recently, NIJ has been emphasizing the development and testing of elder abuse theory. To that end, Jackson and Hafemeister wrote a NIJ research brief titled *Understanding Elder Abuse: New Directions for Developing Theories of Elder Abuse Occurring in Domestic Settings*,⁹³ which served as a starting point for a subsequent meeting focused on elder abuse theory.⁹⁴ The goals of the meeting were to: (1) underscore why it is important to conduct

⁹⁰ *Minimum Data Set 3.0 Public Reports*, CTRS. FOR MEDICARE & MEDICAID SERVS.,

<https://www.cms.gov/Research-Statistics-Data-and-Systems/Computer-Data-and-Systems/Minimum-Data-Set-3-0-Public-Reports/index.html>

(last visited Oct. 31, 2018).

⁹¹ *Elder Abuse Workshop*, OFF. OF JUST. PROGRAMS, NAT'L INST. OF JUST., U.S. DEPT OF JUST., <https://www.ncjrs.gov/pdffiles1/nij/242211.pdf>

(last visited Oct. 25, 2018).

⁹² *Events & Webinars*, HARVARD KENNEDY SCHOOL ASH CENTER FOR DEMOCRATIC GOVERNANCE AND INNOVATION,

<http://www.innovations.harvard.edu> (last visited Oct. 25, 2018) (search “elder abuse”).

⁹³ Shelly L. Jackson & Thomas L. Hafemeister, *Understanding Elder Abuse: New Directions for Developing Theories of Elder Abuse Occurring in Domestic Settings* (U.S. DEPT OF JUSTICE, NAT'L INST. OF JUSTICE, RESEARCH IN BRIEF 2013).

⁹⁴ *Elder Mistreatment: Using Theory in Research—Meeting Summary*, OFF. OF JUST. PROGRAMS, U.S. DEPT OF JUST.,

<https://www.ncjrs.gov/pdffiles1/nij/248390.pdf> (last visited Oct. 31, 2018).

research that is guided by theory; (2) gain insight into barriers to the use of theory in elder abuse research; (3) discuss how to better integrate theory into research designs and proposals; and (4) explore mechanisms to encourage investigators to use theory when developing research proposals and designs.

B. BJS Elder Justice activities

BJS is the statistics arm of the Department of Justice and has supported a number of data collection projects to help document information on crimes against the elderly. BJS collects and analyzes statistics on criminal offending and criminal victimization, including crimes that are committed against elderly individuals. Statistics on crimes against the elderly are also relevant to the issue of elder abuse, although some forms of elder abuse are not criminal and some crimes against the elderly would not fit common definitions of elder abuse.

A special report by BJS on crimes against the elderly provides statistics about violent and non-violent criminal activities committed against adults age 65 and older over the decade between 2003 and 2013.⁹⁵ Overall, the rate of nonfatal criminal victimization among the elderly is the lowest of any age group (3.6 victimizations per 1,000 persons age 65 or older).⁹⁶ However, the number of victimizations reported in the National Crime Victimization Survey (NCVS) should not be expected to align with other measures of elder abuse victimization. The NCVS is designed to measure nonfatal personal and property crimes, but does not include many of the experiences typically reported in elder “BJS Elder Abuse Statistics and Projects” abuse estimates, such as verbal and psychological abuse, some forms of mild physical abuse, or the misappropriation of financial resources.⁹⁷ Some key findings relevant to elder abuse from the report on crimes against the elderly include: (1) Elderly crime victims (59.3%) are far more likely than all other victims to report being victimized at or near their homes; (2) Elderly individuals (5%) were no more likely to experience identity theft than persons age

⁹⁵ Rachel E. Morgan & Britney J. Mason, *Crimes Against the Elderly, 2003–2013* 1 (U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS 2014).

⁹⁶ *Id.*

⁹⁷ Kamala Mallik-Kane & Janine M. Zweig, *What is Elder Abuse? A Taxonomy for Collecting Criminal Justice Research and Statistical Data* 1, 4 (URBAN INST. 2016).

25–49 (7.9%) or age 50–64 (7.8%); (3) Domestic violence (including violence committed by an intimate partner or other family member) made up a smaller percentage of violent crimes committed against elderly individuals (14.3%) than against individuals age 25–49 (26.0%) or age 50–64 (19.9%); and (4) Violent crime rates for elderly individuals with a disability (3.9 per 1,000 persons) were similar to elderly individuals without a disability (4.1 per 1,000 persons). Other factors that were associated with higher rates of criminal victimization for elderly individuals include living in urban areas, being divorced or separated (as compared to never married, married, or widowed), and being unemployed or retired.⁹⁸

BJA also funded the Assessment of Administrative Data on Elder Abuse, Mistreatment, and Neglect project to assess the feasibility of using administrative data collected by Adult Protective Services (APS) agencies for examining cases of abuse, mistreatment, and neglect of the elderly and adults with disabilities reported to APS.⁹⁹ This project developed a taxonomy of elder abuse along three dimensions—the elder abuse acts, the characteristics of the victim, and the relationship between the perpetrator and the victims—to help guide the assessment of whether APS agencies are collecting key indicator statistics that are consistent with the definitions of specific types of elder abuse.¹⁰⁰ This project also developed a survey to measure the capacity of APS data systems to generate key indicators of victimization and criminal victimization consistent with the taxonomy developed in the first stage of the project.¹⁰¹ One of the key goals of the data collection effort was to determine whether APS data can be used to distinguish between criminal and non-criminal acts.¹⁰² In the third stage of the project, an online survey was administered to approximately 140 state and local APS data collection entities. Results from this survey indicated that uniform reporting of elder

⁹⁸ *Rachel E. Morgan*, at 6–10, 20.

⁹⁹ *Kamala Mallik-Kane*, at 1; see also OFFICE OF JUSTICE PROGRAMS, U.S. DEPT OF JUSTICE, 2010 ASSESSMENT OF ADMINISTRATIVE DATA ON ELDER ABUSE, MISTREATMENT, AND NEGLECT SOLICITATION (2012).

¹⁰⁰ See *Kamala Mallik-Kane*, at 7–12.

¹⁰¹ See *id.* at 19.

¹⁰² *Id.* at 1.

abuse is not immediately feasible because of limitations in the availability of electronic data.¹⁰³

C. Office for Victims of Crime (OVC)

The OVC administers the Crime Victims Fund (the Fund), “which is financed by fines and penalties paid by convicted federal offenders, not from tax dollars.”¹⁰⁴ These deposits come primarily from the extraordinary effort of United States Attorneys’ Offices, U.S. courts, and the Federal Bureau of Prisons. “OVC channels funding for victim compensation and assistance throughout the United States, raises awareness about victims’ issues, promotes compliance with victims’ rights laws, and provides training and technical assistance and publications and products to victim assistance professionals” and allied professionals.¹⁰⁵ Victims of Crime Act (VOCA) Formula “grants for crime victim compensation” and victim assistance, which is “awarded through subgrants to state agencies and local service providers.”¹⁰⁶ VOCA also “support[s] direct services to crime victims in every state, the District of Columbia, and every territory.”¹⁰⁷ “In 2017, VOCA grants funded more than 6,700 local organizations across the country. Over the last two years, VOCA-funded programs have reached more than 5.2 million victims, providing services ranging from emergency shelter and transportation to crisis counseling, long-term therapy, and civil legal assistance.”¹⁰⁸ A searchable database of these programs, including programs serving victims of elder abuse and exploitation, is available at <https://ovc.ncjrs.gov/findvictim> services. “In addition, the new VOCA Formula Victim Assistance Rule (Rule)—finalized in August 2016—clarified and expanded states’ allowable uses of VOCA victim assistance funding.”¹⁰⁹ With the recent increase in the Fund’s appropriation cap, awards to the states in

¹⁰³ *See id.* at 18.

¹⁰⁴ *About OVC*, OFFICE FOR VICTIMS OF CRIME, <https://www.ovc.gov/about/initiatives.html> (last visited Oct. 31, 2018).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Press Release, U.S. Dep’t of Justice, Justice Department Announces \$3.4 Billion in Grants to Aid Crime Victims Nationwide (Aug. 9, 2018).

¹⁰⁹ *VOCA-Funded Elder Abuse Programs*, OFFICE FOR VICTIMS OF CRIME, <https://www.ovc.gov/VOCA-Administrators/101217.html> (last visited Oct. 31, 2018).

2018 totaled more than \$3.4 billion and with the new Rule that clarifies and expands how states may expend the funding, states are looking to support all victims, including victims of elder abuse.

In collaboration with the Department of Justice's Elder Justice Initiative (EJI), OVC's Training and Technical Assistance Center (TTAC) launched a free, online elder abuse training for legal service lawyers to help them build the knowledge and skills to recognize the signs of elder abuse, including domestic violence and sexual assault in later life; identify older adults who are at risk of abuse; respond to complex ethical issues; determine various legal solutions; and refer victims to community resources.¹¹⁰ More than 7,000 individuals participated in the training in FYs 2015 and 2016.

The Department's Elder Justice AmeriCorps Program, which was a two-year initiative (ending September 30, 2018) and was funded through a collaborative effort between OVC and EJI, placed 36 paid attorneys and 314 volunteer attorneys specializing in elder abuse in different organizations throughout the United States. The attorneys opened more than 2,400 new cases on behalf of older Americans and trained more than 1,000 legal professionals on indicia of elder abuse. As a result of this program, hundreds of older Americans were referred to law enforcement, adult protective services, and other agencies for support or assistance.¹¹¹

Additionally, under OVC's discretionary authority, OVC awarded almost \$3 million to fund six new grantees under the FY 2018 Field Generated Innovations in Addressing Elder Financial Exploitation Program.¹¹² Through this program, each grantee is developing a response to enhance services to elder victims of financial exploitation based on the individual needs of the community.¹¹³ For example, the Legal Aid Society (LAS) of Metropolitan Family Services (MFS), located in Chicago, Illinois, will develop a multi-system prevention and intervention model for elder victims of financial exploitation,

¹¹⁰ *Online Elder Abuse Training for Legal Service Providers*, OFFICE FOR VICTIMS OF CRIME, TRAINING AND TECHNICAL ASSISTANCE CENTER, <https://www.ovcttac.gov/ElderAbuse/> (last visited Oct. 31, 2018).

¹¹¹ *See generally* Press Release, U.S. Dep't of Justice, Justice Department and CNCS Announce Elder Justice AmeriCorps; \$2 Million Partnership will Expand Legal Resources for Older Crime Victims (June 14, 2016).

¹¹² OFF. OF JUSTICE PROGRAMS, OVC FY 2018 FIELD-GENERATED INNOVATIONS IN ADDRESSING ELDER FINANCIAL EXPLOITATION 1, 5 (2018).

¹¹³ *Id.*

which includes geriatric-specific assessment; case management; legal; financial; and police responses across social service, adult protective services, and financial industries.¹¹⁴ MFS will develop an elder financial abuse specialist team of elder justice attorneys, geriatric-specific mental health counselors, Adult Protective Services caseworkers, and financial industry experts (for example, accountants and/or financial planners) that will support the wraparound model of services to address elder financial exploitation among front-line service providers, law enforcement, and financial industry representatives. The approach will support a comprehensive victim response model comprised of multi-disciplinary partnerships directed toward elder victim advocacy, community education with a financial exploitation detection and prevention focus, and fraud protection efforts among the senior population. Another example includes a grant to the Center for Elder Law and Justice Inc., to design, develop, and test the Senior Financial Safety Tool (SFST), which will use branch logic and risk detecting technology, to allow bank staff to do a quick assessment with older customers and generate a direct referral to the Center and local enhanced Multi-Disciplinary Teams where appropriate.¹¹⁵ The project is a collaboration between Pro Bono Net, Lake Shore Savings Bank, and Erie County Adult Protective Services.

In addition to supporting the training of law enforcement and prosecutors, the Department of Justice has focused on enhancing the capacity of civil legal assistance programs to support victims of elder abuse. In 2014, the Department of Justice's Office for Victims of Crime released online training modules on elder abuse for legal aid attorneys. This initial wave of training modules covered topics including: Domestic Violence and Sexual Assault, Financial Fraud and Exploitation, Practical and Ethical Strategies, and What Lawyers Need to Know.¹¹⁶ The Department of Justice sponsored a five-part webinar on Abuse in Later Life.¹¹⁷ The webinar was created and

¹¹⁴ See *Legal Aid*, METROPOLITAN FAMILY SERVICES, <https://www.metrofamily.org/legal-aid/> (last visited Oct. 31, 2018).

¹¹⁵ See CTR. FOR ELDER LAW & JUSTICE, <https://elderjusticenyc.org/> (last visited Oct. 31, 2018).

¹¹⁶ *Online Elder Abuse Training for Legal Service Providers*, OFF. OF JUST. PROGRAMS, <https://www.ovcttac.gov/ElderAbuse/> (last visited Oct. 31, 2018).

¹¹⁷ See *Abuse in Later Life/Civil Legal Remedies Webinar Series*, NAT'L CLEARINGHOUSE ON ABUSE IN LATER LIFE,

presented by the National Clearinghouse on Abuse in Later Life (NCALL) and the American Bar Association Commission on Domestic & Sexual Violence in 2018. In May 2015, the Department of Justice hosted a Civil Legal Aid Research Workshop, including a panel that focused on innovative ways to address elder abuse and research needs to advance/support those efforts.¹¹⁸

About the Authors

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<http://www.ncall.us/blog/2017/abuse-in-later-life-civil-legal-remedies-webinar-series> (last visited Nov. 1, 2018).

¹¹⁸ See *White House Legal Aid Interagency Roundtable: Civil Legal Aid Research Workshop Report* 3, 29–33 (U.S. Dep't of Justice et al. Feb. 2016).

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Elder Financial Fraud Schemes: The Case for Federal Investigation and Prosecution

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In early April 2016, Russell Thompson¹ received a phone call from someone claiming to be a lawyer for his grandson. Mr. Thompson was a military veteran who had just retired after working 37 years as an over-the-road truck driver. His income consisted of a small IRA and a Social Security check.

The caller told Mr. Thompson that his grandson was in a vehicle accident and was charged with drunk driving. Mr. Thompson panicked. He knew that his grandson just obtained a commercial driver's license and found a good job as a truck driver for a company in the Twin Cities. The caller convinced Mr. Thompson that his grandson's case could be resolved, but only if Mr. Thompson sent money to another individual via Western Union. Mr. Thompson followed the caller's instructions and sent the money. He then received word that more money was needed to have his grandson released. Mr. Thomson sent more money.

Mr. Thompson was a victim of a nationwide scheme to defraud elderly victims. As instructed, the victims wired money to lower level participants, or "runners." Crew leaders then arranged for drivers to gather groups of runners to pick up cash. The crew leaders gathered cash from the runners or instructed the runners to deposit the cash into accounts under their control. The crew leaders ultimately transferred the bulk of the money to participants in the Dominican Republic. Along the way, everyone received a cut of the money. Runners and drivers received some and crew leaders received more.

While the full extent of the scheme is unknown, criminal actors in and around Dubuque, Iowa, stole more than \$750,000 from 285 victims located in nearly every state in the country. Most victims were reluctant to speak to investigators and doubted that the investigators were attempting to help. It was common for a victim to

¹ Not his real name.

hang up on the investigators. Once contact was established, most victims told the investigators how they were devastated, and some broke down on the phone. Ultimately, 22 local participants were prosecuted in Dubuque County, Iowa, and 11 were prosecuted federally. None of the stolen money was recovered by law enforcement.

Elder financial abuse cases deserve special consideration by state and federal prosecutors. These schemes are all too common today. In addition to “grandparent bail scams” like the one Mr. Thompson fell victim to, there are “lottery phone scams” in which callers convince seniors that a large tax or fee must be paid before one can receive lottery winnings; “romance scams,” which lull victims into believing that an online love interest needs funds to travel to the United States or for some other purpose; and “IRS imposter schemes,” in which the defrauder poses as an IRS agent and claims that the victim owes back taxes. The harm from these cases is measured by more than the total dollar amount of the loss. While wide-ranging schemes to defraud the elderly can certainly involve large amounts of money, they consistently inflict significant psychological damage upon the elderly victims. As with financial loss, elderly victims can be ill-equipped to fully recover from such harm. The financial and psychological harm is only exasperated when these schemes go unchecked by the criminal justice system.

I. These cases are important

Protection of the elderly is a core principal of our social contract. Throughout history, societies valued the elderly and afforded them special protections. For many, the manner in which we treat the elderly is considered a sound indicator of the justness of our society. When it comes to the protection of the elderly in the United States, we should hold ourselves to an exacting standard.

The elderly are uniquely vulnerable to these targeted schemes to defraud. As technology changes, common activities such as communication, shopping, and banking change with it. While a grandparent may have a good understanding of email communication and social media, he or she may be less able to understand the common methods used mask or even spoof identities. The elderly may also be more inclined to trust seemingly legitimate electronic or verbal communications. Their experience is defined by decades of living generally free from concern that scammers would boldly and

persistently lie in order to steal someone else's hard earned money. Perhaps most distressing, the elderly might see contact with a scammer as an opportunity for dearly missed social interaction. Studies show that lack of social interaction can have an adverse impact on the health and well-being of aging Americans.²

The need for a law enforcement response is increasingly imperative. The scourge of fraudulent schemes targeting the elderly is a growing problem that is likely to get worse before it gets better. The lure of quick money—often without having to expose one's identity or confront a sympathetic victim face-to-face—has fueled a remarkable increase in these crimes over the last decade.³ By their nature, these crimes are perpetrated remotely, giving the criminals a virtually unlimited supply of potential victims. With little or no limit on the opportunities to offend, the need for a law enforcement response is particularly acute.

Despite loss amounts that do not always reach customary thresholds for federal prosecution, these cases warrant serious attention from United States Attorneys' Offices. Total losses, meaning aggregate losses to the victim of a scheme, can be quite high. But even where total losses are relatively low, these crimes can be uniquely damaging to victims. A few thousand dollars can represent all the money in the world to an elderly victim. It may be the difference between self-sufficiency and relying upon others to survive. Few elderly victims are in a position to earn back a significant financial loss caused by fraud.

What is perhaps most disturbing about these crimes is the non-economic impact upon victims. It is heartbreaking to picture a scammer coming face-to-face with a fragile, elderly person and telling boldfaced lies in order to steal the elderly victim's hard earned money. But there is little practical difference when the offense happens over the phone or the internet. Elderly persons are thrust into a world where it can suddenly be very difficult to determine who can and cannot be trusted. This often happens at a time when elderly persons are becoming more dependent upon others. During this transition,

² Andrew Steptoe et al., *Social Isolation, Loneliness, and All-Cause Mortality in Older Men and Women*, 110 PROC. NAT'L ACAD. SCI. U.S. AM. 5797, 5797–5801 (Apr. 9, 2013).

³ Michelle Singletary, *Financial Crimes Against Seniors a Growing Problem*, WASH. POST (Sept. 15, 2012).

they may also experience a significant blow to their self-esteem, given that they may not have the levels of responsibility that they once did. In the end, they may feel that they let themselves and others down by failing to adequately protect their savings. This victimization can lead to feelings of insecurity, paranoia, and shame for having been misled.

II. These cases are challenging

There are a whole host of reasons why investigating and prosecuting frauds targeting the elderly can be challenging for law enforcement. Scammers will strike victims living in several dispersed jurisdictions. Many times, a criminal enterprise's connection to a given jurisdiction is limited to a single victim. A full investigation into single victim's loss may be impossible given the limited resources available to local law enforcement agencies. These are often considered cases of "death by a thousand cuts."

Due to the large number of criminal actors, the criminal enterprise itself can be hard to disrupt or kill. Perpetrators of these crimes often include a multitude of lower-level participants to move money from the victims' accounts to domestic accounts and often, to accounts overseas. The criminal on the phone or typing on the keyboard may be insulated from detection by a small army of conspirators. Criminal participants can be arrested, or may otherwise come and go, with little impact on the overall effectiveness of the scheme. Like a hydra, there is often no single head that can be lopped off. An effective blow to multiple participants may leave many crimes unidentified and the scheme substantially intact to continue menacing more victims.

Good federal cases often depend upon good cooperating witnesses. In elder financial fraud cases, low loss amounts, and correspondingly low sentencing guidelines ranges, can sometimes make good cooperators hard to locate and develop. The most valuable witnesses may refuse to cooperate or may choose to minimize the scope of the scheme or the involvement of other participants where the threat of significant jail time is not present.

Another cause of significant frustration for criminal investigators is the fact that the leaders of schemes to defraud the elderly are often overseas—and so is their money. Investigators may learn after months of investigation that their ultimate target operates from a country that has no extradition treaty with the United States. Worse, an investigator may assume that is the case and forgo an investigation altogether. Financial records and other documents may

be beyond the reach of investigators due to the lack of a mutual legal assistance treaty. Even where the appropriate treaty relationships exist, the time, effort, and expense of investigating a foreign target can sometimes serve as a disincentive for a robust investigation.

On their face, the schemes to defraud can appear to be unworthy of federal prosecution. Low loss amounts and the tendency of the criminal enterprises to consist largely of a multitude of lower level participants may suggest to prosecutors that the larger case is really a group of “small cases” that are not worth pursuing. On top of this, lower level offenders can, and often do, credibly deny knowledge of the specific nature of the scheme. This can lessen the judge, jury, or prosecutor appeal of such cases and can sometimes present legitimate proof issues.

Finally, these cases can be messy. Due to their age, elderly victims can have limited recall of significant events. Victims may become unavailable due to infirmity or even death. The availability of cooperating witnesses and defendants can be spotty due to their lack of a stable residence, employment, or other resources. Pretrial detention is rare in these cases and negotiations can stall while a defendant’s counsel tries in vain to make contact with his or her client. Key subjects and targets can be beyond the reach of domestic law enforcement.

III. Keys to a successful prosecution

A successful case requires commitment to a meticulous prosecution plan. The goals of the investigation need to be clearly defined in advance and can include securing and seizing proceeds, disrupting ongoing criminal schemes, and prosecuting offenders. Financial records must be identified and secured. Key witnesses must be identified and developed. Searches and seizures must be coordinated and timed in relation to important subject and target interviews. Documents must be obtained and reviewed in time to maximize the productivity of grand jury appearances. All of this takes foresight and strategic planning. It also takes strong leadership from prosecutors, as well as tenacity and discipline on the part of the entire team.

Prosecutors must leverage all available federal statutes to find success. The federal criminal code does not provide for a criminal offense specific to elder financial abuse schemes. Wire fraud is the most obvious federal tool. However, prosecuting an offender for fraud requires proof of specific intent to defraud. This is typically the most

challenging element in any fraud prosecution, but it can become particularly challenging in the context of lower-level participants whose actions may be limited to moving funds. In such circumstances, a money laundering offense may be the more useful tool. Unlike mail or wire fraud, money laundering does not require specific intent to defraud or even general knowledge of a specific fraudulent scheme. Rather, money laundering can be shown where the offender knew the money involved represented the proceeds of “some form of unlawful activity.”⁴ In the typical scenario, where a lower-level participant gets to keep a small percentage of funds that flow through the participant’s account, this can be far easier to prove than specific intent to defraud. Similar to money laundering, an unlicensed money transmitter charge can be a useful tool when investigating a criminal enterprise that defrauds the elderly. Such an offense only requires the movement of funds by a defendant who knows the funds were “derived from a criminal offense. . . .”⁵

A lower-level offender’s sentencing exposure can often be relatively low and insufficient to leverage cooperation up the chain. Under federal sentencing guidelines—and in the minds of many sentencing judges—that exposure is often limited by the foreseeability of the breadth of the overall criminal activity and the loss to its victims. However, the offense of aggravated identity theft⁶ guarantees a minimum starting point of two years’ imprisonment where an offender knowingly uses another’s means of identity to commit the offense. For example, in a case where an elderly victim is tricked into disclosing account control credentials (account numbers, passwords, etc.), the use of those credentials to commit a predicate offense can lead to guaranteed jail time. This can be a powerful tool in the development of cooperating witnesses and the ultimate deterrence of future crimes.

A prosecutor should be prepared to prosecute lower level participants. Lower-level participants are highly culpable and these schemes simply do not work without them. These scammers count on funds being difficult to trace and seize. The use of domestic bank accounts in the names of lower-level participants makes it easier to convince elderly victims to send money in the first instance. The subsequent movement of funds, quite often overseas, helps the crooks

⁴ 18 U.S.C. § 1956(a)(1).

⁵ 18 U.S.C. § 1960(b)(1)(C).

⁶ 18 U.S.C. § 1028A.

avoid detection and seizure. In addition to making the stolen funds harder for law enforcement to track and seize, the use of lower level participants helps to insulate the higher level participants, making them more difficult to track and, ultimately, arrest.

Both the indictment and the government's proof should be broad and victim-centered. Even when targeting a small group of participants in a larger criminal enterprise, prosecutors should commit to proving the forest along with the trees. While an indictment may be limited to charging lower level participants with, for example, money laundering, the entire scheme to defraud is fair game and should be proven to the jury. Even in the absence of a fraud charge, a money laundering charge nonetheless requires proof that the funds at issue be proceeds of an actual scheme to defraud. The government is entitled to present to the jury the full force of its evidence. The full scope and impact of the scheme to defraud need not and should not be stipulated away.⁷

There is no substitute for thorough investigative work and follow through. As the saying goes, there are no small cases in federal court. Even when targeting a small group of money movers, investigators and prosecutors should gather all available financial records and create a spreadsheet with each individual's financial activity. Transactions between participants should be tracked. The government should prove the absence of other sources of income. Investigators should leave no stone unturned in looking for consciousness-of-guilt evidence. Any opportunity to take a statement from a criminal participant is an opportunity worth taking. As in many criminal cases, a provable lie is as good as the truth.

IV. Maximizing impact

The measure of a successful prosecution is oftentimes tied to the impact it can have on would-be perpetrators and on the community. These cases certainly fall within that category. To maximize impact, prosecutors need to build a compelling record for sentencing. Like proof at trial, this means highlighting the entire criminal scheme for

⁷ See *Old Chief v. United States*, 519 U.S. 172, 189 (1997) (“[T]he accepted rule that the prosecution is entitled to prove its case free from any defendant’s option to stipulate the evidence away rests on good sense. A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it.”).

the sentencing judge and the public at large. Victim impact statements should be leveraged as powerful reminders to all involved that these crimes cause significant harm and should not be tolerated.

Prosecutors should publicize successful cases through press releases and press conferences. As stewards of the public's resources who are tasked with deterring crime, it is important to get the word out to perpetrators that prosecutors will seek to hold them accountable when they take advantage of the elderly. And, perhaps just as importantly, victims and their families need to know that their public officials care deeply about these crimes and will seek justice on their behalf.

About the Author

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Stop the Bleeding: Using Civil Injunctions Under 18 U.S.C. § 1345 To Stop Fraud

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I. Introduction

For decades millions of individuals across the globe—including hundreds of thousands of U.S. residents—have received fraudulent letters in the mail. Some letters falsely inform recipients that they have won a large cash prize, but need to pay a fee to claim it. Others appear to come from psychics and promise great wealth in exchange for a small payment. Many individuals who pay the requested fee, expecting prosperity in return, are elderly or vulnerable.

At its core, this fraud is simple, consisting of little more than letters containing false promises. The machinery behind the letters, however, can be complex, consisting of a copywriter to draft the letter, a printer responsible for printing and compiling the materials, a lead list provider who supplies recipient names, and an organizer to direct the effort. When victims respond, a potentially separate cast of characters is involved: someone to open and process the mail (ensuring that victims' names are recorded for retargeting or renting to other schemes) and potentially another person to process victim payments.

Proving fraud is rarely a simple task and can be especially challenging and time-intensive in the case of large-scale fraud schemes, such as those described above. In an ongoing fraud scheme, as prosecutors carefully collect, cull, and compile evidence necessary to indict and try a criminal case, the victimization continues. The Department of Justice (the Department) does not, however, have to begrudgingly watch fraudsters continue to victimize consumers as a criminal prosecution develops. Rather, under 18 U.S.C. § 1345, the Department can seek a civil injunction to stop ongoing fraud.

This article discusses actions brought under 18 U.S.C. § 1345 that seek to enjoin fraud. Its goal is twofold: (1) to introduce section 1345's history and mechanics, and (2) to make the case that when the Department attorneys encounter a large-scale, high-victim, ongoing

fraud scheme, they should consider bringing a section 1345 action, as it “is a powerful weapon in the government’s anti-fraud arsenal.”¹

II. The basics

Placed unobtrusively between the provisions criminalizing bank fraud and health care fraud, section 1345 provides that if a person is “violating or about to violate” statutes prohibiting mail and wire fraud, among others,² “the Attorney General may commence a civil action in any Federal court to enjoin such violation.”³ It continues by stating that the “court shall proceed as soon as practicable to the hearing and determination of such an action, and may . . . enter such a restraining order or prohibition, or take such other action, as is warranted to prevent a continuing and substantial injury to the United States or to any person or class of person for whose protection the action is brought.”⁴

If the authority granted to the Department by section 1345 seems broad, it was intended to be. Congress enacted section 1345 as part of the Comprehensive Control Act of 1984 to enable the Department to

¹ *United States v. Payment Processing Ctr., LLC*, 435 F. Supp. 2d 462, 464 (E.D. Pa. 2006).

² 18 U.S.C. § 1345(a)(1)(A). Section 1345 can also be used to stop violations of other fraud statutes, such as bank fraud and health care fraud. Although much of this article is broadly applicable to section 1345 injunctive actions, it focuses predominately on using section 1345 actions to stop mail and wire fraud schemes.

³ *Id.* § 1345(a)(1).

⁴ *Id.* § 1345(b). Section 1345 also enables actions to prevent alienation or disposal of assets obtained from fraud schemes. The statute specifically contemplates lawsuits to preserve assets arising from violations of banking laws or health care fraud. *See id.*; *see also* Ana Maria Martinez, *Freezing Assets in Health Care Fraud Cases*, 57 U.S. ATT’YS BULL., no. 1, 2009, at 33. Additionally, courts have held that section 1345 lawsuits can also be used to preserve assets related to ongoing mail and wire fraud schemes. *See Payment Processing Ctr., LLC*, 435 F. Supp. 2d at 465–66 (holding lawsuits seeking to restrain assets derived from mail and wire fraud schemes fall within Congress’s broad grant of authority to the Department and the expansive “omnibus provision” of section 1345(b) which directs courts to take “such other action” to prevent “continuing and substantial injury”); *see also* *United States v. Brown*, 988 F.2d 658, 663 (6th Cir. 1993). While unquestionably valuable in their own rights, actions to preserve assets are beyond the scope of this article.

put a “speedy end” to “fraudulent acts or practices.”⁵ The bill’s Senate Report articulated two concerns driving the enactment of section 1345: (1) at the time the law provided the government with inadequate remedies to stop ongoing fraud schemes, and (2) the government needed a tool to move against fraud schemes more quickly. First, the Report noted that although there was a “great need” for injunctive actions in fraud cases, the law at that time only provided the ability to detain incoming mail.⁶ The government could not, according to the Report, prevent fraudsters from sending additional letters or take any action against schemes that did not involve the mail. Second, the procedures necessary to pursue the one remedy available to the government—detaining mail—caused “considerable delay.”⁷ The Senate Committee was attuned to the fact that delay in stopping fraud schemes, particularly the lengthy delay that can result from a thorough criminal investigation, results in additional victim losses: “Since the [criminal] investigation of fraudulent schemes often takes months, if not years, before the case is ready for criminal prosecution, innocent people continue to be victimized while the investigation is in progress.”⁸

What resulted from dual concerns about the flexibility of relief available to halt ongoing frauds and the speed at which relief could be attained, was a provision that courts have characterized as a “powerful”⁹ tool for fraud prevention, one that authorizes “broad”¹⁰ relief.

What is this tool and how does it function? As described in more detail herein, it is a civil lawsuit that seeks injunctive and other relief

⁵ S. Rep. No. 98-225, at 401–02 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3539–40.

⁶ *Id.* at 401.

⁷ *Id.* at 379.

⁸ *Id.* at 402.

⁹ *Payment Processing Ctr, LLC*, 435 F. Supp. 2d at 464; *United States v. Sriram*, 147 F. Supp. 2d 914, 936 (N.D. Ill. 2001) (stating that “Congress intended to give the Government a powerful tool to obtain prompt and speedy injunctive relief.”).

¹⁰ *United States v. Savran & Assoc., Inc.*, 755 F. Supp. 1165, 1182 (E.D.N.Y. 1991) (noting section 1345 had been held to “vest the federal courts with broad power to decree broad remedial preliminary relief” and observing that, as general matter courts, sitting in equity have authority to grant any necessary and appropriate relief).

on allegations defendants are, or will soon be, involved in a fraud scheme. Because of their nature, most section 1345 actions seek immediate or preliminary relief based on evidence presented, at least in part, via an agent affidavit. The evidentiary standard under which a court will evaluate whether the government's evidence warrants an injunction varies, but—as it is a civil case—it is uniformly significantly lower than proof beyond a reasonable doubt. The relief the government can seek is broad. Relief can include not only prohibitions on engaging in the activity underpinning the complaint, but also, for instance, employment restrictions, monitoring programs, reporting to the government of certain activities, detaining mail related to the scheme, notifying other scheme participants about the injunction, and prohibiting use of information gathered as a part of the scheme.

Before turning to the mechanics of section 1345 actions, however, a brief discussion of two section 1345 cases demonstrates how and why the section 1345 tool is so effective.

III. The need

The Department has successfully used section 1345 actions to target schemes that disproportionately impact elderly or vulnerable victims. In attacking elder fraud schemes, the government benefits from section 1345's broad relief capability as well as its flexibility. That flexibility and breadth is best displayed by examining several recent cases. On one end of the spectrum, the Department has used section 1345 actions to sweep broadly, targeting multiple participants who play various roles in complex fraud schemes where the government's evidence was well developed. At the other end, the Department used a section 1345 action to target discrete aspects of a scheme, crippling a fraudulent scheme even though the government's investigation was in its infancy.

A. Mass-mailing initiative

Since 2015, the Civil Division's Consumer Protection Branch, the U.S. Postal Inspection Service's (USPIS) DOJ Mail Fraud Team, the United States Attorney's Office for the Eastern District of New York, and other United States Attorney's Offices, have used section 1345 actions and coordinated criminal actions to systematically dismantle the industry responsible for the fraudulent letters alluded to above. During this same time period, the Department conducted two sweeps

and filed 11 section 1345 actions, resulting in injunctions against nearly 80 defendants.¹¹ Many of these injunctions broadly targeted fraud schemes, naming not only those who were directly responsible for the mailings, but also those responsible for writing solicitations, providing lists of potential victims, printing solicitations, processing victim responses, and compiling information about those who responded to the letters.

The government's ability to use section 1345 actions to broadly target fraud schemes is exemplified by *United States v. BDK Mailing GMBH, et al.* No. 1:16-cv-5264 (E.D.N.Y. 2016) (hereinafter *BDK*). The government's complaint alleged that the defendants were responsible for a mail fraud scheme.¹² The mail fraud scheme involved fraudulent solicitations claiming the recipients won a large prize and needed to pay a fee to claim it, or fraudulent solicitations purporting to come from psychics who urged recipients to purchase an object or service, for a fee, that would lead them to wealth. The complaint named six individual defendants who orchestrated the logistics of the mail fraud scheme, two defendants responsible for providing the scheme lists of potential victims and three defendants responsible for printing the solicitations.¹³

In *BDK*, the government moved for a temporary restraining order, providing support for the request with a declaration from a USPS inspector. The nearly 50 page declaration contained highly detailed information about the scheme, including mailing practices dating back three years; how the mail (which was printed overseas) arrived in the

¹¹ See Press Release, The United States Department of Justice, Justice Department and Law Enforcement Partners Announce Civil and Criminal Actions to Dismantle Global Network of Mass Mailing Fraud Schemes Targeting Elderly and Vulnerable Victims (Sept. 22, 2016); Press Release, The United States Department of Justice, Attorney General Loretta E. Lynch Delivers Remarks at a Press Conference Announcing Law Enforcement Actions Against Mail Fraud (Sept. 22, 2016); Press Release, The United States Department of Justice, Justice Department Coordinates Nationwide Elder Fraud Sweep of More than 250 Defendants (Feb. 22, 2018); Press Release, The United States Department of Justice, Attorney General Sessions Delivers Remarks at the 2018 Elder Fraud Sweep Press Conference (Feb. 22, 2018).

¹² Complaint, *United States v. BDK Mailing, GMBH, et al.*, No. 1:16-cv-5264 (E.D.N.Y. 2016).

¹³ See *id.*

United States; information about how lead lists were selected and how much the list broker received in payment; who opened victim returns; and how victim payments were processed. It discussed emails between the scheme participants; alluded to a number of records acquired by investigators, including some records obtained from foreign authorities; and discussed multiple law enforcement actions, including a two-day operation where USPIS inspectors counted mail pieces related to the scheme and a seizure of three shipments of mail that collectively weighed over 1.3 tons.

The court entered the requested temporary restraining order. The order enjoined defendants from mailing materials that represented that the recipients won a prize, sold information about lotteries, represented an item would improve financial conditions, or contained any other false or misleading misrepresentation. Additionally the injunction prohibited defendants from receiving or opening any mail responsive to materials like those described, or selling or leasing lists of individuals who responded to such mailings.

B. Fraud Protection Agency

Section 1345's usefulness is not relegated to cases where the government has exhaustive evidence of each scheme participant, their role, and knowledge. It can be equally as useful against a known fraud scheme, even if the scheme's participants and inner workings are not well known. Particularly in cases where the government's investigation is not as advanced, section 1345's value lies in the government's ability to secure an injunction with a lower quantum of evidence than what would be required to prove a criminal charge. For instance, in *United States v. John Doe* (hereinafter *Fraud Protection Agency*),¹⁴ the Consumer Protection Branch, with investigative support from USPIS and assistance from the United States Attorney's Office for the Southern District of Florida, successfully sought a temporary restraining order and preliminary injunction against three John Does.¹⁵ That injunction not only enjoined defendants from

¹⁴ *United States v. John Doe*, No. 1:18-cv-22016 (S.D. Fla. 2018) [hereinafter *Fraud Protection Agency*].

¹⁵ *See Current and Recent Cases, Deceptive Trade and Telemarketing Fraud*, U.S. DEP'T OF JUST., <https://www.justice.gov/civil/current-and-recent-cases> (last visited October 2, 2018).

certain activities, it also crippled an instrumentality of the defendants' scheme.¹⁶

The *Fraud Protection Agency* complaint alleged three John Does were operating a mail and wire fraud scheme that targeted elderly consumers.¹⁷ That scheme began with a phone call, often from Doe 1 or Doe 2 who the government believed were located in the United Arab Emirates, claiming to work for the “Fraud Protection Agency.” The callers told recipients that they won a sweepstakes from Fortune 500 Sweepstakes. Does 1 and 2, posing as government officials, reassured consumers that the prize was real and informed them that United States law required them to pay a 1% fee to collect the prize. As part of their attempts to convince potential victims the prize was real, Does 1 and 2 instructed consumers to visit websites registered by Doe 3. One website, www.fraudprotectionagency.com, falsely represented that the “Fraud Protection Agency” was a component of the Federal Trade Commission. The second website, www.fortune500sweepstakes.com, contained a “fraud prevention” warning and told visitors to contact the alias used by Doe 2—who purportedly worked for the “Fraud Protection Agency”—to report suspicious sweepstakes. In connection with the scheme, potential victims also received fraudulent solicitations notifying them that they had won a large cash prize.

The government moved for a temporary restraining order, relying on evidence submitted via declarations from an agent, a former Federal Trade Commission chairwoman, and a victim. The ten page agent affidavit described the websites and fraudulent solicitations, as well as discussed records connected with website and email registrations.

After reviewing the evidence, the court concluded that the government demonstrated the defendants were involved in an ongoing mail and wire fraud scheme and entered a temporary restraining order.¹⁸ That order, among other things, enjoined defendants and their officers and agents from a plethora of activities, including committing mail and wire fraud, engaging in telemarketing or mass mailing in relation to prizes or cash, and advertising lottery or

¹⁶ *See id.*

¹⁷ Complaint, *United States v. John Doe 1, et al.*, No: 1:18-cv-22016 (S.D. Fla. 2018), ECF No. 1.

¹⁸ Temporary Restraining Order and Order to Show Cause Why a Preliminary Injunction Should Not Issue, *United States v. John Doe 1, et al.*, No. 1:18-cv-22016 (S.D. Fla. May 25, 2018), ECF No. 5.

sweepstakes online. It also directed a top-level domain registry and a domain names' registrar to restrain and lock the domains for defendants' fraudulent websites.

The result in *Fraud Protection Agency* demonstrates that the government can use section 1345 actions to halt fraud schemes in spite of obstacles that would make a criminal prosecution difficult. In *Fraud Protection Agency* the government succeeded in securing a section 1345 injunction long before it could have brought a prosecution, just as Congress intended. The government's proffered evidence did not include the defendants' real names, defendants' locations, or detailed information about the fraud scheme's inner workings. Ordinarily in a criminal case, not knowing a defendant's identity or location likely precludes a successful prosecution, particularly where the perpetrator is not located in the United States. By contrast, in this case the government was still able to reach the fraud scheme in part due to the more flexible civil rules. The government successfully moved for an order permitting service via email to the email address used to correspond with an intended victim, an email address used to register the domain names, and the physical address used to receive funds from a victim.¹⁹ Additionally, as in *Fraud Protection Agency*, under section 1345 the government does not have to rely solely on provisions narrowly enjoining defendants from committing fraud; rather it can be creative in its requests for relief, and request relief that prevents defendants from resuming their fraudulent scheme.

In sum, whether the government's investigation is advanced, as in *BDK*, or still progressing, as in *Fraud Protection Agency*, the government can use a section 1345 action to stop the fraudulent activities. Moreover, in both *BDK* and *Fraud Protection Agency*, the government secured relief that stopped the schemes, either by securing strong injunctive relief against known and identified fraud participants or acquiring relief against unidentified defendants while also crippling a critical component of the scheme. This article now turns to how to secure such relief.

¹⁹ United States' Motion for Expedited Order Authorizing Alternate Service of Process on Defendants Pursuant to Federal Rule of Civil Procedure 4(f)(3), *United States v. John Doe 1, et al.*, No. 1:18-cv-22016 (S.D. Fla. 2018), ECF No. 4; *see also* Order, *United States v. John Doe 1, et al.*, No. 1:18-cv-22016 (S.D. Fla. May 22, 2018), ECF No. 8.

IV. The mechanics

Securing a section 1345 injunction requires the government to prove a person is violating or is about to violate specified fraud statutes.²⁰ This section discusses the mechanics of acquiring and presenting the necessary proof, as well as the relief the government can request.

A. Identifying a case

Section 1345 actions are particularly well-suited to halting large-scale fraud schemes that involve a significant number of potential victims.²¹ When the Department is made aware of such a scheme its “prosecutors and civil attorneys . . . should timely communicate, coordinate, and cooperate with one another” to determine whether the conduct should give rise to criminal proceedings, civil proceedings, or both.²²

If the Department elects to proceed with both a civil and criminal investigation, in other words a parallel proceeding, civil and criminal attorneys should coordinate closely. The two proceedings should “complement one another,” and “must be handled carefully in order to avoid allegations of improper use of grand jury material or abuse of civil process.”²³ For instance, there are restrictions on the sharing of

²⁰ If the government encounters putative defendants that cease their activity due to law enforcement action or because they discover an injunctive action is forthcoming, an injunction may still be appropriate. *See* *United States v. Oregon State Medical Soc.*, 343 U.S. 326, 333 (1952) (“It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.”).

²¹ Particularly in the context of mail and wire fraud schemes, many of the Department’s section 1345 actions have been brought against large, complex schemes. *See, e.g.*, *United States v. Kern*, No. 2:18-cv-283-JAD-PAL, 2018 WL 1003744, at *6 (D. Nev. Feb 20, 2018) (halting multi-million dollar scheme involving thousands of victims); *United States v. Levashov*, No. 3:17-cv-00074-TMB, 2017 WL 1398662, at *2 (D. Alaska Apr. 12, 2017) (enjoining scheme that targeted “hundreds of thousands of computers” with malicious malware); *United States v. Hoffman*, 560 F. Supp. 2d 772, 778 (D. Minn. 2008) (enjoining scheme relating to the purchase and sale of real estate where approximate loss was \$5.5 million).

²² JUSTICE MANUAL § 1-12.000.

²³ *Id.*

grand jury information.²⁴ The government should avoid any appearance that the civil suit is merely a tool to further the criminal investigation.²⁵ Where appropriate, however, the civil and criminal teams should share information to further the government's dual roles in enforcing civil and criminal law.²⁶ The Justice Manual instructs that "attorneys should consider investigative strategies that maximize the government's ability to share information . . . including the use of investigative means other than grand jury subpoenas for documents or witness testimony[.]"²⁷ For instance, civil attorneys can use material obtained via search warrant or other law enforcement methods to support section 1345 actions.

Coordination between the civil and criminal investigations should begin early and continue throughout the investigations. If filed too early, a section 1345 action could prematurely reveal a promising criminal investigation.

B. Filing a case

The initial filings in a section 1345 action generally includes: (1) a complaint, (2) an ex parte motion seeking a temporary restraining order and an order to show cause why a preliminary injunction should not issue, (3) a memorandum of law in support of that motion, (4) one or more affidavits providing evidentiary support for the motion, (5) an affidavit from the attorney of record explaining the need for an ex parte temporary restraining order, and (6) a proposed temporary restraining order. Additionally, in some cases it may be necessary to file a motion, and accompanying memorandum, seeking to file documents under seal and/or, as in *Fraud Protection Agency*, a motion asking for alternative service. Local rules may also add requirements, such as a declaration justifying a request for emergency consideration.²⁸

²⁴ FED. R. CRIM. P. 6(e)(3)(A)(i).

²⁵ *Securities & Exch. Comm'n v. Dresser Indus., Inc.*, 628 F.2d 1368, 1387 (D.C. 1980) ("Where the agency has a legitimate noncriminal purpose for the [civil] investigation, it acts in good faith . . . even if it might use the information gained in the investigation for criminal enforcement purposes as well.").

²⁶ JUSTICE MANUAL § 1-12.000.

²⁷ *Id.*

²⁸ *See, e.g.*, D. Nev. Loc. Civ. R. 7-4.

1. Complaint

As in any civil case, a section 1345 action begins with a complaint. As a legal matter, the complaint must sufficiently allege jurisdiction, state a claim, and demand relief.²⁹ Additionally, because the underlying allegations of section 1345 actions involve fraud, the government's allegations of fraud should "state with particularity the circumstances constituting fraud or mistake."³⁰ As a practical and strategic matter, because many section 1345 actions seek temporary and preliminary injunctions and because default judgments are common, a section 1345 complaint should address venue and contain factual detail that goes beyond the basic pleading required by the rules. For example to impress upon the court the urgency of the action, the complaint could discuss the volume of victim losses each month and the number of potential victims targeted by defendants.

2. Temporary restraining order package

Requesting ex parte consideration and a seal

The complaint will likely be accompanied by a motion seeking a temporary restraining order and an order to show cause why a preliminary injunction should not issue. Filing the motion and complaint on a docket that is open to the public, including to the defendants, could carry significant risk. For instance, if defendants are aware of the action before a temporary restraining order is issued, they may dissipate assets or take steps to evade or undermine any efforts to stop the fraud scheme. Additionally, due to the nature of section 1345 allegations, if the filing of the action is coordinated with law enforcement activity, such as execution of a search warrant or arrest, defendants may anticipate law enforcement action, thereby jeopardizing the safety of government agents.

These concerns can be mitigated by requesting that the temporary restraining order be considered ex parte and/or requesting the court temporarily seal all or a part of the docket. Under Federal Rule of Civil Procedure 65(b), a court can issue a temporary injunction ex parte if the requesting party can show "immediate and irreparable injury, loss, or damage will result to the movant before the adverse

²⁹ FED. R. CIV. P. 8(a).

³⁰ FED. R. CIV. P. 9(b).

party can be heard in opposition.”³¹ To seek *ex parte* consideration, the government’s attorney should file an affidavit outlining the need for secrecy, as well as any efforts made to notify defendants or reasons notification should not be required.³²

Requesting the court consider the temporary restraining order *ex parte* does not, however, prevent the complaint from being made public. Accordingly, the government should consider whether concerns such as those outlined above support a motion to seal portions of the docket or the entire docket for a limited period of time, such as until defendants are served with the restraining order.

Temporary restraining order standard

The standard under which a court will evaluate the government’s temporary restraining order motion varies by jurisdiction and may be unsettled in some jurisdictions. Several jurisdictions have held the government need only show there is probable cause to believe defendants are committing or are about to commit fraud.³³ Others require the government to show a violation of the predicate fraud statute by a preponderance of the evidence.³⁴ Still others have applied the conventional temporary restraining order standard of “likely to succeed” on the merits.³⁵ In jurisdictions where the standard is unsettled, the government has described the varying standards and argued that the government can meet any of them, resulting in the court determining it is unnecessary to decide which standard is proper.³⁶

³¹ FED. R. CIV. P. 65(b)(1)(A).

³² *See id.*

³³ *See, e.g.,* United States v. Livdahl, 356 F. Supp. 2d 1289, 1293–94 (S.D. Fla. 2005); United States v. Savran & Assoc., Inc., 755 F. Supp. 1165, 1177 (E.D. N.Y. 1991).

³⁴ *See, e.g.,* United States v. Brown, 988 F.2d 658, 660–63 (6th Cir. 1993); United States v. Barnes, 912 F. Supp. 1187, 1194–95 (N.D. Iowa 1996).

³⁵ Kern, 2018 WL 1003744, *3; Levashov, 2017 WL 1398662, *2 (D. Alaska Apr. 12, 2017); United States v. Morris, No. CV10-4436 GHK (RC), 2010 WL 4796664, *4 (C.D. Cal. Nov. 18, 2010).

³⁶ *See, e.g.,* United States v. Gray, No. 4:15CV1280 RLW, 2016 WL 3181116, at *2 n. 1 (E.D. Mo. June 3, 2016); United States v. Narco Freedom, Inc., 95 F. Supp. 3d 747, 755 (S.D.N.Y. 2015); United States v. Legro, 284 Fed. Appx. 143, 145 (5th Cir. 2008); *see also* United States v. Petters, No. 08-SC-5348 (ADM/JSM), 2008 WL 4614996, at *1 (D. Minn. Oct. 6, 2008) (citing probable cause and likely to succeed on the merits). As a practical

Relatedly, in a temporary restraining order action between private parties, courts evaluate not only the likely success of the claim, but also whether the plaintiff is likely to suffer irreparable harm in the absence of an injunction, whether the balance of equities tips in favor of an injunction, and whether the injunction is in the public's interest. Courts that evaluate a section 1345 injunction under a probable cause or preponderance of the evidence standard generally do not require the government to show any of these factors favor an injunction.³⁷ Even if a court is inclined to test the government's injunction request by the typical standard, it is not difficult to show that enjoining fraud is equitable and in the public's interest. Moreover, when the government acts under a statute authorizing it to seek injunctive relief in the public's interest, irreparable harm may be presumed.³⁸ In section 1345 actions, the government can show irreparable harm not only by pointing to victims' monetary losses and emotional harm, but also by showing damage to "the integrity" of its systems, such as the postal system.³⁹

matter, the divergence in the potential standards may often be little more than semantics. In one instance, a court carefully analyzed the competing standards and applied the conventional temporary restraining order analysis "with only slight adaptation" after concluding "that the 'reasonable probability' standard of conventional preliminary injunction analysis equates with 'probable cause[.]'" *United States v. Fang*, 937 F. Supp. 1186, 1196, 1197 (D. Md. 1996).

³⁷ See *Savran & Assoc., Inc.*, 755 F. Supp. at 1182; *United States v. Medina*, 718 F. Supp. 928, 930 (S.D. Fla. 1989).

³⁸ See *United States v. Am. Therapeutic Corp.*, 797 F. Supp. 2d 1289, 1291 (S.D. Fla. 2011) (stating in section 1345 actions that there is an "implied finding" of irreparable harm when Congress passes a statute authorizing injunctive relief to protect the public (citing *United States v. Medina*, 718 F. Supp. 928, 930 (S.D. Fla. 1989))); *United States v. Belden*, 714 F. Supp. 42, 45 (E.D.N.Y. 1987) (noting that when enacting section 1345, "it is probable that Congress considered the continued existence of a scheme to defraud as irreparable harm *per se*"). *But see Kern*, 2018 WL 1003744, at *3 (questioning whether after *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7 (2008) cases indicating the government does not have to show irreparable harm remain good law).

³⁹ See *Kern*, 2018 WL 1003744, at *3; *Savran & Assoc., Inc.*, 755 F. Supp. at 1180.

Memorandum of law and affidavit

The government’s memorandum of law should provide the factual basis for the temporary restraining order, a legal argument for why the standard is met, and justification for why the requested relief is appropriate. The factual basis is presented through affidavits. The affidavits can include evidence that would be inadmissible at trial, such as hearsay.⁴⁰ The primary affidavit is generally from a law enforcement officer and relays that individual’s knowledge and personal observations, as well as information acquired from other agents. If possible, the affidavit should incorporate or attach documentary evidence of the scheme, such as records obtained from third parties or material gathered through a search warrant (like email), to corroborate the agent’s statements and observations. In addition to an affidavit from an agent, the government should consider including affidavits from fraud victims.

Relief request

Section 1345 authorizes a court to enter a “restraining order or prohibition,” as well as to “take such other action, as is warranted” to prevent injury.⁴¹ Accordingly, the government can request broad relief.⁴² The government’s request for relief should prevent defendants from continuing the fraud scheme, prevent defendants from restarting the fraud scheme, and address victims’ monetary losses. In addition to these broader categories of relief, the government should consider provisions requiring defendants to retain certain records.

Injunctive provisions—fairly obviously—should prohibit defendants from engaging in the activities that led to the section 1345 action. The provisions should go beyond simply prohibiting defendants from engaging in fraud. For instance, as described above in *BDK*, and in other cases in the Department’s mass-mailing initiative, the requested injunctions not only prohibited defendants from committing mail or wire fraud, but also, for instance, from mailing any materials relating

⁴⁰ *Johnson v. Couturier*, 572 F.3d 1067, 1083 (9th Cir. 2009); *United States v. 4492 S. Livonia Rd.*, 889 F.2d 1258, 1267–69 (2d Cir. 1989).

⁴¹ 18 U.S.C. § 1345; *Narco Freedom, Inc.*, 95 F. Supp. 3d at 754; *United States v. Payment Processing Ctr., LLC*, 435 F. Supp. 2d 462, 464 (E.D. Pa. 2006).

⁴² *Narco Freedom, Inc.*, 95 F. Supp. 3d at 755; *Payment Processing Ctr., LLC*, 435 F. Supp. 2d at 466; *United States v. Fang*, 937 F. Supp. 1186, 1196 (D. Md. 1996).

to cash prizes or lotteries, receiving or opening any mail responsive to such materials, and selling or using lists of individuals who have responded to their solicitations.

Additionally, the government can request that the court order defendants to notify the third parties who facilitated the scheme that the temporary restraining order was entered. Doing so places the third parties on notice that the defendants can no longer engage in the activities that led to the section 1345 action. Additionally, if the third parties are involved in other schemes similar to those the defendants were engaging in, it may dissuade them from continuing to do so.

The government can also craft proposed relief that preserves the opportunity for restitution. Initially, the government can request the court freeze bank accounts to preserve the potential for restitution or forfeiture, which is particularly common in section 1345 actions filed in coordination with criminal charges.⁴³ Additionally, in cases involving mass-mailing fraud, the government's proposed temporary restraining orders typically request authority for USPS to detain certain categories of mail, including fraudulent solicitations and mail responding to those solicitations. That mail detention allowed the government later to seek stipulated consent decrees or a permanent injunction allowing it to open the detained victim responses and return payments to victims.

Proposed order

The government should submit a proposed order that can be entered by the court without modification. Accordingly, it should meet the legal elements of Federal Rule of Civil Procedure 65(d) by stating the reasons the order is being issued, contain specific terms, and describe (without reference to another document) the prohibited or required

⁴³ See, e.g., *Payment Processing Ctr, LLC*, 435 F. Supp. 2d at 465–68; *Fang*, 937 F. Supp. at 1194–96; *United States v. Barnes*, 912 F. Supp. 1187, 1198 (N.D. Iowa 1996); *United States v. Quadro Corp.*, 916 F. Supp. 613, 619 (E.D. Tex. 1996); *United States v. Weingold*, 844 F. Supp. 1560, 1576–77 (D.N.J. 1994); *United States v. Savran & Assoc., Inc.*, 755 F. Supp. 1165, 1183 (E.D. N.Y. 1991); see also *United States v. Hoffman*, 560 F. Supp. 2d 772, 777–78 (D. Minn. 2008) (appointing receiver for defendants' assets). One court has gone even further, holding under section 1345 it could award restitution. See *United States v. Cen-Card Agency/C.C.A.C.*, 724 F. Supp. 313, 318 (D.N.J. 1989), *aff'd in part and dismissed in part on other grounds*, 961 F.2d 1569 (3d Cir. 1992) (table).

conduct.⁴⁴ Additionally, the injunctive language proposed by the government can enjoin not only the defendants, but also the other two categories of entities identified in Rule 65(d)(2). Federal Rule of Civil Procedure 65(d)(2) provides that an injunction order can restrain not only the named party, but also, if they receive “actual notice of [the order],” the party’s “officers, agents, servants, employees, and attorneys” as well as “persons who are in active concert or participation with” the party or the party’s officers, agents, servants, employees, and attorneys.⁴⁵

3. Preliminary injunction

If a court grants an *ex parte* temporary restraining order, the order must expire no more than 14 days from the time it was entered; the court can extend the order for “good cause” or if the adverse party consents.⁴⁶ Commonly, the court will set the temporary restraining order to expire the day of or soon after the preliminary injunction hearing. The court’s order will also likely set a schedule by which defendants must file an opposition to the application for preliminary injunction, as well as a date for any reply.

Some courts have held that the preliminary injunction standard is “substantially identical” to the temporary restraining order standard.⁴⁷ Like a temporary restraining order, a court can evaluate the need for a preliminary injunction on evidence submitted by way of affidavits, which can include hearsay.⁴⁸ The preliminary injunction can be adjudicated on affidavits alone. In fact, if the parties are given proper opportunity to provide written testimony, district courts can refuse to allow oral testimony.⁴⁹ If facts are disputed, however, the court will commonly expect oral testimony.⁵⁰ The government can call

⁴⁴ FED. R. CIV. P. 65(d)(1).

⁴⁵ FED. R. CIV. P. 65(d)(2).

⁴⁶ FED. R. CIV. P. 65(b)(2).

⁴⁷ *Stuhlbarg Intern. Sales Co. v. John D. Brush and Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001).

⁴⁸ *See University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (explaining that due to “haste” associated with preliminary injunction determinations, they are granted on “less formal” procedures and “evidence that is less complete than a trial on the merits”).

⁴⁹ 11A CHARLES ALAN WRIGHT & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2949 (3d ed. Sep. 2018).

⁵⁰ *See id.*

the defendant to testify and, if the defendant invokes the Fifth Amendment, the court can draw an adverse inference.⁵¹ When a court rules on whether a preliminary injunction is appropriate, it must—because a preliminary injunction is an interlocutory injunction—“state the findings and conclusions that support its action.”⁵²

C. Discovery

Discovery is unlikely to begin prior to a court’s consideration of a preliminary injunction. Traditional civil discovery is certainly possible in section 1345 cases, but it is rare. Many cases settle before discovery begins. Moreover, 18 U.S.C. § 1345(b) explicitly provides that if an indictment is returned against the civil defendants, discovery proceeds under the Federal Rules of Criminal Procedure.⁵³

Many section 1345 actions do not result in civil discovery either because defendants agree to some form of an injunction or because defendants never contest the complaint. For instance, in the mass-mailing initiative discussed above, in 9 of the 11 section 1345 suits brought by the government, all of the defendants either agreed to stipulated consent decrees or defaulted.

In other section 1345 actions an indictment is returned against the civil defendants simultaneously with or shortly after the complaint is filed. In this situation—which is particularly common in section 1345 suits that seek to freeze assets—section 1345(b) explicitly provides that “discovery is governed by the Federal Rules of Criminal Procedure.”⁵⁴

If the case proceeds to the point where discovery should begin, one party may attempt to avoid civil discovery by asking the court to stay the case until resolution of any criminal investigation. For both parties, the more expansive civil discovery tools provide risk as well as opportunity. Defendants may attempt to avoid civil discovery to prevent the government from discovering their defense to any potential criminal charges, to avoid needing to invoke the Fifth Amendment or, in the case of corporate defendants, to avoid

⁵¹ Ana Maria Martinez, *Freezing Assets in Health Care Fraud Cases*, 57 U.S. ATTY’S BULL., no. 1, 2009, at 33.

⁵² FED. R. CIV. P. 52(a)(2); *see also* Withrow v. Larkin, 421 U.S. 35, 44 (1975).

⁵³ 18 U.S.C. § 1345(b).

⁵⁴ *Id.*

admissions of culpability that could be used against it in a criminal case. Defendants may want to engage in civil discovery because it could yield information about the government's investigation long before they could get it under the criminal discovery rules, if they could get it at all. Where possible and prudent, the government should consider arguing, at least in the alternative, for measures that protect a party's interest without staying the entire case, such as delay of certain discovery tactics or protective orders.⁵⁵

If traditional civil discovery occurs in a section 1345 action, the government should be prepared for defendants to invoke Fifth Amendment privileges.⁵⁶ Individuals who elect to invoke the Fifth Amendment in a civil case cannot attempt to evade all discovery by issuing a "blanket" refusal to respond to discovery.⁵⁷ For instance, in most cases, an individual defendant who is deposed must attend, be sworn, respond to questions that do not risk self-incrimination, and invoke the Fifth Amendment to questions that do incriminate.⁵⁸ If a defendant invokes the Fifth Amendment, the court can draw an adverse inference from the decision to do so.⁵⁹ Corporate defendants, of course, have no Fifth Amendment right not to self-incriminate and must designate someone who will not invoke the Fifth Amendment to appear at depositions and answer discovery requests on behalf of the corporation.⁶⁰ Likewise, corporate records custodians cannot refuse to produce corporate documents by invoking the Fifth Amendment.⁶¹

⁵⁵ See Milton Pollack, *Parallel Civil and Criminal Proceedings*, 129 F.R.D. 201 (1990).

⁵⁶ See FED. R. CIV. P. 26(b)(1) (identifying the "scope of discovery" as "any nonprivileged matter that is relevant. . .").

⁵⁷ See *Securities & Exch. Comm'n v. First Financial Group of Texas, Inc.*, 659 F.2d 660, 668–69 (5th Cir. 1981).

⁵⁸ *United States v. Hansen*, 233 F.R.D. 665, 668 (S.D. Cal. 2005). In rare cases, defendants could avoid a deposition or other discovery request by asking the court to determine that the Fifth Amendment privilege "legitimately" prevents answering any relevant question. See *United States v. Gomez-Rojas*, 507 F.2d 1213, 1220 (5th Cir. 1975).

⁵⁹ See *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 97–98 (2d Cir. 2012).

⁶⁰ See *United States v. Leach*, 156 F. Supp. 2d 491, 498 (E.D. Pa. 2001).

⁶¹ See *Amato v. United States*, 450 F.3d 46, 49–50 (1st Cir. 2006).

D. Seeking permanent relief

Just as few section 1345 actions proceed to traditional civil discovery, few proceed to a litigated resolution. For those that do, the government should be prepared to file a motion for summary judgment and, if summary judgment is not granted, to try its case to the bench.

The more likely outcome, assuming the case is not settled, is that defendants fail to answer the complaint or otherwise defend the action, and the government requests an entry of default and moves for a default judgment.⁶² When a party moves for default judgment, Federal Rule of Civil Procedure 55(b)(2) requires the opposing party be given notice only if it has “appeared personally or by a representative.”⁶³ Regardless, providing gratuitous notice may be good practice and, in at least one district, notice is required regardless of whether a party has appeared.⁶⁴ Whether to grant a default judgment is entrusted to the discretion of the trial court. The tests for how a district court should exercise that discretion vary, but, as a general matter, courts consider whether the movant would be prejudiced if the default judgment is not granted, the merits of the claims and any potential defenses, and whether defendants’ failure to participate is due to inexcusable neglect.⁶⁵

Whether the case proceeds to a fully-litigated resolution, settlement, or default judgment, the relief the government can request remains broad. Just as when the government is crafting temporary relief,

⁶² FED. R. CIV. P. 55 (laying out a two-step process for a default judgment). Local rules often provide additional requirements for seeking a default judgment. For instance in the Central District of California, a declaration is required that must state, among other things, whether the defaulting party is an infant or incompetent party and whether the Service Members Civil Relief Act applies. *See* C.D. Cal. Loc. R. 55-1.

⁶³ FED. R. CIV. P. 55(b)(2).

⁶⁴ *See* E.D.N.Y. Loc. R. 55.2(c) (requiring movant to mail the default judgment filings to defendants, provide proof of mailing, and, if the mailing is returned, provide a supplemental affidavit). Additionally, some courts have held that notice must be provided even if a party has not formally appeared but has communicated with the movant an intention to defend the suit. *See* *New York v. Green*, 420 F.3d 99, 105 (2d Cir. 2005).

⁶⁵ *Compare* *Chamberlain v. Gaimpapa*, 210 F.3d 154, 160 (3d Cir. 2000) (laying out three-factor test), *with* *Eitel v. McCool*, 782 F.2d 1470 (9th Cir. 1986) (laying out seven-factor test).

when it considers permanent relief it should attempt to ensure that the fraud is stopped and that defendants can no longer profit from their activities. A permanent injunction should also prevent defendants or their agents from subverting or ignoring the order and reengaging in fraud, and preserve the opportunity for restitution or return of funds to fraud victims.

To ensure the fraud is stopped and to prevent defendants from resuming the fraud, permanent relief requests can contain provisions monitoring or restricting business activities. For instance, in two cases where a foreign mailer was using U.S. mailboxes to facilitate the fraud scheme, the defendants were ordered to report to the government any involvement in a business that mass-mailed materials to the United States and any interest in a U.S. mailbox.⁶⁶ In another case, the government requested the court order a defendant not to engage in a certain business for ten years.⁶⁷ Another business was required to implement a due diligence or anti-fraud program.⁶⁸

The court can also hinder any effort to resume the fraud by requiring defendants to notify third parties that facilitated the scheme of the permanent injunction. Requiring such notice decreases the likelihood that those same third parties will assist the defendants in resuming the fraud. Courts can also take steps to ensure that defendants do not retain tools of the fraud, such as fraudulent letters or lead lists.

Finally, as noted above, the government can ask that permanent injunctions contain provisions preserving the possibility of returning money to victims.

V. Conclusion

Individuals who fall prey to fraud schemes experience not only financial losses—at times devastating ones—but also “feelings of

⁶⁶ Consent Decree and Final Judgment, *United States v. Alexander Quaglia, et al.*, No. 1:18-cv-1102 (E.D.N.Y. Aug. 6, 2018), ECF No. 32; Consent Decree and Final Judgment, *United States v. Patrick Fraser et al.*, No. 1:18-cv-1104 (E.D.N.Y. Aug. 7, 2018).

⁶⁷ Stipulated Consent Decree and Final Judgment, *United States v. Stephen Fennell, et al.*, No. 2:18-cv-283 (D. Nev. Apr. 18, 2018), ECF No. 33.

⁶⁸ Stipulated Consent Decree and Final Judgment, *United States v. Macromark et al.*, No. 1:16-cv-5264 (E.D.N.Y. Nov. 21, 2017), ECF No. 72.

anger, embarrassment, or distress.”⁶⁹ With the enactment of section 1345, Congress provided the Department with a powerful civil tool to put an end to fraud schemes that cause these harms, even in instances where a criminal prosecution is not ready. Particularly when the government encounters a large fraud scheme that targets the elderly, it should consider using this tool to stop the bleeding and put an end to the victimization.

About the Author

Jacqueline Blaesi-Freed has served as a Trial Attorney with the Consumer Protection Branch of the Civil Division since 2015. As a member of the Consumer Protection Branch, she is tasked with prosecuting civil and criminal matters arising under a variety of federal statutes including the Federal Food, Drug, and Cosmetic Act; the Federal Trade Commission Act; the Federal Odometer Act; and the Consumer Product Safety Act. The lawsuits targeting fraudulent mass mailings that are discussed in this article are part of the Department’s broader efforts to combat elder fraud, for which Ms. Blaesi-Freed and others were awarded the 2018 Attorney General’s Award for Fraud Prevention. Prior to joining the Department through the Attorney General’s Honors Program, she clerked for the United States Court of Appeals for the Tenth Circuit and the Kansas Supreme Court.

⁶⁹ United States v. Kern, No. 2:18-cv-00283-JAD-PAL, 2018 WL 1003744, at*4 (D. Nev. 2018).

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Asset Forfeiture in Elder Fraud Schemes

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I. Introduction

Grandpa, it's me, your favorite grandson. I have been arrested and need money to get bailed out. Can you please send me some money for help?¹

Elder fraud schemes are, unfortunately, legion. The above introductory script to a typical so-called “grandparent scam” is but one of the many ways that criminal actors attempt to swindle elderly victims out of money and other property, sometimes causing victims to lose their life savings. Fortunately, the government has a powerful tool in asset forfeiture that can help victims recoup losses while simultaneously disrupting criminal organizations and deterring future criminal conduct.

This article begins by generally describing administrative, civil, and criminal forfeiture procedure. It then lists the statutory forfeiture authorities that correspond with the most commonly charged criminal offenses in elder fraud schemes (including a recently enacted “mandatory forfeiture” statute for certain telemarketing or email marketing fraud offenses), describes the various theories of forfeiture (including proceeds, facilitating property, and property involved in the offense), and highlights significant issues for prosecutors to consider when applying these theories to elder fraud scheme investigations. Finally, the article presents several recent successful forfeitures in elder fraud scheme prosecutions across the country.

II. Forfeiture procedure

The following is a general overview of federal forfeiture procedure and is not meant to encompass all of the intricacies of forfeiture practice. As will be mentioned throughout this article, prosecutors are

¹ The author of this article actually received this very phone call—on his government-issued cell phone no less. Unfortunately, the author was unable to convince the caller to abandon his criminal life choices.

strongly encouraged to consult with the asset forfeiture experts in their respective offices when faced with forfeiture matters.

In many federal criminal investigations, the government will come across property that it wishes to seize for forfeiture. Most seizures will involve a federal warrant and showing of probable cause that the property is subject to forfeiture.² In all cases, prosecutors should consider seeking “multi-purpose” seizure warrants pursuant to both civil and criminal authorities.³ In either case, the government can seek a warrant in any judicial district regardless of the location of the property.⁴ In the case of seizures for criminal forfeiture purposes, the government has an added burden of showing that a restraining order is not sufficient to assure the availability of the property at trial.⁵

In the vast majority of cases where the government seizes property, the federal agency that seized the property will begin a process known as administrative forfeiture.⁶ Not all property is eligible for administrative forfeiture; notably, high-value assets and real property must be forfeited through the judicial processes described below.⁷ The administrative forfeiture process is akin to an abandonment proceeding where the government notifies interested parties (both by publication and direct notice) of its intent to forfeit specific seized property and gives such interested parties an opportunity to assert an interest in the property.⁸ Unless a third party files a valid claim to the property, the federal agency will complete the administrative forfeiture of the property by issuing a Declaration of Forfeiture.⁹ The Declaration grants full right, title, and interest in the property to the United States and there is no need for the government to take further action to perfect the forfeiture.¹⁰

If a third party files a valid claim, the government must take further action to complete the forfeiture. That is, not later than 90 days after

² See FED. R. CRIM. P. 41.

³ See 18 U.S.C. § 981(b) (civil seizures); 21 U.S.C. § 853(f) (criminal seizures).

⁴ See 18 U.S.C. § 981(b)(3) (civil seizures); 21 U.S.C. § 853(l) (criminal seizures).

⁵ See 21 U.S.C. § 853(f).

⁶ See 18 U.S.C. § 983(a)(1)–(2); 19 U.S.C. §§ 1602–1612.

⁷ See 19 U.S.C. § 1607(a); 18 U.S.C. § 985.

⁸ See 18 U.S.C. § 983(a)(2).

⁹ See 19 U.S.C. § 1609.

¹⁰ *Id.*

a third party files a claim,¹¹ the government must either (a) return the property, (b) file a civil forfeiture complaint, or (c) obtain a criminal indictment containing a forfeiture allegation that the property is subject to forfeiture.¹² If criminal forfeiture is the only option pursued and the asset was not initially seized with criminal process, the government must also take certain steps to maintain custody of the property under criminal seizure authority.¹³

Civil forfeiture is an *in rem* civil action where the government files suit against the property itself.¹⁴ In such an action, the government must prove by a preponderance of the evidence that the property is subject to forfeiture.¹⁵ Third parties may intervene to prove by a preponderance standard that they are an “innocent owner” of the property.¹⁶ Civil forfeiture is not mutually exclusive to criminal forfeiture, and the government will often pursue both options simultaneously. There are numerous potential benefits to pursuing civil forfeiture, and prosecutors should consult with the asset forfeiture experts in their office to better understand the interplay between civil forfeiture and criminal prosecutions.

Criminal forfeiture is part of the sentence in a criminal case.¹⁷ The government must notify a defendant of its intent to forfeit property by including a forfeiture allegation in the indictment.¹⁸ Upon conviction, the court (or a jury, if the defendant so chooses) must determine, by a preponderance of the evidence, whether the government has established the requisite nexus between the criminal offense and the property sought to be forfeited. Upon such finding, the court will issue a preliminary order of forfeiture that forfeits the defendant’s interest in the property and that begins the ancillary proceeding allowing

¹¹ 18 U.S.C. § 983(a)(3)(A) (“[A] court in the district in which the complaint will be filed may extend the period for filing a complaint for good cause shown or upon agreement of the parties.”).

¹² 18 U.S.C. § 983(a)(3)(A)–(B).

¹³ *See id.* § 983(a)(3)(B).

¹⁴ *See* FED. R. CIV. P., SUPP. R. G.

¹⁵ 18 U.S.C. § 983(c).

¹⁶ *Id.* § 983(d).

¹⁷ *See* FED. R. CRIM. P. 32.2(b)(1)(A) (providing that “[a]s soon as practical . . . the court must determine what property is subject to forfeiture”).

¹⁸ FED. R. CRIM. P. 32.2(a).

third parties to assert an interest in the property.¹⁹ Following resolution of any third party claims, the court will issue a final order of forfeiture that forfeits the property as to the world.

III. Forfeiture authority for elder fraud schemes

The government’s authority to forfeit property is governed solely by statute. Unfortunately, the forfeiture statutes are spread across the United States Code and it can sometimes be a challenge to link a criminal offense with its corresponding forfeiture authority. That said, prosecutors should be aware that almost every single federal crime mandates some form of forfeiture.

The chart below lists commonly charged criminal offenses for elder fraud schemes and the corresponding criminal forfeiture authority for such offenses. Generally speaking, these criminal offenses will have corresponding civil forfeiture authority.

Criminal Offense	Criminal Forfeiture Authority
18 U.S.C. § 1028 (identity theft) ²⁰	Gross proceeds + facilitating property 18 U.S.C. § 982(a)(2)(B) and 18 U.S.C. § 1028(b)
18 U.S.C. § 1029 (access device fraud)	Proceeds + facilitating property 18 U.S.C. § 982(a)(2)(B) and 18 U.S.C. § 1029(c)(1)(C)
18 U.S.C. § 1341 (mail fraud) 18 U.S.C. § 1343 (wire fraud)	Proceeds only 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461

¹⁹ See 21 U.S.C. § 853(n); FED. R. CRIM. P. 32.2(c). Section 853 is the drug forfeiture provision, but the procedural aspects contained in section 853 (except for the presumption in subdivision (d)) apply to all criminal forfeitures.

²⁰ Interestingly, there is no forfeiture authority for aggravated identity theft offenses in violation of 18 U.S.C. § 1028A. *But see* United States v. Pollard, 850 F.3d 1038, 1042 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 568 (2017) (holding that when a conviction for aggravated identity theft is premised on a proven or admitted violation of a predicate offense that is enumerated in 18 U.S.C. § 981(a)(1)(C), forfeiture is authorized). Prosecutors should proceed with caution when relying on the *Pollard* decision.

18 U.S.C. § 1347 (health care fraud)	Gross proceeds only 18 U.S.C. § 982(a)(7)
18 U.S.C. §§ 1028–1029, 1341–1344, 1349 (involving telemarketing as defined in 18 U.S.C. § 2325)	Gross proceeds + facilitating property 18 U.S.C. § 982(a)(8)
18 U.S.C. §§ 1028–1029, 1341–1344, 1347, 1349, and 42 U.S.C. § 1320a-7b (where an “enhanced penalty” under 18 U.S.C. § 2326 applies)	Gross proceeds + facilitating personal property 18 U.S.C. § 2328
18 U.S.C. § 1708 (mail theft)	Proceeds only 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461
18 U.S.C. §§ 1956, 1957 (money laundering)	Property involved in the offense 18 U.S.C. § 982(a)(1)

In some cases, the government may not be able to locate specific property for forfeiture. For example, it may be that the criminal actor has already dissipated all assets that were otherwise forfeitable pursuant to the applicable statute. In such cases, prosecutors should be cognizant that the government can obtain a forfeiture money judgment against the defendant and even seek to forfeit substitute assets of the defendant in certain circumstances.²¹ In most cases, the amount of the money judgment is based on the value of the proceeds of the offense (or, in a money laundering offense, the value of the property involved). There are, however, instances where the government can obtain a money judgment based on the value of facilitating property.²² In any event, courts routinely hold forfeiture money judgments can be calculated based on reasonable extrapolations and that such calculations do not require any degree of “mathematical exactitude.”²³

²¹ See FED. R. CRIM. P. 32.2(a), (b)(1)(A) (referring to the government’s power to obtain money judgments); 21 U.S.C. § 853(p) (setting forth the conditions required to forfeit substitute assets).

²² See, e.g., *United States v. Peithman*, No. 4:15CR3091, 2017 WL 1682778, at *2 (D. Neb. May 1, 2017).

²³ *United States v. Prather*, 456 F. App’x 622, 626 (8th Cir. 2012).

Depending on the circumstances of the criminal offense, there may be multiple applicable forfeiture authorities. For example, for an elder fraud scheme that involves an interstate wire, telemarketing, or email marketing that affects a financial institution,²⁴ and that includes money laundering, the government could cite to the forfeiture authority in any of the following sections of Title 18 of the United States Code: 981(a)(1)(C),²⁵ 982(a)(1), 982(a)(2), 982(a)(8), and 2328.²⁶ In such a scenario, prosecutors should be mindful that (1) some of these statutes provide more expansive forfeiture authority than others, and (2) even though the language in some of these statutes appears similar, there are subtleties that can have significant consequence. As such, prosecutors should consult with the asset forfeiture experts in their office to apply the most appropriate forfeiture authority to their case.

Congress recently enacted the Elder Abuse Prevention and Prosecution Act (EAPPA) that includes a new “mandatory forfeiture” provision, codified at 18 U.S.C. § 2328. This forfeiture provision applies to certain interstate fraud offenses where the section 2326 enhanced penalties apply (that is, when the offense is committed in connection with the conduct of telemarketing or email marketing).²⁷

²⁴ Although some courts have held that “affecting a financial institution,” as set forth in 18 U.S.C. § 982(a)(2)(A), means that a financial institution must be a victim of the offense. Other courts have a broader view. *See, e.g.*, *United States v. Lindell*, No. 3-00512 DKW, 2016 WL 4707976 (D. Haw. Sept. 8, 2016).

²⁵ Section 981 is a civil forfeiture section that is applicable to criminal offenses through 28 U.S.C. § 2461. Although wire fraud is not specifically listed in section 981(a)(1)(C), it is a “specified unlawful activity” pursuant to 18 U.S.C. §§ 1956(c)(7)(A) and 1961(1)(B).

²⁶ *Compare* *United States v. Edelkind*, 467 F.3d 791, 799 (1st Cir. 2006) (holding that section 981 civil forfeiture authority can be used for criminal forfeiture through use of the 28 U.S.C. § 2461 “bridging statute” even where there is directly applicable criminal forfeiture authority), *with* *United States v. Chittenden*, 896 F.3d 633, 636 n.2 (4th Cir. 2018) (suggesting that the government cannot use section 981 civil forfeiture authority for bank fraud offenses where section 982(a)(2) criminal forfeiture authority applies).

²⁷ *See* Elder Abuse Prevention and Prosecution Act, Pub. L. 115-70, 131 Stat. 1208 (2017). The enhanced penalties in section 2326 include up to five years additional prison sentence for offenses conducted in connection with telemarketing or email marketing, and up to ten years additional sentence if

This new provision mandates forfeiture of both the gross proceeds obtained from the offense and any “equipment, software, or other technology used or intended to be used to commit or to facilitate the commission of such offense.”²⁸

Even before enacting EAPPA, the government had the authority to forfeit the gross proceeds and facilitating property for certain fraud offenses involving telemarketing. In 1998, Congress enacted the Telemarketing Fraud Prevention Act, which was codified at 18 U.S.C. § 982(a)(8).²⁹ The somewhat subtle differences between the forfeiture authority in section 982(a)(8) and section 2328 are as follows:

- Section 982(a)(8) and section 2328 apply to the same interstate fraud offenses with the exception of health care fraud offenses³⁰ and fraud involving federal health care programs.³¹ Section 2328 applies to those offenses, whereas section 982(a)(8) does not.
- With respect to facilitating property, section 982(a)(8) authorizes forfeiture of any real or personal property, whereas section 2328 is limited to “any equipment, software, or other technology.”³²
- With respect to proceeds, section 982(a)(8) includes a “directly or indirectly” modifier to the “obtained” language³³ (that is, gross proceeds that the defendant obtained directly or indirectly as a result of the offense), whereas section 2328 does not (namely, gross proceeds obtained from such offense).³⁴

Below is a more detailed explanation of the various forfeiture theories that can apply for elder fraud schemes, including proceeds, facilitating property, and property involved in the offense.

the offense targeted persons over the age of 55 or victimized ten or more persons over the age of 55.

²⁸ 18 U.S.C. § 2328(a).

²⁹ See Telemarketing Fraud Prevention Act of 1998, Pub. L. 105-184, 112 Stat. 520.

³⁰ 18 U.S.C. § 1347.

³¹ 42 U.S.C. § 1320a-7b.

³² 18 U.S.C. § 2328(a)(2).

³³ 18 U.S.C. § 982(a)(8).

³⁴ 18 U.S.C. § 2328.

A. Proceeds

In virtually all white collar fraud cases, the government has the statutory authority to forfeit the proceeds of the offense. Courts have just about universally held that the proceeds of an offense are determined by applying a “but for” test—that is, proceeds includes any property the defendant would not have obtained or retained but for the criminal offense. Prosecutors should think broadly when considering what constitutes the proceeds of a criminal offense and not just focus on the direct or most obvious proceeds.³⁵

Proceeds also include property derived from the offense—property that is traceable to criminal proceeds. Financial investigation is crucial to tracing criminal proceeds, as monies will often flow through various accounts and assets. Prosecutors should coordinate early and often with forfeiture experts in their office to understand the tracing requirements in their respective jurisdiction.³⁶

Exactly what constitutes proceeds is complicated by the different wording of the various forfeiture statutes. Consider the language of

³⁵ See, e.g., *United States v. Cekosky*, 171 F. App'x 785, 788 (11th Cir. 2006) (holding that the interest earned on non-criminal monies was forfeitable because the defendant committed identity theft to open the bank account where the monies were on deposit); *United States v. Torres*, 703 F.3d 194, 199 (2d Cir. 2012) (upholding a forfeiture money judgment based on the amount of rental subsidies that were paid for the defendant's benefit as a result of her theft of government property scheme involving under-reporting of income on housing applications).

³⁶ There is a circuit split on whether and how the government can trace criminal proceeds that have been commingled with clean money. The Second, Sixth, and Ninth Circuits allow various tracing methodologies. See, e.g., *United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1158–62 (2d Cir. 1986); *United States v. \$72,050.00 in U.S. Currency*, 2013 WL 4042895 (E.D. Ky. Aug. 8, 2013), *aff'd*, 587 F. App'x 241 (6th Cir. 2014); *United States v. Laykin*, 886 F.2d 1534, 1541 (9th Cir. 1989). The Third, Fifth, Tenth, and Eleventh Circuits have held that tracing is not possible when there has been commingling, thus requiring the government to rely on substitute asset theory under 21 U.S.C. § 853(p). See, e.g., *United States v. Voigt*, 89 F.3d 1050, 1087–88 (3d Cir. 1996); *United States v. Ayika*, 837 F.3d 460 (5th Cir. 2016); *United States v. Bornfield*, 145 F.3d 1123, 1137–39 (10th Cir. 1998); *In re Rothstein, Rosenfeldt, Adler, P.A.*, 717 F.3d 1205, 1213–15 (11th Cir. 2013).

the following statutes that apply to elder fraud schemes, depending upon the predicated violation that is charged:

- “any property, real or personal, which constitutes or is derived from proceeds traceable to [the offense]”;³⁷
- “any property constituting, or derived from, proceeds the person obtained directly or indirectly, as a result of [the offense]”;³⁸
- “property, real or personal, that constitutes or is derived, directly or indirectly, from gross proceeds traceable to the commission of the offense”;³⁹
- “[any real or personal property] constituting, derived from, or traceable to the gross proceeds that the defendant obtained directly or indirectly as a result of the offense”;⁴⁰ and
- “any property, real or personal, constituting or traceable to gross proceeds obtained from such offense.”⁴¹

In analyzing the statutory language, one important issue to consider is whether the statute authorizes forfeiture of gross or net proceeds of the criminal offense. In most elder fraud schemes, the government will be entitled to seek forfeiture of the gross proceeds either because the applicable statute directly authorizes forfeiture of gross proceeds, or because the conduct involves “illegal goods, illegal services, unlawful activities, . . . telemarketing, [or] health card fraud schemes.”⁴² To be clear, there is not a definition of “proceeds” in 18 U.S.C. § 982 or most other criminal forfeiture statutes. In many fraud cases the criminal forfeiture authority is predicated on a civil forfeiture statute, 18 U.S.C. § 981(a)(1)(C), used in combination with 28 U.S.C. § 2461(c). Where section 981(a)(1)(C) forfeiture authority applies, the definition of “proceeds” in section 981(a)(2) will also apply, and the government may face arguments from defense counsel that the statutory term “proceeds” means net (as opposed to gross) profit.⁴³

³⁷ 18 U.S.C. § 981(a)(1)(C).

³⁸ 18 U.S.C. § 982(a)(2).

³⁹ 18 U.S.C. § 982(a)(7).

⁴⁰ *Id.* § 982(a)(8)(B).

⁴¹ 18 U.S.C. § 2328(a)(1).

⁴² *See* 18 U.S.C. § 981(a)(2)(A).

⁴³ *See id.* § 981(a)(2)(B) (stating that, in cases involving “lawful goods or lawful services that are sold or provided in an illegal manner, the term ‘proceeds’ means the amount of money acquired through the illegal

There, the claimant has the burden of proof with respect to the issue of direct costs.⁴⁴

Another important issue is the impact of the word “obtained” in the forfeiture statute. In a recent United States Supreme Court decision, *Honeycutt v. United States*, the Supreme Court held that a defendant cannot be jointly and severally liable for property that a co-conspirator derived from a drug conspiracy where the defendant himself did not acquire the property.⁴⁵ In other words, the government must show that a defendant personally “obtained” proceeds of the conspiracy in order to hold that defendant responsible for the proceeds through a forfeiture money judgment. *Honeycutt* was decided in the context of a drug conspiracy where the applicable forfeiture authority is proceeds that the defendant “obtained, directly or indirectly.”⁴⁶

Notwithstanding, a circuit split has developed as to whether *Honeycutt* is applicable to other forfeiture statutes, including section 981(a)(1)(C) where there is no “obtained” language in the statute.⁴⁷ The bottom line is that this is a difficult and developing issue in the forfeiture world and prosecutors should consult with the forfeiture experts in their office when faced with forfeiture issues in investigations involving elder fraud conspiracies.

B. Facilitating property

Facilitating property is any property that makes the criminal offense easier to commit or harder to detect.⁴⁸ There must be a

transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services.”).

⁴⁴ *Id.*

⁴⁵ See *Honeycutt v. United States*, 137 S. Ct. 1626, 1635 (2017) (“Forfeiture pursuant to § 853(a)(1) is limited to property the defendant himself actually acquired as the result of the crime.”).

⁴⁶ See 21 U.S.C. § 853(a).

⁴⁷ Compare *United States v. Gjeli*, 867 F.3d 418, 427 n.16 (3d Cir. 2017), and *United States v. Carlyle*, 712 F. App’x 862, 864 (11th Cir. 2017), with *United States v. Sexton*, 894 F.3d 787, 799 (6th Cir. 2018) (holding that *Honeycutt* does not apply).

⁴⁸ See, e.g., *United States v. Schifferli*, 895 F.2d 987, 991 (4th Cir. 1990) (holding that an office building where the defendant wrote illegal prescriptions was subject to forfeiture as facilitating property because it made the defendant’s “crimes ‘more or less free from obstruction or hindrance’” (citing *United States v. Premises Known as 3639-2nd Street, N.E., Minneapolis, Minn.*, 869 F.2d 1093, 1096 (8th Cir. 1989))).

substantial connection between the facilitating property and the offense.⁴⁹

As with proceeds, the concept of “facilitating property” is complicated by the fact that the various forfeiture statutes are worded differently. Consider the language of the following statutes that could be applicable to an elder fraud scheme:

- “[any real or personal property] used or intended to be used to commit, to facilitate, or to promote the commission of [the] offense”;⁵⁰
- “any personal property used or intended to be used to commit the offense”;⁵¹
- “any equipment, software, or other technology used or intended to be used to commit or to facilitate the commission of [the] offense.”⁵²

The statutory forfeiture language for identity theft and access device fraud offenses, section 1028(b) and section 1029(c)(1)(C) respectively, only authorizes forfeiture of property that is “used or intended to be used to commit the offense.”⁵³ It does not include any facilitation language. Arguably, the language in section 1028(b) and section 1029(c)(1)(C) limits forfeiture to the instrumentalities of the crime only; that is, the items that the defendant directly used to commit the crime. Such a distinction may not matter depending on the circumstances.⁵⁴

⁴⁹ See, e.g., 18 U.S.C. § 983(c)(3) (stating that for civil forfeiture actions based on a facilitation theory, the government “shall establish that there was a substantial connection between the property and the offense.”).

⁵⁰ 18 U.S.C. § 982(a)(8).

⁵¹ 18 U.S.C. § 1028(b)(5) (for identify theft); 18 U.S.C. § 1029(c)(1)(C) (for access device fraud).

⁵² 18 U.S.C. § 2328(a)(2).

⁵³ 18 U.S.C. § 1028(b)(5) (for identify theft); 18 U.S.C. § 1029(c)(1)(C) (for access device fraud).

⁵⁴ See, e.g., *United States v. Hull*, 606 F.3d 524, 527 (8th Cir. 2010) (finding that in a child pornography production conviction, where 18 U.S.C. § 2253(a)(3) forfeiture authority applies for “any property, real or personal, used or intended to be used to commit or to promote the commission of” the offense, the defendant’s computer was the instrument of the crime, but the defendant’s house was used to commit or promote the offense because it enabled the defendant to establish a hardwired connection

In addition, while section 982(a)(8) mandates forfeiture of both real and personal property, sections 1028(b), 1029(c)(1)(C), and 2328 are limited to personal property (section 2328 is further limited to “equipment, software or other technology”).⁵⁵ So, for example, if the government is investigating an elder fraud scheme where wire fraud and/or identity theft are the viable charges, the government would only be able to forfeit personal property used or intended to be used to commit the offense (for example, computers, cell phones, gift cards). If the same scheme involved telemarketing, the government could seek to forfeit both real and personal property used or intended to be used to commit, to facilitate, or to promote the offense (for example, potentially a residence that criminal actors used during the course of the criminal scheme).

C. Property involved in the money laundering offense

The criminal forfeiture authority for money laundering offenses is any property involved in the offense, and any property traceable to such property.⁵⁶ The “involved in” concept has broad applications and includes the criminal proceeds that are being laundered,⁵⁷ non-criminal proceeds that are commingled with the criminal proceeds, any property that is involved in any type of laundering exchange, and any facilitating property provided that it is substantially connected to the offense.⁵⁸ As such, section 982(a)(1)

to the internet and provided a secure place to store images related to the offense).

⁵⁵ See 18 U.S.C. § 982(a)(8); 18 U.S.C. §§ 1028(b), 1029(c)(1); 18 U.S.C. § 2328.

⁵⁶ § 982(a)(1).

⁵⁷ Most money laundering offenses require there to be proceeds of a “specified unlawful activity,” which includes hundreds of different criminal offenses. See 18 U.S.C. §§ 1956(c)(7), 1961(1). The exception is that international money laundering involves using “clean” money to conceal or promote a specific unlawful activity. See 18 U.S.C. § 1956(a)(2). In such cases, the “clean” money is subject to forfeiture as being involved in the offense.

⁵⁸ See, e.g., *United States v. Bornfield*, 145 F.3d 1123, 1135 (10th Cir. 1998) (explaining that property involved in an offense includes the “corpus” being laundered, commissions/fees paid to a laundered, and facilitating property for the laundering offense, and that property traceable to that property means the acquisition is attributable to the money laundering scheme).

“involved in” forfeiture authority can be more expansive than the above referenced proceeds theories.⁵⁹

As an example, where a defendant is convicted of wire fraud (perhaps in connection with the above mentioned “grandparent scheme”), and the government is able to show that the defendant used \$50,000 of the criminal proceeds to improve and/or make mortgage payments on a house, the government could forfeit \$50,000 of the market value of the house using a proceeds theory pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461. If, however, the above payments on the house constitute a money laundering violation, the government may be able to forfeit the entire house as being “involved in” the laundering offense pursuant to 18 U.S.C. § 982(a)(1).

IV. Recent successful forfeitures in elder fraud schemes

The following are provided as examples of recent forfeiture successes in various elder fraud prosecutions, including a telemarketing scheme, a romance scheme, and Ponzi-style investment scheme. In each of these cases, the government was able to use forfeiture to recover victim monies.

A. Eastern District of Missouri

The Eastern District of Missouri recently convicted 20 defendants related to a telemarketing enterprise scheme that targeted persons over the age of 55 and that victimized ten or more persons over the age of 55.⁶⁰ The scheme involved making unsolicited interstate telephone calls to victims across the country to “sell” goods and services for fictitious business opportunities.⁶¹ As part of the scheme, the enterprise employed “reloaders,” or individuals whose specific objective was to discover the financial position of past victims and contact them again and again to solicit more money.⁶² In total, the

⁵⁹ See, e.g., *United States v. McGauley*, 279 F.3d 62, 77 (1st Cir. 2002) (explaining generally that funds involved in money laundering is a broader concept than proceeds of unlawful activity).

⁶⁰ See *United States v. Michael McNeill, et al.*, No. 16-cr-466 (E.D. Mo. 2016).

⁶¹ See Press Release, U.S. Dep’t of Justice, *Twentieth Defendant Sentenced for Federal Fraud and Money Laundering Charges Related to Telemarketing Enterprise that Targeted the Elderly* (May 22, 2018).

⁶² See *United States v. Michael McNeill, et al.*, No. 16-cr-466 (E.D. Mo. 2016).

scheme caused approximately 4,000 victims to lose more than \$20 million.⁶³

The various defendants pled guilty to bank fraud, wire fraud, money laundering and telemarketing enhancements under 18 U.S.C. § 2326.⁶⁴ As such, the applicable forfeiture statutes mandate forfeiture of gross proceeds and facilitating property (for the bank fraud, wire fraud, and telemarketing enhancements), and property involved in the offenses (for the money laundering offenses). In the course of its investigation, the government was able to locate and seize cash, gold coins, luxury watches, guns, shares of stock in privately-held companies, a promissory note, a vehicle, and a house.⁶⁵ Some of these assets were discovered and collected through post-plea asset proffers wherein a defendant agreed, as part of his plea agreement, to be interviewed by federal agents for the purpose of identifying and tracing assets subject to criminal forfeiture.

This case is notable in that the government used criminal seizure authority to preserve directly-forfeitable property from being dissipated pending the criminal prosecution. In addition, the government was able to locate and forfeit additional assets through use of post-plea asset proffers.

B. Western District of New York

The Western District of New York recently convicted Jason Osei Bonsu and Adams Amen for wire fraud related to a “romance scheme.”⁶⁶ In this scheme, individuals created fictitious accounts on a dating website (www.millionairematch.com) for the purposes of coaxing victims into sham romantic relationships.⁶⁷ One victim was lead to believe that she was in a relationship with a wealthy businessman.⁶⁸ After numerous communications, the criminal actor convinced the victim that he needed money for a business venture that involved the cocoa and timber trade. The victim was duped into sending \$718,000 to various bank accounts all over the world,

⁶³ *See id.*

⁶⁴ *See* Press Release, U.S. Dep’t of Justice, *supra* note 61.

⁶⁵ *See id.*

⁶⁶ *See* United States v. Jason Osei Bonsu, No. 17-cr-249 (W.D.N.Y. 2017); United States v. Adams Amen, No. 18-cr-008 (W.D.N.Y. 2018).

⁶⁷ *See* Press Release, U.S. Dep’t of Justice, Ghanaian Man Pleads Guilty to His Role in Internet Romance Fraud Scheme (Feb. 8, 2018).

⁶⁸ *See id.*

including in the United States, the United Kingdom, and Ghana. Several other elderly victims were duped in the same manner and sent over \$500,000 to various accounts.⁶⁹ The defendants' role in the scheme was to control bank accounts that received the victims' payments and send proceeds along to their co-conspirators, including some who resided abroad.

The defendants pled guilty to wire fraud.⁷⁰ As such, the applicable forfeiture statute mandates forfeiture of the proceeds of the offense. The government was able to identify and forfeit funds in various bank accounts (including one in the United Kingdom), several home entertainment systems, and numerous cell phones.

This case is notable in that it demonstrates how schemes often involve a rapid and complex flow of criminal proceeds through the financial system. In this case, the scheme involved numerous co-conspirators, some in the United States and some abroad, each who played a different role in the effort to separate victims from their monies. As is often the case, by the time the government was able to identify bank accounts used by the criminal actors, a significant amount of the criminal proceeds had already been dissipated. The government is currently in process of repatriating funds from the United Kingdom back to the United States to help the victims recoup some of their losses.

C. District of Minnesota

In 2015, the District of Minnesota convicted Sean Meadows related to a large scale Ponzi-scheme involving his financial planning and asset management firm.⁷¹ As part of his scheme, Meadows convinced his victims, who were largely working-class individuals, to remove monies from their retirement savings and turn them over to his firm for his management and investment.⁷² In reality, Meadows used the victim monies for his own personal use, including to pay credit card bills, to purchase vehicles, for travel, to gamble, and for adult entertainment.⁷³ One elderly victim who was diagnosed with lung

⁶⁹ *See id.*

⁷⁰ *See id.*

⁷¹ *See* United States v. Meadows, No. 14-cr-251, 2016 WL 3676172 (D. Minn. July 7, 2016).

⁷² *See* Press Release, U.S. Dep't of Justice, Sean Meadows Sentenced to 25 Years for Defrauding Investors of More than \$13 Million (June 26, 2015).

⁷³ *See id.*

cancer was deceived into transferring a \$200,000 life insurance annuity to the defendant's control, which deprived her of the use of the money for medical expenses. In total, the scheme caused approximately 100 victims to lose more than \$13 million.

The defendant pleaded guilty to mail fraud, wire fraud, and money laundering.⁷⁴ The applicable forfeiture statutes mandated forfeiture of proceeds (for the mail and wire fraud) and property involved in offense (for the money laundering offenses). Through its financial investigation, the government was able to identify directly-forfeitable property (including a house, a boat, and a luxury watch) and substitute assets (including additional houses, another luxury watch, and some cash).⁷⁵ In addition, the government obtained a more than \$10 million forfeiture money judgment.

This case is notable because the government did an excellent job of applying the financial investigation for forfeiture purposes. Although the defendant unfortunately did not appear to have left much for his victims, the government used its various tools to recover whatever it could.

V. Conclusion

Elder fraud schemes often involve victims who suffer catastrophic financial losses. Forfeiture is an important part of prosecuting these schemes because it not only penalizes criminal actors and takes the profit out of crime, it provides a mechanism for the government to recover criminal proceeds and compensate victims. Prosecutors should be mindful of the government's forfeiture options, including administrative, civil, and criminal forfeiture, and understand the different forfeiture authorities that could apply depending on how the scheme is charged. Finally, prosecutors should coordinate with the asset forfeiture experts in their office as early as possible in order to develop financial investigation for application to forfeiture.

About the Author

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⁷⁴ See *Meadows*, 2016 WL 3676172, at *1 (D. Minn. July 7, 2016).

⁷⁵ See Press Release, U.S. Dep't of Justice, *supra* note 72.

Complex Assets Unit of the Asset Forfeiture Division, United States
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Using Fraud and Scam Reports to Fight Fraud Affecting Older Consumers¹

Lois C. Greisman
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I. Introduction

As the nation's primary consumer protection agency, the Federal Trade Commission (FTC) has a broad mandate to protect consumers from unfair, deceptive, or fraudulent practices in the marketplace.² The FTC's anti-fraud program tracks down and stops some of the most pernicious frauds that prey on U.S. consumers, such as imposter scams, deceptive credit schemes, prize promotion fraud, and business opportunity scams. The FTC's focus on consumer fraud provides tremendous benefits to consumers and creates opportunities for

¹ The views expressed in this article are those of the author and do not necessarily reflect the views of the Commission or any individual Commissioner.

² See 15 U.S.C. § 41 *et seq.* (outlining the FTC's law enforcement responsibilities under the Federal Trade Commission Act); *see also Statutes Enforced or Administered by the Commission*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/statutes> (last visited Oct. 23, 2018) (outlining the other laws enforced or administered by the FTC, which range from the Telemarketing and Consumer Fraud and Abuse Prevention Act to the Fair Credit Reporting Act; Commission has enforcement and administrative responsibilities under more than 70 laws); *Protecting Older Consumers: 2017–2018: A Report of the Federal Trade Commission* 1 n.6 (Fed. Trade Comm'n Oct. 18, 2018) ("In fiscal year 2018 [FY18], the FTC filed 48 new complaints in federal district court and obtained 84 permanent injunctions and orders requiring defendants to pay more than \$226.8 million in consumer redress or disgorgement of ill-gotten gains. Defendants also were required to pay approximately \$40.5 million under three civil contempt orders. In addition, cases referred to DOJ resulted in 11 court judgments imposing civil penalties of approximately \$3.2 million. The FTC also issued 16 new administrative complaints and entered 20 administrative orders. During FY18, the FTC returned more than \$83.3 million to consumers, and sent an additional \$8.5 million to the U.S. Treasury.").

collaboration with criminal and civil law enforcement partners to increase the collective impact. The FTC's Criminal Liaison Unit works with federal and state criminal prosecutors to help bring more criminal consumer fraud cases, often building on facts exposed as the FTC develops its civil law enforcement actions.³

The FTC's law enforcement experience shows that older adults have been targeted or disproportionately affected by fraudsters in the context of certain deceptive schemes.⁴ For example, the FTC has seen scams targeting Medicare recipients;⁵ a robocall interest rate reduction scheme touting a purported special government program for senior citizens;⁶ and advertising claims for brain training programs that allegedly combat cognitive impairment associated with aging.⁷ Further, as described below, older adults report some of the highest dollar losses related to certain types of fraud.

According to U.S. Census Bureau projections, by 2030 more than 20% of U.S. residents will be over age 65, compared to 13% in 2010, and 9.8% in 1970.⁸ The baby boomer generation, which is driving the growth of the older population, is expected to live longer than earlier generations of older adults but have a more challenging economic situation.⁹ As the population of older Americans grows rapidly, the government's efforts to bring law enforcement action against scams

³ See *Criminal Liaison Unit*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/criminal-liaison-unit> (describing the FTC's Criminal Liaison Unit) (last visited Oct. 23, 2018).

⁴ For purposes of this article, the terms "older adult," "older consumer," "senior," and "elderly" refer to persons 60 and older.

⁵ *Federal Trade Comm'n v. Sun Bright Ventures LLC*, No. 14-CV-02153-JDW-EAJ (M.D. Fla. 2014).

⁶ *Federal Trade Comm'n v. Life Mgmt. Servs. of Orange County, LLC*, No. 6:16-cv-982-Orl-41TBS (M.D. Fla. 2016).

⁷ *Federal Trade Comm'n v. LearningRx Franchise Corp.*, No. 16-cv-01159-RM (D. Colo. 2016).

⁸ Sandra L. Colby & Jennifer M. Ortman, *Projections of the Size and Composition of the U.S. Population: 2014 to 2060* 1 (U.S. Dep't of Commerce, U.S. Census Bureau Mar. 2015).

⁹ See Marguerite "Marti" DeLiema, Comments at the FTC Workshop on The Changing Consumer Demographics at the Federal Trade Commission 19–20 (Dec. 6, 2016) (discussing the changes in life expectancy, the increased time spent in retirement, and the lack of financial safety net for many people later in life).

that affect them, as well as provide useful consumer advice, become increasingly vital.

The FTC's last fraud survey found that 10.8% of adults in the United States—an estimated 25.6 million people—were victims of one or more of the frauds included in the survey.¹⁰ That same research demonstrated that, contrary to popular thinking, older Americans are not necessarily defrauded at higher rates than younger consumers for the surveyed frauds.¹¹ Nevertheless, certain types of scams are more likely to affect certain groups. For example, older adults in the survey (ranging in age from 55–74) were more likely to be victims of fraudulent prize promotions than were younger consumers.¹²

The ubiquity of consumer scams and the reality of limited resources demand that law enforcers target their efforts strategically. A key source for information in developing effective strategies to fight fraud affecting consumers of all ages is consumer report data. This article provides information about the FTC's consumer report database, Consumer Sentinel Network (Consumer Sentinel), including information about new features available for law enforcement and the public. The article also shares new analysis of trends in fraud reports from older consumers, and describes how this data compares to reports from younger consumers. Finally, the article summarizes efforts the FTC makes through its Criminal Liaison Unit (CLU) to refer cases for prosecution when evidence of possible criminal conduct surfaces in civil cases. And, it highlights the Consumer Sentinel Network's CLU Library, which provides information on how to access key charging documents from prior law enforcement actions. The goal is to provide useful context to prosecutors working to combat fraud affecting older consumers and make you aware of tools that can assist in this critical mission.

¹⁰ Keith B. Anderson, *Consumer Fraud in the United States, 2011: The Third FTC Survey* 17, 56–59 (Fed. Trade Comm'n Apr. 2013).

¹¹ *See id.* at 56–59.

¹² *Id.* at 58.

II. Consumer Sentinel Network

The FTC collects and analyzes consumer report information through Consumer Sentinel to inform its consumer protection mission.¹³

Consumer Sentinel is a secure online database of 16 million consumer complaint records that provides federal, state, and local law enforcement agencies with access to details



Emblem of the Consumer Sentinel Network

that consumers report about frauds, identity theft, and other consumer protection problems they have encountered. Consumer Sentinel is a free tool available to law enforcement users to enhance their investigation capabilities, make their work more efficient, and enable them to identify trends.¹⁴ Members of the law enforcement community who are interested in gaining access to Consumer Sentinel can go to www.ftc.gov/enforcement/consumer-sentinel-network and follow the steps to set up a secure account. Consumer Sentinel is easily accessible through a secure web-based portal protected with IP address restriction and two-factor authentication.

Currently, more than 2,500 law enforcement users across federal, state, and local agencies use Consumer Sentinel.¹⁵ The records in Consumer Sentinel come from consumers who have reported to the FTC, or any of the 42 data contributors who share complaints with Consumer Sentinel.¹⁶ Among the data contributors are various federal and state agencies, the AARP Fraud Watch Network, the Council for Better Business Bureaus, Microsoft Corporation, and many others.¹⁷ Through this system, law enforcement agencies have immediate

¹³ See *Consumer Sentinel Network*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/consumer-sentinel-network> (last visited Oct. 23, 2018).

¹⁴ See *id.*

¹⁵ See *Consumer Sentinel Network Members*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/consumer-sentinel-network/members> (last visited Oct. 23, 2018).

¹⁶ See *Consumer Sentinel Network Data Contributors*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/consumer-sentinel-network/data-contributors> (last visited Oct. 23, 2018).

¹⁷ *Id.*

access to reports about fraud happening in their small towns or large cities across the country.

While Consumer Sentinel's value is enhanced by a broad intake of millions of consumer complaints, its power is in the tools that drill into the details of these reports. It is a system that is designed for law enforcement to be able to identify targets, locate witnesses, monitor top complaint subjects—and to do so within relevant geographic jurisdictions.

In 2017, the FTC, working in close collaboration with the Department of Justice, deployed substantial enhancements to Consumer Sentinel to make it even more effective, including:

- A new Spotlights feature that enables users to set up one or more personalized search settings to meet their investigative needs. With this feature, the CSN system proactively monitors and analyzes relevant consumer reports and provides corresponding results through interactive data visualizations, drill down maps, and word clouds. With this tool, users can select complaints filed by consumers who have identified as older than 60, and can select geographical areas or particular complaint types to monitor.
- A natural language processing tool to offer an interactive consumer word or phrase cloud that provides users the essence of a set of consumer complaints without having to manually read each and every complaint narrative.
- A graph analytics feature, allowing users to quickly make connections between complaints about entities obfuscating their identities by identifying important commonalities, like operations using the same phone number, or URL, or email address.¹⁸

In addition to the investigative enhancements referenced above, which are available only to law enforcement users, the FTC recently launched a public platform to publish aggregate statistics about

¹⁸ See *Consumer Sentinel Network*, Network News: Autumn 2017, FED. TRADE COMM'N, <https://content.govdelivery.com/accounts/USFTC/bulletins/1c86746> (last visited Oct. 30, 2018).

consumer complaints on a quarterly basis.¹⁹ By visiting www.ftc.gov/data, the public can view and interact with graphs and charts that reveal top facts about various frauds, a state-by-state analysis, dollars lost to fraud by various age groups, and other statistics.²⁰ And unlike the record-level data that is restricted to law enforcement on Consumer Sentinel, the aggregated statistical information on the public platform can be used for consumer education or outreach presentations.²¹

The FTC also created a new report for the public, the Data Spotlight, to identify interesting changes in the data.²² For example, the FTC's recent Data Spotlight highlights the rising number of fraud reports in which scammers demanded gift cards as payment.²³ Analysis of the reports since 2015 demonstrated a 270% increase in the percentage of fraud reports indicating gift cards were used to pay scammers.²⁴ That same report shows that gift cards are now the number one method of payment for imposter scams.²⁵

Of great relevance to law enforcement working to combat fraud affecting older consumers, Consumer Sentinel can parse consumer report data by the age of the submitter, allowing the user to identify reports filed by older consumers.²⁶ The remaining portion of this article provides an in-depth analysis of the 2017 complaint reports received from consumers who reported their age as 60 or older. This information was recently included in a comprehensive report, which

¹⁹ See *Data and Visualizations*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/data-visualizations> (last visited Oct. 23, 2018).

²⁰ See *id.*

²¹ See *FTC is Making Consumer Complaint Data More Accessible*, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/press-releases/2018/10/ftc-making-consumer-complaint-data-more-accessible> (last visited Oct. 23, 2018).

²² See *Consumer Protection Data Spotlight, Scammers Increasingly Demand Payment by Gift Card*, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/blogs/data-spotlight/2018/10/scammers-increasingly-demand-payment-gift-card> (last visited Oct. 23, 2018).

²³ See *id.*

²⁴ *Id.*

²⁵ See *id.*

²⁶ See *Data and Visualizations*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/data-visualizations> (last visited Oct. 23, 2018).

outlined the FTC's research, law enforcement, and education efforts aimed at protecting older Americans.²⁷

From Consumer Sentinel Network to Guilty Pleas

On September 5, 2018, five defendants pleaded guilty to conspiracies to commit mail fraud and money laundering for their roles in a multi-million dollar sweepstakes scam that targeted the elderly. Ruben Fernandez, an agent with ICE Homeland Security Investigations, reports that early on in the relevant investigation he conducted searches on the Consumer Sentinel Network, which allowed him to identify victims, establish an interstate nexus, get a sense of the nature and scope of the fraud, and obtain contact information for follow-up interviews. This investigation ultimately uncovered, in the words of United States Attorney Byung J. "BJay" Pak, that the "defendants stole the life savings of dozens of elderly victims." All five defendants were scheduled to be sentenced in November. Assistant United States Attorneys Kelly K. Connors and Cassandra J. Schansman in the Northern District of Georgia are prosecuting the case.

III. Analysis of Consumer Sentinel fraud reports from older adults²⁸

During 2017, Consumer Sentinel received nearly 2.7 million reports from consumers and its data contributors.²⁹ Of the 2.7 million, approximately 1.1 million were fraud reports, 371,000 were identity theft reports, and 1.2 million were "other" reports.³⁰ Of the 1,138,306 total fraud reports in 2017, 49% included consumer age information.³¹ Analysis of the consumer reports filed by those indicating their age provides insights into the issues facing older consumers.

²⁷ *Protecting Older Consumers*, *supra* note 2.

²⁸ All of the data and figures in the following section were taken from the FTC's Report to Congress. *See Protecting Older Consumers*, *supra* note 2.

²⁹ *Consumer Sentinel Network: Data Book 2017 3* (Fed. Trade Comm'n Mar. 2018) (Consumer Sentinel data is self-reported, not a survey. The reports are unverified, and as noted, not all consumers provide information about their age, payment method, amount of dollar loss, etc.).

³⁰ *Id.*

³¹ *Id.* at 13.

A. The number of reports and the amount of money lost by older adults

Consumer Sentinel data suggests that older adults are good at reporting frauds they encounter. In 2017, older adults were more likely to report fraud to Consumer Sentinel than younger people, and in those reports, indicated less frequently that they had lost money. But as detailed below, while consumers age 20–59 more frequently report losing money in their complaints, older adults reported much higher dollar losses, individually, than younger consumers.

To compare Consumer Sentinel fraud reports filed by seniors and younger consumers, it is helpful to look at the data for the age groups relative to the population size by age. This report refers to this practice as having “normalized” the data, using population numbers obtained from the U.S. Census Bureau.³² Figure 1 shows the number of reports filed per million consumers in each age group.³³ The yellow line shows the average rate of reports.³⁴ All three age brackets of older adults (those age 60 and older) filed reports at a higher rate than younger age groups. In fact, consumers in their 60s filed reports at almost twice the rate of those in their 20s—those age 60–69 filed

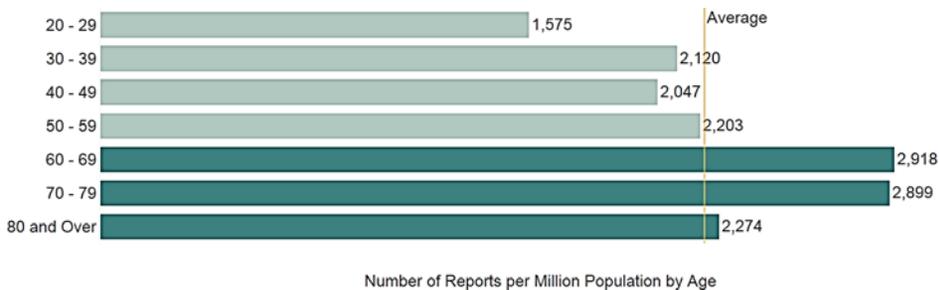


Figure 1: Consumer Fraud Reports Per Million by Age

³² See *National Population by Characteristics: 2010–2017, Annual Estimates of the Resident Population for Selected Age Groups by Sex for the United States, States, Counties and Puerto Rico Commonwealth and Municípios* (U.S. Census Bureau June 2018).

³³ Data normalized with age group population data from the U.S. Census Bureau, including reports where no money was reported lost as well as reports with a loss.

³⁴ Average line calculated based on the total number of reports filed by people age 20 and over and the total population age 20 and over.

about 3,000 reports per million people, as compared to about 1,500 for those age 20–29.

As the 2017 Consumer Sentinel data in Figure 2³⁵ below shows, when younger people reported fraud, they were far more likely than older adults to report losing money. Figure 2 shows the contrast between seniors and younger people in the percentage of reports that indicated a monetary loss.³⁶ When consumers ages 20–29 filed reports, they were more than twice as likely as seniors to indicate a monetary loss. In fact, those in their twenties reported losing money 40% of the time, while those age 60 and older indicated a monetary loss just 18–20% of the time.

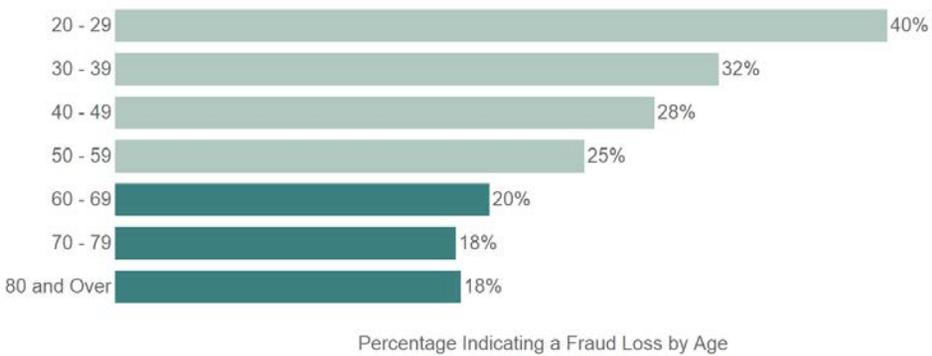


Figure 2: Percentage of Reports Indicating a Monetary Loss by Age

The Consumer Sentinel data does not explain why older adults are more likely to report fraud. Seniors may be targeted more by fraudsters, be more knowledgeable about where to report, be more interested and willing to help fight fraud, or there may be some combination of these or other factors driving their relatively high reporting activity. Further, while the data suggest that older consumers are less likely to report having lost money when exposed to fraudulent offers than younger consumers, younger consumers may also be more inclined to file fraud reports only in instances where they suffered a financial loss. Notably, the FTC’s fraud survey also found that the rates of victimization for the various categories of frauds

³⁵ See *Consumer Sentinel Network: Data Book 2017*, *supra* note 27, at 13.

³⁶ Percentages calculated based on the number of fraud reports indicating a monetary loss in each age group divided by the total number of fraud reports filed by the age group.

included in the survey were generally lower for those 65 and older than for younger consumers.³⁷ Whatever the cause, the FTC remains concerned about fraud victimization across all age groups and appreciates the contributions from older consumers in reporting fraud.

None of this suggests that older consumers need fewer protections. To the contrary, the Consumer Sentinel data shows significant individual financial losses reported by older consumers, particularly those age 80 and older. In 2017, the largest individual losses to fraud were reported by older consumers. Figure 3³⁸ shows that when a monetary loss was reported, people age 60 and older reported much higher median losses than the younger age groups.³⁹ In fact, consumers age 80 and older report the largest median losses of \$1,100, over twice the median loss amount reported by each of the age groups under age 60.

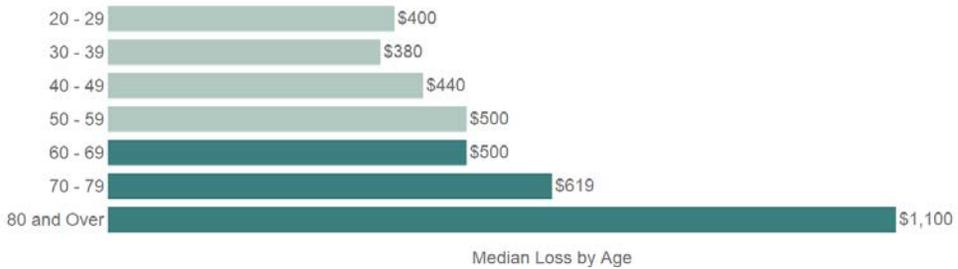


Figure 3: Median Individual Monetary Loss Reported by Age

Many possible explanations could account for the reported difference in the dollar loss between those age 80–plus and younger consumers. Factors, such as the fact that some older adults may have access to more assets through retirement accounts or home equity,⁴⁰ or even access to regular social security or pension benefit payments, could explain some of the monetary loss differences. Other factors, such as instances where older adults have less social support than younger adults, or the onset of cognitive decline diseases, could account for

³⁷ See Anderson, *supra* note 10, at 56–59.

³⁸ See *Consumer Sentinel Network: Data Book 2017*, *supra* note 27, at 13.

³⁹ Median losses calculated based on reports in each age group indicating a monetary loss of \$1 to \$999,999.

⁴⁰ Jesse Bricker, et al., *Changes in U.S. Family Finances from 2013 to 2016: Evidence from the Survey of Consumer Finances*, 103 FED. RES. BULL. 1, 13 (Sept. 2017).

some differences between younger consumers and those 80 years and older. As discussed below, however, the disparity may also be explained in part by generally higher median losses by all ages to the fraud types seniors report more frequently.

B. The top fraud types, methods of contact, and payment methods reported by older adults

The 2017 reports to Consumer Sentinel show that seniors are more likely than younger people to report financial losses to certain types of schemes, such as technical support scams, prizes/sweepstakes/lottery scams, family and friend imposter frauds, and real estate and timeshare resale offers. Figure 4 illustrates the number of reports for various types of frauds in which consumers indicated they lost money.⁴¹ The dark teal bar represents loss reports filed by consumers over age 60, while the narrow light green bar represents loss reports filed by consumers age 20–59. For comparison purposes, the data has been normalized to show the number of reports with a loss per million people in each age group. Figure 4 illustrates that seniors were about five times more likely to report losing money to tech support scams than younger consumers. However, seniors were *less* likely than younger people to report losing money to shop-at-home or catalog sales and frauds such as government imposter scams, counterfeit checks, and others. Interestingly, younger consumers and older consumers filed complaints about losing money to romance scams at about the same rate. This data helps the FTC and other law enforcement agencies identify the types of scams causing the greatest harm to consumers over age 60, which in turn helps the agencies focus their enforcement efforts and consumer education initiatives.

⁴¹ Data normalized with age group population data from the U.S. Census Bureau. For a detailed description of each of these fraud types see Appendix B to *Protecting Older Consumers—2017–2018—A Report of the Federal Trade Commission* (Fed. Trade Comm’n Oct. 18, 2018).

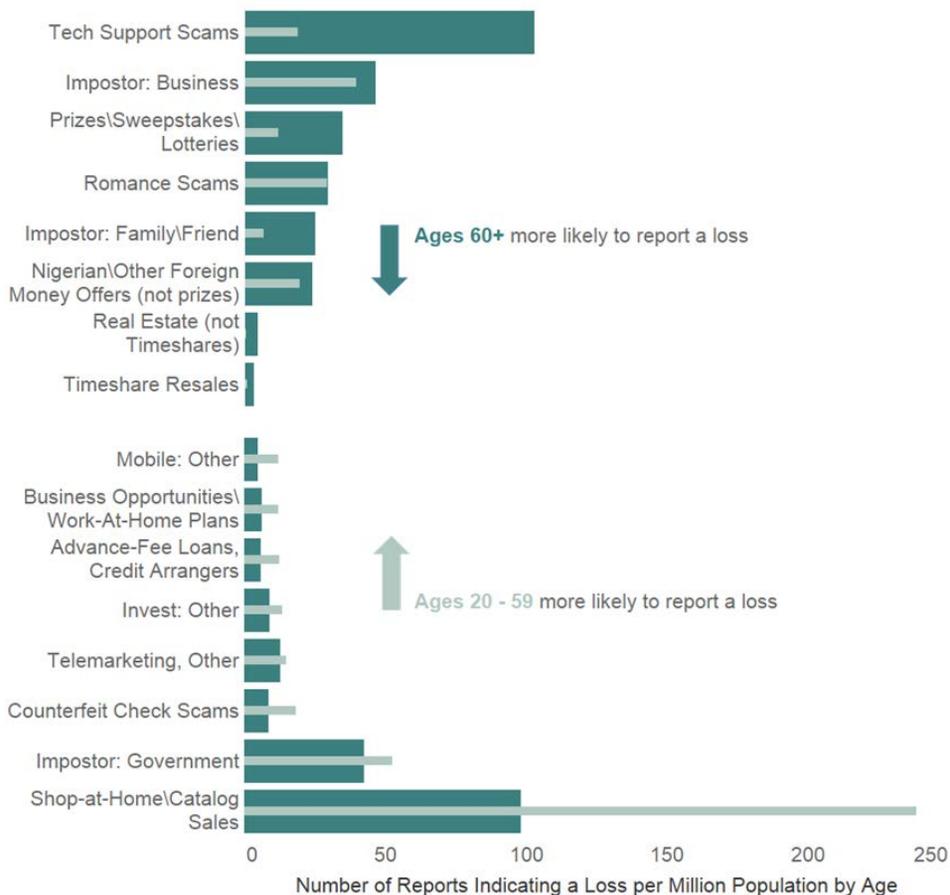


Figure 4: Loss Reports by Age and Type

Median losses reported to Consumer Sentinel vary considerably by fraud type. Higher median losses reported by seniors may be partially explained by differences in the types of fraud they experienced. For example, median losses to scams such as real estate and timeshare resale—both of which disproportionately harm seniors—are among the highest median dollar losses reported in Consumer Sentinel. In contrast, median losses to shop-at-home offers, which are heavily reported by younger people, are among the lowest median dollar losses reported. But, even when median losses are compared by age and fraud type, seniors report higher losses for most frauds tracked in Sentinel. For example, the median reported loss to

prizes/sweepstakes/lottery scams is \$1,300 for seniors age 60 and over, but only \$431 for younger people.

Telephone scammers are a tremendous problem for consumers of all ages. People age 60 and older who reported a fraud loss reported that the phone was the top method of contact by the scammers. In addition, as outlined in Figure 5, the 2017 Consumer Sentinel data shows that seniors reported far greater median losses to phone scams than their younger counterparts.⁴² The dark teal line on Figure 5 represents the median dollar loss seniors reported in the fraud complaints where they identified a method of contact, while the light green bar represents the median dollar loss reported by consumers younger than 60.

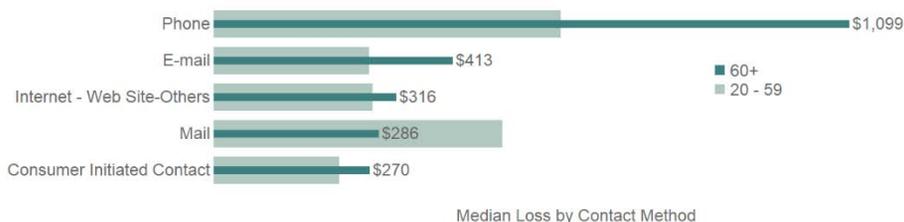


Figure 5: Median Loss Reports by Age and Method of Contact

Reports in Consumer Sentinel can also include information about the method of payment. The first column in Figure 6⁴³ shows that seniors most often reported paying money to a fraud with a credit card, wire transfer, or gift card/reload card (prepaid card).⁴⁴ The second column of Figure 6 shows the aggregate dollar losses seniors

⁴² Median losses calculated based on reports in each age group indicating a loss of \$1 or more.

⁴³ The total 2017 fraud loss reported by consumers age 60 and older (including reports to the FTC and all data contributors) was \$252 million. Wire transfer companies MoneyGram International and Western Union, and prepaid card provider Green Dot, contribute a significant number of reports to Sentinel each year. To avoid distorting the number of complaints reporting certain payment methods, Figure 6 excludes data provided by data contributors.

⁴⁴ For the purposes of this report, gift cards and cards that can be used to reload funds, such as MoneyPak, are referred to as prepaid cards.

reported for the top five payment methods.⁴⁵ In 2017, people age 60 and older paid \$104 million via wire transfer to fraudulent schemes, far surpassing the amounts they reported paying through any other payment method. Again, this data helps law enforcers identify areas where attention is warranted, as the FTC’s recent action against Western Union shows.⁴⁶

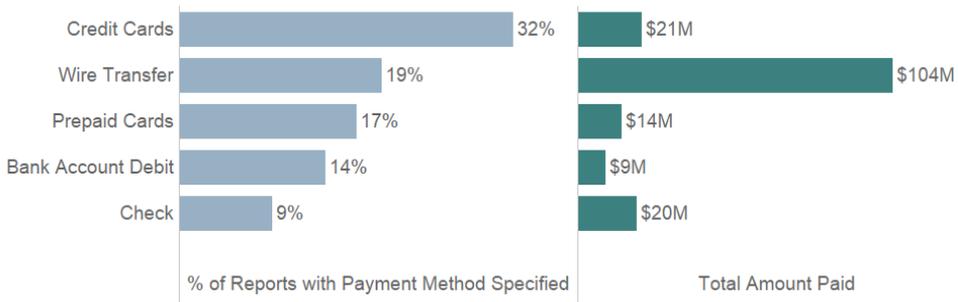


Figure 6: Top Payment Methods and Total Amount Paid (Age 60 and Over)

III. FTC’s Criminal Liaison Unit

In 2003, the FTC established a CLU to help build and strengthen the agency’s alliances with criminal law enforcement partners. One function of the CLU is to refer cases for prosecution when evidence of possible criminal conduct, such as fraud, surfaces during the course of FTC investigations or litigation.⁴⁷ Through FY 2018, prosecutors have

⁴⁵ See *Consumer Sentinel Network: Data Book 2017*, *supra* note 27, at 11 (outlining the top reported payment methods for all fraud reports in 2017 as wire transfer, credit cards, prepaid cards, bank account debit, and internet/mobile).

⁴⁶ See *Federal Trade Comm’n v. The Western Union Co.*, No. 1:17-cv-00110-CCC (M.D. Pa. 2017).

⁴⁷ See 15 U.S.C. § 46(k) (“Whenever the [FTC] obtains evidence that any person, partnership, or corporation, either domestic or foreign, has engaged in conduct that may constitute a violation of Federal criminal law, [the FTC shall have the power] to transmit such evidence to the Attorney General, who may institute criminal proceedings under appropriate statutes.”); 15 U.S.C. § 57b-2(b)(6) (granting authority for the FTC to share information with law enforcement agencies upon appropriate written request by the agency); 16 C.F.R. §§ 4.10–4.11 (setting forth procedures for sharing information with law enforcement).

relied on FTC information and support to charge 1,039 defendants, including those involved in numerous scams that targeted or victimized older Americans.⁴⁸ In FY 2018 alone, prosecutors relied on FTC information and support to charge 28 new defendants, obtain 52 pleas or convictions in new or pending cases, and obtain sentences against 80 individuals in new or pending cases.⁴⁹ Prosecutors obtained substantial sentences, often reflecting the enormous economic harm done by fraudsters. In FY 2018, for example, 12 defendants were sentenced to ten years or more, and the average sentence was 58 months.⁵⁰

The Consumer Sentinel Network includes a tool called the CLU Library that provides information on how to access key charging documents filed in criminal prosecutions that relied on FTC information and support. The CLU library also provides contact information for the FTC's CLU Chief, who can serve as an additional resource and liaison between the FTC and criminal law enforcers.

⁴⁸ See, e.g., *United States v. Lovisa et al.*, No. 2:18-cr-349 (E.D.N.Y. July 10, 2018), *United States v. McNeill et al.*, No. 4:16-cr-0466 (E.D. Mo. Oct. 19, 2016), *Arizona v. Rose et al.*, No. CR2016-002145 (Ariz. Super. Ct. May 17, 2016).

⁴⁹ See *Criminal Liaison Unit Results*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/criminal-liaison-unit/results> (last visited Oct. 23, 2018).

⁵⁰ See *Criminal Liaison Unit Results*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/criminal-liaison-unit/results> (last visited Oct. 23, 2018).

IV. Conclusion

Data from the Consumer Sentinel Network highlights the enormity and complexity of the risks facing older consumers in this country. Yet, the data can also play a key role in refining agencies' strategies about how to use limited resources to protect the growing population of older adults in the years ahead. Finally, the same data is a critical tool as law enforcers investigate and file both civil and criminal actions to stop fraud. If you are a member of a federal, state, or local law enforcement agency and are not already a member of Consumer Sentinel, please join us by visiting <https://www.ftc.gov/enforcement/consumer-sentinel-network>.

About the Author

Lois C. Greisman heads the Division of Marketing Practices in the FTC's Bureau of Consumer Protection. Marketing Practices leads the FTC's law enforcement initiatives tackling telemarketing fraud (including Do Not Call/Robocall enforcement), fraudulent business and investment opportunity schemes (including multi-level marketing), mail fraud (including sweepstakes and lotteries), illegal spam, and internet frauds (including technical support scams). Ms. Greisman also directs the FTC's work to curb fraud in connection with different payment systems. She has testified before Congress on behalf of the FTC in the areas of illegal robocalls, investment scams, fraud against seniors, and patent trolls. Ms. Greisman serves as the FTC's Elder Justice Coordinator.

Before joining Marketing Practices, Ms. Greisman headed the Division of Planning and Information, where she managed the FTC's Identity Theft Program, the Consumer Response Center, and also supervised implementation of the National Do Not Call Registry. Previously, Ms. Greisman served as Chief of Staff to FTC Chairman Timothy J. Muris. She also served as Attorney Advisor to Chairman Robert Pitofsky and Chairman Janet D. Steiger. Ms. Greisman received her bachelor's degree from Brown University and her law degree from George Washington University.

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Money Mules: Stopping Older Adults and Others from Participating in International Crime Schemes

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I. What is a money mule and how do scammers use them?

Dear [VICTIM 1], tell your bank that [COCONSPIRATOR NAME] is a business associate of yours and that the money you sent to her is to purchase some items and send on your behalf to your native country. Tell the bank everything is fine. I don't want you to reveal the main reason for sending the money to the bank at this stage for security and confidentiality purposes. The bank is delaying the process, which could hurt your business. Regards, Timothy.

That language was found in the online chat history between two fraudsters. It was a script one fraudster wrote for another to send to an unwitting “money mule” or “catcher” of funds from a fraud. Timothy—not his real name—then sent an email containing that language to Victim 1, instructing her to lie to her bank. “Timothy’s” goal was for the bank to allow the money Victim 1 had received from another fraud victim—in a separate con—to be sent to a coconspirator abroad. “Timothy” and his coconspirators were using Victim 1 as a money mule, someone who receives victim funds in the United States and then forwards them on to a scammer located in the U.S. or abroad.

Foreign scammers often use U.S.-based money mules to knowingly or unwittingly receive funds from U.S. victims because victims are more likely to send money to a recipient in the United States as opposed to a foreign location. There are other advantages to money mules. In some cases, they can be used to collect and bundle scam proceeds from multiple victims, allowing the scammers to place a buffer between themselves and the victims, and making it harder for law enforcement to track down the most culpable participants in the scheme. The bundling efforts by the money mules also simplify transfers of funds abroad. For example, instead of 50 separate \$1,000 transfers, the money mule can send one \$50,000 wire transfer to an international scammer, disguising the wire transfer as a business payment to a fake foreign business bank account controlled by the scammer.

In addition to working with money transfers, money mules are often bundlers of counterfeit instruments. Scammers use “mules” or “bundlers” in the United States to receive bulk quantities of counterfeit monetary instruments that are created abroad. The mules then send the counterfeit instruments to multiple intended victims in mass mailings. Many fraud schemes (such as lotteries, work-at-home, and “secret shopper” schemes) involve the use of a counterfeit monetary instrument. A victim receives a fraudulent instrument and is induced to send genuine currency, a wire transfer, or a genuine monetary instrument of lesser value in return. By the time the victim realizes the monetary instrument he or she received is counterfeit, it is too late—the victim has already sent his or her own real money to the scammer.

Money mules may also become re-shippers or re-packagers. In those situations, scammers give the money mule’s U.S.-location home address to multiple victims who have been fraudulently induced to send goods to a scammer. The money mule (intentionally or unwittingly) then bundles together the goods received from victims and repackages them for international shipment to the foreign scammer. For example, some scam victims believe they are working an “at-home” job purchasing consumer electronics and shipping them to their “boss” in the United States. The shipping address is, in reality, the money mule’s U.S. address. The foreign scammers ask the scam victims to buy the goods with their own funds and pay the victims with counterfeit money orders or checks. Alternatively, scammers provide the victims with stolen credit cards to purchase the

electronics and to pay for shipment to the money mule's address. The goods are sent from multiple scam victims to the money mule, who receives the items and then repackages them for international shipment.

Those are just some of the ways that money mules are used by scammers. Scammers continue to innovate new uses for money mules. They become a human instrument, a U.S.-based tool used to perpetrate the foreign scammer's crimes. In extreme cases, older adult victims of fraud schemes have even become drug mules.

[The criminals] trick the individual into traveling overseas under a pretense, such as collecting money that has been won in a "lottery" or recovering important documents in person. The criminals cover the cost of international travel for their victim . . . [and] require the senior to . . . carry a package or suitcase with him. Unbeknownst to the senior, these packages have drugs carefully hidden inside. At least 145 victims, mainly seniors, have been arrested overseas because they have been found carrying illegal drugs.¹

II. Scope of the problem

Law enforcement officers on the federal level frequently come into contact with money mules when investigating large-scale fraud cases and when reviewing reports from financial institutions that notice money mule activity. State and local investigators encounter money mules when investigating fraud complaints by local victims, only to discover that their victim sent money across the United States to a "mule" located in a different jurisdiction. Scammers may have the same victim send money to multiple money mules, each located in a different jurisdiction. Gathering such far-flung evidence becomes difficult for federal authorities and nearly impossible for state and local investigators.

Compounding those difficult problems, a significant portion of money mules are older adults. As noted above, sometimes the money

¹ See Press Release, U.S. Senate Special Comm. on Aging, Senate Aging Committee and Department of Homeland Security Unveil New Scam Perpetrated Against our Nation's Seniors: How Global Drug Traffickers Are Deceiving Seniors to Unknowingly Smuggle Drugs Across International Borders (Feb. 10, 2016).

mule began as a scam victim, but when the scammer tapped the victim's resources dry, the scammer will find another way to put the victim to work as a money mule. These older adult money mules may be unwittingly assisting the scammers to rip off other older adult victims. In practice, investigators and victim specialists say that in these scenarios, it becomes very difficult for a family member or law enforcement to convince the money mule to stop working for the scammer.

Money mules are in every state and can be used to move funds from every type of scam, including lottery/sweepstakes scams and business email compromise scams.

A. Lottery/sweepstakes scams

These mass-marketing schemes targeted at older adults have flourished for decades. Typically, scammers claim that a potential victim has won a large prize, but has to first pay fictitious taxes, armored car fees, customs duties, or lawyer's fees before the prize can be paid. More recently, these schemes employ money mules to funnel the bogus taxes and fees from victims to the scammers. For example, after scammers have already convinced Victim 1 to send her own funds to the scammers for the bogus taxes or fees, the scammers sometimes convert Victim 1 into a mule by claiming that other people will be sending Victim 1 money because they are "sponsoring" Victim 1 by helping Victim 1 pay her remaining fees. In fact, the "sponsors" are other victims of the same or other schemes, who are sending their own fraudulently induced payments to Victim 1, whereupon Victim 1 then forwards that money to the scammers. This technique allows the scammers to continue to exploit the relationship they established with Victim 1, even after Victim 1 is no longer able or willing to send the scammers her own funds.

B. Business Email Compromise (BEC)

BEC scams, which have emerged as a devastating cyber threat employed by transnational criminal organizations, have caused *billions* of dollars in losses and are growing in scope and sophistication.² BEC scams generally target businesses, both large

² See Public Service Announcement, Fed. Bureau of Investigation, Business E-mail Compromise: The 12 Billion Dollar Scam (July 12, 2018) [hereinafter 12 Billion Dollar Scam]. For further background and description of BEC

and small, that regularly perform wire transfer payments. In the typical BEC scam, fraudsters compromise legitimate business email accounts through social engineering (such as email “spoofing”) or computer intrusion (such as a phishing email with a malicious link) to trick companies into conducting unauthorized transfers of funds. For example, a spoofed email impersonating a high-ranking official of the victim company (such as the CEO) is sent by the fraudsters to another employee of the company (such as the CFO), instructing that a large payment be wired for a legitimate business purpose into a specified bank account. The bank account, unbeknownst to the CFO or victim company, belongs either to one of the scammers or to a money mule who may be unaware that he or she is receiving stolen funds into their bank account. BEC scams may also involve requests for checks rather than wire transfers. A variant of BEC, referred to as Email Account Compromise (EAC), exploits individual victims, such as real estate purchasers, older adults, and others, by using similar methods to convince victims to make wire transfers to bank accounts controlled by criminals or money mules. The FBI recently reported that BEC/EAC fraud is increasingly targeting the real estate industry, in which victims involved in real estate transactions receive a spoofed email appearing to be from another participant in the transaction and with instructions directing the recipient to change the payment type and/or payment location to a fraudulent account.³

The role of money mules, witting or unwitting, in BEC/EAC schemes is very important—they are used to receive the stolen money and transfer the funds as directed by the fraudsters. The stolen money may be wired or sent by check for deposit into the money mule’s own bank account, or, the money mule may be directed to open new accounts to receive the money. The mule will then be given instructions on transferring the funds into a designated account, which may belong to another money mule. The BEC/EAC fraudsters often recruit and groom money mules through “work at home” and romance scams, described further below. Romance scam victims used for BEC/EAC schemes—frequently older adults—are particularly vulnerable to believing the elaborate false stories told by scammers

scams, *see* Public Service Announcement, Fed. Bureau of Investigation, Business E-mail Compromise E-mail Account Compromise The 5 Billion Dollar Scam (May 4, 2017).

³ *See id.*

posing as their online love interests as to why the money needs to be transferred through their bank accounts.

Recently reported data to the FBI's Internet Crime Complaint Center (IC3) shows that BEC scams resulted in, by far, the most reported losses to victims in 2017.⁴ In the authors' states, Texas and California, BEC scams resulted in \$53 million and \$106 million in loss, respectively.⁵ From October 2013 through May 2018, IC3 and international law enforcement data, along with financial filings, indicate that there was a total loss of more than \$12 billion from BEC/EAC fraud.⁶ Other reports and interviews with law enforcement indicate that most of those losses were laundered through money mules.

C. Romance scams

Potential victims are targeted through Facebook, popular Internet dating websites (including Match.com and Ourtime.com), and other online platforms by impostors who create fake online dating profiles and pretend to be successful men and women looking for romance. Through such "catfishing," the impostors cultivate online romantic relationships with the victims with the fraudulent aim of convincing the victims to send money to the impostors under false pretenses. Older adults, who may be lonely and unfamiliar with the risks of the Internet, are particularly vulnerable to these online romance scams.

Once trust is firmly established, and sometimes even after depleting his or her assets due to the fraud, a romance scam victim may be converted into a money mule. For example, the impostor may ask the victim to do him the favor of receiving a wire transfer needed for an important business deal, and then sending the wired funds to an account (often overseas) designated by the impostor. The impostors often concoct elaborate false stories as to why they are unable to receive the funds themselves, such as having to work on an oil rig overseas without access to a bank. The impostors may even arrange for their "financial advisor" (a co-conspirator) to contact the victim and help coordinate the money transfer through the victim's bank account;

⁴ See FED. BUREAU OF INVESTIGATION, 2017 INTERNET CRIME REPORT 12 (2017).

⁵ See FED. BUREAU OF INVESTIGATION, 2017 IC3 TEXAS ANNUAL REPORT (2017); FED. BUREAU OF INVESTIGATION, 2017 IC3 CALIFORNIA ANNUAL REPORT (2017).

⁶ See 12 Billion Dollar Scam, *supra* note 2.

the advisor will also corroborate the impostor's false story. The funds, of course, were stolen from another victim, usually from a romance scam or a BEC scam. Some romance scam victim money mules have been convinced to "go into business" with their impostor partner, and have established corporate entities and corporate bank accounts to receive and send money at the behest of the impostor as part of their (fictitious) business arrangement.

In these scenarios, the fraudsters are exploiting romance scam victims to essentially create an unwitting mule network as their money laundering apparatus. Like mules in lottery fraud schemes, the extreme emotional manipulation used in romance scams allows the impostor to continue exploiting the relationship with the romance scam victim, even when the victim can no longer send his or her own funds, and thus perpetuating the BEC/EAC and other such fraud schemes.

D. Reshipping scams

These scams involve stolen goods rather than stolen money. The goods are often stolen through a variant of the BEC scam, in which the fraudsters use social engineering or email intrusion to trick businesses into sending expensive products to what the victim company believed was their legitimate customer's address. In reality, it may be the address of a money mule, who then re-ships the stolen goods as directed by the fraudster. These mules are often victims of other schemes, including romance scams, and may be convinced that the goods are part of the fraudsters' business. Once received, the mules reship the stolen goods to other mules or overseas, as directed by the fraudsters.

E. Work-at-home scams

Criminal organizations have targeted students and the unemployed with online postings, advertisements, or social media contacts offering work-at-home jobs as "money transfer agents," or similar alleged jobs. The nature of the business that the offering company will claim to conduct may vary, but what does not vary is that the job applicant has to use his or her bank account to move money. Europol has created

robust consumer education materials to warn potential money mules against participating in such schemes.⁷

III. Money mules: knowing, unknowing, or don't want to know?

Money mules can be fully participating coconspirators in schemes. One tactic used by knowing money mules is to open bank accounts under business names to both conceal their identity and to increase the maximum wire transfer amount banks will allow. Alternatively, fraudulent foreign passports in fake names are used to open bank accounts. All it takes is a small fee and one passport photo sent to the right forger and, within a short time period, a bogus foreign passport in a fake name with the money mule's photo on it arrives in the mail. While the passport may not be of high enough quality to travel internationally, it is often good enough to fool a bank employee. There have been recent cases of a single money mule utilizing eight fake passports to open 16 bank accounts at various financial institutions—all of which were used to receive fraud proceeds.

On the other hand, a money mule may not fully understand that they are participating in fraud. The money mule may be a victim of a romance scam or may believe he or she is legitimately working from home. In many instances, however, that belief is based on the money mule willfully blinding themselves to reality. A small dose of common sense would reveal that the money mule is not participating in a legitimate business. The signs are there if the money mule opens his or her eyes: strange instructions not consistent with legitimate business activity; constantly transferring money to West Africa without a credible reason; being paid to simply remove money from one bank account and place it into another; or being asked to deceive bank employees about the true purpose for sending money. Instead of using common sense, the money mule deceives him or herself, either out of amorous feelings in a romance scam or greed in a work-at-home scam, and continues to work for the fraudster.

Importantly, the level of a money mule's knowledge is often not static. A money mule may be able to legitimately claim ignorance when they first begin working for a scammer, but that claim strains

⁷ See *Money Muling*, EUROPOL, <https://www.europol.europa.eu/activities-services/public-awareness-and-prevention-guides/money-muling> (last visited July 30, 2018).

credulity after a money mule has had four bank accounts closed by the bank for suspicious activity.

IV. Addressing the problem

A. Knowing money mules

There is no easy way to stop scammers—especially scammers located abroad. Modern communication technology has made it easier than ever for foreign criminals to exploit vulnerable victims in the United States. One possible way to thwart the scammers' activities is to go after the flow of money to the scammers. After all, there is only one reason scammers spend hours crafting scripts to fool victims, like the one at the beginning of this piece, and why they hire forgers to make fake passports and counterfeit money orders: they want money.

How do we stop the scammers from getting the money? One way is to aggressively prosecute the knowing money mules who use fraudulent passports or business accounts to funnel money back to the scammers. It is a felony under 18 U.S.C. § 1543 to knowingly use a fraudulent passport.⁸ A person using a passport with their own picture in a fake name from a foreign country to open a U.S. bank account violates section 1543. Evidence of one fake foreign passport is often just the tip of the criminal iceberg. For example, although law enforcement may initially be alerted by a \$60,000 deposit into a bogus money mule account, search warrants and further investigation may reveal that the money mule has actually received \$800,000 of fraud proceeds in multiple bogus accounts under multiple false identities.

Another path to prosecution may be through 18 U.S.C. § 1956(h): Conspiracy to Commit Money Laundering.⁹ In many money mule cases, proving the underlying specified unlawful activity—wire fraud or mail fraud—is accomplished by locating the victims who sent the money to the bank accounts operated by the money mule. It may be straightforward to demonstrate that the transfer of funds was done for concealment purposes—either due to a fake passport, a fake business, or because a money mule acted as an intermediary. Often the difficult element to show is proving that the money mule knew that the funds were from some form of unlawful activity. In cases where fake business accounts or fake passports are used, the

⁸ 18 U.S.C. § 1543.

⁹ 18 U.S.C. § 1956(h).

circumstantial case of the defendant's mens rea can be rather strong. A search warrant executed on the money mule's phone or computer may produce additional evidence of the money mule's knowledge, which may support a money laundering prosecution, as well as provide leads to other co-conspirators.

Another potential violation committed by money mules is 18 U.S.C. § 1960: Unlicensed Money Transmittal Business.¹⁰ "Money transmitting" is defined in the statute to include transfers of "funds on behalf of the public by any and all means including but not limited to transfers within this country or to locations abroad by wire, check, draft, facsimile, or courier[.]"¹¹ If the money mule is receiving money from numerous sources they do not know and transferring that money to others without being licensed as a money transmitter, the money mule may be in violation of this statute.

Finally, in the case of chronic money mules who for whatever reason do not merit a criminal prosecution, pursuing an injunction against fraud pursuant to 18 U.S.C. § 1345 may be an option.¹² Violation of an injunction could be punishable by contempt.

B. Unknowing money mules: serve a warning letter

While aggressively prosecuting knowing money mules for the crimes described above may slow down the money network utilized by scammers, a large portion of scam funds flow through the hands of unknowing money mules or through money mules whose level of knowledge is not readily provable. One way to discourage unwitting money mules and awaken them to their peril is to personally serve them with a Money Mule Warning Letter. The text of a template warning letter similar to ones recommended to federal law enforcement officers in the authors' districts is appended to this article (See Appendix 1: Warning Letter at pp.110–11).¹³ When law enforcement officers encounter a victim who appears to be an unwitting mule, and where it does not appear that the person is already the subject of an ongoing investigation (after de-confliction

¹⁰ 18 U.S.C. § 1960.

¹¹ *Id.* § 1960(b)(2).

¹² 18 U.S.C. § 1345.

¹³ The authors recommend that agents and prosecutors in districts in which such letters are not already in use seek supervisory concurrence of the practice prior to serving their first warning letter.

through available law enforcement databases),¹⁴ the warning letter can be a useful tool to personally connect with the unwitting money mule and warn them of the danger they themselves may be in and the harm they have caused to other victims.

Serving the warning letter has three purposes. First and foremost, its aim is to stop the money mule from continuing to help the scammers. Second, if the money mule does not stop when warned the first time, the fact that a warning letter was served may provide evidence of knowledge and fraudulent intent showing that the person is a knowing, rather than unwitting, participant in a fraud scheme, which could assist in future prosecution of that person. Third, the agent may be able to gather important information about the scammer who is using the money mule while interviewing the money mule.

1. The warning letter as a specific deterrent

FBI Special Agents interviewed for this article who have had multiple contacts with money mules in connection with investigations of BEC and romance scams agree that a short and focused warning letter, coupled with an in-person visit from a law enforcement agent who explains how the money mule has been assisting criminals to victimize other people, can be an effective wake-up call to some unwitting money mules. To be effective, these agents agree that the warning letter should be specific enough to identify the kind of scam in which the money mule has participated, and to describe the role of a money mule in that kind of scam. For example, a letter to a person moving victim money in a tech support scam could state:

Information collected by [AGENCY] indicates that you have been sending money to [INSERT INDIVIDUAL RECIPIENT NAME OR BUSINESS NAME], and that this entity appears to be involved in a tech support scam. A tech support scam is a fraud scheme in which

¹⁴ The authors emphasize it is important to de-conflict before agents or officers propose to personally contact a money mule. The de-confliction process may reveal that the money mule is, or is suspected to be, a knowing mule and is already under investigation in another matter or connected to other cases, in which case the agents or officers responsible for that ongoing investigation should be contacted to discuss the appropriateness of contacting the money mule.

individuals convince victims to send money for a fake product or service that is falsely promised to remove computer viruses from the victims' computers. Victims of these scams are often elderly and vulnerable people.

The goal of such scams is to obtain money from victims fraudulently. In such scams, criminals falsely represent themselves as someone else in order to trick the victims into sending money to a pre-determined beneficiary bank account. The beneficiary bank account that receives the victim's money often belongs to individuals such as you.

Next, an effective letter should explicitly advise the money mule that they may be committing a crime. The key to the deterrence function of the letter and in-person contact with the money mule is to explain in layman's terms the money laundering implication of that particular money mule's activity. The agent serving the letter should explain the danger of continuing to work with or help the people the money mule has been helping, and the letter should reinforce this danger:

Knowingly facilitating or helping others perpetrate a fraud scheme is a crime. If you continue to aid the scheme and/or its operators by receiving or sending victim funds, you could be subject to a civil enforcement action or criminal prosecution. Moreover, if you continue receiving or sending victim funds and merely change your methods of transmitting those funds, you may be viewed as seeking to hide your involvement in the scheme and could face additional penalties under federal and/or state laws. Your receipt of this letter will be taken into consideration should you continue to be involved in the type of activities described above.

The authors recommend that the serving agent read the warning letter aloud to the money mule as part of the in-person contact. Finally, the money mule should be asked to voluntarily sign both the warning letter the agent leaves with the victim and a duplicate copy of the warning letter, which the serving agent should retain.

The deterrent effect of serving a warning letter in person and discussing the money mule's role in the fraud scheme varies from person to person, but these steps are somewhat likely to stop a truly

unwitting money mule from continuing their past behavior. If, however, the money mule is a romance scam victim, or a chronic victim of sweepstakes scams, or if the money mule appears resistant to the agent's message, the serving agent can enlist the agency's victim specialists (or other agency personnel who frequently interact with victims) to follow up with the money mule to reinforce the deterrence message of the in-person contact and to connect the person to appropriate services for crime victims in their local area. Indeed, when dealing with older adults involved as money mules, many agree that one-time interventions generally do not work, because it is all too easy for the scammers to reestablish contact with the chronic money mule after the service of the letter and try to convince the person that the agent was mistaken. Particularly in the case of older adult money mules, it is important to consider whether contacting the person's family members or local Adult Protective Services office to advise them of the problem may be appropriate to separate the person from the scammers.

2. The warning letter as the foundation for a future prosecution

A money mule who continues to help scammers transfer money after receiving a warning letter plus an in-person visit by an investigator who explains the person's role in money laundering should be considered as a candidate for prosecution, after weighing all relevant factors. But the service of the letter and the visit from the investigator will be of no help to later prosecutors and investigators if the visit and service are not documented. Accordingly, agents should document service of the letter and the in-person visit in accordance with that agency's practice for any interview report or contact (such as an FD-302). Documentation should include the following:

- Describe what the money mule was told about the scam in which he or she participated;
- Describe what the money mule was told about his or her role as part of the laundering of the proceeds of that scam;
- Indicate that a Warning Letter was personally served, the pertinent text of the letter, that the letter was read to the money mule, that the money mule appeared to understand the letter, and whether the person signed a copy or refused to sign;

- Include a copy of the signed (or unsigned) warning letter.

There could be some efficacy in utilizing existing law enforcement collaboration systems, such as the Law Enforcement Enterprise Portal,¹⁵ to provide an easy to use mechanism to track who has been served with a warning letter. This way, a local law enforcement officer in one jurisdiction who serves such a letter can contribute potentially key information to investigators of the same money mule in another state, or to a federal investigation involving that same money mule.

3. Furthering investigation into the scammers and money launderers

During the service of the money mule warning letter, law enforcement may be able to gather valuable information about the scammers and money launderers who exploit the money mules to further their criminal enterprises. The money mule may be able to provide important names, phone numbers, email addresses, cell phone messaging application names, foreign and domestic bank accounts, and even local coconspirators. Without interviewing the money mules, investigators will be hard-pressed to discover that information. And while that information may not be immediately useful in a local prosecution, if it were documented and made available for sharing by law enforcement, it could prove invaluable to another district or state with a related case. Note that in some cases it may be appropriate to seek and then execute a search warrant at a money mule's residence for financial records and electronic communications regarding the financial transactions.

V. Conclusion

Criminal networks are exploiting U.S. citizens, many of whom are older Americans, to launder the proceeds of their crimes. Investigators and prosecutors must take an active approach to the problem—waiting for it to disappear will not work. In an ever connected world, it will continue to be easier for cyber enabled thieves to reach across borders and defraud U.S. citizens. While prosecutors should pursue those thieves with all the tools in the prosecutorial toolbox, they must also attack the money laundering networks upon

¹⁵ See *Law Enforcement Enterprise Portal (LEEP)*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/services/cjis/leep> (last visited Oct. 28, 2018).

which these thieves rely. Part of that attack involves addressing the money mules in the United States through outreach, warning letters, and, where appropriate, prosecution.

About the Authors

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Appendix 1: Warning Letter

INSERT CONTACT INFO FOR
AGENCY SERVING THE
LETTER

HAND-DELIVERED

Dear Mr./Ms. [XXXXXXXX]:

Information collected by [INSERT AGENCY NAME] indicates that you have been sending money to a [INSERT INDIVIDUAL RECIPIENT NAME OR BUSINESS NAME], and that this entity appears to be involved in a [INSERT FRAUD OR SCAM TITLE THEN DESCRIPTION, SUCH AS: tech support scam. A tech support scam is a fraud scheme in which individuals convince victims to send money for a fake product or service that is falsely promised to remove computer viruses from the victims' computers.] Victims of these scams are often elderly and vulnerable people.

The goal of such scams is to obtain money from victims fraudulently. In such scams, criminals falsely represent themselves as someone else in order to trick the victims into sending money to a pre-determined beneficiary bank account. The beneficiary bank account that receives the victim's money often belongs to individuals such as you. This letter provides you with notice that you may be facilitating a fraud scheme by helping the scheme obtain money from victims. More information about fraudulent schemes can be found online at: <http://www.ic3.gov/crimeschemes.aspx>.

Knowingly facilitating or helping others perpetrate a fraud scheme is a crime. If you continue to aid the scheme and/or its operators by receiving or sending victim funds, you could be subject to a civil enforcement action or criminal prosecution. Moreover, if you continue receiving or sending victim funds and merely change your methods of transmitting those funds, you may be viewed as seeking to hide your involvement in the scheme and could face additional penalties under federal and/or state laws. Your receipt of this letter will be taken into consideration should you continue to be involved in the type of activities described above.

If you wish to discuss this letter, please contact me at [INSERT CONTACT INFORMATION]. Thank you very much for your time and attention to this important matter.

Sincerely,

[AGENT NAME AND TITLE]

Recipient Name: _____

Recipient Signature: _____ Date: _____

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Seeking Justice: The Department of Justice's Civil and Criminal Tools and Strategies to Bring to Justice Nursing Homes Who Provide Grossly Substandard Care to Our Nation's Elderly Residents

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Middle District of Tennessee

I. Introduction

Thirty-one years after passage of the Omnibus Budget Reconciliation Act of 1987 (OBRA 1987), the quality of care in many of our nation's nursing facilities that provide skilled nursing care (referred to as nursing homes or SNFs) is still a significant problem facing the growing elderly population. It is a concern to nursing facility residents, their families, caregivers, clinical professionals, and to policy makers. Rarely a month goes by when there is not an article in the press about a nursing facility providing grossly substandard care to its residents. Stories in the media in the past two years chronicled devastating cases of resident death due to overheating after generators failed,¹ a scabies infestation,² and overuse of

¹ Caitie Switalski, *'Hellish Nightmare:' Hollywood Hills Nursing Home Tragedy Continues in Court*, WLRN (Mar. 1, 2018), <http://www.wlrn.org/post/hellish-nightmare-hollywood-hills-nursing-home-tragedy-continues-court>.

² Kristine Phillips, *She Modeled in New York and Worked for the Navy. At 93, Parasites Ate Her Alive at a Nursing Home*, WASH. POST (May 1, 2018), <https://www.washingtonpost.com/news/to-your-health/wp/2018/05/01/she-mod>

antipsychotic medications.³ When federal lawyers are faced with fact patterns evidencing grossly substandard care by nursing facilities in their districts, there are civil and criminal theories that can be used to bring individual nursing facilities and nursing home chains to justice.

For more than the past decade, the Department of Justice (the Department), through the Elder Justice Initiative, has brought cases against nursing home chains, individual facilities, and individuals for providing grossly substandard care to residents. These cases have been primarily brought under the False Claims Act, based on the federal nursing home regulations.

II. Federal nursing home regulations

The Medicare program reimburses SNFs to provide skilled nursing services and skilled rehabilitation therapy. Sections (b), (c), and (d) of the Nursing Home Reform Act (NHRA), and corresponding regulations, contain essential quality of care provisions at the heart of the bargain between the government and SNFs.⁴ For example, section 483.25 of the regulations provides that “the facility must ensure that residents receive treatment and care in accordance with professional standards of practice, the comprehensive person-centered care plan, and the resident’s choices[.]”⁵ This section further requires that SNFs provide basic treatment to prevent pressure ulcers;⁶ to prevent falls and other accidents;⁷ to maintain proper nutrition and hydration;⁸ and to prevent medication errors and over-medication of residents.⁹ Congress underscored the materiality of these essential skilled nursing services by authorizing the Secretary of Health and Human Services to “deny payment” to SNFs, if the SNFs fail to provide these

eled-in-new-york-and-worked-for-the-navy-at-93-parasites-ate-her-alive-at-a-nursing-home/?noredirect=on&utm_term=.1c4b03baf020.

³ Jessica Ravitz, *Nursing Homes Sedate Residents With Dementia by Misusing Antipsychotic Drugs, Report Finds*, CNN (Feb. 5, 2018), <https://www.cnn.com/2018/02/05/health/nursing-homes-dementia-antipsychotic-drugs/index.html>.

⁴ See 42 U.S.C. § 1395i-3(b), (c), and (d); 42 C.F.R. §§ 483.13–483.70.

⁵ 42 C.F.R. § 483.25.

⁶ 42 U.S.C. § 483.25(b)(1).

⁷ *Id.* § 483.25(d).

⁸ *Id.* § 483.25(g).

⁹ *Id.* § 483.45(d), (f).

skilled nursing services.¹⁰ If the services are not provided, or are provided so poorly as to be worthless, the SNF provider is not entitled to payment.¹¹

III. Identifying corporate and individual targets

Federal lawyers have many sources, including referrals, data analytics, and *qui tam* complaints, to identify a civil or criminal case. State partners at the Medicaid Fraud Control Unit (MFCU), or the state agency that supervises skilled nursing facilities, may refer a facility to federal partners for investigation.¹² The Centers for Medicare and Medicaid Services (CMS) may refer potential cases to the Department. The state or volunteer ombudsman may also refer a case. Data analysis can identify troubling trends at any facility the government is evaluating as a potential target. For example, data can show if there is an unusually high use of antipsychotic medications per resident or a high number of resident deaths, pressure ulcers, falls, or medication errors—all of which indicate potential grossly substandard care. Finally, an Assistant United States Attorney may read about the closure of a facility for grossly substandard resident care on the front page of the local newspaper and open up a case as a result. Or a case may come into the office as a False Claims Act *qui tam* complaint.

IV. Investigating a failure of care a/k/a worthless services case

Federal lawyers considering an investigation into nursing home chains, individual facilities, and individuals should consult with state partners and CMS early on. CMS regularly contracts with states to perform surveys of facilities to assess compliance with the NHRA and

¹⁰ 42 C.F.R. § 488.417.

¹¹ See *United States ex rel. Scharber v. Golden Gate Nat'l Senior Care, LLC*, 135 F. Supp. 3d 944, 964 (D. Minn. 2015); see also *United States ex rel. Acad. Health Ctr., Inc. v. Hyperion Found., Inc.*, No. 3:10-CV-552, 2014 WL 3385189, at *42–43 (S.D. Miss. July 9, 2014); *United States v. Villaspring Health Care Ctr.*, No. 3:11-43-DCR, 2011 WL 6337455, at *4 (E.D. Ky. Dec. 19, 2011); *United States v. Cathedral Rock Corp.*, No. 4:03CV1090, 2007 WL 4270784, at *6 (E.D. Mo. Nov. 30, 2007).

¹² 42 C.F.R. § 1007.11(e).

state quality standards.¹³ These surveys can come in the form of a required annual survey; a complaint-driven survey; or, when a facility is under heightened review due to prior problematic surveys, a more frequent survey. These surveys are a font of information about real-time care to nursing home residents and may highlight instances of immediate harm to residents and other failures. For example, the CMS state surveys may include surveyor interviews with facility employees and contractors, like the nursing home administrator, medical director, director of nursing, nurses, and pharmacist. Federal lawyers can utilize these surveys to target potential problematic issues at a particular facility.

In a situation when the initial evidence shows conditions that are harming residents, federal lawyers should consider starting early discussions with CMS and defense counsel aimed at stopping the resident harm. Such facts might include evidence of inadequate staff, supplies, and/or terrible physical plan conditions. Such facts could also include choices driven by profit and not resident care, inadequate funds for training or supplies, and failure to investigate resident complaints. Although the approach of reaching out to defense counsel is atypical, the approach is increasingly employed in similar situations involving a public health risk, such as opioid overprescribing.¹⁴ Early discussions can lead to outcomes that quickly safeguard vulnerable, elderly residents, which is the paramount goal of the Elder Justice Initiative. These discussions can also save both parties years of investigation and litigation resources while effectively meeting the goal of improved resident care.

At the same time, federal lawyers should strategically decide how to gather evidence when pursuing a litigation matter. Federal lawyers frequently retain expert geriatric nurse consultants to evaluate available medical records and evidence about the skilled nursing facilities under review. Federal lawyers should also request Medicare claims data from the Medicare contractor and state Medicaid claims data from state partners. This information can help the United States

¹³ See, e.g., *Facility Survey Inspection*, TENN. DEP'T OF HEALTH, <https://www.tn.gov/health/health-professionals/hcf-main/facility-survey-inspection.html> (last visited Oct. 30, 2018).

¹⁴ See, e.g., Press Release, Federal Judge Approves Injunction Permanently Barring Akron Doctor From Prescribing Opioids or Practicing Medicine, U.S. Dep't of Justice (Oct. 26, 2018).

hone in on skilled nursing facilities with potentially big failures in resident care and a significant billing impact on the federal fisc.

Armed with the results of the clinical review and billing data, federal lawyers will next want to serve a discovery request on nursing home chains, individual facilities, and/or individuals. A United States Department of Health and Human Services (HHS), Office of Inspector General (HHS-OIG) subpoena is an excellent tool for these circumstances.¹⁵ HHS subpoenas have advantages as compared to other civil options. For example, HHS can usually finalize and serve an HHS subpoena within a few weeks, making them a relatively speedy way to obtain needed information. HHS subpoenas can also be used in either a civil or criminal investigation since the grand jury is not involved. Further, since the relevant federal agency itself issues the subpoena, the agency is voicing its need for the documents, which can be used to defeat potential objections to producing the records, especially records that concern compliance with federal nursing home requirements. But there is still often a question about on whom to serve a subpoena. This issue arises due to the complex corporate structure created by many nursing home chains. In addition to the skilled nursing facility itself, a subpoena should also be issued to the facility's parent company and to any ancillary companies that may hold responsive records.

Regardless of the form of a discovery request, federal lawyers should seek to obtain a broad array of documents. Due to skilled nursing facilities' frequently complex, multi-layered corporate structures, discovery requests should seek organizational and corporate structure charts, management agreements, employee lists, and documents sufficient to identify a facility's corporate officers, medical director, director of nursing, and pharmacy. A subpoena should also request documents regarding quality of resident care, budgets, resident census, incident reports, and complaints. If the government has already pulled a statistically valid random sample of resident claims, those resident files should be included in the requests too. Together, the responsive documents should provide a plethora of information pertinent to a worthless services case. In addition, federal agents should conduct the other usual investigative steps, including interviewing former employees and contractors, such as former

¹⁵ See 5 U.S.C. app. 3 § 6(a)(4); 42 C.F.R. § 1006.1.

nursing home administrators, medical directors, and directors of nursing.

Finally, an expert medical reviewer should review a sample of Medicare and Medicaid claims for specific dates of service for the residents in the facilities at issue in the case. The reviewer will use the resident files for the residents and determine if the claims were non-payable in whole or in part. A statistician can then extrapolate the results of the claims review to project Medicare and Medicaid losses.

V. Bringing a civil worthless services case

Once the government gathers strong factual support for a worthless services case, it should consider its legal theories and anticipate common defenses.

A. Affirmative legal theories

There are three leading legal theories that the government relies on in worthless services cases. Each legal theory is considered and outlined below.

1. False Claims Act implied false certification

The United States' primary legal claim in the worthless services context is that a defendant has made an implied false certification (or a legally false claim) in violation of the False Claims Act (FCA), 31 U.S.C. § 3729(a)(1)(B). "An implied false certification claim is based on the notion that the act of submitting a claim for reimbursement itself implies compliance with governing federal rules that are a precondition to payment."¹⁶ The United States Supreme Court affirmed the implied false certification theory as a basis for liability in *Universal Health Services, Inc. v. United States ex rel. Escobar* (hereinafter *Escobar*).¹⁷

The nursing home statutes and regulations summarized above set forth requirements that skilled nursing facilities must meet to receive payment under the Medicare and Medicaid programs, including 42 C.F.R. § 483.25. These regulations, which derive from the NHRA,

¹⁶ *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 699 (2d Cir. 2001), *abrogated in part by* *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2001–02 (2016).

¹⁷ *Escobar*, 136 S. Ct. at 1999.

are the backbone of the government's agreement with providers for reimbursement for providing a certain type and level of care to patients.¹⁸ If such care is not provided, or is provided in a materially deficient way, the government does not receive the benefit of the bargain, and reimbursement is inappropriate.¹⁹ Knowing violations of these important obligations can render claims false.²⁰

2. False Claims Act false statements

Federal lawyers can also bring a legal claim that defendants made, or caused to be made, false statements of compliance with essential statutes and regulations in violation of the FCA.²¹ In states that have their own version of the FCA, the United States and the state can bring a similar claim under the state FCA.²² False statements can appear in facilities' certifications of compliance with federal and state laws and regulations, which are made on nursing facilities' Medicare and Medicaid provider agreements,²³ electronic data interchange enrollment forms,²⁴ Health Insurance Benefit Agreement forms,²⁵

¹⁸ See 42 U.S.C. § 1395i-3(b), (c), (d).

¹⁹ See *Hyperion*, 2014 WL 3385189, at *38 & 44–45.

²⁰ See *United States ex rel. Aranda v. Community Psychiatric Ctrs. of Okla., Inc.*, 945 F. Supp. 1485, 1488 (W.D. Okla. 1996) (declining to dismiss FCA complaint, which alleged violations of Medicaid quality of care statutes and regulations, and finding that FCA claims can stand “against a provider of substandard health care services under appropriate circumstances”).

²¹ See 31 U.S.C. § 3729(a)(1)(B).

²² See, e.g., Tenn. Code Ann. § 71-5-181 to -185 (Tennessee Medicaid False Claims Act).

²³ See 42 C.F.R. § 489.3.

²⁴ See MEDICARE CLAIMS PROCESSING MANUAL Ch. 24 §§ 30–30.5.

²⁵ See 42 U.S.C. § 1395cc; *Health Insurance Benefit Agreement* (DEPT OF HEALTH & HUMAN SERVS. No. 0938-0832), <https://www.cms.gov/Medicare/CMS-Forms/CMS-Forms/downloads/cms1561.pdf>.

claims forms,²⁶ cost reports,²⁷ and Minimum Data Set (MDS) forms.²⁸ The MDS is part of the federally required process for clinically assessing residents in Medicare or Medicaid-certified homes, and an employee of the facility must certify that the information in the MDS is accurate.²⁹ The MDS certification language states that the certification is used as a basis for payment and that a false certification can subject the facility to civil and criminal penalties.³⁰ Thus, the MDS forms can be a fertile source of false statements.

3. Common law claims

Federal lawyers can also bring federal common law claims for unjust enrichment and payment by mistake. These theories—especially unjust enrichment—are particularly successful against individual defendants. For example, profits from Medicare and Medicaid non-reimbursable services often enrich owners, making an unjust enrichment theory especially viable. This theory fits the facts of worthless services cases well and can provide a quicker resolution of a case with a lower level intent requirement.

B. Common defenses in civil worthless services cases

There are several commonly-raised defenses in worthless services cases, but the government has good responses to all of them.

²⁶ Relevant claim forms include those known as UB-92, HCRA-1450 or UB-04, and CMS-1450. *See, e.g.,* CMS.GOV, *Details for title: CMS 1450, CTRS. FOR MEDICARE & MEDICAID SERVS.*, <https://www.cms.gov/Medicare/CMS-Forms/CMS-Forms/CMS-Forms-Items/MS1196256.html> (last visited Oct. 30, 2018).

²⁷ Skilled nursing facilities submit annual cost reports known as CMS-2540-96 and CMS-2540-10. *See, e.g.,* CMS.gov, *Details for title: CMS-2540-96, CTRS. FOR MEDICARE & MEDICAID SERVS.*, <https://www.cms.gov/Medicare/CMS-Forms/CMS-Forms/CMS-Forms-Items/MS019499.html> (last visited Oct. 30, 2018); CMS.gov, *Details for title: CMS-2540-10, CTRS. FOR MEDICARE & MEDICAID SERVS.*, <https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing-Items/CMS-2540-10.html> (last visited Oct. 30, 2018).

²⁸ *See* 42 C.F.R. § 483.315.

²⁹ *Id.*

³⁰ *Id.*

1. Defense that the nursing home care must be so deficient as to have zero value

Defense counsel often argue that, for a successful worthless services case, the entire bundle of services must have had no value whatsoever. In *United States ex rel. Absher v. Momence Meadows Nursing Center, Inc.*, the Seventh Circuit Court of Appeals noted that relators failed to present evidence that skilled nursing facility defendants in a non-intervened FCA *qui tam* violated nursing facility standard of care regulations material to payment or violated certifications in various submissions to CMS.³¹ The court offered no reasoning for its ruling that “[s]ervices that are ‘worth less’ are not ‘worthless,’” and while it did not reject the worthless services theory of liability, it determined that the evidence in that case, which was tried to a jury, did not rise to the level of worthlessness.³²

But most courts considering the worthless services theory of FCA liability in the context of skilled nursing services have found that it is *not* limited to instances where no services were provided at all.³³ Instead, the FCA allows for liability “when a provider seeks reimbursement for seriously deficient care, even if that care is not completely worthless.”³⁴ As a practical matter, the United States’ consultants typically perform a percentage analysis to quantify the amount of care—if any—that was worthless and non-payable. That percentage can range from 0% on certain dates of service to 100% on other dates of service, depending on the factual circumstances.

2. Defense that the government continued to pay claims

Defense attorneys may also claim that the government continued to pay claims despite negative survey findings and, therefore, the FCA’s

³¹ 764 F.3d 699, 710–13 (7th Cir. 2014).

³² *Id.* at 710.

³³ See *United States ex rel. Scharber v. Golden Gate Nat’l Senior Care, LLC*, 135 F. Supp. 3d 944, 964–65 (D. Minn. 2015); *Hyperion*, 2014 WL 3385189, at *42–43; *United States v. Associates in Eye Care, P.S.C.*, No. 13-27-GFVT, 2014 WL 414231, at *7 (E.D. Ky. Feb. 4, 2014); *United States v. Villaspring Health Care Ctr., Inc.*, No. 3:11-43-DCR, 2011 WL 6337455, at *5–8 (E.D. Ky. Dec. 19, 2011).

³⁴ See *Scharber*, 135 F. Supp. 3d at 964; see also *Hyperion*, 2014 WL 3385189, at *42–43; *Villaspring Health Care Center*, 2011 WL 6337455 at *4.

materiality element cannot be met. In responding to this defense, it is important to look closely at the facility to determine if CMS or Medicaid have taken negative actions with respect to payment, such as issuing warnings, assigning a “Special Focus Facility” status to a facility (requiring more frequent CMS inspections), denying payment to claims, or even terminating the Medicare or Medicaid provider agreement at one or more facilities in a chain. These actions can be a good fact-based response to the defense. Additionally, depending on the length of a survey, surveyors’ isolated knowledge of a facility’s practices cannot be equated with knowledge of a consistent pattern of grossly substandard services.

There is developing case law post-*Escobar* holding that continued government payments do not foreclose materiality under the FCA. In the remanded *Escobar*, the First Circuit Court of Appeals held that the “mere awareness [by state regulators] of allegations concerning noncompliance” did not constitute “actual knowledge,” and even if it did, there was no evidence that the government entity paying the Medicaid claims had actual knowledge.³⁵ In an FCA case about Title IV education funds, *United States ex rel. Rose v. Stephens Institute*, the First Circuit Court of Appeals relied on evidence that the Department of Education was concerned about the violations at stake, and could demonstrate materiality “without directly limiting, suspending, or terminating schools’ access to federal student aid.”³⁶ Similarly, in *United States ex rel. Ling v. City of Los Angeles*, a district court pointed to other ways that the government could show materiality in an FCA case short of cutting off funds to a defendant, such as pleading that withholding funds “would have been an impossible or at least impractical option given the importance of the services that the funding facilitates and the unavailability of an alternative recipient of funds.”³⁷ In the nursing home world, cutting off funding is often impractical, and ongoing resident care concerns

³⁵ *United States ex rel. Escobar v. Universal Health Servs., Inc.*, 842 F.3d 103, 112 (1st Cir. 2016).

³⁶ *United States ex rel. v. Stephens Inst.*, 901 F.3d 1124, 1134 (9th Cir. 2018).

³⁷ *United States ex rel. Mei Ling v. City of Los Angeles*, No. CV 11-974, 2018 WL 3814498, at *21 (C.D. Cal. July 25, 2018).

may influence CMS' and states' choice of statutory and administrative remedies when confronted with worthless services.³⁸

3. Defense that the nursing home corporate structure was so complex that there is no liability above the facility-level

Skilled nursing home facility chains often have extremely complex corporate structures.³⁹ A parent company usually sits atop the corporate structure. The parent then has multiple subsidiaries, ranging from a subsidiary facility that has the Medicare and Medicaid billing number, a management subsidiary that provides managerial services, a financial subsidiary that handles billing, a property subsidiary that owns the facility's property, and even a related closed-door pharmacy that provides medications to the facility. These multiple corporate layers aim to insulate a facility and its parent from liability, but they are not impenetrable shields. Rather, federal lawyers have various options when faced with complex corporate structures.

One option is to gain evidence showing that the corporate parent has individual liability due to its ownership and control over the facility and the other key subsidiaries.⁴⁰ Another option is veil-piercing. Federal lawyers can attempt to pierce the parent's

³⁸ See *United States ex rel. Onnen v. Sioux Falls Indep. Sch. Dist. No. 495*, 688 F.3d 410, 414–15 (8th Cir. 2012).

³⁹ See Jordan Rau, *Care Suffers as More Nursing Homes Feed Money into Corporate Webs*, N.Y. TIMES (Jan. 2, 2018), <https://www.nytimes.com/2018/01/02/business/nursing-homes-care-corporate.html>; David G. Stephenson, *Nursing Home Ownership Trends and their Impacts on Quality of Care: A Study Using Detailed Ownership Data from Texas*, J. Aging & Social Policy, 2013, at 30–47.

⁴⁰ See, e.g., *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 125 (D.C. Cir. 2015) (denying motion to dismiss FCA suit where complaint alleged that AT&T “chose not to train its employees in E-rate compliance, leaving its subsidiaries’ employees unaware of the illegality of their actions”); *Scharber*, 135 F. Supp.3d at 967 (same where there were allegations of wrongdoing as to the parent company’s employees); *United States ex rel. Martin v. Life Care Ctrs. of Am., Inc.*, No. 2014 WL 11429265, at *13 (E.D. Tenn. 2014) (same where complaint included “dates, locations, and persons supporting its claims,” such as having high-level employees focus on certain billing trends, against the parent company).

corporate veil by showing that the parent acted as an alter ego for its subsidiaries.⁴¹

4. Defense that the case amounts to a battle of the experts

Another common defense refrain is that a worthless services case will boil down to the stereotypical “battle of the experts.” But this defense is easily defeated with a heavy dose of firsthand, non-expert evidence from former employee witnesses, family members of residents, complaint forms made with the facility, and company emails that show grossly substandard services and evidence of quality problems. Ultimately, worthless services cases will have a lot of appeal to a judicial fact-finder and will contain much more than expert evidence.

5. Defense that the nursing home has potential financial troubles or bankruptcy

Skilled nursing facilities facing worthless services allegations may also assert that they are in financial straits, or may even file for bankruptcy. The co-authors of this article faced this situation in the worthless services case filed in the Middle District of Tennessee.⁴² There, the parent company and several of its subsidiaries filed for Chapter 11 bankruptcy during the investigative phase of the case.⁴³ On the September 6, 2016 deadline for filing proofs of claim, the United States and Tennessee filed the FCA suit in district court, alleging worthless services by five Vanguard skilled nursing facilities. Later that day, the United States and Tennessee moved for an order that their pending FCA suit was legally excepted from the automatic

⁴¹ See, e.g., *United States v. Dynamic Visions, Inc.*, 220 F. Supp. 3d 16, 25–26 (D.D.C. 2016) (granting government’s summary judgment motion in FCA case against parent company after finding many factors, including the owner’s withdrawal of large monetary sums from the company and the inequity and inability to reach funds that would result absent veil-piercing, favored the outcome); *Scharber*, 135 F. Supp.3d at 967 (rejecting a motion to dismiss an FCA suit where relators alleged “a level of control by the parent company over the culture, policies, and decision-making”).

⁴² Complaint, *United States v. Vanguard Healthcare, LLC*, No. 3:16-cv-02380 (M.D. Tenn. 2016), ECF No. 1.

⁴³ See *In re Vanguard Healthcare, LLC*, No. 16-bk-03296 (Bankr. M.D. Tenn. 2016).

stay.⁴⁴ The district court granted the motion, ruling that the FCA suit fell within the police and regulatory powers exception to the automatic stay.⁴⁵

The United States also moved to withdraw the reference of the FCA case to the bankruptcy court.⁴⁶ The parties eventually entered an agreed order withdrawing the reference of objections to the government's FCA proofs of claim to the district court.⁴⁷ This ruling meant that the district court, rather than the bankruptcy court, would ultimately decide the merits of the case. Vanguard emerged from bankruptcy with an approved reorganization plan, and the parties ultimately reached a settlement in principle subject to all required approvals.⁴⁸ The experience in Vanguard demonstrates that it is possible to successfully navigate worthless services cases despite a bankruptcy filing.

In sum, over the past decade plus, the Department settled over 40 failure of care/worthless services civil cases and returned significant funds to the Medicare fisc.⁴⁹ Another critical piece of these civil failure of care cases is often that HHS-OIG required the settling defendant to enter into a quality of care Corporate Integrity Agreement (CIA) negotiated by HHS. A quality of care CIA is an enforcement tool used by HHS-OIG to improve SNF quality of care and to promote compliance with health care regulations. Quality of care CIAs are typically five years in duration. The purpose of a quality CIA is to focus on the SNF's systemic care issues, not individual

⁴⁴ See United States' and Tennessee's Joint Motion for an Order that Their Pending False Claims Act Civil Action Is Legally Excepted from the Automatic Stay in Bankruptcy, *United States v. Vanguard Healthcare, LLC*, No. 3:16-cv-02380 (M.D. Tenn. 2016), ECF No. 2.

⁴⁵ See *United States v. Vanguard Healthcare, LLC*, 565 B.R. 627, 632 (M.D. Tenn. 2017).

⁴⁶ See United States' and Tennessee's Joint Motion to Withdraw Reference of Objections to False Claims Act Proofs of Claim, *In re: Vanguard Healthcare, LLC*, No. 3:17-cv-00166 (M.D. Tenn. 2017), ECF No. 1.

⁴⁷ See Agreed Order Withdrawing the Reference Regarding Debtors' Objections to the Government Claims and Consolidating Civil Actions 17-CV-00166 and 16-CV-02380 (M.D. Tenn. 2016), ECF No. 93.

⁴⁸ *Id.* at ECF No. 126.

⁴⁹ See *Elder Justice Prosecution Samples*, U.S. DEP'T OF JUST., <https://www.justice.gov/elderjustice/prosecutors/samples> (last visited Oct. 30, 2018).

facility problems, and to focus on the SNF's internal system of quality assurance and improvement. To that end, a SNF placed under a CIA is generally required to hire a compliance officer and appoint a compliance committee; develop written standards and policies; implement a comprehensive employee training program; retain an independent review organization to review claims submitted to federal health care programs; establish a confidential disclosure program; restrict employment of ineligible persons; report overpayments, reportable events, and ongoing investigations; and provide an implementation report and annual report to the OIG on the status of the entity's compliance activities. If a SNF corporation fails to comply with its CIA, HHS-OIG may impose civil monetary penalties (CMPs). Similarly, if the SNF materially breaches the CIA, HHS-OIG may exclude one or more of the SNF's individual facilities from participation in federal health care programs.⁵⁰

VI. Bringing a criminal worthless services case

While the majority of worthless services cases are civil, criminal theories are also readily available. Potentially available criminal theories include: (1) criminal health care fraud;⁵¹ (2) false statements relating to health care matters;⁵² (3) false statement in connection with “[f]ederal health care programs;”⁵³ (4) mail fraud;⁵⁴ (5) wire fraud;⁵⁵ (6) failure to pay payroll taxes;⁵⁶ (7) failure to file individual tax return;⁵⁷ (8) fraud and false statements;⁵⁸ and (9) false claims.⁵⁹

In 2012, the United States brought a criminal health care fraud claim in the Northern District of Georgia against George Houser for worthless services where there was evidence of inadequate staff,

⁵⁰ See 42 U.S.C. § 1320a-7a; 42 U.S.C. § 1320a-7(b)(7).

⁵¹ 18 U.S.C. § 1347; see also 18 U.S.C. § 1365 (providing a ten year maximum sentence unless “serious bodily injury”).

⁵² 18 U.S.C. § 1035.

⁵³ 42 U.S.C. § 1320a-7b(a).

⁵⁴ 18 U.S.C. § 1341.

⁵⁵ *Id.* § 1343.

⁵⁶ 26 U.S.C. § 7202.

⁵⁷ *Id.* § 7203.

⁵⁸ 18 U.S.C. § 1001.

⁵⁹ *Id.* § 287.

supplies, and terrible physical plan conditions, as well as choices driven by profit and not resident care, inadequate funds for training or supplies and failure to investigate resident complaints. In *United States v. Houser*, the court applied the worthless services theory to find the defendant SNF operator guilty of criminal health care fraud:

A worthless services claim stands for the unexceptional proposition that an entity may not bill the Government for products or services that are not rendered, or that are so deficient that they have no value to the resident, or are totally undesirable. Worthless services are services that are so inadequate, deficient, and *substandard*, or so completely lacking in value or of no utility to the resident, that a reasonable person would understand that any services provided were worthless.⁶⁰

The *Houser* decision was affirmed on appeal.⁶¹

In conclusion, the nation's frail elderly residents are entitled to quality nursing home care. The government has the civil and criminal tools to bring providers who fail to provide the care that they have certified that they will and have provided to justice.

About the Authors

Susan Lynch is Senior Counsel for Elder Justice at the Department of Justice where she has been civilly prosecuting fraud cases for almost 20 years. Susan is a Department expert on failure of care nursing home cases and is the national lead for the Department's ten Elder Justice Task Forces. Susan is also a national training lead for the Department's Elder Justice Coordinators. Susan has resolved some of the Department's most complicated nursing home cases, obtaining the Department's largest non-bankruptcy failure of care civil settlement. Susan also works extensively on elder justice policy as part of the Department's Elder Justice Initiative. She earned her Doctor of Public Health in Health Policy from the Johns Hopkins

⁶⁰ *United States v. Houser*, No. 4:10-cr-00012-HLM-WEJ (N.D. Ga. Apr. 2, 2012), ECF No. 290 at p.430 (emphasis added).

⁶¹ *See United States v. Houser*, 754 F.3d 1335 (11th Cir. 2014).

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Ellen Bowden McIntyre currently serves as the Affirmative Civil Enforcement Coordinator in the Middle District of Tennessee.

McIntyre has served as an Assistant United States Attorney for 15 years, representing the United States in both civil and criminal health care fraud cases. She recently spoke about both elder justice and the Controlled Substances Act at the National Advocacy Center and has also spoken about elder justice at the American Health Lawyers Association and Tennessee Bar Association conferences.

Using the False Claims Act to Combat Fraud by Personal Care Homes

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Eastern District of Pennsylvania

I. Introduction

The False Claims Act frequently applies to the health care industry. As the government's primary weapon against fraud,¹ the False Claims Act generally makes it unlawful for a person knowingly to submit or to cause the submission of a false claim for payment to the federal government.² A false claim "may take many forms, the most common being a claim for goods or services not provided, or provided in violation of contract terms, specification, statute, or regulation."³

Acting upon that mandate, the Department of Justice routinely investigates and brings False Claims Act cases against nursing homes, skilled nursing facilities, community homes, and others that fail to live up to their bargain to provide adequate or appropriate services.⁴ When those services fall short, the False Claims Act

¹ S. Rep. No. 99-345, at 2 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5266.

² *See* 31 U.S.C. §§ 3729–33; *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2000 (2016) (discussing False Claims Act).

³ S. Rep. No. 99-345 at 9, *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5274.

⁴ *See, e.g., United States ex rel. Academy Health Ctr., Inc., v. Hyperion Found., Inc.*, No. 3:10-CV-552-CWR-LRA, 2014 WL 3385189, at *1 (S.D. Miss. July 9, 2014) (noting government's intervention in a case where there were allegations of false claims and false statements related to false claims to Medicare and Medicaid for nursing home services); *see also* Complaint, *United States ex rel. Emerson & Tuesca v. Signature HealthCARE, LLC*, et al., No. 1:15-cv-00027 (M.D. Tenn. Mar. 27, 2015), ECF No. 1; Second Amended Complaint, *United States ex rel. Cretney-Tsosis v. Creekside Hospice II, LLC*, No. 2:13-cv-167-HDM (D. Nev. Nov. 25, 2014), ECF No. 52.

provides a civil remedy to recover the funds paid by Medicare, Medicaid, and other federally funded programs. This civil remedy complements more traditional criminal state law remedies, such as theft, abuse, and neglect.

The civil remedy also extends to personal care homes, which are a different type of housing provider that can fly under the radar. This article describes what personal care homes do, why they matter, and how you can investigate and develop a False Claims Act case to protect vulnerable populations and the public fisc.

II. Personal care homes offer mid-level support for the elderly and disabled

Elderly and disabled persons might choose to live in a personal care home when they do not need the intensive services offered by skilled nursing facilities or nursing homes, but they nonetheless require support. Although not expressly defined by federal statute, personal care homes provide only “personal care,” such as shelter, food, clothing, laundry services, trips to health care appointments, and assistance with activities of daily living. Thus, unlike skilled nursing facilities and other providers, personal care homes do not provide medical care. Typically, state and local governments license and regulate personal care homes.⁵

Because these homes generally do not provide medical care, they differ from the facilities that routinely face False Claims Act liability arising from direct payments by the government. Personal care homes typically do not bill the Medicare program for medical services. Instead, residents of personal care homes—rather than a federal payer—are typically responsible for financing their own stays. The exception is where a state Medicaid program provides for benefits. Alternatively, residents might receive financial assistance through the Social Security Administration (SSA),⁶ or they might receive assistance through other government programs, such as the

⁵ Not all states license personal care homes, and not all states license them in the same way. *See, e.g.*, 62 PA. CONS. STAT. § 211 (2007); 55 PA. CODE §§ 2600.1-2600.270 (2007); GA. CODE ANN. § 31-7-12 (2011).

⁶ *See* 42 U.S.C. § 423 (providing for disability insurance benefits); § 1382c (defining “aged, blind, or disabled individual”).

Department of Veterans Affairs (VA) Community Residential Care program.⁷

When an individual receives federal money under these programs, or others, the recipient typically becomes responsible for spending it in an appropriate way. Thus, personal care homes have not been subjected to the same types of health care billing fraud scrutiny applied to facilities that provide medical care.

Nevertheless, deficiencies at these homes can trigger False Claims Act liability. Imagine reading a newspaper article that describes abuse or a squalid environment at a local personal care home for elderly and disabled residents, or learning about these conditions from a local police department.⁸ You might hear about unclean living spaces, blocked fire exits, visibly malnourished residents, beds with no sheets or blankets, or other troubling scenarios. Assuming that the personal care home receives no direct federal funds, and no indirect federal funds through a state Medicaid program, you may still be able to use the False Claims Act to vindicate public interests.

III. Representative payees owe fiduciary duties to the federal government

False Claims Act liability for personal care homes can arise from representative payee programs. Under these programs, a third party is appointed to manage income benefits for a beneficiary who needs assistance, perhaps because the person is unable to manage her finances, or because she would like to pay her benefits to a service provider each month through a simplified payment process. Residents of personal care homes often use these programs.

⁷ The VA Community Residential Care (CRC) program provides health care supervision and funds for eligible veterans who are not in need of acute medical care, but who are not able to live independently without supportive care. See 38 U.S.C. § 1730(a). The program encompasses a variety of enriched housing options for veterans, such as personal care homes.

⁸ See, e.g., Al Winn, *Tina Fake receives 15-35 years in prison; Abuse, negligence at care home lead to state sentence*, PATRIOT NEWS, Feb. 16, 2007, at B1; Ken Dilanian, *Criminal Neglect, Overlooked Cruelty; Rotten Food, Violence and Suspicious Deaths - and State Regulators Failed to See It*, PHILA. INQUIRER, Feb. 26, 2007, at A1.

For example, under a SSA program, beneficiaries can designate a representative payee to manage their benefits.⁹ Other federal agencies—such as the Office of Personal Management, the Railroad Retirement Board, and the Department of Labor—likewise have representative payee programs.¹⁰ The VA has a similar system to appoint representatives called “fiduciaries,” a person appointed in a representative capacity to receive VA benefits for the use and benefit of a beneficiary.¹¹ These federal programs have procedural mechanisms to monitor and regulate the individuals who serve as representative payees and fiduciaries.

A representative payee under the SSA’s program is an individual or organization appointed by the agency to receive and manage Social Security or supplemental security income benefits for a beneficiary.¹² The SSA pays benefits to a representative payee when doing so would be in the beneficiary’s interest, such as when the beneficiary is legally incompetent, mentally incapable of managing benefit payments, or physically incapable of managing or directing the management of benefit payments.¹³ A private institution, operated for profit and licensed under state law might also be a representative payee.¹⁴ Because of this structure, personal care homes—as well as the individuals who work there—can be appointed as representative payees of residents who receive federal benefits, such as Social Security.

To become a representative payee under SSA’s program, an individual or entity must complete standard form SSA-11 Request to Be Selected as Payee.¹⁵ The SSA-11 requires the representative payee applicant to certify, among other things, that SSA payments made to the representative payee will be used for the beneficiary’s current needs or saved for the beneficiary’s future needs.

⁹ See 42 U.S.C. § 1007.

¹⁰ See, e.g., 5 U.S.C. § 8345(e) (Office of Personnel Management); 20 C.F.R. § 725.510(a) (Department of Labor); 20 C.F.R. § 266.7 (Railroad Retirement Board).

¹¹ See 38 U.S.C. § 5506.

¹² See § 1007.

¹³ 20 C.F.R. §§ 404.2010, 416.610.

¹⁴ 20 C.F.R. §§ 404.2021, 416.621(a)(4).

¹⁵ See generally SOCIAL SECURITY, <https://www.ssa.gov/payee/> (last visited Sept. 19, 2018) (discussing SSA representative payee program and eligibility).

Representative payees owe duties to the beneficiary and the agency that appointed them. For example, an SSA representative payee assumes trust responsibilities to the beneficiary and to the United States.¹⁶ Payments by the SSA to the representative payee must be for the use and benefit of the beneficiary and must be used for the beneficiary's current maintenance, including the costs incurred in obtaining food, shelter, clothing, medical care, and personal comfort items.¹⁷

Ultimately, the representative payee must use the payments for the beneficiary's use and benefit, in a manner that advances the beneficiary's best interests.¹⁸ This includes conserving or investing for future use any benefits not used by the representative payee for current maintenance on behalf of the beneficiary.¹⁹

A representative payee must maintain records of spending and must certify in an annual report how he or she has accounted for the benefits.²⁰ Under the standard form for this purpose, form SSA-6234, the representative payee must certify and "declare under penalty of perjury that [they] have examined all the information on this form, and on any accompanying statements or forms, and it is true and correct to the best of [their] knowledge."²¹

The representative payee must further certify that he or she understands "anyone who knowingly gives a false or misleading statement about a material fact in this information, or causes someone else to do so, commits a crime and may be sent to prison, or may face other penalties, or both."²²

IV. The False Claims Act can be an appropriate remedy to combat personal care home fraud

A personal care home can be liable under the False Claims Act when it serves as a representative payee and fails to meet these obligations. The False Claims Act makes it unlawful to "knowingly present, or

¹⁶ See 20 C.F.R. §§ 404.2045(a), 416.645(a).

¹⁷ 20 C.F.R. §§ 404.2040(a), 416.640(a).

¹⁸ 20 C.F.R. §§ 404.2035(a), 416.635(a).

¹⁹ See §§ 404.2045(a), 416.645(a).

²⁰ See 20 C.F.R. §§ 404.2065, 416.665.

²¹ See Sample Representative Payee Report, SOC. SEC. ADMIN.

²² *Id.*

cause[] to be presented, a false or fraudulent claim for payment,” as well as to “knowingly to make,[] use[], or cause[]to be made or used, a false record or statement material to a false or fraudulent claim.”²³ The False Claims Act imposes civil monetary penalties for each false claim and treble damages.²⁴

In certain unfortunate cases, the personal care home might provide substandard or dangerous housing. It might provide substandard care, poor nutrition, deficient oversight, or other conditions that jeopardize the beneficiary’s health and welfare. The payee might be keeping the money for itself, or might be depriving the beneficiary of basic assistance with daily living. A personal care home operating under these conditions fails to provide the beneficiary with current maintenance and fails to preserve surplus funds for future maintenance, as the program requires.

A case from the Eastern District of Pennsylvania is instructive. Starting in the 1980s and continuing through the 2000s, Rosalind S. Lavin owned or operated several personal care homes, including Ivy Ridge Personal Care Center in Philadelphia, Pennsylvania.²⁵ Ivy Ridge housed between 30 and 60 residents and served as the representative payee for benefits that some of its residents received from SSA. SSA sent those benefits directly to Ivy Ridge, which endorsed and negotiated the benefit checks. Other facilities operated the same way by serving as the SSA representative payee for residents.

The United States asserted that Lavin and these facilities subjected beneficiary-residents to grossly inadequate, dangerous housing and care that included structurally unsafe residences, inadequate security, insufficient food and nutrition, unsanitary living conditions, and irregular and limited personal care, among other things. The United States further asserted that Lavin and the entities diverted the SSA benefits for their own use benefit, including for personal expenses and salaries, instead of conserving or investing the benefits

²³ 31 U.S.C. § 3729(a)(1)(A)–(B).

²⁴ *Id.* § 3729(a)(1).

²⁵ On June 10, 2008, the United States Attorney for the Eastern District of Pennsylvania announced a civil settlement with Lavin and her personal care homes. The case garnered media attention. *See* Settlement Agreement and Mutual Releases; Kitty Caparella, *Lavin ‘knows how to exploit the system,’* PHILA. DAILY NEWS, June 12, 2008.

for the resident-beneficiaries as the SSA representative payee program requires.²⁶

When such a scenario happens and a representative payee fails to fulfill its duties, the payee violates the False Claims Act by causing the submission of false claims, wrongfully retaining a government overpayment, or creating false records and statements. Each time the personal care home endorses and negotiates monthly benefit checks for resident beneficiaries, it makes a false and fraudulent claim because it knows the money does not provide for the beneficiary's maintenance. The personal care home continues to violate the False Claims Act by retaining monthly overpayments that it should have spent on the beneficiary or saved for the beneficiary's future use.²⁷

Furthermore, the personal care home may be subject to additional False Claims Act liability each time that it makes false statements or falsifies records. False statements and records might be included in the SSA-11 Request to be Selected as Payee, or in the annual SSA-6234 Representative Payee Report showing an inaccurate accounting of the funds used for the beneficiary's care and maintenance. Fraudulently endorsed checks can be an additional source of false records.

Federal agencies rely upon representative payees to keep their promises and fulfill their fiduciary duties by acting in the best interests of the resident, accepting responsibility for current maintenance, conserving and investing unused payments, and maintaining an accurate accounting of how the payments were spent. Failing to do so can make the personal care home liable for using false records or statements pursuant to section 3729(a)(1) of the False Claims Act.

²⁶ See Settlement Agreement and Mutual Releases (outlining settlement of \$700,000, Ivy Ridge's agreement to cease operations, and agreement by personal care homes and their owners to never again act as representative payees for purposes of receiving federal government benefits or operate any care facilities).

²⁷ A person's guardian under state law is not necessarily a proper representative payee. Thus, an additional avenue of False Claims Act liability can arise when a guardian avoids entering into the agency's representative payee program, thereby avoiding the procedural safeguards that come with it, in order to conceal improper payments and overpayments.

V. Conclusion

Residents of personal care homes depend on their caregivers to provide necessities and assistance for their everyday lives. Because of this reliance, these residents can be vulnerable to abuse and neglect.

Congress recently responded to this problem by amending the Social Security Act to facilitate information sharing with law enforcement agencies.²⁸ As the new information-sharing provisions come into effect, it may become easier than ever to use the False Claims Act and other tools to hold personal care homes accountable, recoup money for the federal fisc, and, most importantly, deter others from neglecting and abusing those in their care. Although traditional criminal remedies might be the first response, the False Claims Act can complement—and, in some cases, even substitute for—those remedies.

About the Authors

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²⁸ Strengthening Protections for Social Security Beneficiaries Act of 2018, Pub. L. 115-165, 132 Stat. 1257.

Elder Justice—Federal, State, and Local Partnerships

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I. Introduction¹

The concept of “playing well with others” is, for most of us, a concept that was shared early and often in our lives. If you embraced it, you ruffled no feathers and drew praise. On the flip side, if you dared not to share your toys or went so far as to play by yourself in the corner with your coveted toy, you risked the “does not play well with others” label being reported back home or, worse, forever noted in your permanent records. Fast forward to today where the push to leave the comfort of our silos in the name of “teamwork” is as strong as ever. As prosecutors, this push generally comes from higher-ups, colleagues, and, sometimes, the public we have pledged to protect and serve. And, rather inconveniently, now that we no longer have the luxury of experimental learning in the relatively consequence-free environment of the sandbox, our work leads us directly into partnering on serious endeavors using the resources (often seemingly too little) and power (often misjudged by others) of the government that have been entrusted to us. Fortunately, we know that partnering up often leads to good outcomes and can result in justice that otherwise would not have been possible. It can also lead to frustration on both sides, including communications problems, perceptions of cherry-picking of cases, information-sharing issues, and outright disagreement on the best way to handle a case. The key to success always seems to return to one thing: communication.

For nearly five decades, there has been a solid push, sometimes a mandate, for all levels of government to work together, primarily in

¹ The image in Figure 1 is from the *Elder Abuse* handout created by the Office for Victims of Crime. See OFFICE FOR VICTIMS OF CRIME, NAT'L CTR. FOR VICTIMS OF CRIME, ELDER ABUSE.

the areas of violent crimes, drug offenses, and, more recently, human trafficking.² Over time there has been an expansion of federal interest into areas traditionally viewed as “local” areas. This is in recognition, perhaps, that at the end of the day, we serve a community that does not live according to neatly drawn notions of the operation of government. Perhaps there is no area in which this is truer than that of “elder justice.”

Elder abuse is not a new issue and it is certainly not an isolated one. As long as there have been “older” people, there have been those who seek to take advantage of them and harm them. Elder abuse pays no respect to economic, social, or geographic boundaries. Power differentials are real and, for an older person who is socially isolated and disempowered or is reliant upon another to secure the basic necessities, these differentials can be very dangerous. Elder abuse, like child abuse, domestic violence against younger persons, and human trafficking, is underreported, involves individual and family dynamics that often boggle our minds, and is a true social ill.³



Figure 1: Statistics for reporting of elder abuse.

As aptly recognized by the Elder Abuse Prevention and Prosecution Act (EAPPA),⁴ it is the quintessential example of the type of behavior that requires a community approach and collaboration at all levels. The EAPPA, enacted on October 18, 2017, is a “multi-pronged approach to prevent elder abuse, protect victims, and prosecute

² See generally Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS, 2 CRIMINAL JUSTICE, 82–96 (U.S. Dep’t of Justice, Office Justice Programs 2000).

³ *Get Involved, Get Safe*, U.S. DEP’T OF JUST., ELDER JUST. INITIATIVE, [https://www.justice.gov/file/1033716/download#Financial Exploitation Get Involved – Handout](https://www.justice.gov/file/1033716/download#Financial%20Exploitation%20Get%20Involved%20-%20Handout).

⁴ 34 U.S.C. § 21711(b)(2) (referencing training of elder justice issues for law enforcement, court personnel, social services personnel, etc., and “any other individuals whose work may bring them in contact with elder abuse”).

perpetrators of elder abuse crimes.” It seeks to improve elder abuse prevention by improving elder abuse collection data at local, state and federal levels; improve law enforcement training and technical assistance regarding elder abuse; provide improved victim assistance to victims of elder abuse; improve and support federal prosecution of elder abuse; and create enhanced penalties for those who engage in telemarketing and email scams targeting elders.⁵

So what do we do when, as is the case with elder justice, the paths of the federal and state prosecutors not only run parallel and intersect, but merge? We seize the opportunity. The creation of the Elder Justice Coordinator (EJC) positions by the U.S. Department of Justice opens doors and puts a much-needed spotlight on the targets older persons in this country wear on their backs.⁶ The freedom and creativity allowed to tailor those positions to the needs of each district provides an opportunity to address the specific needs of the community. The Iowa Attorney General’s (AG) Office is the recipient of a DOJ Office on the Violence Against Women grant for Training and Services to End Abuse in Later Life. The Iowa AG’s Office has partnered with state and county-level law enforcement, adult protective services, the state coalitions against domestic violence and sexual assault, the state long term care ombudsman, and two county attorney offices in administering the grant. The grant has three areas of focus: (1) training of law enforcement, judges, prosecutors, and victim services providers; (2) creation of a coordinated community response team; and (3) providing victim services. Perhaps you are in a district of a state, such as Iowa, where there is ongoing work at the state and local level to address elder abuse.⁷ Maybe you are not aware or do not know that you are in a district where there is ongoing work at the state and local level. Maybe, if put under oath, you would be forced to say that you have no idea. Regardless of where you find yourself, there are some key points that may serve you well as you head out of the sandbox with a mission and resources in hand.

⁵ See generally 34 U.S.C. ch. 27.

⁶ 34 U.S.C. § 21711(b)(1), (3); see *Elder Justice Initiative (EJI)*, U.S. DEP’T OF JUST., <https://www.justice.gov/elderjustice> (last visited Oct. 30, 2018).

⁷ See Press Release, U.S. Dep’t of Justice, Regional Elder Justice Task Forces Launched and U.S. Attorney’s Office Selected to Participate (Mar. 30, 2016).

II. Identify state and local players⁸

The challenge of addressing elder abuse is one faced by all states. Not only does each state face different issues and use different approaches, each community within a state can bring its own unique issues and approaches to the table. Keep in mind you likely will be attempting to engage a system that is struggling to address elder abuse or does not recognize it as an issue, much less a priority. Think broadly and creatively when identifying sources of information and opportunities for collaboration, and prepare yourself for the possibility that you may be, at least initially, the primary motivator. Talk to state and federal prosecutors in other states to get an idea of what seems to be working there. Reach out to state and federal agency staff to talk about what work they are doing on behalf of older persons. Identify the agencies and organizations in your area that have received elder abuse or related grants.⁹

While state and local government agencies, including state and local law enforcement and prosecutors, often have a good sense of what is going on in their community and may know of existing elder abuse initiatives, they may not be aware of what you can bring to the table. Organizations, including non-profits, that regularly engage with victims of elder abuse often have valuable information and can be a great resource.¹⁰ Financial institutions are often the eyes and ears of law enforcement when it comes to elder abuse, because of the institution's unique access to financial records and their front-line staff's one-on-one interactions with elderly customers. Do not discount the interest most financial institutions have in their customers' well-being and their willingness to assist in eradicating elder crime. You will often find that financial institution employees are the most vocal when stakeholders gather to discuss preventing and addressing elder abuse.

⁸ The image in Figure 2 is from the *Elder Abuse* handout created by the Office for Victims of Crime. See OFFICE FOR VICTIMS OF CRIME, NAT'L CTR. FOR VICTIMS OF CRIME, ELDER ABUSE.

⁹ OVE Abuse in Later Life Grant Program, NCALL, <http://www.ncall.us/ovw-abuse-in-later-life-grant-program> (last visited Oct. 16, 2018).

¹⁰ *Elder Justice Neighborhood Map*, U.S. DEP'T OF JUST., <https://www.justice.gov/elderjustice/support/resources-neighborhood> (last visited Oct. 18, 2018).

Older adults with cognitive impairments experience **2X** the economic losses of peers without such incapacities^D

Figure 2: Statistics for older adults with cognitive impairments.

Start conversations about elder abuse and challenge people to think differently. Look for and ask about elder abuse initiatives and training already underway in your area, and make yourself known as an available resource. Ask your state and local partners to make introductions. If your state and local partners do not know the people you are discovering and meeting, make sure to include them. Know that someone in your position expressing an interest really does mean something and can spur action.

III. Make yourself a fixture

Take the time to develop relationships with state and local prosecutors, law enforcement, and the community. Is there a Special Assistant United States Attorney (SAUSA) in your area with expertise in elder justice? Is there a state prosecutor with an interest who can be persuaded to join the ranks? Are the prosecutors in your area dealing with these issues but in need of a boost? Networking and collaboration often take a backseat when you have the pressure of a full court calendar, but an investment of time upfront will ultimately save you much time and effort in the end. EJC's should realize that there are many providers and advocates available who are familiar with these issues. What you see as a novel, mind-boggling issue may be familiar to these providers and advocates and they may have extensive experience navigating the waters. Save yourself some time and learn from and lean on them—they will appreciate it. Again, though it can be tough to add one more task to the calendar, touch base regularly, both formally and informally, with them to ensure an open line of communication. Think about how much more we tend to learn from casual conversations as opposed to regularly scheduled, formal meetings. There is real value in cultivating relationships, one of which is helping you to ultimately be more effective and efficient.

Historically, when you ask state or local agencies about their experience with “the Feds,” the answer tends to center around three chief complaints: (1) the Feds “cherry pick” cases based on some

mysterious criteria or seemingly ever-changing dollar threshold; (2) they take a significant amount of time to bring a case; and (3) once you give them *your* case, they will disappear, leaving you to wonder what happened and leaving you with no answers for the family members that are trying to reach out about the status of their case. Now, not only does the state prosecutor have a victim who has been abused, the prosecutor now feels behind and has to spend time trying to connect with you. Of course we know there are two sides to every story. State and local law enforcement and prosecutors can be slow in bringing federal resources to the table, or may be disinclined to ask for help at all. Sometimes this is a result of prior experiences, as described above; it may be a lack of awareness or simple misjudgment of the case; and, dare we say, once in a while it is purely ego driven. You may also be dealing with a small, rural town which does not have sufficient resources to handle a case of this type.

Additionally, locally-elected prosecutors and government officials are directly answerable to their constituents in a way federal prosecutors are not. They may feel a real pressure to resolve cases in a way they see as more palatable to the victims and the community. This pressure may motivate them to keep the case local. The state prosecutor who brings in the federal government to “deal” with “local matters” may receive criticism from the victims and the community. Keep in mind that states, just like the federal government, struggle with resource issues. It may be that the state prosecutor is not hearing about these cases because law enforcement has deemed them to be “civil matters” and therefore, is not taking the reports or sharing them with the prosecutor.

Fortunately, very different from the stories we create based on a bad game of telephone, when the federal and state prosecutor communicate with each other and establish a relationship it usually results in the recognition that there is a well-intentioned human being on the other side. Good communication within a well-maintained relationship is key to minimizing, if not totally avoiding, these misunderstandings and helps to ensure that the focus stays on the victims. If you have identified a case or have been referred a case that you believe can go federal, great. Speak with the state and locals about how you can work together and what resources you can draw from within the community. If you are looking at a case thinking it is not one for federal charges, be upfront about it, make sure the

information is communicated to the right people, and, again, offer what you can.

IV. Recognize and adopt the benefits of a multidisciplinary approach

We certainly cannot do this work alone, nor do we need to. We will see better outcomes for victims when we consider and incorporate different perspectives. A multi-disciplinary approach allows you to benefit from the experiences and expertise of others. Also a partnership can yield many resources you may not otherwise have access to such as knowledge of and experience with local resources, assistance from staff of state or local agencies with special expertise, and streamlined access to records and other information. Elder rights specialists at the local area agency on aging, local long term care ombudsmen, facility surveyors or inspectors, and systems and community-based advocates can facilitate communication with and interviews of older victims and are often far-better equipped to identify and address any special needs or concerns. Your participation on an existing multi-disciplinary team (MDT) or your drive to create one can not only help you identify cases but can also help you more effectively and efficiently resolve them.

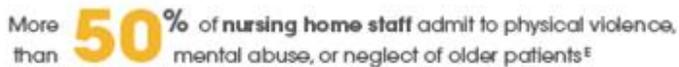
V. Go beyond finding cases¹¹

Identifying and working cases is essential work. However, you will be missing out on many opportunities if your communication with the state and locals ends once you have identified and accepted or denied a case. Our focus as prosecutors tends to be on bringing cases; however, older victims rarely feel relief as a result of a criminal prosecution of their offender, who is often a trusted person in their lives or the only person whom the victim believes cares about them. Ask prosecutors about the odds of collecting restitution in a financial exploitation case and you are likely to get a collective eye roll. Further, abused older persons are three times as likely to die and four times as likely to enter a nursing home.¹² As “law enforcement,” we

¹¹ The image in Figure 3 is from the *Elder Abuse* handout created by the Office for Victims of Crime. See OFFICE FOR VICTIMS OF CRIME, NAT’L CTR. FOR VICTIMS OF CRIME, ELDER ABUSE.

¹² THE ELDER JUSTICE ROADMAP: A STAKEHOLDER INITIATIVE TO RESPOND TO AN EMERGING HEALTH, JUSTICE, FINANCIAL AND SOCIAL CRISIS, NAT’L CTR. ON

sometimes find ourselves holding what is a rather narrow view of our roles. Though our jobs involve investigating and prosecuting conduct that has already occurred (the “reactive” approach), we are equally well-positioned to help stop elder abuse (the “proactive” approach). Our knowledge of both the law and the system—the good, the bad, and the ugly—means we must have a seat at the “prevention” table. And let’s face it, it feels just as good, if not better, to spare someone pain as it does to make someone answer for it.



More **50%** of nursing home staff admit to physical violence, mental abuse, or neglect of older patients^F

Figure 3: Statistics of older patients subjected to abuse by nursing home staff.

Along those lines, participation in joint efforts and outreach with the state and locals is critical. EAPPA requires EJC’s to “conduct[] public outreach and awareness activities relat[ed].”¹³ Why start from scratch on your own and leave out important parties when having these conversations? How about taking advantage of a coordinated effort and the presence of a united force? There are active coordinated community response teams, task forces, or initiatives in every state. Some of them may be legislatively required to act and others may be office-initiated, but they will have points of contact and likely also have established meetings and outreach efforts. Your time is valuable. Make sure you are thinking strategically and leveraging all available resources.

Also, there may be groups that were once active but are now disbanded because they completed their assigned task, or there is a lack of leadership, or lack of funding. You can still draw contacts from these past initiatives. Any scammer can tell you about the tremendous value of a good contact list.

VI. Try a little bar review

Not every case is a federal one and there may be times when it is beneficial or preferable to keep a case at the state level. This means that you need to have at least a basic familiarity with your state’s

ELDER ABUSE, U.S. DEP’T OF JUSTICE & U.S. DEP’T OF HEALTH AND HUMAN SERVS. 4 (2014).

¹³ 34 U.S.C.A. § 21711(a)(1)(A)–(D).

laws on elder abuse, vulnerable adult abuse, or general statutes (criminal and civil) applicable to the abuse of older persons. For example, many federal prosecutors have no cause (other than a personal one) to be familiar with their state's laws on powers of attorney (POA). However, the rights, responsibilities, and duties of an agent under a POA law are highly relevant when looking at any type of abuse committed by a fiduciary. Some state laws may require or provide for a signed acknowledgement of those rights, responsibilities, and duties. A state POA law may carry criminal penalties or that agent's position as a fiduciary may give rise to criminal charges under federal law. And perhaps more importantly, a state POA law may give rise to a civil action which will allow the victim to seek what they see as more immediate and effective relief.¹⁴ Many states have criminal elder or vulnerable adult abuse statutes that may be more appropriate or effective given the circumstances. Those statutes also often come with civil provisions which, again, can assist an older victim in getting relief such as protective orders and access to services that they may not otherwise have access to or that may be difficult to obtain under federal law.¹⁵

On the flip side, make sure that state and local law enforcement and prosecutors in your area have some grasp of relevant federal law and process. Many may be unaware of the federal laws regarding elder abuse. They may have not heard about the creation of the EJC positions. They also know little to nothing about the case process at the federal level—who to call, case acceptance procedures, required disclosures, etc. Though the federal government has always had a hand in addressing scams affecting older persons, the federal focus on elder abuse is new and not necessarily intuitive. Highlight for them the work that has been and is being done via the Elder Justice Initiative and the resources available to them. Explain to them what your role is, your understanding of their role, and how you can help each other be more effective in this area. If you are not quite sure what your role is or how this will ultimately play out, be vocal. It is very likely that those you are encountering on the state and local level

¹⁴ See, e.g., Iowa Code Ann. ch. 633B; S.C. Code Ann. § 62-8-101 *et seq.*; N.C. Code Ann. ch. 32C.

¹⁵ For example, Iowa has a provision that allows for a victim of elder abuse to petition a court for a protective order from the elder abuse. See Iowa Code Ann. §235F.5.

are equally unsure of the best way to approach the issue or, perhaps, where to even start. Victims are best served when we put ourselves out there and are honest about what we know and do not know and what we can and cannot do.

It is said that experience is a tough teacher in that she gives the test first and the lesson later. That is similar with elder abuse. There is no easy solution and there is no single approach that mirrors what we have applied in the past to other forms of abuse. Do not be discouraged when you head out and hit the first wall, and then the second. Prosecuting cases and the work that goes with it is hard. Getting everybody on the same page and going in the same direction can be even harder. Add to that the dynamics of elder abuse and you may find yourself seriously wondering whether you can be successful. Like anything else we do, you are going to try things that do not work. You will encounter situations, people, and cases that challenge you on every level. Those challenges will make you a better prosecutor in the end. Own your mistakes and, more importantly, own your successes. Though elder abuse and these cases rarely garner the attention and accolades others do, they matter. Not only are we standing up for older persons who cannot stand up for themselves, we are working to ensure that future generations, perhaps including our own, can live their lives free from abuse.

About the Authors

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Promoting Elder Justice in Rural America: What the United States Department of Agriculture Brings to the Table

Brent Elrod

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USDA National Institute of Food and Agriculture

I. Introduction

The proportion of older adults in the United States is growing at an unprecedented rate. By 2050, the number of Americans age 65 or older may reach nearly 89 million (more than double their number in 2010).¹ Currently, “the rural population includes over 8 million people age 65+, and rural areas are older than urban ones with a greater percentage of population age 65 and over (16.2 versus 12.6).”²

The rapid aging of the U.S. population is driven by two realities: (1) Americans are living longer, and (2) the post-World War II baby boom resulted in proportionately more older adults. The aging of the U.S. population has wide-ranging implications for virtually every facet of American society, including public health, family development, and housing and community needs. In rural areas, including frontier and tribal communities, the associated challenges can be even more vexing.

Compared to elders living in more urban areas, rural elders generally:

- have higher poverty rates, lower incomes, and fewer employment opportunities;
- live in less adequate and older housing;

¹ GRAYSON K. VINCENT AND VICTORIA A. VELKOFF, U.S. CENSUS BUREAU, THE NEXT FOUR DECADES, THE OLDER POPULATION IN THE UNITED STATES: 2010 TO 2050 1 (May 2010).

² John A. Krout, *Rural Aging*, GRANTMAKERS IN AGING, <https://www.giaging.org/issues/rural-aging%20/> (last visited Aug. 27, 2018).

- rely more heavily on themselves and informal networks for transportation;
- are less healthy;
- have less access to a wide range of community-based social, health, and mental health services; and
- have fewer long-term care options.³

Any of these factors can place vulnerable elders at serious risk of abuse and exploitation. Coupled or grouped together, ill effects can compound. In worst case scenarios, life savings are lost, families are broken, and exploited adults die undignified deaths.

To help reduce threats to an aging populace, the U.S. Department of Agriculture (USDA) offers a wide variety of programs and resources to strengthen individuals, families, and communities.

II. “Do right and feed everyone”⁴

George Ervin “Sonny” Perdue III made that simple, yet powerful statement to USDA staff upon his confirmation as the 31st Secretary of Agriculture in 2017. Perdue’s statement guides a departmental strategic plan that provides all Americans access to a safe, nutritious, and secure food supply.⁵ The intention also informs USDA’s leadership of the Interagency Task Force on Agriculture and Rural Prosperity (ARP).⁶ The task force stood up in response to an April 2017 executive order⁷ and identified over 100 recommendations for the federal government to help improve life in rural America. The recommendations were consolidated and organized under five thematic areas: (1) e-Connectivity, (2) economic development, (3) innovation and technology, (4) workforce, and (5) quality of life.⁸

In implementing the ARP recommendations, the USDA applied Perdue’s “doing right” philosophy to ensure USDA programs and policies contribute to enhancing the quality of life of America’s aging

³ *Id.*

⁴ U.S. DEPT OF AGRIC., USDA STRATEGIC PLAN: FY 2018–2022 2 (May 2018).

⁵ *See id.*

⁶ *Rural Prosperity: Interagency Task Force on Agriculture and Rural Prosperity*, U.S. DEPT OF AGRIC., <https://www.usda.gov/topics/rural/rural-prosperity> (last visited Aug. 27, 2018) [hereinafter *Rural Prosperity*].

⁷ Exec. Order No. 13790, 82 Fed. Reg. 20237 (Apr. 25, 2017).

⁸ *Rural Prosperity*, *supra* note 6.

farmers and ranchers, their family members and neighbors, and the communities in which they live.

Because the USDA is a large, multifaceted federal entity, there are many avenues of assistance at its disposal. Comprised of 29 agencies and offices, spread out over 4,500 national and international sites, the majority of the USDA's 100,000 employees are field-based. This is especially true in rural communities, where staff live, work, and worship alongside those they serve. In contrast, most other federal (non-military) agencies have a much smaller rural footprint.

III. Health and hearth

When considering the challenges facing rural seniors, USDA programs are often critical lifelines for the most vulnerable. The agricultural enterprise, encompassing food, fiber, fuel, and water, is foundational to meeting the basic physiological necessities of human survival. By offering services and resources that meet these basic human needs, the USDA helps set a more equitable table for an increasingly diverse and elderly American population.

Most everyone agrees good health begins with access to safe, nutritious, and affordable food. Proper diet, coupled with exercise, is a recipe for success as individuals age. This is especially true as metabolisms slow down, and muscle and bone density wane from physical peaks. Lifestyle changes can also play a role in how individuals purchase and consume food. As children grow up and leave the nest, mom or dad may not prepare meals like they once did. Cooking for one or two may prove less attractive than fixing the larger family meal, and may contribute to less nutritious choices. The elderly may be confronted with decreasing mobility and challenging medical conditions. Those living on a fixed income may find it difficult to pay bills when confronted with the associated medical costs. In light of all of these factors and the rising number of elderly in the United States, the need for programs tailored to aging seniors is more important than ever.

Of the seven nutrition assistance programs that the USDA offers, three exclusively target seniors: (1) the Commodity Supplemental Food Program, (2) the Senior Farmers Market Nutrition Program, and (3) the Nutrition Services Incentive Program. For the latter program, the USDA partners with the Department of Health and Human

Services Administration for Community Living.⁹ While these programs are critical sources of the health and nutrition support for older Americans, they do not reach all who are eligible.

The Supplemental Nutrition Assistance Program (SNAP), as an example of a program that is not exclusively targeted to seniors, reaches less than half of eligible seniors.¹⁰ The agency that oversees the SNAP program, the Food and Nutrition Service, has multiple and ongoing efforts underway to grow these numbers.¹¹ Increasing the percentage of eligible adults participating in the program through collaborative efforts at the grassroots level is one key to improving the dietary aspects of health for more rural seniors.

Assume that Mrs. Richards¹² is one of the four million seniors participating in SNAP. She can use her benefits to buy breads and cereals, fruits and vegetables, meats, fish, poultry, and dairy. In small town America, that can mean arranging transportation for a lengthy trip to and from the local grocery or corner store. During the winter months this can be especially challenging. Upon returning home, she may have to store dry goods in a kitchen pantry under a leaky roof, or cook on a stove with a faulty element. What then?

Food production and safety are well known aspects of the USDA mission. Less recognized is that the USDA plays a leading role in the rural housing arena. For example, Mrs. Richards may qualify for a grant or direct loan to address the health and safety hazards in her home through the Rural Housing Service's (RHS) Single-Family Housing Repair Program. Perhaps she'd be better served by moving to one of the 146,000-plus safe, affordable apartments that the USDA's Rural Development (RD) agency administers through its Multi-Family Housing Investments for Seniors. Maybe she benefits from the food bank or health care clinic that received financial support under RHS's Community Facilities (CF) program. If she becomes too frail to continue living safely and independently in her own home, then a CF-funded assisted living facility or nursing home might ensure the appropriate level of care and support for the latest years of life.

⁹ Press Release, U.S. DEP'T OF AGRIC., Fact Sheet: USDA Support for Older Americans (Mar. 16, 2018).

¹⁰ *Id.*

¹¹ *Id.*

¹² Mrs. Richards is fictional and the events described are not based on any one particular individual or example.

Because USDA programs can be grouped and administered to complement one another, some rural communities are strategically addressing the issues that accompany the aging of their lifelong residents. Carthage, Illinois, a town of less than 3,000 people, presents a good case study.¹³ Working through the Hancock County Senior Services Association, Rural Development provided a \$1 million Rural Economic Development loan, a \$300,000 Rural Economic Development grant and a \$2.2 million Community Facilities loan to help build Maple Grove Apartments, a “memory care” facility.¹⁴ Conceived and designed for persons living with cognitive impairments such as dementia, this innovative project creates a living space that feels more like a home than an institutional setting.¹⁵ In addition to having their own private studio apartments, residents benefit from around the clock staff ensuring safety and security.



Photo of Maple Grove Apartments

Facilities like Maple Grove are part of a larger movement that utilize “universal design” principles.¹⁶ Whether in a single-family home or a larger residential complex, the overarching goal is to incorporate design elements that allow individuals, both those

¹³ POPULATION.US, *Population of Carthage, IL*, <https://population.us/il/carthage/> (last visited Oct. 16, 2018).

¹⁴ Press Release, U.S. DEP’T OF AGRIC., Fact Sheet: USDA Support for Older Americans (Mar. 16, 2018).

¹⁵ *See id.*

¹⁶ 7 *Principles of Universal Design*, EXTENSION.ORG, <https://articles.extension.org/pages/24186/7-principles-of-universal-design> (Sept. 25, 2015).

receiving and giving care, to extend independence and comfort in the built and surrounding environment.¹⁷

IV. Other key ingredients in the USDA's alphabet soup: NIFA, LGUs, and CES

Researchers at Land-Grant Universities and Colleges¹⁸ are among those studying and making discoveries related to universal design. Another USDA agency, the National Institute of Food and Agriculture (NIFA), partners with the Land-Grant Universities (LGUs) and the Cooperative Extension Service (CES), to conduct research, education, and outreach in the food and agricultural sciences.¹⁹ Through this unique, 150-plus year partnership, federal financial assistance and national program leadership help advance the educational and decision-making needs of producers and their families across multiple domains.

The legislative definition of food and agricultural sciences explicitly includes social sciences, including activities related to home economics and rural human ecology.²⁰ People and their financial security are thus naturally woven into NIFA's tablecloth. Utilizing NIFA funding, LGU faculty and educators developed courses in risk management for agricultural producers, money management for youth, and retirement planning for the "it's never too late" crowd, setting the table for financial success across the lifespan.²¹ When the crop fails and red ink soars, or when junior dips into his college fund to buy the latest model motorcycle, good financial planning can help ward off any need to replace the fine china with paper plates. If a financial setback does occur, lack of awareness, preparation, and early intervention will almost certainly make a challenging situation even more difficult to overcome. This is especially true when a family member illegally

¹⁷ *See id.*

¹⁸ *Partnerships, About: How We Work*, U.S. DEP'T OF AGRIC.: NAT'L INST. OF FOOD & AGRIC., <https://nifa.usda.gov/partnerships> (last visited Aug. 27, 2018).

¹⁹ National Agricultural Research, Extension, and Teaching Policy Act of 1977, Pub. L. No. 95-113, § 1402 (codified at 7 U.S.C. § 3101).

²⁰ *Id.* § 1404(8).

²¹ Debra Pankow & Barbara O'Neill, *eXtension Financial Security for All: A Community of Practice to Increase Financial Literacy*, 46 J. EXTENSION (June 2008), <https://www.joe.org/joe/2008june/a3.php>.

accesses and depletes grandma's savings. The resulting spill can be ugly, debilitating, and leave a permanent family stain.

Financial exploitation of an older adult by a family member is a particularly troublesome risk area, reflecting nearly 58% of perpetrators in one study.²² Social isolation,²³ gender,²⁴ race,²⁵ and functional impairment²⁶ are among the characteristics that make adults vulnerable as they age. To better understand how and why financial exploitation occurs, and how it might be prevented and mitigated, the NIFA supported multistate research project, *Elder Financial Exploitation: Family Risk and Protective Factors*, began a new, five-year study in 2017.²⁷

Bringing together LGU faculty from Iowa State University, South Dakota State University, University of Minnesota, University of Wisconsin, University of Wyoming, Virginia Polytechnic Institute and State University, and Washington State University, the team seeks to understand the parameters and ramifications of elder financial exploitation (EFE).²⁸ The Centers for Disease Control and Prevention define "financial abuse or exploitation" of elders as "the illegal, unauthorized, or improper use of an older individual's resources by a

²² Janey C. Peterson et al., *Financial Exploitation of Older Adults: A Population-Based Prevalence Study*, 29 J. GEN. INTERNAL MED. 1615 (2014).

²³ *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America* 5 (Richard J. Bonnie & Robert B. Wallace 2003), <https://www.ncbi.nlm.nih.gov/books/NBK98788/>.

²⁴ Edward O. Laumann, Sara A. Leitsch, & Linda J. Waite, *Elder Mistreatment in the United States: Prevalence Estimates from a Nationally Representative Study*, 63 J. GERONTAL B PSYCHOL. SCI. SOC. SCI. 4, S248–54 (July 2008).

²⁵ Janey C. Peterson et al., *Financial Exploitation of Older Adults: A Population-Based Prevalence Study*, 29 J. GEN. INTERNAL MED. 1615–23, 2014.

²⁶ Bruce Friedman et al., *Longitudinal Prevalence and Correlates of Elder Mistreatment Among Older Adults Receiving Home Visiting Nursing*, 27 J. ELDER ABUSE & NEGLECT 34, 36 (2014).

²⁷ *W3191: Elder Financial Exploitation: Family Risk and Protective Factors*, NIMSS.ORG, <https://www.nimss.org/projects/18384> (last visited Aug. 27, 2018).

²⁸ NIMSS.ORG, https://www.nimss.org/projects/view/appendix_e_direct/18384 (last visited Aug. 27, 2018).

caregiver or other person in a trusting relationship, for the benefit of someone other than the older individual.”²⁹

The previous study, *Elder Financial Exploitation: Impact on Families*, resulted in a number of publications and presentations between 2012 and 2017.³⁰ The investigators’ findings shed light on a serious problem that often remains hidden and underreported, especially when the abuser is a family member acting as a power of attorney for the elderly relative.³¹

The University of Minnesota (UMN) is building upon this and associated research to prevent and minimize negative impacts from these kinds of illicit activities. The goal of the UMN project “is to develop and disseminate research-informed EFFE prevention education for family members and practitioners with the long term goal of safeguarding the health, and economic and social well-being of adults in later life, intergenerational family systems, communities and larger society.”³²

Individuals who have experienced financial exploitation of an elderly family member may be eligible to participate in the study. A dedicated portal describes the project in greater detail.³³

The multistate and UMN research efforts complement other NIFA-supported programming designed to raise awareness and understanding of the complicated issues associated with aging at the individual, family, and community levels.

²⁹ *Elder Abuse: Definitions*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/violenceprevention/elderabuse/definitions.html> (last visited May 17, 2018).

³⁰ *W2191: Elder Financial Exploitation: Impact on Families*, NIMSS.ORG, <https://www.nimss.org/projects/14656> (last visited Aug. 27, 2018).

³¹ *Id.*

³² *Examining Elder Family Financial Exploitation to Inform Prevention Education*, U.S. DEP’T OF AGRIC., <https://portal.nifa.usda.gov/web/crisprojectpages/1013288-examining-elder-family-financial-exploitation-to-inform-prevention-education.html> (last visited Aug. 27, 2018).

³³ See *Welcome to the Elder Family Financial Exploitation Project*, UNIV. OF MINN., <http://www.cehd.umn.edu/fsos/research/effep/default.asp> (last visited Nov. 2, 2018).

Aging in Place: Home and Community in Rural America is a newly authorized multistate research project.³⁴ Over the next five years, the research team will compare how state-level policies impact older adults' ability to age in place in rural areas and lay the groundwork for new policies that encourage environmental, social, and financial factors to age in place.

The North Central Region Aging Network (NCRAN) is working across 12 states to build and amplify knowledge on various aging-related topics. NCRAN is preparing Cooperative Extension System (CES) educators to effectively assess, deliver, and evaluate aging-related programming. To build system capacity, the group is developing a toolkit of high quality, aging-related CES programs and resources, training curricula, and indicators of success and impact.³⁵

Like NCRAN, the Adult Development and Aging Workgroup (ADAW) is building a repository of evidence-based programs that directly target and benefit seniors, but on a national scale.³⁶ NIFA established the ADAW in January 2017 to inform, assess, and address the existing and emerging needs and priorities of older Americans.³⁷

One program listed in the repository, Older Wiser Learners Series (OWLS), is a four-week program focusing on the unique needs of individuals over 65.³⁸ As part of the curriculum, educators from Ohio State University Extension Family and Consumer Sciences teach elders how to maintain personal safety while identifying potential scams.

Programs like OWLS are designed to help ensure that the maturing population is better equipped and protected from abuse and

³⁴ NIMSS.ORG, <https://www.nimss.org/projects/18430> (last visited Oct. 16, 2018).

³⁵ *North Central Region Aging Network Toolkit Development*, MICH. STATE UNIV., https://www.canr.msu.edu/news/north_central_region_aging_network_toolkit_development (last visited Aug. 27, 2018).

³⁶ *Adult Development and Aging Workgroup*, FAMILY & CONSUMER SCIENCES, https://nifa.usda.gov/sites/default/files/resource/Programs-in_CES-Aging-Portfolio.pdf (last visited Oct. 16, 2018).

³⁷ ADULT DEVELOPMENT AND AGING WORKGROUP CHARTER, U.S. DEP'T OF AGRIC. (Feb. 8, 2017).

³⁸ *Older Wiser Learners*, OHIO STATE UNIV. EXTENSION FAMILY AND CONSUMER SCIENCES, <https://www.nimss.org/projects/18430> (last visited Oct. 16, 2018).

exploitation. Individuals, family members, providers, and first responders may engage with their state Land-Grant and/or local Cooperative Extension office to find available program offerings or consider collaborative opportunities in their area.³⁹

As population numbers grow, and the percentage of older adults increases, ensuring the golden years do not tarnish should be on everyone's menu, not just the "early bird." The Cooperative Extension Service will continue its educational programming to dish up the latest discoveries of Land-Grant University research. USDA, NIFA, and sister agencies are well positioned to contribute the foundational selections that enhance safety, affordability, and physical and financial health—from farm to market, to school, and to table. Reservations are *not* required. Pull up a chair and join the USDA in doing right and feeding everyone.

About the Author

Brent Elrod is the National Program Leader of Community Development in the Institute of Youth, Families & Communities for the U.S. Department of Agriculture's National Institute of Food and Agriculture. In collaboration with the Land-Grant University System, Cooperative Extension Service, federal agencies, and non-governmental organizations, Elrod leads teams that advance the human and social dimensions of food and agricultural sciences. At the agency level, he represents NIFA on the Agriculture and Rural Prosperity Task Force implementation teams, Veterans in Agriculture Task Force, and contributes to the Department's OneUSDA initiative. Elrod serves on the Beginning Farmer and Rancher Development Program team, facilitates the eXtension Advisory Group, and liaises with the National Association of Community Development Extension Professionals (NACDEP). He is the NIFA liaison to the University of New Hampshire and several multistate research groups. Elrod was recognized with eXtension's national Champion Award in 2012, the Harold E. Hughes Award of Excellence for Responsiveness to Rural Issues & Concerns in 2015, the NIFA Partnership Award for Multistate Efforts as liaison to the Stronger Economies Together program in 2015, the NIFA A.J. Dye Award for Diversity in 2016, and

³⁹ *Land-Grant University Website Directory*, U.S. DEP'T of AGRIC., <https://nifa.usda.gov/land-grant-colleges-and-universities-partner-website-directory?state=KY&type=Extension> (last visited Aug. 27, 2018).

the NACDEP National and Southern Region Awards for Excellence in Teamwork as a member of the Rapid Response Team Regarding Civil Discourse on Race Relations in 2017. In 2018, he was honored with the Research, Education, and Economics (REE) Under Secretary's Award.

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Opioid Abuse and Elder Justice

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I. Introduction

Opioid abuse among older Americans is a rapidly growing health problem in the United States. Preliminary data from the Centers for Disease Control and Prevention (CDC) report estimates opioid deaths increased by approximately 10% from 2016–2017, claiming the lives of more than 70,000 people in the United States.¹ Every day, 115 Americans die from opioid abuse, including prescription opioids, heroin, and synthetic opioids such as fentanyl.²

In 2016, “one in three people with a Medicare prescription drug plan received an opioid prescription,” putting “baby boomers and our oldest generation at great risk.”³ As will be apparent from reading this article, for those 65 years old and over, opioid addiction is underestimated and underdiagnosed.

Sadly, opioid abuse may actually mimic symptoms of other medical or mental health disorders—such as diabetes, dementia, or depression—that are common in older patients. For those reasons, it is easy for doctors who encounter an older patient to chalk up declining mental or physical health simply to “old age,” instead of identifying the root of the problem, opioid abuse.

¹ *Alaska Opioid Response 2017–2018: Saving Lives Now and Working to Prevent Future Opioid and Substance Misuse 1* (Alaska Dep’t of Health & Soc. Servs., Rep. to Legis. Oct. 1, 2018).

² Nat’l Inst. on Drug Abuse, *Opioid Overdose Crisis*, <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis#one> (last visited Oct. 18, 2018).

³ Preventing and Treating Opioid Misuse Among Older Americans: Hearing Before the S. Spec. Comm. on Aging, 115th Cong. (2018) (statement of Sen. Bob Casey, Ranking Member, S. Spec. Comm. on Aging).

II. How opioids work

“Opioids are prescription medications designed to help people [including older Americans] cope with pain.”⁴ Opioids “do not physically block a pain signal, but they boost a signal of pleasure deep within the brain.”⁵ “When pleasure signals are high, pain signals are easier to ignore or live with.”⁶

[Opioid] painkillers are remarkably common, as are addictions to those drugs. According to the National Institute on Drug Abuse (NIDA), an estimated 2.1 million people in the United States were addicted to painkillers in 2012. Many of these people came to addictions after abusing medications they were prescribed for pain. Others came to addictions due to borrowing or grabbing medications that belonged to others.⁷

Opioids are also purchased (illegally) from friends or someone with a legitimate prescription. There are many opioids available, according to NIDA, including: Hydrocodone, Oxycodone, Kadian, Avinza, Codeine, Demerol, Dilaudid, Fentanyl, Methadone, Morphine, and Heroin.⁸ As the website Sunrise House notes,

[e]ach drug comes with different dosing instructions and different risks, but they all work by tinkering with the brain’s pleasure signals. They all also come with a significant risk of overdose. Medscape reports that people who take too much of an opioid can slip into a coma-like state in which breathing rates and heart rates slow down to a crawl. With prompt medical attention, this process can be reversed. There are medications that can render opioids inactive, and if they are applied in

⁴ *What Is the Difference Between Prescription Opiates and Benzodiazepines?*, SUNRISE HOUSE, <https://sunrisehouse.com/prescription-drug-addiction-recovery/opiates-benzodiazepines/> (last visited Oct. 15, 2018).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Commonly Abused Drugs Charts*, NAT’L INST. ON DRUG ABUSE, <https://www.drugabuse.gov/drugs-abuse/commonly-abused-drugs-charts#prescription-opioids>.

time, people can make a full recovery from an overdose. But, if those medications are not applied in time, a severe overdose can be fatal.⁹

III. Statistics related to the opioid crisis

The following opioid crisis statistics from the National Institute on Drug Abuse are compelling:

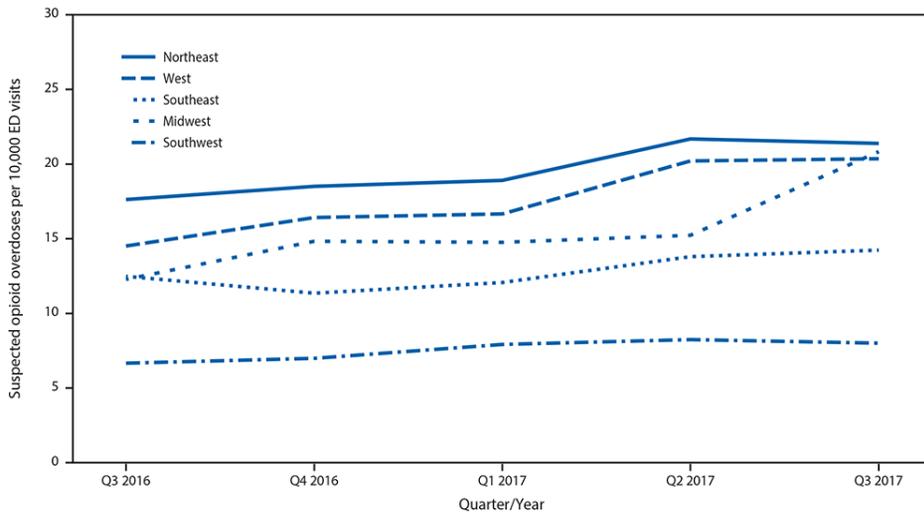
- Roughly 21 to 29 percent of patients who were prescribed opioids for chronic pain misuse them[;]
- Between 8 and 12 percent develop an opioid use disorder[;]
- An estimated 4 to 6 percent who misuse prescription opioids transition to heroin[;]
- About 80 percent of people who use heroin first misused prescription opioids[;]
- Opioid overdoses increased 30 percent from July 2016 through September 2017 in 52 areas in 45 states[;]
- The Midwestern region saw opioid overdoses increase 70 percent from July 2016 through September 2017[; and]
- Opioid overdoses in large cities increased by 54 percent in 16 states.¹⁰

The below chart from the Centers for Disease Control and Prevention, as cited by the National Institute on Drug Abuse is similarly instructive:¹¹

⁹ SUNRISE HOUSE, *supra* note 4.

¹⁰ Nat'l Inst. on Drug Abuse, *Opioid Overdose Crisis*, <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis> (last visited Oct. 19, 2018) (internal citations omitted).

¹¹ Nat'l Inst. on Drug Abuse, *Opioid Overdose Crisis*, <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis> (last visited Oct. 19, 2018) (citing M. Vivolo-Kantor, et al., Vital Signs: Trends in Emergency Department Visits for Suspected Opioid Overdoses—United States, July 2016–September 2017 (Ctrs. for Disease Control & Prevention Mar. 9, 2018)).



Quarterly rate of suspected opioid overdose, by US region
Source: Centers for Disease Control and Prevention

IV. Increase in addiction by older Americans

Because of the significant increase in opioid abuse and its connection to older Americans, the Senate Special Committee on Aging convened a hearing on May 23, 2018, on opioid misuse and the elderly. The Washington Post reported the following:

“Older Americans are among those unseen in this epidemic,” said Sen. Robert P. Casey Jr. (Pa.), the top Democrat on the panel. “In 2016, one in three people with a Medicare prescription drug plan received an opioid prescription. . . .”

Unwittingly, Medicare compounds the epidemic by funding needed opioids that can be abused, but, generally, not funding the care and medicines needed to fight opioid addiction.

. . .

“[W]hile Medicare pays for opioid painkillers, Medicare does not pay for drug and alcohol treatment in most instances, nor does it pay for all of the medications used

to help people in the treatment and recovery process,” William B. Stauffer, executive director of the Pennsylvania Recovery Organizations Alliance, in Harrisburg, Pa., said at the hearing. “Methadone, specifically, is a medication that is not covered by Medicare to treat opioid use conditions.”

Offering scary statistics and practices involving older folks, Gary Cantrell, a deputy inspector general at the Department of Health and Human Services, said “our nation is in the midst of an unprecedented opioid epidemic.”

He focused on Medicare Part D beneficiaries. Part D is the prescription drug section of Medicare, the government health insurance program covering older people. About a half-million Part D recipients “received high amounts of opioids” in 2016, Cantrell said. Almost 20 percent of that group are at “serious risk of opioid misuse or overdose,” he warned, placing the high risk in two categories—those receiving “extreme amounts of opioids” and some “who appeared to be ‘doctor shopping.’”

Doctor shoppers “each received high amounts of opioids and had four or more prescribers and four or more pharmacies for opioids,” Cantrell explained. “While some of these beneficiaries may not have been doctor shopping, receiving opioids from multiple prescribers and multiple pharmacies may still pose dangers from lack of coordinated care. Typically, beneficiaries who receive opioids have just one prescriber and one pharmacy.”

Many elderly get hooked on opiates through prescriptions, rather than street drugs like heroin.

“Older adults are at high risk for medication misuse due to conditions like pain, sleep disorders/insomnia, and anxiety that commonly occur in this population,” said Stauffer, who is in long-term recovery. “They are more likely to receive prescriptions for psychoactive medications with misuse potential, such as opioid

analgesics for pain and central nervous system depressants like benzodiazepines for sleep disorders and anxiety. One study found that up to 11 percent of women older than age 60 misuse prescription medications. The combination of alcohol and medication misuse has been estimated to affect up to 19 percent of older Americans.”¹²

According to the New York Office of Alcoholism and Substance Abuse Services, alcohol abuse among the elderly can be classified into two general forms: “the ‘hardy survivors,’ those who have been abusing alcohol for many years and have reached 65, and the ‘late onset’ group, those who begin abusing alcohol later in life.”¹³ Presumably, the same two forms exist in terms of other substance abuse.

V. Life-changing triggers causing opioid addiction in the elderly

Life-changing potential triggers for opioid addiction in the elderly include, as follows: “Retirement[;] Death of a family member, spouse, pet, or close friend[;] Loss of income or financial strains[;] Relocation or placement in a nursing home[;] Trouble sleeping[;] Family conflict[; or] Mental or physical health decline ([for example,] depression, memory loss, major surgeries).”¹⁴

¹² Joe Davidson, *Unseen Face of the Opioid Epidemic: Drug Abuse Among the Elderly Grows*, WASH. POST (May 25, 2018), https://www.washingtonpost.com/news/powerpost/wp/2018/05/25/unseen-face-of-the-opioid-epidemic-drug-abuse-among-the-elderly-grows/?utm_term=.8f04e75bfc4.

¹³ OFFICE OF ALCOHOLISM AND SUBSTANCE ABUSE SERVS., *Addiction Medicine FYI: Elderly Alcohol and Substance Abuse*, <https://www.oasas.ny.gov/AdMed/FYI/FYIInDepth-Elderly.cfm> (last visited Oct. 19, 2018).

¹⁴ ADDICTION CENTER, *Addiction in the Elderly—Senior Citizens and Substance Abuse*, <https://www.addictioncenter.com/addiction/elderly/> (last visited Oct. 19, 2018).

VI. Signs of addiction

There are many indications that may evidence a person is struggling with addiction. The following list from Dr. Louise Stanger's website allaboutintervention.com outlines several of these signs:

- Hiding drug or alcohol use[;]
- Taking multiple prescriptions from multiple places[;]
- Lying and cheating loved ones[;]
- Sudden mood swings and short tempers[;]
- Legal problems[;]
- Withdrawing from social activities they once enjoyed[;]
- Impulsive actions and decision making[;]
- Itchy skin[;]
- Needle marks, dry mouth, blurred vision, skin blotches[; and]
- Complaints of severe confusion, mania, hallucinations[.]¹⁵

VII. Particular dangers of elderly substance abuse

Opioid abuse among older people is particularly dangerous because senior citizens are physically more susceptible to the deteriorating effects of opioids. Individuals over 65 have a decreased ability to metabolize drugs, combined with an increased brain sensitivity to those same drugs.¹⁶ This makes it dangerous for seniors to use drugs or alcohol at all, even if the person is not addicted.¹⁷

Benzodiazepines (benzos), which are used to treat anxiety, pain, or insomnia, are some of the most dangerous prescription drugs for

¹⁵ Louise Stanger, *Pain Management and Opioid Addiction*, ALL ABOUT INTERVENTIONS, <https://www.allaboutinterventions.com/pain-management-and-opioid-addiction/> (last visited Nov. 2, 2018).

¹⁶ See Richard A. Friedman, *A Rising Tide of Substance Abuse*, N.Y. TIMES (Apr. 29, 2013), <https://newoldage.blogs.nytimes.com/2013/04/29/a-rising-tide-of-mental-distress/#more-15217>.

¹⁷ See *id.*

seniors.¹⁸ These are generously prescribed and highly addictive, particularly when prescribed with opioids, as described below.¹⁹

VIII. Dangers of combining opioids with benzodiazepines in the elderly

According to David Di Salvo in his 2018 Forbes article, *The Common Drug That May Make Opioid Drug Overdose Five Times as Likely*, “[a] new study shows the combination of opioids with one common class of drugs in particular is especially risky in the first 90 days of concurrent use.”²⁰ “Those drugs are benzodiazepines (often called ‘benzos’), the class that includes alprazolam (Xanax), diazepam (Valium), and clonazepam (Klonopin), med[ications] frequently prescribed to alleviate anxiety.”²¹

The study examined data from more than 71,000 Medicare Part D beneficiaries to find out how simultaneous use of opioids and benzos influence overdose risk over time. Patients were divided based on whether they had only taken opioids prior to overdose or had a supply of both opioids and a benzo drug. For those in the group with a supply of both, the researchers subdivided by the cumulative number of days the patients had taken an opioid with a benzo.

The analysis showed that the overdose risk was five times higher for patients taking both drugs during the first 90 days compared to those only taking an opioid. Risk was doubled for those taking both drugs during the next 90 days. After 180 days, risk of overdose was roughly the same as taking only opioids.

“Patients who must be prescribed both an opioid and a benzodiazepine should be closely monitored by health

¹⁸ See David DiSalvo, *The Common Drug That May Make Opioid Overdose Five Times As Likely*, FORBES (June 25, 2018), <https://www.forbes.com/sites/daviddisalvo/2018/06/25/the-common-drug-that-makes-opioid-overdose-five-times-as-likely/#506f41ef75c7>.

¹⁹ See *id.*

²⁰ *Id.*

²¹ *Id.*

care professionals due to an increased risk for overdose, particularly in the early days of this medication regimen,” said lead study author Inmaculada Hernandez, Pharm.D., Ph.D., assistant professor at the University of Pittsburgh School of Pharmacy, in a press statement.

The researchers adjusted the results to account for a range of demographic variables and clinical factors, including the number of clinicians that prescribed the drugs. The adjustment revealed that risk increased with the number of clinicians involved—the more clinicians prescribing drugs to any given patient, the greater the risk of overdose. The researchers think this result points to lack of communication between doctors treating the same patient.

“These findings demonstrate that fragmented care plays a role in the inappropriate use of opioids, and having multiple prescribers who are not in communication increases the risk for overdose,” said senior study author Yuting Zhang, Ph.D., of University of Pittsburgh Graduate School of Public Health.

The risk of combining opioids and benzos has been studied extensively, with alarms sounded by multiple public health groups and government agencies, including the US [Federal Drug Administration] and Centers for Disease Control and Prevention. The FDA released an emphatic warning earlier this year, citing risk of respiratory depression when taking the drugs together because both are potent central nervous system depressants. Respiratory depression occurs when breathing becomes slow and erratic and the body can’t adequately remove carbon dioxide. In the case of overdose, breathing can completely stop, leading to respiratory arrest and potentially death.

More than 30% of overdoses involving opioids also involve benzos, according to the NIH National Institute of Drug Abuse (a third common drug, alcohol, another central nervous system depressant, often also plays a role in overdose deaths involving opioids and benzos).

A 2017 study found that among more than 315,000 privately insured patients, the number who were prescribed both an opioid and a benzo increased 80% from 2001 to 2013. Similar to the latest study, that study also found a significant increase in overdoses among patients taking both drugs.²²

Even so, in 2017 the FDA advised that “the opioid addiction medications buprenorphine and methadone should not be withheld from patients taking benzodiazepines or other drugs that depress the central nervous system (CNS).”²³ “The combined use of these drugs increases the risk of serious side effects; however, the harm caused by untreated opioid addiction can outweigh those risks.”²⁴

IX. Opioids and rural America: a problem that is getting older

A frequently forgotten part of the opioid crisis involves older people living in small towns and rural areas. “There are approximately 10 million people age 65 and older living in rural America today, and one out of four older Americans lives in a small town or other rural area.”²⁵

In rural areas, work-related injuries from physically demanding jobs like coal mining and farming happen often, resulting in chronic pain. The physiology of aging can alter how people react to powerful narcotics, and cultural and generational sensitivities may stop people from seeking help (which may be scarce anyway) . . .

These are all drivers of the emerging evidence that Medicare patients have some of the highest and fastest

²² *Id.*

²³ U.S. Food & Drug Admin., *FDA Drug Safety Communication: FDA Urges Caution About Withholding Opioid Addiction Medications from Patients Taking Benzodiazepines or CNS Depressants: Careful Medication Management Can Reduce Risk*, <https://www.fda.gov/Drugs/DrugSafety/ucm575307.htm> (last visited Oct. 24, 2018).

²⁴ *Id.*

²⁵ GRANTMAKERS IN AGING, HEARTACHE, PAIN, AND HOPE: RURAL COMMUNITIES, OLDER PEOPLE, AND THE OPIOID CRISIS 4 (2017).

growing rates of opioid use disorder, including related hospitalizations increasing by 10 percent per year.

“Opioid misuse by older adults is very common in this region, largely due to poor health literacy and misunderstanding of the medication itself rather than a blatant desire to abuse,” explains Ashley Merritt, PharmD, with Parkland Health Mart Pharmacy in rural Ironton, Missouri. “They also have very little understanding of serious side effects like respiratory depression and potential signs of an overdose.”²⁶

To address the lack of pain management resources in many rural areas, one program from the University of Washington (UW) Division of Pain Medicine uses audio and video conferences to connect providers from rural, tribal, and medically underserved areas with pain medicine specialists.²⁷ “UW TelePain provides weekly audio and videoconferences that include a chronic pain case study and education on topics such as how to take a pain history, nondrug treatment options, safe opioid prescribing and psychological therapies.”²⁸ “Since UW TelePain began in 2011, more than 1,500 providers have participated from Washington, Wyoming, Montana, Oregon, Idaho, Alaska, and elsewhere.”²⁹

Senior-centered therapy at “Senior Hope Counseling in Albany, NY, is one of the few senior-only addiction treatment centers, offering support groups, addiction and trauma therapy, and Medication-Assisted Therapy for opioid addiction.”³⁰ Because “one size does not fit all,” “Senior Hope therapies reflect the needs of an older population.”³¹ “Older adults who have tried groups that included younger patients say they are uncomfortable with the profanity that is

²⁶ *Id.* at 4–5.

²⁷ See Robin Warshaw, *Bringing Medical Help to Rural Areas Overwhelmed by Opioid Abuse*, AAMCNEWS (June 27, 2017), <https://news.aamc.org/patient-care/article/bringing-help-rural-overwhelmed-opioids/>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Grantmakers, *supra* note 25, at 5.

³¹ Grantmakers, *supra* note 25, at 5.

common, and they feel like ‘mom’ or ‘dad,’ who had to focus on helping others instead of their own needs.”³²

Finally, Nora D. Volkow, M.D., the director of the National Institute on Drug Abuse, summarized the point, as follows:

[b]aby boomers’ histories of illicit drug use, and their relatively tolerant attitudes toward it, along with the fact that they now comprise nearly 30 percent of the Nation’s population, have raised the stakes on understanding and responding effectively to drug abuse among older adults.³³

X. Medicare Part D opioid prescription tracking methods

The Centers for Medicare & Medicaid Services (CMS) developed a website that tracks Medicare Part D opioid prescribing.³⁴ It is a mapping tool that is interactive and “shows geographic comparisons, at the state, county and ZIP code levels, of de-identified Medicare Part D opioid prescription claims,” specifically, those prescriptions “written and then submitted to be filled” within the United States.³⁵ “The mapping tool presents Medicare Part D opioid prescribing rates for 2016 as well as the change in opioid prescribing rates from 2013 to 2016.”³⁶

The mapping tool allows the user to see both the number and percentage of opioid claims at the local level in order to better understand how this critical issue impacts communities nationwide. By openly sharing data in a secure, broad, and interactive way,

³² Grantmakers, *supra* note 25, at 5.

³³ Nora D. Volkow, *Substance Abuse Among Older Adults*, NAT’L INST. ON DRUG ABUSE (Dec. 19, 2011), <https://www.drugabuse.gov/news-events/nida-notes/2011/12/substance-abuse-among-older-adults> (last visited Oct. 19, 2018).

³⁴ *Medicare Part D Opioid Prescribing Mapping Tool*, CTMS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/Medicare-Provider-Charge-Data/OpioidMap.html> (last visited Oct. 24, 2018).

³⁵ *Id.*

³⁶ *Id.*

the CMS and the U.S. Department of Health and Human Services (HHS) believe that this level of transparency will increase community awareness among providers and local public health officials.

The data reflects Medicare Part D prescription drug claims prescribed by health care providers. Approximately 70% of Medicare beneficiaries have Medicare prescription drug coverage either from a Part D plan or a Medicare Advantage Plan offering Medicare prescription drug coverage. In 2016, Medicare Part D spending was \$146 billion; U.S. retail prescription drug spending was about \$329 billion. The mapping tool does not contain beneficiary information nor does the information presented in this tool indicate the quality or appropriateness of care provided by individual physicians or in a given geographic region.³⁷

In addition to the mapping tool detailing opioid prescribing rates for Medicare Part D, there is also a look-up tool that allows the user to locate “a Medicare Part D prescriber by National Provider Identifier (NPI), by name or by location.”³⁸

This look-up tool is a searchable database that allows [a user] to find a Medicare Part D prescriber by National Provider Identifier (NPI), or by name and location. The look-up tool will return information on prescriptions provided to and filled by Medicare beneficiaries, including drug name, total number of prescriptions dispensed (including original prescriptions and refills), and total drug cost. The data covers calendar year 2016 and is based on final-action Part D claims for the entire Medicare Part D population. Information is redacted where necessary to protect beneficiary privacy.

The database is populated from the Medicare Part D Prescriber Public Use File (PUF). Although the Part D Prescriber PUF has a wealth of information on payment

³⁷ *Id.*

³⁸ *Medicare Provider Utilization and Payment Data: 2016 Part D Prescriber Look-Up Tool*, DATA.CMS.GOV, <https://data.cms.gov/part-d-prescriber> (last visited Oct. 24, 2018).

and utilization for Medicare Part D claims, the dataset has a number of limitations. Of particular importance is the fact that the data may not be representative of a physician's entire practice as it only includes information on beneficiaries enrolled in Medicare Part D prescription drug program. In addition, the data are not intended to indicate the quality of care provided.³⁹

XI. Tools to fight opioid addiction

Federal, state, and local governments have passed laws to deter trafficking, curtail overprescribing, and reduce diversion. In their 2018 article, *All Americans Can Help Fight the Opioid Epidemic*, authors Derek Schmidt and Jerome Adams discuss the positive benefits of drug courts and the overdose-reversing medication, naloxone:

Two specific interventions requiring cross-system collaborations are drug courts and the overdose-reversing medication, naloxone. As part of a comprehensive opioid strategy, these tools can impact the lives of people who misuse, their families and the first responders and health professionals who serve them.

In virtually every state and territory and in many tribal communities, treatment courts reduce recidivism, promote public safety and improve public health. Through more than 3,000 treatment courts in the United States today, nearly 150,000 Americans gain access to life-restoring services such as [medication-assisted treatment], instead of being held behind bars. As a result, these individuals, their families and our communities are safer, healthier and economically stronger. Well-administered drug courts— particularly those that partner with both behavioral health and law enforcement—reduce recidivism by as much as 45 percent, reduce drug use, improve health outcomes (including for babies of women

³⁹ *Id.*

with opioid use disorder) and save an average of \$6,000 for every person served.

As an influx of synthetic opioids in the illicit drug supply has increased America's overdose deaths, public safety leaders are working to stay ahead of the ever-evolving supply chain. For example, the National Association of Attorneys General recently endorsed proposed legislation to make fentanyl analogues illegal. In addition, the surgeon general issued a rare public health advisory to encourage more Americans to carry naloxone.

Congress, the White House, the Departments of Justice and Health and Human Services and state, local and tribal governments have expanded efforts to make naloxone more available. All states have passed naloxone-access laws and, in the vast majority of states, individuals can purchase naloxone without a prior prescription. In addition, most states have laws designed to protect health care professionals prescribing and dispensing naloxone from civil and criminal liabilities as well as Good Samaritan laws to protect people who administer naloxone or call for help during an opioid overdose emergency.

Recent polling shows the majority of Americans would use this life-saving medication. States are leading initiatives to harmonize good[sic] Samaritan laws, expand insurance coverage to include third parties likely to encounter an overdose and increase co-prescribing of naloxone to patients receiving high-dose opioid prescriptions for chronic pain. Since January 2017, the number of naloxone prescriptions dispensed on a monthly basis has nearly tripled.⁴⁰

⁴⁰ Derek Schmidt & Jerome Adams, *All Americans Can Help Fight the Opioid Epidemic*, KAN. CITY STAR (Sept. 20, 2018), <https://www.kansascity.com/opinion/readers-opinion/guest-commentary/article218719765.html> (last visited Nov. 1, 2018).

XII. Conclusion

In addition to the tremendous loss of life each year, “[t]he Centers for Disease Control and Prevention estimates the total ‘economic burden’ of prescription opioid misuse alone in the United States is \$78.5 billion a year, including the costs of health care, lost productivity, addiction treatment, and criminal justice involvement.”⁴¹ Aging baby boomers, becoming eligible for Medicare at a rate of approximately 10,000 per day,⁴² will only cause that number to increase exponentially in the next ten years.

As outlined by the National Institute on Drug Abuse, the Department of Health and Human Services (HHS) is focusing on the following five priorities: (1) “improving access to treatment and recovery services;” (2) “promoting use of overdose-reversing drugs;” (3) strengthening the “understanding of the epidemic” through “public health surveillance;” (4) “providing support for cutting-edge research on pain and addiction;” and (5) “advancing better practices for pain management.”⁴³ The National Institute on Drug Abuse goes on to describe the “National Institutes of Health (NIH), a component of HHS, as the nation’s leading medical research agency helping solve the opioid crisis via discovering new and better ways to prevent opioid misuse, treat opioid use disorders, and manage pain.”⁴⁴ “In the summer of 2017, NIH met with pharmaceutical companies and academic research centers” to discuss three issues: (1) “safe, effective, non-addictive strategies to manage chronic pain;” (2) “new, innovative medications and technologies to treat opioid use disorders;” and (3) “improved overdose prevention and reversal interventions to save lives and support recovery.”⁴⁵ In addition, “[i]n April 2018 at the National Rx Drug Abuse and Heroin Summit, NIH Director Francis S. Collins, M.D., Ph.D., announced the launch of the HEAL (Helping to End Addiction Long-term) Initiative, an aggressive, trans-agency

⁴¹ Nat’l Inst. on Drug Abuse, *supra* note 2.

⁴² Eric Pianin, *10,000 Boomers Turn 65 Every Day. Can Medicare and Social Security Handle It?*, FISCAL TIMES (May 9, 2017), <http://www.thefiscaltimes.com/2017/05/09/10000-Boomers-Turn-65-Every-Day-Can-Medicare-and-Social-Security-Handle-It>.

⁴³ Nat’l Inst. on Drug Abuse, *supra* note 2.

⁴⁴ Nat’l Inst. on Drug Abuse, *supra* note 2.

⁴⁵ Nat’l Inst. on Drug Abuse, *supra* note 2.

effort to speed scientific solutions to stem the national opioid public health crisis.⁴⁶

NIH aims to find a solution by understanding the biological underpinnings of chronic pain, accelerating the discovery and pre-clinical development of non-addictive pain treatments, and advancing new non-addictive pain treatments through the clinical pipeline.⁴⁷

In the end, older Americans experiencing pain must honestly address issues of opioid addiction with a physician. While many federal, state, local, and private groups like HHS, CMS, NIH, and DEA can provide statistics and reasons for the increase in opioid addiction in the elderly, the solution lies within each individual and his or her family and friends to recognize and treat that vulnerable older age group, who are often in more pain than others, by providing reasonable alternatives to opioid overuse.

About the Author

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⁴⁶ Nat'l Inst. on Drug Abuse, *supra* note 2.

⁴⁷ See *Enhance Pain Management*, NAT'L INSTS. OF HEALTH, <https://www.nih.gov/research-training/medical-research-initiatives/heal-initiative/enhance-pain-management> (last visited Oct. 22, 2018).

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Transnational Scam Predators and Older Adult Victims: Contributing Characteristics of Chronic Victims and Developing an Effective Response

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I. Introduction

With the advent of new technologies that make financial exploitation crimes increasingly easy to carry out, more and more Americans are falling victim. Certain populations are especially vulnerable, including older adults. Older adults are often identified as a group with cash resources that can be exploited, as well as a sensitivity to falling victim to scams, particularly by international predators who are often working as part of a transnational criminal enterprise. As such, older adults are frequently targeted and prone to chronic victimization.

Financial fraud crimes result in more than just a loss of financial resources. Recent research identified an association between a sudden loss of net worth (characterized as a loss of 75% of net worth over a two-year period) and increased mortality.² This type of loss appears to double the risk of death. These frauds are also widespread among older adults. A recent meta-analysis of current research found that

¹ The information, views and opinions provided by the authors do not express the official policy of the FBI or United States Department of Justice.

² Lindsay R. Pool et al., *Association of a Negative Wealth Shock with All-Cause Mortality in Middle-aged and Older Adults in the United States*, J. AM. MED. ASS'N (2018).

financial fraud and scams reach approximately 1 out of 18 cognitively intact older adults each year.³

To address these increasing crimes, each United States Attorney's Office and federal investigative agency will need to move beyond the idea that susceptibility to this type of fraud is related to dementia or someone simply making a bad decision. In this article, we will attempt to characterize the needs of older adults and why older adults are more vulnerable to transnational fraud and chronic victimization. The article will also explore the innovative strategies being used to combat financial exploitation and protect our older adults.

II. Impact of financial exploitation crimes

Although it is not usually identified as such, serious financial exploitation, like violent crimes, can be traumatic and life changing to an older victim. According to the U.S. Department's Health and Human Services, Substance Abuse and Mental Health Services Administration, (SAMHSA), "trauma results from an event, series of events, or set of circumstances experienced by an individual as physically or emotionally harmful or threatening with lasting adverse effects on the individual's functioning and mental, physical, social, emotional, or spiritual well-being."⁴ It is defined by the experience of the victim involved. In many cases, these crimes are disruptive enough to make it difficult or impossible for victims to re-establish any sense of a return to "normal" daily living. One older victim of an investment fraud described it as a form of "financial violence"⁵ a term that is now used in academic research.⁶ The types of financial exploitation most likely to be investigated and prosecuted federally are those that may have a devastating impact on many older adults, particularly those identified as chronic victims. Chronic victims refer to those victims often repeatedly victimized by or compliant with the

³ David Burnes et al., *Prevalence of Financial Fraud and Scams Among Older Adults in the United States: A Systematic Review and Meta-Analysis*, AM. J. PUBLIC HEALTH (2017).

⁴ *Trauma*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., <https://www.integration.samhsa.gov/clinical-practice/trauma-informed> (last visited Oct. 31, 2018).

⁵ See Debbie Deem, *Assisting Financial Crime Victims*, 47 U.S. ATT'YS BULL., no.1, 1999, at 31–33.

⁶ Thomas Price et al., *Elder Financial Exploitation: Implications for Future Policy and Research in Elder Mistreatment*, WEST. J. EMERG. MED. (2011).

people exploiting them, to their continued financial, physical, and emotional detriment.

Transnational financial exploitation may include mass marketing crimes in which scam predators often assume “imposter” identities and affiliations, or other labels of “authority.” Examples include crimes of lottery or sweepstake fraud, online romance scams (a form of “cyber intimate partner exploitation” in which a victim truly believes he or she is in an intimate partner relationship), grandparent scams, IRS and tech support scams, variations on advance fee scams including the “Nigerian Scam,” various types of investment frauds, and certain health care frauds. Repeated victimization can create a domino effect, eventually negatively impacting the financial totality of a victim’s everyday life. Early deaths, physical decline, loss of credit, bankruptcy, isolation from others, and depression are all examples of the impact of such scams.⁷ Prosecutors can document the resulting impact on victims when prosecuting someone who will be sentenced for crimes involving certain frauds under the U.S. Sentencing Guidelines. The guidelines authorize enhancements for substantial financial hardship to victims that can include these factors, especially if that financial hardship impacts five or more victims.⁸

The True Link Report on Elder Financial Abuse (the True Link Report) found that older adults lose \$36.48 billion each year to elder financial exploitation.⁹ Fraud and other misleading sales tactics associated with mass marketing and related frauds were estimated at over \$30 billion of the \$36.48 billion quoted;¹⁰ much more than that reported in earlier published estimated surveys, such as the 2011 MetLife Study of Elder Financial Abuse (the MetLife Study).¹¹ The MetLife Study estimated exploitation at approximately \$2.9 billion. While the MetLife Study used a very different methodology, it was written only six years earlier.¹² The True Link Report found that for

⁷ *Mass-Marketing Fraud: A Threat Assessment* 7–9 (Int’l Mass-Mktg. Fraud Working Grp. June 2010).

⁸ OFFICE OF GEN. COUNSEL U.S. SENTENCING COMM’N, PRIMER ECONOMIC CRIME VICTIMS § 2B1.1(b)(2) (2017).

⁹ *The True Link Report on Elder Financial Abuse 2015* 1 (TRUE LINK Jan. 2015).

¹⁰ *Id.* at 2.

¹¹ *The MetLife Study of Elder Financial Abuse: Crimes of Occasion, Desperation, and Predation Against America’s Elders* 2 (METLIFE June 2011).

¹² *Id.*

older adult victims, “risk equals vulnerability plus exposure.”¹³ How systems and technology can be utilized to limit exposure and vulnerability remains an important question for future researchers and programs.

The True Link Report also described an exploitation progression to mass marketing frauds where small losses are often “the first step in a financial exploitation progression.”¹⁴ It also helps frame the importance of understanding and developing early intervention services for victims before they become chronically involved with perpetrators.

The impact of “imposter” crimes and other mass marketing crimes, such as investment frauds and cybercrime may be devastating to many older adults and their families.¹⁵ Yet in a research review for this article, little research on the impact of mass marketing fraud in regard to older adults has been published. Like other forms of financial exploitation such as the True Link and the Met Life Study indicate, these crimes are likely also vastly underreported.

In Author Deem’s experience, victims report feeling shame, humiliation, and guilt, and often blame themselves for the financial devastation they may face. Family and friends, who may have tried to stop the crimes, may be perceived as judgmental. One victim described her adult child’s voice as “like a sledgehammer” continually yelling at her to stop talking to perpetrators or to stop sending money. She described just “tuning out” anything family members said about the phone scammers who she thought of as her friends. Family responses perceived as judgmental and controlling may often further isolate the older adult from family and other support, especially if the older adult does not yet recognize they are a victim. Of course, this is what the scam predators want. The targeting, threats, promises, isolation, grooming, and manipulation techniques on vulnerable older adults by fraud predators are, in some ways, similar to the techniques used by perpetrators of domestic violence and human trafficking.

If the chronic victim is married, they may also destroy their spouse’s income and assets. Chronic victims may lie to their non-participating spouse, family members, investigators, and Adult Protective Services

¹³ *True Link Report On Elder Financial Abuse 2015*, *supra* note 9, at 1.

¹⁴ *True Link Report On Elder Financial Abuse 2015*, *supra* note 9, at 2.

¹⁵ *Mass-Marketing Fraud: A Threat Assessment 7–8* (Int’l Mass-Mktg. Fraud Working Grp. June 2010).

(APS) about their involvement with fraud predators. Such spouses may need financial and even physical protection from the chronic victim, especially if the spouse complains or tries to stop the hemorrhaging of joint life savings. Older chronic adult victims have also been subjected to physical and emotional abuse by family members when the victim finally admits how much money was stolen.¹⁶ To extort more money from victims, some scam predators make threats to harm a victim's family. Or, in romance or sextortion fraud crimes, the predators threaten to publicize intimate photos when victims finally attempt to stop contact.¹⁷

Older victims may not remember all of the details of the crimes committed. These crimes are often financially complex, involving multiple transactions over a long period of time and convoluted explanations to explain the various delays. The complex nature of the scheme makes it very difficult for older victims to report to the appropriate law enforcement agencies or participate meaningfully in any investigation. Still others will have all their transactions, records of every phone number used or text message received, and be very helpful to an investigation. Victim services, consultations with Multidisciplinary Teams (MDT's), APS, and knowledgeable banking and medical professionals, along with working with family members and long-term case managers, can make a difference both to a victim and to the case investigation and prosecution.

Many older adults do not understand how the perpetrator's manipulations, lies, and use of technology are being used against them. Perpetrators may have required victims to take large advances on credit cards; remortgage a home and/or car; deplete IRA's, investment accounts, or life savings; and borrow (or steal) money from family and friends that they cannot possibly repay. Victims are further damaged as they may be forced to pay penalties on IRAs or incur other huge tax liabilities and penalties. Later, victims may be re-victimized by the same or similar perpetrators through identity theft, or the unknowing installation of malware on their computer or cell phone.

¹⁶ *Id.*

¹⁷ Kate Murphy, *In Online Dating, 'Sextortion' and Scams*, N.Y. TIMES, Jan. 15, 2016, <https://www.nytimes.com/2016/01/17/sunday-review/in-online-dating-sextortion-and-scams.html>.

Victims describe to Author Deem the confusion on where to report such crimes, as well as disappointment and frustration by the lack of action taken by law enforcement once a complaint or crime report is filed. Victims further describe that being referred to other agencies, being personally blamed, lacking an opportunity to be heard, or being given excuses can be almost as damaging as the fraud itself, and may even aggravate the emotional impact of the crime.¹⁸ An Australian report on improving responses to online fraud victims found that “[f]or the small number of victims who had a positive experience in reporting, this was due to [the law enforcement representative] taking the time to acknowledge the victim and listen to their story in an empathetic manner.”¹⁹

Victims are also recruited to work as unwitting money mules, often once their own funds are gone. Many do so, believing it will be a way to finally get their promised winnings or for their online “fiancée or online true love” to finally appear in person. Testimony provided to the United States Senate Special Subcommittee on Aging, as well as news accounts, describe older victims traveling overseas to try to collect money won, or a return of their own funds, or to meet their “supposed true love,” only to end up in a prison overseas as money or drug mules.²⁰

Many older chronic victims describe being deeply depressed, isolated, financially devastated, and with little or no hope for a future in which they will not have basic financial and emotional needs met. Suicides and even murders have been connected by law enforcement and media to several of these types of crimes,²¹ although there is not a national database or any known mental health entity that collects this

¹⁸ Cassandra Cross et al., *Improving Responses to Online Fraud Victims: An Examination of Reporting and Support* 6–7, 14 (Criminology Research Grants Aug. 2016).

¹⁹ *Id.* at 7.

²⁰ *Do You Know What Is In Your Suitcase? How Drug Traffickers Are Deceiving Seniors To Smuggle Contraband: Hearing on International Drug Smuggling Scams Targeting Seniors Before the S. Special Comm. on Aging*, 114th Cong. 5–6 (2016) (statement of Alan Scott Brown, Acting Assistant Dir. for Investigative Programs, Homeland Sec. Investigations, U.S. Immigration and Customs Enf’t).

²¹ *Mass-Marketing Fraud: A Threat Assessment*, *supra* note 15 at 8–9.

information. “Simply put, a victim of any kind of elder financial abuse is never the same after it occurs.”²²

III. Current procedures for protecting elders

Many of the laws developed to protect exploited or abused older adults are modeled after earlier laws and programs, which were first established for children and domestic violence victims.²³ Later, laws and programs were created for older adults, leading to programs such as APS in each state.²⁴ The real move toward creating APS and related programs came with the passage of Title XX of the Social Security Act in 1974.²⁵ The Act authorized limited funding for such programs through the use of Block Grants to the states for the protection of children as well as adults.²⁶

One major way in which laws designed to protect older adults from abuse differ from the earlier child abuse models is that with children who are abused or exploited, there is no “right of self-determination” and children are not legally capable of giving consent (unless emancipated). This is a critical difference when working with adults, where competency and the right of self-determination or personal autonomy is presumed until taken away through a legal process. This may make efforts to protect an older adult more difficult, particularly for the spouse or family, especially if that adult does not perceive themselves as a victim in need of protection and is presumed competent.

²² *Broken Trust: Elders, Family, and Finances, A Study On Elder Financial Abuse Prevention*, 7 (METLIFE MATURE MKT. INST. Mar. 2009).

²³ See David A. Wolfe, *Elder Abuse Intervention: Lessons from Child Abuse and Domestic Violence Initiatives*, in 15 ELDER MISTREATMENT: ABUSE, NEGLECT, AND EXPLOITATION IN AN AGING AMERICA (Nat’l. Research Council, 2003).

²⁴ See Rosalie Wolf, *Elder Abuse and Neglect: History and Concepts* in Appendix C, ELDER MISTREATMENT: ABUSE, NEGLECT, AND EXPLOITATION IN AN AGING AMERICA (Nat’l. Research Council, 2003).

²⁵ See *id.*

²⁶ *History: About Adult Protective Services from 1960 to 2000*, NAT’L ADULT PROTECTIVE SERVS. ASS’N, <http://www.napsa-now.org/about-napsa/history/history-of-adult-protective-services/> (last visited Oct. 31, 2018); see also S. REP. 93-1356, reprinted in 1974 U.S.C.C.A.N. 8133.

Another way in which abuse of older adults is treated differently than abuse of children is in reporting requirements. While there is a federal statute that requires United States Department of Justice (DOJ) employees to report child abuse and exploitation under 42 U.S.C. § 13031,²⁷ there is not a corresponding federal statute requiring employees to report elder abuse, neglect, or exploitation. In some states the Department employee may have a professional license that requires reporting, but this is done only on the state level.²⁸ There is, however, the United States Attorney General Guidelines for Victim and Witness Assistance (hereinafter the Guidelines), which provides:

[W]henver Department personnel suspect that an elderly or otherwise vulnerable adult victim or witness may be suffering from neglect, abuse, or exploitation (whether or not the individual is the subject of the matter being investigated or prosecuted), Department personnel should promptly contact the local Adult Protective Services agency or local law enforcement agency to report the concerns. . . . In addition, Department personnel should identify and provide referrals to appropriate local social service agencies best able to meet the needs of the victim.²⁹

Under the Guidelines, such crimes occurring to an older adult in nursing homes and related situations should also be reported to APS, law enforcement, or the state Attorney General or other appropriate body as determined by each state.³⁰

A. APS referral

APS are government-funded social services programs administered at the county or state level to serve older adults and/or dependent

²⁷ 42 U.S.C. § 13031 is now codified at 34 U.S.C. § 20341.

²⁸ 2013 NATIONWIDE SURVEY OF MANDATORY REPORTING REQUIREMENTS FOR ELDERLY AND/OR VULNERABLE PERSONS (EVERSAFE, NAT'L ADULT PROTECTIVE SERVS. ASS'N Dec. 2015).

²⁹ U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE FOR VICTIMS OF CRIME, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 23 (2011, rev. May 2012).

³⁰ *Id.*

adults who may need protection and assistance.³¹ APS hotlines take reports by phone or online from those concerned about the safety of an older or vulnerable adult due to various types of abuse, neglect (including self-neglect), or financial exploitation. Those filing reports may remain confidential. APS works closely with local law enforcement, local prosecutors, financial institutions, and medical providers during their investigation. APS programs help by assessing a reported abuse victim's unique needs and desires, as well as the nature of the abuse and neglect, identification of the perpetrators, and development of a service plan to maintain that victims' safety, health, and independence. Victims may choose to decline services or intervention, as well. Each state has different statutory requirements on what kinds of abuse, neglect or financial exploitation may be investigated, but each focuses on protection of older and/or vulnerable adults. Information on accessing each state's APS is available on the United States Department of Justice's Elder Justice website, as well as many additional resources are available at www.elderjustice.gov.

States also have mandated reporter laws, requiring those in certain professions to report elder abuse, neglect, and exploitation to APS and/or local law enforcement.³² There is not, however, a standard definition for all states as to what constitutes abuse, neglect, financial exploitation, or other safety issues for reporting. The minimum age required for APS to take a report, investigate allegations, and provided services also varies from state to state. There are states that under their current state codes for APS do not authorize APS involvement for the assessment, investigation, or creation of a service plan for an older adult who is a victim in a transnational fraud crime or other mass marketing fraud, cyber fraud, investment fraud, or other crimes that are typically investigated by a federal investigative agency.

APS agencies should also be aware of the advantages associated with helping a victim file a report with the Internet Crime Complaint Center (IC3), at www.IC3.gov, and the Federal Trade Commission

³¹ For information about the role and how to access each state's APS program, the National Adult Protective Services Association has information on many aspects of APS. *See* 2013 NATIONWIDE SURVEY OF MANDATORY REPORTING REQUIREMENTS FOR ELDERLY AND/OR VULNERABLE PERSONS (EVERSAFE, NAT'L ADULT PROTECTIVE SERVS. ASS'N Dec. 2015).

³² *See History: About Adult Protective Services from 1960 to 2000*, *supra* note 26.

(FTC), at <https://www.ftccomplaintassistant.gov/> in addition to filing a police report. The filing with IC3 or the FTC may lead to an investigation and possibly a later federal prosecution. In some locations, such as Ventura County, and Riverside California, APS workers are encouraged to file IC3 and/or FTC reports in addition to filing a local police report on cases involving mass marketing and cyber fraud crimes with unknown scam perpetrators.

Collaboration between APS programs and federal agencies—such as victim services, the United States Department of Justice’s Office for Victims of Crime, the United States Health and Human Services, Administration on Aging and Elder Justice, and coordinators at each United States Attorney’s Office—can help address these types of anticipated challenges.

B. Law enforcement referral

Local law enforcement is a critical referral when reporting older adult abuse, neglect, and exploitation, particularly if the crime involves more traditional forms of financial exploitation by those in positions of trust, such as family members, caretakers, or trusted professionals. Difficulties often arise, however, in cases of mass-marketing and some cyber fraud. Local law enforcement agencies may not have the resources or training to investigate mass-marketing or cyber fraud crimes, particularly when they are transnational crimes involving predators in other domestic jurisdictions or outside the United States.³³

A family member or others may try to report an older adult’s involvement in a scheme as a money mule to local police (often describing the behavior, not knowing the actual term), but receive little response or interest. Filing the reports with the IC3 and FTC national databases may be a helpful way to share information that may be useful to other law enforcement investigating a case. Encouraging victims to download copies of the IC3 and FTC reports before submitting them may also be helpful in dealing with creditors, taxes, and even bankruptcy by documenting their victimization.

The IC3 and FTC are national federal government databases that provide documentation of the crime through victim complaints that

³³ U.S. GOV’T ACCOUNTABILITY OFF., GAO-13-110, ELDER JUSTICE NATIONAL STRATEGY NEEDED TO EFFECTIVELY COMBAT ELDER FINANCIAL EXPLOITATION (Nov. 2012).

can include information on financial transactions, loss amounts and predator information.

The IC3 is available as a research tool for sworn law enforcement only and focuses on internet related fraud.³⁴ The FTC is available to both law enforcement (including prosecutors) and other regulatory agencies, and has a broader focus on accepting complaints on all fraud crimes, whether by mail, phone, internet, or other means.³⁵ Both websites provide useful annual reports with statistics on the incidence of various fraud crimes.

C. Conservatorship or guardianship proceedings

Where a question arises as to whether an older victim can handle their future financial affairs, a judge may require medical assessments to determine decision-making capacity. This process may be viewed by some victims as demeaning or unnecessary. Family members can seek assistance regarding this procedure in their state by sharing their concerns with the victim's medical doctor and APS, or consulting with an attorney who specializes in elder law issues.

Many states have established procedures meant to protect individuals who are deemed incompetent to manage their own financial or medical affairs.³⁶ While the form of proceedings and terminology vary from state to state, the proceedings are often characterized as conservatorship or guardianship proceedings.³⁷

The competency decisions are a legal finding, often based on both state law and evaluations by professionals. Competency decisions are also often broad, and determine an individual's ability to manage their financial and personal affairs as an all or nothing decision.

The exact requirements necessary to determine financial incompetency vary between states but, in general, there must be evidence of a disabling condition that causes cognitive impairment

³⁴ FED. BUREAU OF INVESTIGATION, INTERNET CRIME COMPLAINT CENTER, WWW.IC3.GOV BROCHURE.

³⁵ *Consumer Sentinel Network*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/consumer-sentinel-network> (last visited Oct. 30, 2018).

³⁶ AM. BAR ASS'N & AM. PSYCHOLOGICAL ASS'N, ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR PSYCHOLOGISTS 20 (2008).

³⁷ *See, e.g.*, CAL. PROB. CODE § 1801; N.Y. MENTAL HYG. LAW § 81.01.

and results in diminished functional (decision-making) capacity.³⁸ While such proceedings can serve to protect an individual from impaired decision-making ability and significant financial loss, there are obvious limitations. Incompetency proceedings are not appropriate for healthy older adults who have fallen victim to financial exploitation. Often these individuals exhibit adequate decision-making ability in most domains, but fall victim to the particular manipulative circumstances present in the scams.

IV. Factors that contribute to financial exploitation

In exploring what may make older adults more prone to victimization by scams, an obvious area of concern is increasing age and accompanying life changes. Although dementia and other degenerative conditions have been a major focus, it is important to be aware of the changes that accompany healthy aging and that may make it more difficult for older adults to identify and appropriately respond to scams and financial exploitation.

A. Dementia

Dementia is a sometimes misunderstood concept. Dementia itself is not a disease, though much of the public use it interchangeably with the term Alzheimer's disease. When used in the medical field, it refers to a level of functioning. In particular, it indicates that an individual is exhibiting significant impairment in cognitive functioning that reduces daily living skills.³⁹ The presence of dementia is often one condition that can be used in determining decision-making capacity and the need for conservatorship. Dementia by itself does not establish the need for conservatorship. There must also be a corresponding loss or significant reduction in independent living skills, such as managing medications, finances, or personal care.⁴⁰

Although dementia is discussed as a monolithic term, there are many different conditions that result in dementia, and these

³⁸ AM. BAR ASS'N & AM. PSYCHOLOGICAL ASS'N, ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR PSYCHOLOGISTS 16–23 (2008).

³⁹ AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).

⁴⁰ ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR PSYCHOLOGISTS, *supra* note 38, at 20.

conditions can be present with different types of cognitive impairment.⁴¹ Dementia of the Alzheimer's-type is the most common form of dementia and as noted above, the terms are used synonymously by many people.⁴² This condition initially results in disorientation, memory loss, impaired language skills, and a decrease in abstract reasoning.⁴³ In contrast, Frontal Temporal Dementia is first signified by dramatic behavioral change, such as disinhibition or impulsivity.⁴⁴ Obviously, either of these conditions can make older adults more prone to financial victimization for different reasons. In general, dementia should be considered a significant risk factor for both fraud victimization and repeat victimization. It is important to note though that dementia is not the only cause of financial victimization, and many normally aging, dementia-free seniors can also suffer from financial exploitation.

B. The aging brain

Brains begin developing before birth and continue to grow through childhood and young adulthood. Our brain neuronal volume peaks in an individual's 20s.⁴⁵ Atrophy (loss or shrinkage) of neurons becomes evident in the brain in an individual's 40s.⁴⁶ This atrophy continues with age. Atrophy matters because neurons are the specialized cells that comprise our brain and transmit sensory information and allow for motor responses.⁴⁷ Because brain capacity decreases, the brain begins to function more slowly. In addition to brain shrinkage due to neuronal loss, brain metabolism and cerebral blood flow also decline with age, further weakening the brain's functional capacity.⁴⁸

⁴¹ MARIO F. MENDEZ & JEFFREY L. CUMMINGS, *DEMENTIA: A CLINICAL APPROACH* 1–6 (Butterworth-Heinemann eds., 3d ed. 2003).

⁴² ALZHEIMER'S ASS'N, *What is Dementia? Types of Dementia*, <https://www.alz.org/alzheimers-dementia/what-is-dementia/types-of-dementia> (last visited Oct. 10, 2018).

⁴³ MENDEZ & CUMMINGS, *supra* note 41, at 68–76.

⁴⁴ *Id.* at 181–191.

⁴⁵ MURIEL LEZAK ET AL., *NEUROPSYCHOLOGICAL ASSESSMENT* 355 (Oxford Univ. Press, 5th ed. 2012).

⁴⁶ Ruth Peters, *Ageing and the Brain*, *POSTGRAD MED. J.* 82, 84–88 (2006).

⁴⁷ NEIL R. CARSON, *PHYSIOLOGY OF BEHAVIOR* 29 (11th ed. 2013).

⁴⁸ Simonetta Camandola & Mark P. Mattson, *Brain Metabolism in Health, Aging, and Neurodegeneration*, *THE EMBO J.*, 2017 at 1474–1492.

Because of these physical brain changes, there is a normal transition in thinking abilities with age. The primary change is that the speed of information processing declines.⁴⁹ An aging individual can still learn new skills and function in the world, but it takes longer and requires more practice and effort. In addition, while basic attention remains adequate, complex attention becomes more challenging.⁵⁰ Similarly, it becomes more difficult to solve unfamiliar problems, because there are some changes in reasoning skills.⁵¹

One definition of intelligence is “the ability to apply knowledge to manipulate one’s environment or to think abstractly[.]”⁵² Intelligence can be further classified into crystallized intelligence (the ability to use our experiences and learned information to solve new problems) and fluid intelligence (the ability to use logic and pattern recognition to solve new problems).⁵³ As an individual ages normally, crystallized reasoning skills remain generally intact and continue to grow as they gain new experiences. This is sometimes characterized as wisdom.⁵⁴ In contrast, the area where an individual begins to decline is in fluid intelligence, likely at least partially due to the slowed processing and decreased complex attention that develops.⁵⁵ As fluid reasoning skills decline, it becomes much more difficult to solve novel abstract problems or understand unfamiliar or new situations.

As may be apparent, these changes in thinking ability and reasoning make rapid decision-making more difficult. When transnational financial fraud predators rely on creating a sense of urgency to respond, some older victims may be unable to carefully think through what is occurring and recognize the scam.

While these difficulties can make it more challenging to rapidly analyze the situation and make an appropriate decision, they do not fully explain why some older adults fall prey to scams so easily.

⁴⁹ See Mark A Eckert et al., *Age-Related Changes in Processing Speed: Unique Contributions of Cerebellar and Prefrontal Cortex*, FRONTIERS IN HUM. NEUROSCIENCE, Mar. 2010, at 1–14.

⁵⁰ LEZAK ET AL., *supra* note 45, at 358.

⁵¹ *Id.* at 356–57.

⁵² MERRIAM-WEBSTER, *Intelligence* 1a(2), <https://www.merriam-webster.com/dictionary/intelligence> (last visited Oct. 15, 2018).

⁵³ *Id.*

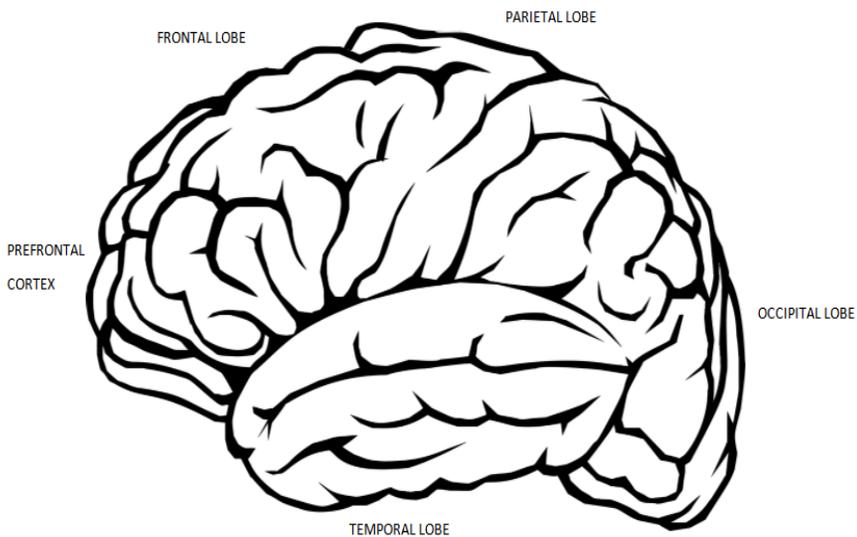
⁵⁴ *Id.*

⁵⁵ *Id.*

Understanding this requires a more thorough analysis of the brain and how it ages.

C. Frontal lobe hypothesis of aging

In examining the brain, specific functions can be associated with various regions. Older, inner portions of the brain relate to basic life support issues and alertness to threats.⁵⁶ Moving to the neocortex, the newer, outer portion of the brain, different functions predominate.⁵⁷ The neocortex is broken into different lobes (regions) that can be seen as responsible for different cognitive functions.⁵⁸ These include the temporal lobe, occipital lobe, and parietal lobe, which are respectively responsible for perception of sound, sight, and tactile sensation.⁵⁹



Lobes of the Human Brain

The largest lobe of the brain is the frontal lobe, which is the part of the brain responsible for our ability to make a decision and take action.⁶⁰ The frontal lobe is involved in the planning, execution, and control of movements and action.⁶¹ At the tip of the frontal lobe is an

⁵⁶ LEZAK ET AL., *supra* note 45 at 47–49.

⁵⁷ *Id.* at 52–57.

⁵⁸ *Id.* at 5, 57.

⁵⁹ *Id.* at 70, 81.

⁶⁰ *Id.* at 87.

⁶¹ *Id.*

important area known as the prefrontal cortex, which is primarily responsible for planning and decision-making.⁶² Damage to the prefrontal cortex can result in poor judgment, impulsivity, and poor awareness of deficits.⁶³ One source suggests that the cognitive deficits seen in older adults are primarily due to the anatomical and functional deterioration of the frontal lobes and that this region of the brain is one of the earlier areas of the brain to show aging effects.⁶⁴ This hypothesis is supported by several lines of evidence, including both observable physical changes in the brain and changes in cognitive functioning.⁶⁵

As noted above, physical changes to the aging brain include a reduction in brain volume (neuronal atrophy).⁶⁶ Research has found that age related atrophy and white matter deterioration (wearing away of the axons of neurons, the part of neurons that transmit information to other neurons) are more pronounced in the prefrontal cortex than in other brain regions.⁶⁷ Changes in neurotransmitter availability in this region is also evident, with decreases in the availability of dopamine evident with increasing age.⁶⁸

In addition to the physical changes that affect the frontal lobe and prefrontal cortex specifically, research found that the cognitive deficits exhibited by older adults are often related to impairment in executive functions.⁶⁹ Executive functions (higher level processing and concentration skills that include goal setting, planning skills, initiation and maintenance of effort, multitasking, and problem-solving skills) are generally believed to be mediated by the prefrontal cortex.⁷⁰

As a result of this more rapid aging and degeneration of the frontal lobe, older adults are more prone to deficits in executive control

⁶² LEZAK ET AL., *supra* note 45 at 87.

⁶³ *Id.*

⁶⁴ Robert L. West, *An Application of Prefrontal Cortex Function Theory to Cognitive Aging*, 120 PSYCHOLOGICAL BULL., 1996.

⁶⁵ *Id.* at 288–289.

⁶⁶ *Id.*

⁶⁷ See Faith M. Gunning-Dixon et al., *Aging of Cerebral White Matter: A Review of MRI Findings*, 24 INT. J. GERIATRIC PSYCHIATRY, Feb. 2009.

⁶⁸ West, *supra* note 64.

⁶⁹ *Id.*

⁷⁰ See LEZAK ET AL., *supra* note 45.

processes.⁷¹ This results in difficulty inhibiting irrelevant information, coordinating multiple operations at once (multi-tasking), manipulating information for use in decision-making, and decreased ability to rapidly retrieve memory for use in reasoning. Older adults will struggle with these skills, which are often the same skills necessary to detect and resist financial fraud and scams. Confirmation of this susceptibility to impaired decision-making has been found in research involving real world decision-making on individuals with damage to the frontal lobe of the brain and on older adults above the age of 55.⁷²

In neuropsychology, it has been challenging to develop tests that properly mimic real world decision-making situations. There are a number of measures that examine logical reasoning, pattern recognition, and concept formation, but real world reasoning can often rely on emotional components and other superficial criteria. Reasoning based on these issues is sometimes described as peripheral reasoning, whereas reasoning based on logic can be characterized as central reasoning.

Studies of one test that attempts to examine real world reasoning through a gambling paradigm, complete with flashing lights and sounds like a slot machine, have shown that individuals with impaired frontal lobe functioning will display impulsive decision-making marked by a tendency to make choices that focus on immediate rewards.⁷³ This remains true even when continuing the pattern will result in long-term negative consequences such as losing.⁷⁴ Essentially, the individuals are falling prey to the promise of a simple solution to a complex problem. They do not learn to adapt their behavior to the situation, but instead will maintain their pattern

⁷¹ West, *supra* note 64 at 288–289.

⁷² See Natalie L. Denburg et al., *The Ability to Decide Advantageously Declines Prematurely in Some Normal Older Persons*, 43 NEUROPSYCHOLOGIA, 2005, at 1099–1106; Natalie L. Denburg et al., *The Orbitofrontal Cortex, Real-World Decision Making, and Normal Aging*, ANNALS OF THE N.Y. ACAD. SCI., Dec. 2007, at 480–498; George Fein et al., *Older Adults Make Less Advantageous Decisions than Younger Adults: Cognitive and Psychological Correlates*, J. INT’L NEUROPSYCHOLOGICAL SOC’Y, 2007.

⁷³ Melissa T. Buelow & Julie A. Suhr, *Construct Validity of the Iowa Gambling Task*, 19 NEUROPSYCHOLOGY REV., Mar. 2009, at 102–114.

⁷⁴ See *id.*

of choices past the point when individuals with intact prefrontal cortex functioning will realize how the game works and change their behavior to be more successful. These individuals are demonstrating impaired self-awareness and continuing the poor choices, similar to the pattern of repeat or chronic victimization by financial predators seen with some older adults. On this particular gambling task, older adults over the age of 55 show a similar performance to individuals with impaired prefrontal cortex functioning.⁷⁵ A subset of approximately 35% did much worse than their peers, which may reflect the percentage susceptible to being chronic victims.⁷⁶

It is important to also note that these older adults are otherwise functioning normally and not exhibiting dementia. In fact, on this gambling task individuals with dementia show a different type of impaired performance marked by apparently random guessing rather than the pattern of risk-taking seen in normally aging older adults.⁷⁷

D. Age-associated financial vulnerability

Having discussed how the aging brain and diseases of the brain can result in fraud victimization, it is important to understand that there are many other factors that can contribute to or result in victimization by scams. Recognizing the need to study such factors, epidemiologist Mark Lachs, MD, MPH, in 2015, coined the term “Age-Associated Financial Vulnerability” as a way to characterize and study patterns of financial behaviors in older adults that put them at risk of financial loss, are inconsistent with their previous financial decision-making, and which are not due to dementia.⁷⁸

Dr. Lachs identified four primary factors that he felt should be studied further to determine their contribution to Age-Associated Financial Vulnerability, as well as multiple sub-factors within each category.⁷⁹ As would be expected, the cognitive changes associated with aging, as discussed above, compromise one factor. Other areas of

⁷⁵ *See id.*

⁷⁶ *The Ability to Decide Advantageously Declines Prematurely in Some Normal Older Persons*, *supra* note 72.

⁷⁷ *See* Laura Zamarian et al., *The Impact of Mild Cognitive Impairment on Decision Making in Two Gambling Tasks*, 66B J. GERONTOLOGY SERIES B PSYCHOLOGICAL SCI. AND SOC. SCI., 2010, at 23–31.

⁷⁸ Mark S. Lachs & S. Duke Han, *Age-Associated Financial Vulnerability: An Emerging Public Health Issue*, ANNALS OF INTERNAL MED., 2015, at 877–879.

⁷⁹ *See id.*

concern include (1) issues associated with the medical and functional decline many older adults experience as they age; (2) phase of life issues and their impact on psychosocial functioning; and (3) environmental concerns, primarily the difficulty adapting to our rapidly changing and fast-paced technological lifestyle.⁸⁰

Regarding the functional decline of older adults, impaired mobility and sensory loss are possible factors that may contribute to victimization. Older adults may not fully comprehend what is being explained or may be a captive audience for scam predators due to loss of mobility.⁸¹ As individuals age, polypharmacy (the use of multiple medications) becomes more prevalent and can limit functional abilities and cause a decline in cognitive functioning, thereby making it easier for older adults to become scam victims.⁸²

For many, adapting to a new phase of life can be challenging. This can be especially difficult for older adults, who may become more socially isolated. Social isolation can stem from mobility or health issues that limit them, or simply the loss of their loved ones or friends with increasing age. Transnational scam perpetrators are often eager to fill the social gap. The victim may see the perpetrator as a friend or, in some instances, more important than family members. Social isolation may also have the effect of limiting who an older adult can consult with.⁸³

In addition to social isolation and loneliness, emotional disorders, such as depression, may also affect functioning with age. While there is little evidence that depression is more common in older adults, there is some indication that it presents with different symptoms, such as apathy and a tendency to withdraw, rather than sadness.⁸⁴ Such depression may result in increased dependency or shame that makes older adults hide their difficulties, rather than seek help.⁸⁵

A last area of significant concern identified by Dr. Lachs is related more to the surrounding environment, rather than the older adult him or herself. In general, as the world has become more complex and

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Robert L. Maher et al., *Clinical Consequences of Polypharmacy in Elderly*, 13 EXPERT OP. DRUG SAFETY, Jan. 2014.

⁸³ See Lachs & Han, *supra* note 78.

⁸⁴ Dan G. Blazer; *Depression in Late Life: Review and Commentary*, 58A J. OF GERONTOLOGY: MED. SCIS. 249–265 (2003).

⁸⁵ See Lachs & Han, *supra* note 78.

technologically advanced, more and more choices and options are available to us. With their lack of experience with technology and decreased cognitive efficiency, it may be that the choices become overwhelming to older adults or that sophisticated marketing techniques making use of urgency and emotional appeals result in greater difficulty making appropriate decisions.⁸⁶ In addition to these aging factors, there is a noticeable concentration of wealth in the older adult population which likely increases their attractiveness as a target for financial fraud predators.⁸⁷

V. Identifying victim needs

In victim-centered approaches that are trauma informed and culturally respectful, each victim's needs, safety, wishes, and well-being take priority (to the extent possible) in accessing services and in their dealings with the criminal justice process, including law enforcement interviews. Services and investigations are not done by multiple agencies acting "in silos" but rather are coordinated and respect the victim's ongoing and changing needs for information, intervention, advocacy, support, and services.⁸⁸ As with any crime victim, there are basic needs in assisting a chronic older victim that are helpful, culturally and trauma informed, and victim centered. This approach encourages a victim to be empowered in decision-making, and promotes self-determination and independence when possible.⁸⁹ As described by an older adult in the Cyber Seniors Program's⁹⁰ trailer video, "no matter how old we are, we do need a purpose for getting up in the morning."⁹¹ The challenge with chronic older adult

⁸⁶ *Id.*

⁸⁷ Neil Howe, *The Graying of Wealth*, FORBES, Mar. 16, 2018.

⁸⁸ U.S. DEP'T JUSTICE, ELDER JUSTICE INITIATIVE, DEVELOPING AN ELDER ABUSE CASE REVIEW MULTIDISCIPLINARY TEAM IN YOUR COMMUNITY 6 (Dec. 2015, rev. Sept. 2016).

⁸⁹ See *Trauma*, *supra* note 4.

⁹⁰ Cyber Seniors is a "connecting generations" program found in many locations in the United States and Canada, in which young students teach older adults who are not 'tech smart' how to use the internet to safely connect with family and friends. See *About Cyber-Seniors*, CONNECTING GENERATIONS: CYBER-SENIORS, <https://cyberseniors.org/about/> (last visited Oct. 31, 2018).

⁹¹ Cyber-Seniors, *Cyber-Seniors Documentary—Official Trailer*, YOUTUBE (Apr. 13, 2014), <https://www.youtube.com/watch?v=bemDf6wuHJ0>.

victims is helping them find ways to change their “purpose” from looking forward to participating with scam predators, to healthy behaviors, such as connecting with those in their community.

Below is a general summary of identifiable victim needs, with recognition that each victim may have differing and unique specific needs that should also be considered. While these are the often identified needs, the provision and funding of both short and long-term victim services and research into the most effective types of services are still in their infancy with older chronic victims of transnational crimes.

A. Information on where and how to report crime

Information on where and how to report a crime is especially important and online databases should be recommended. Many victims do not understand that, in many cases, they will not be contacted after filing a report with law enforcement or via an online national database, unless their information becomes useful in an investigation. Victims may need assistance in managing expectations about whether a crime will result in an investigation, a prosecution, restitution or their money repaid, or even access to victim services. Victims also may need information on the importance of not sharing information that they have reported the crime with scam predators. For support, safety planning and information, victims need referral to a local or federal victim assistance program, which may only assist victims of cases under an investigation. State and county 211 systems may have useful information to assist with coping with the aftermath, including information on food banks, government benefits, and job assistance.⁹² Additionally, staff at libraries and senior centers, as resources on reporting, safety from scams, and filing a complaint with IC3 and the FTC, can help victims better understand the complaint process and what to expect with respect to follow up (or the lack of it) after reporting a financial crime.

B. Informed and victim-centered crisis intervention

When chronic victims learn that they have been defrauded and there is little hope for a return of their money or the apprehension of

⁹² *Consumer Help Center*, FED. COMM’NS COMM’N, <https://www.fcc.gov/consumers/guides/dial-211-essential-community-services> (last visited Oct. 31, 2018).

the criminal, they may be emotionally and financially vulnerable. Some may even express thoughts of extreme hopelessness or suicide.

Victim assistance programs and crisis intervention services are critical needs. Crisis response teams working with APS to connect victims with services that focus on safety, mitigating further victimization and dealing with immediate financial and emotional issues is a very important need. Referrals and access to emergency funds that can cover loans, one-time payments for mortgage and rent, and food vouchers or access to food bank programs, as well as emergency intervention with creditors are critical needs, as well. Phone support groups and other counseling for chronic victims as well as family members is also a critical need.

C. Coordinated case management

Coordinated case management for victims in the long term is also a need for many victims. APS is usually a short-term intervention program.⁹³ Their tools for assisting and referring older chronic fraud victims are often limited since these services are in their infancy. It is known that for most “chronic” victims, one time “interventions,” whether by police, family, APS, bankers, or others, will normally not be successful. Instead, victims may respond to whoever makes contact last with them, whether it be a scam predator, law enforcement, victim assistance, or APS program. Programs and services that encourage checking in if a victim is unsure what to do with new or continued solicitations and rewarding successes with earned praise, when even small steps are taken to avoid a predator’s call, mailing, or email, can be critical. Also finding and encouraging activities that can help replace the relationship and reliance that a victim had with a scam predator is important. This is also consistent with what we know of the aging brain, as older adults will require more repetition and practice to take in and understand new information.

Case management may include programs that can help access emergency funds, housing, help with utility bills, even finding work or additional benefits for which they may be eligible. Continuing education and assistance with preventing or mitigating against future

⁹³ NAT’L CTR. ON ELDER ABUSE, *What We Do, Practice Intervention Partners: How APS Works*, <https://ncea.acl.gov/whatwedo/practice/intervention-APS-howitworks.html> (last visited Oct. 30, 2018).

crimes is a needed service on an ongoing and long term basis for victims. Habits and addictions are both very difficult to change for most people, even when good advice is given by a doctor, the police, or a banker. Chronic victims may exhibit “relapse” behaviors in which a victim is convinced to send even more money, after being warned that it is to their continued detriment. Professionals who understand that this is a normal part of the cycle of changing long-term behaviors will do much better if victims believe they are respected and consulted even if they “make a mistake.” This is again very similar to what is experienced by domestic violence and human trafficking victims, who may continue contact with their abuser/predator several times before stopping all communication, and regaining “power and control” of their lives once again.

D. Financial counseling and creditor/legal intervention

Financial counseling and creditor/legal intervention, including options regarding possible bankruptcy, is a needed service. This may include tasks such as taking a financial assessment of remaining funds and assets, outlining how to protect those assets, changing bank account and credit card numbers, and taking other steps to stop the financial hemorrhaging of those still believing they should send money to a scam predator.

It may also include help by family members or an attorney to intervene with banks and other creditors or those from whom a victim may have borrowed money. Victims may need assistance contacting the IRS through their Taxpayer Advocate Service or dealing with possible tax deductions available.⁹⁴ Nonprofit legal services may be helpful in notifying creditors that a victim is “judgment proof,” or helping them document that they are a victim of a crime in hopes of forgiveness of certain debts, especially in dealings with banks and credit cards for debt and advances that cannot easily be repaid. Creditor intervention letters as well as notifications that a victim has been identified in a criminal investigation, usually available through victim assistance programs where a victim has a case that is under investigation have been very helpful to some victims for these purposes. Copies of police reports and reports filed with IC3 and the

⁹⁴ See *Taxpayer Advocate Service*, INTERNAL REVENUE SERV., <https://www.irs.gov/taxpayer-advocate> (last visited Oct. 31, 2018).

FTC are also helpful for these purposes. Intervention in identity theft-related crimes that may come afterward are also a continuing needed intervention service.

E. Mental health counseling and support groups

Mental health counseling and phone or online survivor-based support groups for victims and family members can help a victim deal with the guilt, shame, and humiliation that many victims feel when they are defrauded.⁹⁵ Currently, very few states authorize Federal Victim of Crime Act (VOCA)⁹⁶ compensation or assistance funding or programs to cover the costs of counseling, intervention, or support groups for victims of financial crime, or to fund programs specifically for chronic older victims of transnational fraud crimes. With the passage of the Elder Abuse Prevention and Prosecution Act of 2017, it is anticipated that states will increase funding for these programs as elder abuse is prioritized by various federal agencies including the Office for Victims of Crime.

This is a critical need especially for older chronic victims of transnational fraud crimes. After sending their life savings and incurring lifetime debt, victims may not be able to afford co-pays to counselors covered by health insurance or have no access to trauma informed counseling, particularly in rural areas or if they are low income or self-employed. In addition, few counselors have received specialized training on chronic fraud victim issues.

In Los Angeles, California, older victims of internet romance scams had access to a survivor-based phone support group facilitated by a mental health counselor at Wise and Healthy Aging.⁹⁷ Participating victims shared their stories with other survivors including that they were suicidal, that they were involved in money mule activities, and that they continued contact with the scam predator after learning it

⁹⁵ FIN. INDUS. REGULATORY AUTHORITY, TAKING ACTION: AN ADVOCATE'S GUIDE TO ASSISTING VICTIMS OF FINANCIAL FRAUD 20–21 (2018).

⁹⁶ *About OVC: Crime Victims Fund*, U.S. DEP'T OF JUST., OFF. FOR VICTIMS OF CRIME, <https://www.ovc.gov/about/victimsfund.html> (last visited Oct. 15, 2018).

⁹⁷ Anai Ibarra, *This Valentine's Day May You Find A Real Relationship, Not An Online "Romance Scam,"* AARP CALIFORNIA (Feb. 12, 2018), <https://local.aarp.org/news/this-valentines-day-may-you-find-a-real-relationship-not-an-online-romance-scam-los-angeles-ca-2018-02-12.html>.

was a scam by law enforcement. Each of them stopped these harmful behaviors due to the help of fellow victims on the weekly calls.

F. Computer and cellphone hygiene and theft precautions

Computer/cellphone safety hygiene and identity theft precautions, as well as safety planning against future re-victimizations is critical. While older victims use some of the latest communication devices and applications, many chronic victims do not have a basic understanding of how these crimes work or how perpetrators are able to target them. They may need assistance in learning skills on how to block a cellphone number, register for phone-blocking programs, access voice mail messages, or distinguish spam email or junk mailings.

G. Victim assistance post-scam

Assistance in helping a victim re-learn how to spend time without the scam perpetrator in their life will be important. When there is no longer contact with the scam perpetrator, this can leave, what is perceived by a victim as a very empty void. Previously, each day included interactions on a deeply intimate or personal level with the scam perpetrator, whether for the chance to win money, or with the belief they were in an intimate relationship (and sometimes a combination of both). Many chronic victims spend hours on the phone or computer communicating with their predators. It can be difficult, but critical, for friends and family members to help them find a way to replace this time with other more positive activities and connections with people.

H. Managing victim expectations

Managing expectations is also critical for victims who have filed a complaint with law enforcement or the national databases, or have been contacted by a federal or local law enforcement officer or victim assistance staffer. Chronic victims may continue contact with perpetrators, believing they have a mutual relationship. Victims may hope to convince the perpetrator to return the money sent or borrowed, or talk them into following through on their promises. They may even divulge that they have been contacted by law enforcement, hoping this will scare the perpetrators into returning the money.

During this time, victims may need additional reassurance and gentle convincing that they should prepare for the fact that there is little likelihood of getting any money returned, or in many cases, no

perpetrator is likely to be apprehended (at least soon), especially if the perpetrator is located overseas. Many of these victims do not understand that they were victimized by those in criminal enterprises or transnational crimes in which their money has already been spent. Assistance in helping them transition to this reality, stopping contact with their perpetrators, and planning for living out their final years with reduced financial assets is a very sensitive and difficult task. This process may take several weeks or months.

VI. Promising practices in serving chronic victims

The provision and funding of crisis and long-term intervention and support services, as well as research into the most needed and effective types of services for serving older chronic victims of transnational crimes are still in their infancy. Current protections, funding, and programs are inadequate in dealing with the large numbers of victims living throughout the United States. Unlike victims of violent crimes, there are very few referrals in our communities that are available to victims, families, or professionals trying to help. The hope is that this will change as the profile of these victims and the devastating impact they endure is made known to researchers and grant funders. Technological innovations in terms of devices design, and applications for both protection and assistance, are hopefully on the horizon as well.⁹⁸

For victim assistance programs in federal investigative or prosecution programs at the United States Attorney's Offices, the victim lists may include hundreds or even thousands of victims. "Ensuring [victims'] rights is among the most challenging problems facing criminal justice and victim services providers today."⁹⁹

The examples below briefly describe promising practices that may be helpful for professionals working with older chronic adult victims. Some of the programs are not specifically for the older chronic adult victim population but may have services that can benefit this population.

⁹⁸ STEPHEN DEANE, U.S. SEC. & EXCHANGE COMM'N, OFFICE OF THE INVESTOR ADVOCATE, *ELDER FINANCIAL EXPLOITATION: WHY IT IS A CONCERN, WHAT REGULATORS ARE DOING ABOUT IT, AND LOOKING AHEAD* 18 (June 2018).

⁹⁹ Debbie Deem, et al., *Victims of Financial Crime*, in *VICTIMS OF CRIME* 205 (Robert C. Davis, et al. eds., 4th ed. 2013).

Additional agencies that may be useful include American embassies or the State Department's Overseas Citizen's Services, who can offer tips to verify if the situation is legitimate or a scam and even help ensure money is only legitimately wired through a special program with the State Department.¹⁰⁰ Contact can be made, as well, with state lottery commissions or the Publisher's Clearinghouse Fraud website if it involves a lottery scam¹⁰¹ to help a chronic victim understand that they are not dealing with real lottery agents. Families may request blocks on money transmitter services, such as Western Union¹⁰² and Money Gram,¹⁰³ to prohibit a chronic older victim from wiring money using those services, by contacting their fraud departments located on their websites. Additionally, banks may be able to red flag or place security alerts on victim accounts to ensure that scammers cannot as easily impersonate a victim to transfer money, cash checks or open accounts in their names. So much more needs to be done.

A. Multidisciplinary teams (MDTs) and working groups

The use of MDTs is a collaborative attempt to identify, assess, and develop a service delivery plan for older adult victims. "No one agency can address all the needs (physical, emotional, intellectual, familial, interpersonal, financial, social, cultural, and spiritual) of an older victim."¹⁰⁴ Using a team of professionals from a variety of disciplines, including law enforcement, MDTs are better able coordinate various

¹⁰⁰ See *International Financial Scams*, U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, <https://travel.state.gov/content/travel/en/international-travel/emergencies/international-financial-scams.html> (last visited Oct. 31, 2018).

¹⁰¹ See *Consumer Information, Fraud Protection*, PUBLISHERS CLEARING HOUSE, <http://info.pch.com/fraud-protection-2/> (last visited Oct. 31, 2018).

¹⁰² See *Report Fraud*, WESTERN UNION, <https://www.westernunion.com/us/en/fraudawareness/fraud-report-fraud.html> (last visited Oct. 31, 2018).

¹⁰³ See *Consumer Fraud Prevention Center*, MONEYGRAM, <http://corporate.moneygram.com/compliance/fraud-prevention> (last visited Oct. 31, 2018).

¹⁰⁴ U.S. DEP'T OF JUSTICE, ELDER JUSTICE INITIATIVE, DEVELOPING AN ELDER ABUSE CASE REVIEW MULTIDISCIPLINARY TEAM IN YOUR COMMUNITY 6 (Dec. 2015).

agency involvement in a way that ensures respect for each victim's priorities and needs.

Similarly, Financial Abuse Specialist Teams (FAST) are professionals in a wide variety of disciplines who meet to discuss complicated financial exploitation cases presented by members.¹⁰⁵ The meetings often involve discussion of a complex case that an APS worker is currently working. The meetings provide free and confidential consulting about possible solutions, as well as training on trends and various types of elder financial exploitation. FASTS may differ based on the varying needs of an individual county or community.

Other types of working groups include Elder Abuse Forensic Centers and Rapid Response Expert Teams. These are specialized multidisciplinary teams of professionals—usually county based—that provide expert case examination, documentation, and consultation, as well as prosecution of elder and dependent adult abuse cases. The teams usually meet monthly or weekly to share information and create a plan of action for working complex abuse/neglect and exploitation cases. The plan often involves assessment of older victims at home. Such teams may include APS, law enforcement, a district attorney representative, a member of the Long-Term Care Ombudsman Program, a geriatrician, nurse, certified fraud examiner, attorney, a neuropsychologist, and often a case manager from a county program that works with vulnerable/dependent adults. Other professionals may be invited on a case-by-case basis.

An Enhanced Multi-Disciplinary Team¹⁰⁶ (E-MDT) such as teams in New York are Multi-Disciplinary Teams that include members with professions such as those listed above but are also enhanced with additional professionals as members including a forensic accountant, geriatric psychiatrist, and community legal services as team members.

Working groups usually have less structure, are not funded, and meet on an informal basis to work on a single issue, such as international financial scams. For example, the Oregon Social Services Fraud Working Group, which is coordinated by the

¹⁰⁵ *What We Do, Practice, Multidisciplinary Teams, Financial Abuse Specialist Teams (FAST)*, NAT'L CTR. ON ELDER ABUSE, <https://ncea.acl.gov/whatwedo/practice/Teams-fast.html> (last visited Oct. 31, 2018).

¹⁰⁶ See JENNIFER ROSENBAUM ET AL., N.Y. STATE OFFICE FOR AGING, ELDER ABUSE INTERVENTIONS AND E-MDT INITIATIVE (June 6, 2018).

United States Attorney's Office in Oregon, has a mission to promote and encourage the confidential sharing of information between law enforcement agencies and government investigators involved in the investigation of identity theft, fraudulent receipt of government benefits, and abuse of the elderly and disabled. They have collaborated on several successful prosecutions since their founding.

Additionally, SCAMS LA Working Group and the Central Coast Stop Scams Working Groups are two multidisciplinary groups of professionals in Los Angeles and the central coast of California (Santa Barbara, Ventura and San Luis Obispo Counties). The teams are coordinated by elder abuse prosecutors at the Los Angeles and Santa Barbara District Attorney's Offices along with Victim Specialist Debbie Deem. They have bi-monthly speakers and meet to collaborate on encouraging better reporting of these crimes, and to develop a more effective service agency safety net for victims of international and other fraud crimes. The Los Angeles group recently sponsored a summit for first responders, and created a checklist of "to do" intervention items that first responders, such as police and APS, may use to assist victims.¹⁰⁷

B. Nonprofit agencies

The Holistic Elder Abuse Response Team (HEART),¹⁰⁸ with Wise and Healthy Aging, partners with the Long Beach California Police Department to help vulnerable older adults, especially those at risk of re-victimization, including victims of transnational fraud crimes. Wise and Healthy Aging provides case management, advocacy, and counseling in the home for older and vulnerable adult victims.

The Coalition for Family Harmony in Ventura, California¹⁰⁹ is a nonprofit agency primarily working with victims of domestic violence and related crimes. In 2018, they extended their vision to include internet romance scam victim services. Services available include free counseling, walk-in counseling, shelter services, and a survivor-based

¹⁰⁷ SCAMS LA Working Group, Don't Get Scammed! Tips for Avoiding Financial Scams (Oct. 24, 2016).

¹⁰⁸ News Release, WISE & Healthy Aging, WISE & Healthy Aging, Long Beach Police Department Launch Collaborative Holistic Elder Abuse Response Team (Aug. 31, 2016).

¹⁰⁹ See *Online Romance Scams*, COALITION FOR FAMILY HARMONY, <http://thecoalition.org/online-romance-scams/> (last visited Oct. 31, 2018).

phone support group for victims who reside in Ventura County, and other parts of California.¹¹⁰

The Jewish Free Loan Association in Los Angeles is another example.¹¹¹ It is a nonprofit and non-sectarian agency providing emergency interest free loans to people of all faiths. While not specifically for crime victims, this program fulfills a very important void by providing access to a one-time “bridge” financial assistance loan. Such loans can make the difference in paying one or two months of a victim’s rent, mortgage, medical bills, or car loans. It enables the victims to get back in control of their finances. Loans must be co-signed and can be for a maximum amount of \$5,000.

A new agency, the Cybercrime Support Network is working to create an effective partnership with various nonprofits in an effort to aid, support, and give out referrals to victims of cybercrime, including chronic victims of mass marketing fraud. One of their pilot programs involves training 211 phone staff to effectively assist and help victims of such cyber-financial crimes to know and understand how to report these crimes.¹¹² If successful in Rhode Island, Orlando, Florida, and Grand Rapids, Michigan, author Debbie Deem believes these pilot referral service programs could become a model for integrating other 211 phone assistance programs into an effective resource nationwide for assisting victims and informing them of where to report transnational fraud crimes.

Curtiling Abuse Related to Elderly and Disabled Adults (CARE) in Riverside, California is an example of a program affiliated with the county’s APS.¹¹³ CARE coordinators are stationed in sheriff offices and are available to respond to reports of allegations involving older and dependent adult victims involved in serious consumer crime. Coordinators meet with clients; provide resources, support, and advocacy, including drafting letters to creditors and assisting

¹¹⁰ See COALITION FOR FAMILY HARMONY, ONLINE ROMANCE SCAM PHONE SUPPORT GROUP (2016).

¹¹¹ See *General Loans*, JEWISH FREE LOAN ASS’N, <https://www.jfla.org/loan-programs/general-loans/> (last visited Oct. 31, 2018).

¹¹² See *Cybercrime Resources: Before, During and After*, CYBERCRIME SUPPORT NETWORK, <https://cybercrimesupport.org/> (last visited Oct. 31, 2018).

¹¹³ See *C.A.R.E. Program (Curtiling Abuse Related to the Elderly)*, CTY. OF RIVERSIDE DEP’T OF PUB. SOCIAL SERVS., <http://dpss.co.riverside.ca.us/adult-services-division/care-program> (last visited Oct. 31, 2018).

with filing forms and complaints; help victims protect remaining funds; and, if possible, work to regain financial assets.¹¹⁴

C. Law enforcement and related victim assistance program interventions

The Federal Bureau of Investigation (FBI) recently hired victim specialists to assist older adults and other fraud victims who have filed complaints with the Internet Crime Complaint Center (IC3). These specialists are part of the FBI's Victim Services Division.¹¹⁵ When an online complaint is received and it is determined that the victim needs assistance, crisis intervention, referral, or safety planning, the call center victim specialists assist the victim by phone or email. The call center victim specialists work with field-based FBI victim specialists and other victim assistance programs throughout the United States for follow up assistance, as needed.

Both the FBI and Homeland Security have child/adolescent forensic interviewers who are available to do forensic interviews with older adults.

Victim assistance positions in the FBI, United States Postal Inspection Service, and United States Department of Homeland Security, as well as United States Attorneys' Offices, have trained staff who are available to provide crisis intervention, safety planning, assistance, and resource referral to victims. County or state victim assistance program staff, often a part of local district attorney's offices, particularly those with elder abuse/exploitation programs, may also be helpful in these efforts. For example, the Colorado Department of Investigation initiated an Identity Theft, Fraud, and Cyber Crimes Victim Support Unit.¹¹⁶ The program helps victims file police reports, report to other agencies and organizations, obtain referrals, and obtain support to address and repair the damage caused by identity theft and fraud, including assistance to chronic older victims.

¹¹⁴ *Id.*

¹¹⁵ U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, OFFICE OF VICTIM ASSISTANCE, FBI VICTIM ASSISTANCE PROGRAM.

¹¹⁶ *Identity Theft, Fraud and Cyber Crimes Victim Support*, COLO. BUREAU OF INVESTIGATION, <https://www.colorado.gov/pacific/cbi/identity-theft-fraud-and-cyber-crimes-victim-support> (last visited Oct. 31, 2018).

Another example is Senior Police Partners.¹¹⁷ It is a volunteer-based organization of individuals age 50 and older working under the direction of the Long Beach, California Police Department. Based on referrals by the police department, volunteers assist older adults in their homes by providing crime prevention and resource referrals, including instruction on how to recognize various fraud crimes if they are identified by police as a potential or chronic victim. Repeat visits are made to chronic victims to help repeat the message of fraud intervention as well as serving as a sometimes much needed relationship.

The National Association of Triads is a partnership of three organizations—law enforcement, older adults, and community groups, who collaborate to promote older adult safety and reduce the fear of crime that older adults may experience.¹¹⁸ Triads are found in locations throughout the United States. The programs are increasingly focused on prevention and intervention with chronic victims of international fraud crimes.

Further, police departments and sheriff offices are creating their own scam hotlines the public can use to make reports if they receive scam calls, emails, mailings, or social media solicitations. In Moorpark, California, the police department's scam hotline is managed by a fraud detective who works closely with specially trained volunteers and interns.¹¹⁹ They respond and provide follow-up support and services as needed, including assistance to chronic scam victims and their families.

D. Victim assistance fraud helplines

The Identity Theft Resource Center, while not specifically for older adult victims, has a victim centered website, cell phone app, and phone line support available in both English and Spanish to assist anyone who is victimized in identity theft and related scams.¹²⁰ Many

¹¹⁷ *Senior Police Partners*, LONG BEACH POLICE DEP'T, <http://longbeach.gov/Police/About-the-LBPD/Employment/Senior-Police-Partners/> (last visited Oct. 31, 2018).

¹¹⁸ *National Triad*, NAT'L SHERIFFS' ASS'N, <https://www.sheriffs.org/programs/national-triad> (last visited Oct. 31, 2018).

¹¹⁹ Press Release, Ventura Cty. Sheriff's Office, IRS Phone Scam Involving Law Enforcement (Sept. 16, 2015).

¹²⁰ IDENTITY THEFT RESOURCE CENTER, <https://www.idtheftcenter.org/> (last visited Oct. 31, 2018).

of their information guides involve useful tips for those who have been harmed in financial and cybercrimes. This website and helpline is also an important resource for victims who discover unauthorized credit card charges, accounts opened in their names, and other forms of identity theft related to earlier crimes.

AARP Fraud Watch Helpline and Fraud Watch Network has a call center where mass marketing fraud victims can call to learn about a prospective fraud and ways to protect themselves.¹²¹ It can be a useful resource for chronic victims who are ready to accept that they have been victimized and want further information. Victims can also go online to register for fraud alerts.

The Financial Industry Regulatory Authority (FINRA) operates a toll-free number for older adult investors to get assistance from FINRA, and address concerns about issues with brokerage accounts and investments or a broker.¹²² It is an important resource for any victim making or considering making unwise financial decisions after being solicited online or by phone or mail. They may be especially helpful in sharing warnings on trending investment scams such as those involving various cyber currencies.

Finally, the National Telemarketing Victim Call Center provides education and prevention services to older consumers who have been victimized or are at risk of being victimized by mass marketing and investment frauds, particularly by scam companies who purchase lists of victims to solicit.¹²³ Volunteers are trained to address risk victims and provide a specific prevention message, including tips on avoiding future re-victimization.

VII. Concluding thoughts

This article focuses on several promising programs that strive to prevent or address financial fraud predators. As the full force of the Elder Abuse and Protection Act of 2017 is engaged, community-based

¹²¹ *Report Fraud*, AARP FOUND.,

<https://www.aarp.org/aarp-foundation/our-work/income/elderwatch/report-fraud/> (last visited Oct. 31, 2018).

¹²² *FINRA Securities Helpline for Seniors*, FIN. INDUS. REGULATORY AUTH., <http://www.finra.org/investors/highlights/finra-securities-helpline-seniors> (last visited Oct. 31, 2018).

¹²³ *Preventing Consumer Fraud*, NAT'L TELEMARKETING VICTIM CALL CENTER, <http://ntvcc.org/> (last visited Oct. 31, 2018).

and national organizations will work toward solutions for victims and their families. Training professionals, including law enforcement, medical personnel, law professionals, APS, elder advocacy programs, grant funders, senior centers, and researchers is critical.

In addition, knowledge of the factors that contribute in making older adults particularly vulnerable to scam predators and even re-victimization by such predators is critical. Older adults face two kinds of risk. “First, there is the risk that an elderly person becomes the target of attempted financial exploitation. Second, once targeted, a person may be less able to protect himself.”¹²⁴ Professionals need to consider the changes associated with aging, not just the aging brain. It is important to continue to study the physical, emotional, technological, and societal factors that make older adults vulnerable. Without awareness and study of this more universal view of the challenges faced by older chronic victims and their families, the needs of present and future victims of international fraud crimes are not being served.

About the Authors

Debbie Deem is a Victim Specialist for the FBI in the Los Angeles Field Office. She works with victims of financial and violent crimes under investigation by the FBI. She also presents and trains on financial crime, international fraud crimes against older adults, human trafficking, and other victimization issues at the local, state and national level. She has also presented on these topics internationally in England, Syria, and Canada. Ms. Deem co-authored a chapter on victims of financial crime in the third and fourth editions of *VICTIMS OF CRIME*. While working as a Victim Witness Coordinator for the United States Attorney’s Office in Los Angeles, she wrote an article titled, *Observations in Working with the Forgotten Victims of Personal Financial Crimes*, which was published in 2000 in Volume 12 of the *Journal of Elder Abuse and Neglect*. She also contributed to a prior issue of the *DOJ Journal* (formerly *USABulletin*). The article was published in the January 1999 issue and is titled, *Assisting Financial Crime Victims*.

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¹²⁴ Deane, *supra* note 98, at 7.

Dr. Lande is a consulting neuropsychologist with the Ventura County Rapid Response Expert Team for APS and provides training and consultation to various organizations and community groups, including the Ventura Law Enforcement Crisis Intervention Training Team and the Ventura Brain Injury Center. Dr. Lande previously served as a lecturer at the University of California, Santa Barbara (UCSB), and as the Director of the Psychology Assessment Center at UCSB.

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Investigating and Prosecuting Transnational Telefraud Schemes: The India-Based Call Center Scam and Costa Rica Telemarketing Fraud Cases

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U.S. Department of Justice

I. Overview

This article presents a study of two cases involving prolific international fraud schemes that prey on elderly and other vulnerable populations of U.S. residents via the telephone. The article serves to illustrate key aspects of how these schemes were discovered, and the manner in which they were investigated and prosecuted. These cases highlight the successes that can be achieved through the combined efforts of Criminal Division components, United States Attorney's Offices, a broad range of federal and state law enforcement agencies, and international partners, working in concert towards the common goal of dismantling and disrupting a transnational criminal conspiracy.

II. The India-based call center scam case

A. Anatomy of a scam phone call

The following is an example of an Internal Revenue Service (IRS) scam call script seized from a conspirator's email account and used by India-based callers to defraud U.S. victims over the telephone.

Mr BOB [REDACTED]
 Before I start off I need to introduce myself as Ben McCoy, Special Agent in Charge of the Office of Inspector General for the U.S. Department of Tax Administration and IRS Tax Evasion call-Texas Region. This line has been recorded for Scrutiny and surveillance purpose. You have a right to remain silent for next 2 minutes and you will have your right to speak after I complete.

Now Mr John [REDACTED] Your case id – 7008974/2011 case is being jointly investigated by agents with IRS and U.S. Treasury Inspector General for Tax Administration (TIGTA).

Your case id is registered with charges of Felony and Treason for :-

1. **Tax fraud and money laundering**–which carries a maximum sentence of 10 years in prison and a fine of up to \$100,000 with your Deportation back to your country imminent and on the cards with a water tight case against you with the Board of Deportation(B.O.D)
2. **Unreported personal income and Tax Evasion and defaults on tax**- on American Soil Its an act of Treason and Felony , For not paying sufficient taxes and unaccounted personal income.
Now if charges are pressed:-

A.ARREST and DEPORTATION is imminent- In the next one hour Our team of Special Division of Asset Recovery would be at your doorstep which is responsible for the collections of federal debts and the forfeiture of assets related to Tax Evasion AND would be co-joined by the Financial Litigation Unit, responsible for the collection of civil debts DUE to the United States Government .And we would do it in an aggressive, efficient and effective manner.

SETTLEMENT-NO Leniency can be expected from us as we consider it as aggravated felonies” grounds for removal (deportation). Under immigration law, but YES we we have one aim that is to ensure that Taxes that you have evaded for these years go back to the IRS without Fail.

(If Customer is on his Knees after the Threats)-then go for the KILL(closing)

So MR..... how do you intend to do a Foreclosure and Pay up your impending Taxes ???.....

You Can Apply for an Offer in Compromise (OIC)

Figure 1: IRS Scam Call Script Seized from Conspirator’s Email Account

B. The victim aftermath

Below is an excerpt from a victim impact statement of an individual who was defrauded out of nearly \$15,000:

Words cannot even begin to express the emotional terror I experienced when I was threatened by the IRS impersonator with either coming up with the additional thousands of dollars they said I owed or the consequences would be losing my children, having all of our assets seized and going to federal prison. I was scared out of my mind and didn’t know what to do. Per their instructions, I was not allowed to discuss this ‘offer to settle’ with anyone, including my husband. I was told to sell my jewelry, go to the bank and get a loan, borrow it from a family member without disclosing what it was for, do whatever was necessary to come up with the rest of the money or an agent would be at my house within 45 minutes to arrest me . . . The impact of being a victim to this scam has been endless . . . The continued impact is my shame, embarrassment and humiliation. It has also been next to impossible to recover from the financial impact . . . [The crime] financially destroyed us. I had to use every penny of our funds in our bank accounts and was told it still wasn’t

enough. I had no money left to pay our monthly bills, buy groceries, pay for school expenses for our children, etc . . . Our mortgage payments got so far behind that our house was foreclosed on in January of 2017. We had to uproot our family and move out of our home of 20+ years.¹

C. Summary

Triggered by a flood of phony impersonation phone calls of the type depicted above and many similarly heart wrenching reports of victimization that ensued, multiple federal and local law enforcement agencies joined forces in 2013 to investigate and ultimately expose a massive international tele-fraud and money laundering conspiracy.² It quickly became clear that the elderly, recent immigrants, and other vulnerable persons living throughout the United States were being scammed on an epic scale. Left in the conspiracy's wake were thousands of fraud victims who lost hundreds of millions of dollars collectively, as well as tens of thousands of individuals who had their identities misappropriated to facilitate the laundering of the victim funds.³

¹ Government's Sentencing Memo, *United States v. Dipakkumar Sankalchand Patel*, No. 1:17-cr-00158 (N.D. Ga. Feb. 8, 2018), ECF No. 25, Ex. 5.

² *See* Press Release, U.S. Dep't of Justice, *Dozens of Individuals Indicted in Multimillion-Dollar Indian Call Center Scam Targeting U.S. Victims* (Oct. 27, 2016).

³ *See* Superseding Indictment, *United States v. Joshi, et al.*, No. 4:16-cr-00385 (S.D. Tex. Oct. 19, 2016), ECF No. 6.

HOW THE SCAM WORKS



Figure 2: Flowchart of “How the Scam Works”

An 85-year-old California woman was extorted by individuals impersonating IRS employees who threatened her with arrest unless she paid \$12,000 for nonexistent tax violations, which she paid via 32 prepaid cards over the course of three days. A disabled Army veteran from the Midwest contemplated suicide after sustaining losses of over \$157,000 attributable to this scheme, including the entire inheritance left to him by his mother. Another man was called multiple times over a 20-day period, demanding payment for alleged tax violations, and was eventually extorted out of \$136,000 via a series of increasing monetary demands and transactions.⁴

The multi-year investigation revealed a complex scheme involving a network of call centers conducting scam phone calls originating in

⁴ See Press Release, U.S. Dep't of Justice, *supra* note 2.

India.⁵ The call centers worked in close concert with United States-based conspirators operating across the country to profit from and hide the money generated by the scheme. This transnational criminal ring targeted American victims via a range of fraudulent phone call schemes, most frequently impersonating IRS, immigration, police, and other government officials, and demanding immediate payments to avoid deportation, arrest warrants, or to cover allegedly unpaid income taxes. The callers often required the victims to stay on the phone for the duration of the transactions—at times for several hours—while the victims drove around to various banks and stores collecting funds. The callers also instructed victims not to speak to anyone about their debts or payments, including their own family members. The victims reported that they believed they were speaking with legitimate government officials.

This was, in part, because the callers often took steps to obtain personal data about their victims in order to add credibility to the calls. This includes acquiring personal information available on job search websites and lead information used for legitimate marketing purposes, then using the contact and biographic information in service of the criminal scheme. Additionally, the scammers took steps to mask their locations and to “spoof” their telephone numbers to make it appear, in some instances, they were calling from government agencies such as the IRS or USCIS. The scam calls were all aimed at fraudulently obtaining funds from targeted victims over the telephone. The Indian call centers then used a broad network of regional United States-based associates to liquidate and launder the funds as quickly as possible. In the process, these criminals defrauded victims out of hundreds of millions of dollars and ensured that by the time a victim realized they had been duped, their money could no longer be located and recovered.

The investigation culminated in *United States v. Sunny Joshi et al.*,⁶ also known as the India-Based Call Center Scam case. The case was the first large-scale, multi-district investigation and criminal prosecution aimed at dismantling the international network of fraudsters and money launderers who were responsible for perpetrating telephone impersonation schemes conducted from India.

⁵ See Plea Agreement of Miteshkumar Patel, Cr. No. 4:16-cr-00385 (S.D. Tex. Nov. 13, 2017), ECF No. 471.

⁶ *United States v. Joshi et al.*, No. 4:16-cr-00385 (S.D. Tex. 2016).

The case was indicted and a national takedown operation was executed in October 2016, with arrests, search warrants, and related activities spanning many judicial districts across the country.⁷ The indictment⁸ charged a total of 61 domestic and India-based defendants with conspiracy, wire fraud, money laundering, and immigration fraud offenses.⁹ As of July 2018, 24 of the defendants charged in relation to the *Joshi* case have been convicted of various conspiracy charges, along with naturalization fraud and passport fraud.¹⁰ The defendants have been sentenced to terms of imprisonment of up to 20 years individually and over 180 years collectively.¹¹

D. The investigation

Beginning in 2013, a dedicated team of agents from Immigration & Customs Enforcement (ICE), Homeland Security Investigations (HSI), the Treasury Inspector General for Tax Administration (TIGTA), and the Department of Homeland Security-Office of Inspector General (DHS-OIG), assisted by other federal agents and local police, began coordinating their investigative efforts after realizing that they had common open cases involving victim reports of government impersonation scam telephone calls that appeared to be originating from India.

In 2014, the Department of Justice, Criminal Division's Human Rights & Special Prosecutions Section (HRSP) was approached by the

⁷ See Press Release, U.S. Dep't of Justice, *supra* note 2.

⁸ See Superseding Indictment, *supra* note 3.

⁹ The indictment in this case included charges against 32 India-based conspirators and 5 India-based call centers. These defendants have yet to be arraigned. An indictment is merely an allegation and the defendants are presumed innocent until proven guilty beyond a reasonable doubt in a court of law.

¹⁰ Press Release, U.S. Dep't of Justice, Last Defendant in the United States Pleads Guilty in Multimillion Dollar India-Based Call Center Scam Targeting U.S. Victims (Nov. 13, 2017).

¹¹ Press Release, U.S. Dep't of Justice, 24 Sentenced in Multimillion Dollar India-Based Call Center Scam Targeting U.S. Victims (July 20, 2018). In addition to the 22 defendants sentenced in the *Joshi* case in the Southern District of Texas, Houston Division, two others were convicted and sentenced in other districts for their involvement in the same fraud and money laundering scheme. See *United States v. Raman Patel*, CR-17-01382-PHX-JJT (D. Ariz. 2017); *United States v. Dipakkumar Patel*, 1:17-cr-00158-ELR-JSA (N.D. Ga. 2017).

team of agents to participate in the investigation. HRSP was contacted based on potential links to alien smuggling activity, along with the fact that numerous domestic targets involved in the call center conspiracy appeared to have illegally entered the United States and/or engaged in immigration fraud to obtain status while committing their crimes within the United States. Prior to HRSP's involvement, agents from the various field offices across the country were conducting similar investigations of targets in specific geographic regions with varying degrees of coordination, organization, and support from their local United States Attorneys' Offices. HRSP believed that national prosecution support and coordination of the related law enforcement efforts was essential to identifying the entire network and pursuing a broad, enterprise-type investigation. HRSP opened a case in September 2014 and began working the national and international aspects of the investigation, partnering closely with the United States Attorney's Office for the Southern District of Texas in Houston (USAO Houston). The partnership was based on USAO Houston's open case on the Houston-area targets and a mutual interest in pursuing a prosecution aimed at the full scope of the criminal organization. HRSP also consulted with other DOJ Criminal Division sections including the Fraud Section and the Money Laundering & Asset Recovery Section (MLARS, previously the Asset Forfeiture & Money Laundering Section) to determine their interest and available resources to participate in the investigation. The Fraud Section contributed valuable advisory support and MLARS assigned an attorney to join the fold as part of the prosecution team. The Criminal Division's Office of International Affairs (OIA) was also contacted early in the investigation and provided significant support and guidance.

During the course of the ensuing efforts, 13 additional United States Attorneys' Offices contributed assistance both small and large to the case. Numerous other federal agencies and offices lent their support to further the investigation.¹² Ultimately, the strength of the core agent

¹² Valued assistance was provided by police departments in Fort Bend, Texas; Hoffman Estates, Illinois; Leonia, New Jersey; Naperville, Illinois; along with the San Diego County District Attorney's Office Family Protection/Elder Abuse Unit; the United States Secret Service; United States Small Business Administration Office of Inspector General; IOC-2; INTERPOL Washington; USCIS; United States State Department's Diplomatic Security Service; the Federal Communications Commission's Enforcement Bureau; the Federal

team and the ability of the different agencies, offices, and prosecutors to work well together greatly increased the effectiveness of the investigative and prosecution efforts.

Using many different investigative tools, the investigation developed substantial evidence about the contours of the scheme and the extent of criminal activity involved. Those tools included:

- the use of tracker warrants on conspirators' vehicles;
- physical and retail store video surveillance;
- trash pulls;
- e-mail and other electronic evidence search warrants;
- interviews;
- border searches; and
- grand jury subpoenas to numerous financial institutions and retail entities.

Agents also received information from various human sources with knowledge of the scam, including an individual who worked at a call center in India. The individual working at the call center provided agents with recorded calls and scam phone call scripts written by and distributed to individuals working at the call center, photos of the call center, images of the management of the call center, lead lists,¹³ and processing sheets detailing payments made by victims. Victim reports collected by the investigative team and maintained by other federal agency databases were especially important to the process. The agents used the victim reports as a starting point to trace the money provided by the victims to the scam callers. They learned how the money was obtained and subsequently liquidated by specific domestic or foreign conspirators and call center groups. Eventually, defendant cooperation further corroborated other evidence gathered during the case.

The 70 email search warrants obtained for various internet service providers were aimed at the accounts of primarily foreign defendants and proved vital to cracking the case. Their contents revealed the

Trade Commission, and the Executive Office for United States Attorneys (EOUSA), Legal and Victim Programs.

¹³ A short-form "lead list" contained personally identifiable information such as name, address, and telephone numbers. A long-form "lead list" contained personally identifiable information such as name, address, telephone numbers, dates of birth, and social security numbers, among other pieces of identifying information.

manner and means by which the Indian defendants and call centers created and executed the scams and communicated with their U.S.-based conspirators to liquidate the money derived from victims.



Figure 3: Email Attachment Circulated Among Conspirators and Seized by Way of a Search Warrant

The investigation determined that the call center groups and individuals involved in the fraud and money laundering scheme were located in various parts of the United States, and overseas in Ahmedabad, Gujarat, India.¹⁴ The criminal activity flowed from the Indian call center groups owned, operated, and/or managed by conspirators located in or from India. The employees of the call centers used scripts to call unsuspecting victims based in the United States. In the most common but not the only iteration of the call center scams being conducted, the callers claimed to be federal agents. They told the victim that law enforcement agents intend to prosecute them or are on the way to the victim's location to arrest them for either an immigration violation or a tax violation unless the victim is willing to pay fines and fees associated with their purported violation. The caller instructed the victim not to tell anyone about the

¹⁴ See, e.g., Government's Sentencing Memo, *supra* note 1; Superseding Indictment, *supra* note 3; Plea Agreement of Miteshkumar Patel, *supra* note 5.

potential violation and to stay on the phone. In some instances, the victims stayed on their phone for as long as eight hours, while they drove to banks to withdraw money and/or to stores to place funds on Green Dot MoneyPaks¹⁵ or equivalent prepaid cards.¹⁶ The funds loaded on the prepaid card were then loaded onto general purpose reloadable (GPR) cards.¹⁷ While the victim was obtaining the funds, a scam fund liquidator or “runner” located somewhere in the United States, purchased temporary GPR cards at retail outlets and sent emails, WhatsApp, or other texts with photos detailing the cards’ numbers to the caller back in India. While the caller still had the victim on the phone, the caller registered the temporary GPR cards using misappropriated personal identifying information (PII) to register one or several of the GPR cards either online or by phone under a different person’s name.

Once the victim purchased MoneyPaks or equivalent prepaid cards, they gave the PIN on the back of the cards to the caller, who then transferred the funds on the MoneyPaks or prepaid cards to the temporary GPR cards registered by the scammers and still in the possession of the runner. The phone numbers used to move the funds from the prepaid cards to the GPR card in the possession of a runner were typically MagicJack or similar voice over internet protocol (VOIP) phone lines. If the funds were transferred via internet, a VPN

¹⁵ A MoneyPak or a similar prepaid card is a product that allows a purchaser to load funds onto the card without having to provide any PII. The card will typically have a unique number and personal identification number (PIN). The card typically cannot be reloaded and the funds on the card can only be cashed out or spent.

¹⁶ In addition to laundering victims’ funds using GPR cards, runners also received victims’ funds via MoneyGram and Western Union wire transfers using fictitious identities/false identification documents, direct bank deposits by victims into the accounts of witting and unwitting bank account holders, and through iTunes or other gift cards that victims purchased.

¹⁷ A GPR card is usually a Visa or MasterCard sponsored debit card that allows users to place a limited amount of money on the card and then functions as a debit or credit card accepted by most major retailers and vendors. Unlike MoneyPaks or similar prepaid cards, GPR cards are reloadable. This means the GPR cards can accept funds from outside sources, such as bank accounts, other Visa or Mastercards, etc. In order for the card to be reloadable, the card must be registered using PII. Some GPR card companies permit users to directly load funds from MoneyPaks (Green Dot recently discontinued MoneyPaks), or similar products.

server was commonly used to mask the true location and IP address of the call center. In either case, misappropriated PII was used to register the VOIP phone and the VPN.

Next, the runner used the temporary GPR cards in their possession to purchase money orders that they eventually deposited in a bank account, as instructed, while keeping a percentage of the profits from the cards for themselves. In this manner, the runners effectively laundered the criminal proceeds obtained from scam victims by liquidating whatever form of payment was derived from the victim into another medium as quickly as possible, usually within a matter of hours, and before any fraud detection or prevention measures could be used to freeze the extortionate funds. Using these methods, the investigation determined that a typical runner in the scheme could move hundreds of thousands, and in some instances up to \$1 million, per month in victim funds. Security officials from Green Dot and Blackhawk provided data substantiating many of these GPR and prepaid card transactions. This data revealed a core group of VOIP telephone numbers used to access and transfer fraudulently derived funds onto approximately 300,000 debit cards involving hundreds of millions of dollars. Altogether, evidence of total losses resulting from the indicted activity exceeded \$230 million.

According to the evidence, India-based conspirators worked with various foreign hawaladars¹⁸ to transfer funds from persons in India and elsewhere to persons in the United States using the hawala system. Typically, this transfer of funds from a hawaladar overseas

¹⁸ A hawaladar is a person who operates a “hawala.” A hawala is an informal banking system based on trust through which money can be made available internationally without actually moving it or leaving a record of the transaction. In a hawala system, a person wanting to send money abroad contacts a broker (the hawaladar), and gives him money, a fee, name, and location of the person to whom he wants the money delivered. The hawaladar contacts another hawaladar in the recipient’s country, and the second hawaladar delivers the money to the recipient. The first hawaladar then owes the transferred amount to the second, and the debt is frequently repaid by transactions conducted in the reverse direction. The legality or illegality of specific hawala transactions and persons involved in the system is heavily fact dependent, and beyond the scope of this article. For more information, see the following resource: Patrick M. Jost & Harjit Singh Sandhu, *The Hawala Alternative Remittance System and its Role in Money Laundering*, FINANCIAL CRIMES ENFORCEMENT NETWORK.

would require locating a hawaladar that operates in the United States to complete the transaction using his or her accounts and available funds. However, in this case the fraud funds from victims in the United States were used to fund the transfers to the persons in the United States that were expecting money from overseas. The Indian conspirators were in turn being financially enriched for facilitating the money transfers in the United States directly from the hawaladars in India.

The investigation identified 56 individuals located in the United States or in India who were involved in the scheme, each of whom held one or more specific roles in furtherance of the conspiracy:

- *Runner*: “Runners” were located in the United States and typically operated regionally. Runners purchased temporary GPR cards; forwarded the unique GPR card numbers to the Payment Processors located in India so the cards could be registered; purchased money orders using GPR cards funded with fraud proceeds; retrieved cash payments of scammed funds via money transmitters such as Western Union and MoneyGram using fake identification documents; and deposited scammed funds into bank accounts. Runners were often directed by Domestic Managers.
- *Domestic Manager*: “Domestic Managers” were located in the United States and directed runners’ activities and at times provided runners with resources and supplies, such as vehicles and credit cards for travel expenses. Domestic Managers were often the direct points of contact with the Call Center Operators and Payment Processors in India. They negotiated their crew’s payout of scammed funds.
- *Call Center Operator*: “Call Center Operators” were typically located in India and oversaw and managed the daily operations of the call centers. They performed duties such as keeping time and attendance; maintaining the facilities, acquiring telephone numbers from which scam calls would be made; maintaining expense sheets for respective call centers; obtaining and distributing lead lists; and creating monthly invoices for Payment Processors regarding how much was owed to the call centers based on the amount of scam funds the call centers accrued. In some cases, the Call Center Operators had equity shares in the call centers.
- *Caller*: “Callers” received lead list information and call scripts.

Callers made fraudulent and extortionate calls to victims in the United States and elsewhere, purporting to be United States government officials or money lenders in order to extract scammed funds from victims.

- *Payment Processor*: “Payment Processors” were located in India, were often affiliated with particular call centers, and were the intermediaries between the call centers and the Runners. For example, they facilitated overseas payments for hawaladars, activated (or managed individuals who activated) GPR cards with unwitting United States citizens’ PII, communicated with and instructed Runners to liquidate GPR cards, transferred scammed funds from prepaid stored value cards to GPR cards, and coordinated with call centers that made the scam calls.
- *Data Broker*: “Data Brokers” identified and contacted United States and foreign lead generators and marketing companies to purchase names and PII for registering GPR cards and targeting potential victims. Data Brokers also facilitated payment for PII through domestic Runners.¹⁹

The investigation identified five major conglomerates of call centers, all located in Ahmedabad, Gujarat, India: HGlobal, Call Mantra, Worldwide Solution, Zoriion Communications, and Sharma BPO (Business Process Outsourcing).²⁰ Based on the evidence gathered, the call center conglomerates often acted together during the course of the conspiracy to effect the scheme, including exchanging scam call scripts and lists of potential victims/PII used in the scheme, processing payments for each other, and directing the liquidation of victim funds.



Figure 4: Photograph of Zoriion Call Center Seized from Conspirator’s Email Account

¹⁹ See Superseding Indictment, *supra* note 3.

²⁰ See Superseding Indictment, *supra* note 3.

E. The criminal prosecution

1. The indictment

On October 19, 2016, a grand jury in the Southern District of Texas returned a sealed indictment²¹ against 61 individuals and entities in the United States and India identified during the investigation. The indictment charged the defendants with the following offenses:

- *Count 1: General Conspiracy* (18 U.S.C. §§ 371 (general conspiracy) to commit: 1343 (wire fraud); 1951(a) (extortion); 912 (false personation of government employee); 1028(a)(7) (identity fraud); 1029(a)(2) (access device fraud); 1956(a)(1)(B)(i) (concealment money laundering));
- *Count 2: Wire Fraud Conspiracy* (18 U.S.C. § 1349); and
- *Count 3: Money Laundering Conspiracy* (18 U.S.C. §§ 1956(a)(1)(B)(i) (concealment money laundering)/1956(h) (money laundering conspiracy)).²²

Multiple conspiracy counts were charged in the indictment for strategic purposes, including to account for the number of defendants and their various roles and scope of activity in furtherance of the overall telefraud and accompanying laundering scheme. This also allowed prosecutors flexibility during plea negotiations while maintaining potential leverage to add additional substantive counts via a superseding indictment for defendants who elected to go to trial.

A plethora of other conspiracy and substantive charges were considered for inclusion in the indictment, but the team decided a streamlined menu of charges that cut to the gravamen of the criminal conduct and avoided unduly complicating an already complex case was preferable. A charge considered but ultimately discarded was RICO conspiracy (18 U.S.C. § 1962(d)). Although RICO was feasible given the case facts, and may have offered some possible advantages, the concern was that it would complicate the indictment and trial presentation, add elements of proof, and not necessarily add to the case. The base offense level/statutory maximums available under wire fraud and/or money laundering conspiracy statutes would not necessarily be increased by the RICO charge. Further, general

²¹ Defendant Sunny Joshi was charged in the original, sealed indictment in August 2016 with two counts of passport fraud. That indictment was superseded on October 19, 2016 to add the call center conspiracy counts.

²² See Superseding Indictment, *supra* note 3.

conspiracy law is broadly applied and construed in the Fifth Circuit and was viewed favorably for connecting our defendants to a single conspiracy in the absence of pleading and proving a *Gleicier*²³-type RICO conspiracy.

Venue for the conspiracy charges was appropriate in the Southern District of Texas under 18 U.S.C. § 3237(a) based on commission of the offenses within more than one district and a substantial amount of illegal activity was begun, continued, or completed within the Southern District, including acts committed by runners and the defrauding of Southern District of Texas victims.²⁴ Given the scope of the criminal activity and victims located in every state and United States territory, venue could have been established in nearly every district.

2. Takedown planning

Long before the indictment, the prosecution team began planning for a simultaneous arrest and search warrant operation to be conducted in over half a dozen districts. The prosecution team knew from their experience with previous large scale takedown operations that advance coordination, paperwork preparation, and logistical

²³ See *United States v. Gleicier*, 923 F.2d 496, 498–500 (7th Cir. 1991). Under this theory, the government would prove that the defendant agreed to further an endeavor, which if completed, would satisfy all the elements of a substantive RICO offense, and agreed that at least one member of the conspiracy would commit at least two racketeering acts in furtherance of the enterprise’s affairs. It is not necessary to allege that the defendant agreed to personally commit any racketeering act or to allege specific racketeering acts that were the objectives of the RICO Conspiracy. Rather, it is sufficient to allege that it was a part of the RICO conspiracy that the defendant agreed that a conspirator, which could be the defendant himself, would commit at least two acts of racketeering activity in the conduct of the affairs of the enterprise and to include sufficient allegations to inform the defendant of the nature of the charge.

²⁴ *United States v. Rodriguez-Lopez*, 756 F.3d 422, 430 (5th Cir. 2014) (referencing *United States v. Winship*, 724 F.2d 1116, 1125 (5th Cir. 1984) (“[V]enue is proper in conspiracy cases in any district where the agreement was formed or an overt act occurred.”)). “Venue may be proper in districts in which conspirators ‘have never set foot.’” *Id.* (citing *Winship*, 724 F.2d at 1125); see *United States v. Garcia Mendoza*, 587 F.3d 682, 687 (5th Cir. 2009) (“[O]ne co-conspirator’s travel through a judicial district in furtherance of the crime alleged establishes venue as to all co-conspirators.”).

attention to detail was key to a successful takedown. As a result, weeks in advance of the takedown, the prosecution team reached out to Assistant United States Attorneys in each district where an indicted defendant was located to loop them into the efforts and closely coordinate with them on the assistance that was needed within their district, including procuring search warrants and handling initial appearances/detention hearings. By doing so, the prosecution team was able to identify go-to local prosecutor contacts to work with leading up to and on arrest day, to obtain local go-by templates, and to familiarize those Assistant United States Attorneys tapped to assist us with the case in advance. The prosecution team provided them with extensive information about the overall case and specific defendants, including detailed, individualized detention hearing packets. The prosecution team also identified agents that were available to testify, if required. The prosecution team worked with the agents to ensure the team had accurate information about each defendant's immigration status and that ICE detainers were in place where appropriate. Given the expansive nature of the conspiracy, the hundreds of millions of dollars of victim loss at issue, and the illegal immigration status of a number of the defendants, the team believed it had very strong detention arguments on safety and flight risk grounds for nearly all of the defendants.

Likewise, the prosecution team knew it was paramount to closely coordinate with the core case agent team and the many agents across the country tapped to assist in the takedown. Coordination ensured the prosecution team was able to provide sound advice and assistance both before and during the operation in an effort to mitigate potential issues that could negatively impact the team's litigation interests. In advance of the takedown, the team coordinated to ensure that:

- travel alerts were in place for all of defendants (at least one of whom had recently returned from a trip to India);
- agents had clear instructions on best practices for handling electronic devices and digital evidence, including password protected cell phones and available remedies including biometric unlocks authorized via search warrant or consent;
- the plan incorporated on-call and embedded interpreter resources as needed for interviews;
- agents were armed with a vetted list of interview questions and interview strategies/use of evidence were discussed;

- vetted foreign language consent to search/computer forensics search/rights advisement forms were distributed to all agents.

On the day of the takedown, prosecutors were split between two groups. One group supported court proceedings in the various districts and the other group staffed a “command center” along with the agents. The command center fielded phone calls to address issues when arrest and search warrants were executed, initial appearances occurred, interviews were conducted, and evidence was generated that served as a basis for additional search warrants that needed to be drafted, obtained, and executed as soon as possible.

3. Foreign outreach

Based on feedback from contacts within the Department and other government enforcement and investigative agencies familiar with working with India, the prosecution team carefully weighed the relative risks and rewards of reaching out in advance to Indian law enforcement officials regarding the foreign based defendants. The prosecution team ultimately decided to keep the indictment and takedown operation covert until close to the takedown date. This decision was made to maintain operational security, avoid the possible flight of dozens of United States based defendants, and mitigate the likelihood of destruction of evidence that would occur if the element of surprise was lost. However, beginning on the date of the takedown and continuing to the present date, the prosecution team worked through Department’s Office of International Affairs, Interpol, and various United States law enforcement agencies to engage with Indian authorities on a number of corresponding Mutual Legal Assistance Treaty requests and other issues in furtherance of the respective interests in disrupting and dismantling the Indian call center scam industry. Efforts aimed at holding the foreign defendants in the case accountable remain ongoing.

4. Takedown

On the morning of October 27, 2016, the indictment was unsealed and the takedown operation went live. The operation resulted in the arrest of 20 defendants and the execution of nine search warrants across eight states. Several high level defendants’ homes, vehicles, and electronic devices used in furtherance of the scheme were searched, yielding valuable evidence and forfeitable assets. A significant number of the defendants waived their *Miranda* rights and

provided inculpatory statements to agents. One defendant was hospitalized on the date of the takedown and was subsequently arrested. Two other defendants were unable to be located and arrested on the takedown date, but were subsequently found and arrested as fugitives in 2017. An additional defendant was later identified, located, arrested, and charged separately with passport fraud and conspiracy for his role in the scheme.

Out of the 24 defendants the team requested to remain detained, only 2 were released. The team requested that the Assistant United States Attorneys seek a temporary stay of the magistrate release orders in an effort to obtain a stay from the district court judge assigned to the case in the Southern District of Texas and allow him to serve as the final arbiter of pre-trial detention determinations. Stays were obtained for those defendants, who were subsequently transferred to the Southern District of Texas, where the assigned judge ordered them detained. Both individuals later unsuccessfully appealed their pre-trial detention to the Fifth Circuit Court of Appeals.²⁵

5. Pre-trial phase and conviction of all United States defendants

Once the defendants were arraigned, ordered detained, and transferred from the districts in which they were arrested to Houston, Texas, our team immediately made various court filings to have the case declared complex, move for alternative victim notification procedures cleared for use by the court in mass victim cases, unseal search warrants, and other legal process. Thereafter, multiple rounds of discovery comprising terabytes of data were provided to defense counsel accompanied by a detailed index and list of “hot docs” containing key documents and evidence against each defendant. Stipulated protective orders were also agreed to with each defendant to assure victim information and PII was properly handled and protected.

In short order, it became abundantly clear that prosecutors needed to be proactive in educating defense counsel to help them make sense of the massive amount of evidence in the case, understand the operation of the complex scheme, and recognize where their particular client fit into it. As a result, prosecutors engaged in a robust reverse

²⁵ See *United States v. Patel*, 685 F. App'x 323 (5th Cir. 2017).

proffer process aimed at positioning opposing counsel to advise their clients on the strength of the government's case, cooperation potential, and plea possibilities. PowerPoint presentations specific to the evidence against each individual defendant were prepared and presented via a series of meetings with defense counsel assigned to the case. The provision of discovery and follow-up reverse proffer sessions led to a torrent of interest from defendants who wanted to debrief with the government. This opened the doors for conspirators at all levels of the hierarchy of the scheme to cooperate against other domestic defendants they worked with and any foreign defendants they communicated with as part of the scheme.

Ultimately, all 24 defendants located within the United States agreed to cooperate and each pleaded guilty to one of the conspiracy counts in the indictment.

F. Victim identification and impact

Victim identification was a uniquely challenging aspect of this case. These difficulties were due to the inherent nature of the scheme, gaps in victim reporting and available data, and the resource intensive nature of obtaining and combing through available evidence in an effort to trace financial transactions back to a specific, identifiable victim. The unfortunate reality is that thousands of victims of this scheme remain unidentified for a myriad of reasons, including because they did not report being scammed to federal law enforcement authorities, or because their reports to local police were not conveyed to the investigating authorities. Because the scheme utilized anonymous forms of payment—prepaid cards—and GPR cards registered illegally with other people's PII, the victim payments were often untraceable by design. In many instances, it proved impossible to trace scam funds associated with the scheme back to particular victims. In short, the tactics employed by the conspirators to defraud victims in this case and then launder the funds were highly successful.

The victim identification issues aside, through development of a detailed plan to address victim aspects of the case and diligent efforts by the case team, including the Southern District of Texas Victim Witness Coordinator, thousands of victims of the scheme were identified and notified via traditional and alternative victim notification procedures. Hundreds of those victims provided impact statements (VISs) prior to sentencing. In their statements, the victims reported profound negative impacts on their lives, including losses of

hundreds to thousands to tens of thousands of dollars, and, in some instances, over \$100,000. Many victims urged the maximum penalty be imposed. As a result of the impact of this case, many victims reported they no longer answer their phone for lack of trust as to who is on the other end of the line.

One victim described his overwhelming fear on the day that he was scammed into believing he would be arrested because there would be no one to take care of his ailing mother.²⁶ This fear caused him to be duped into paying over \$10,000 to the fraudsters. Another victim described now feeling incredibly paranoid, and that after being scammed she and her children went without food for two weeks. This victim lost \$258 at the hands of the fraudsters. Another victim described having lost her confidence and her “self-respect,” and feeling paranoia when someone unknown calls her. She stated that she has not spoken to anyone about the incident apart from her husband due to the shame and guilt that she feels. This victim, a housewife who does not earn a paycheck, was scammed out of over \$8,000 at the hands of the fraudsters.

Another victim lost her job as the scammers demanded that she stay on the phone with them for over two hours and proceeded to email her false arrest warrants while she was at work. The loss she incurred was equivalent to half her rent, which she already struggled to pay. One victim lost over \$18,000 at the hands of the fraudsters, money taken from her that was being saved to start a non-profit. She eventually had to move back to her hometown to garner emotional support from her family and was not able to start her business. This victim states that the fraudsters “should be court ordered to work the rest of their lives and pay back installments that . . . [are] owed to all the victims they affected by this scam.”²⁷

Yet another victim scammed out of nearly \$9,000 described literally emptying his bank account to come up with the funds. His credit score dropped 200 points as he was not able to pay his bills, was unable to refinance his home, and had to pay higher interest rates. Another scam victim, a single parent of three children, feared for her and her family’s well-being as the scammers said they would arrest her and send her children to foster care. She was afraid to sleep at night and afraid to send her children to school. She “had no money for food or

²⁶ See, e.g., Government’s Sentencing Memo, *supra* note 1.

²⁷ Government’s Sentencing Memo, *supra* note 1.

heat.” In her words, the loss is “something that I will never forget . . . For months we experienced financial problems, my children received counseling at school, it affected their school work.”²⁸

Another victim wrote: “[n]ow I trust nothing, so I panic and second guess everything I do which affects all areas of my life. I don’t even trust this [VIS] form . . . sounds crazy right? THAT’S what THEY have done to me.”²⁹

For all of these reasons, during the sentencing phase in this case, the prosecutors fought for restitution for every identified victim with substantiated losses—either from their own financial records or from the other evidence collected in the case. Prosecutors also urged the court to consider the victims’ statements and the direct harm that the actions of the conspirators caused to the victims when determining appropriate sentences. Throughout the course of the various sentencing hearings, the district court judge continually emphasized the victim impact in this case as factoring into his decisions on the sentences imposed.

G. Sentencing

Between July 18 and 20, 2018, 21 of the defendants in the *Joshi* case were sentenced to individual terms of imprisonment of up to 20 years in the United States District Court for the Southern District of Texas, Houston Division. Three other defendants related to the case had previously been sentenced earlier in 2018 in Texas, Arizona, and Georgia.³⁰

Notable defendants sentenced in the case included the following:

- Miteshkumar Patel, 42, of Illinois, was sentenced to serve 240 months in prison followed by three years of supervised release on the charge of money laundering conspiracy. Based on admissions in Patel’s plea, beginning in or around 2013, Patel managed a crew of a half dozen domestic runners involved in the criminal scheme, liquidating as much as approximately \$25 million in victim funds for conspirators from the India-based call center and organizational co-defendant HGLOBAL. Patel communicated about the fraudulent scheme with various domestic and India-based co-defendants via email, text

²⁸ *Id.*

²⁹ *Id.* (emphasis in original).

³⁰ See note 6, *supra*.

messaging, and WhatsApp messaging. Patel and his runners purchased reloadable GPR cards that were registered using the misappropriated PII of unsuspecting victims that were later used to receive victims' funds, and used those reloadable cards containing victims' funds to purchase money orders and then deposit those money orders into bank accounts, as directed, while keeping a portion of the scam proceeds as profit. Patel also trained the runners he managed on how to conduct the liquidation scheme, provided them with vehicles to conduct their activities in Illinois and throughout the country, and directed a co-defendant to open bank accounts and limited liability companies for use in the conspiracy. Patel further admitted to using a gas station he owned in Racine, Wisconsin to liquidate victim funds, and possessing and using equipment at his Illinois apartment to make fraudulent identification documents used by co-defendant runners in his crew to receive wire transfers directly from scam victims and make bank deposits in furtherance of the conspiracy. Evidence also showed Patel started his own Indian call center conducting IRS scam calls toward the end of the charged conspiracy. The court found Patel was a leader or organizer in the scheme and assessed an aggravating role enhancement pursuant to U.S.S.G. § 3B1.1(a).³¹

- Hardik Patel, 31, of Illinois, was sentenced to serve 188 months in prison followed by three years of supervised release on the charge of wire fraud conspiracy. Patel consented to removal to India upon completion of his prison term. According to the factual basis of his plea agreement, Patel was a co-owner and manager of an India-based call center involved in the conspiracy. In addition to managing the daily operations of a call center, Patel also processed payments and did bookkeeping for the various call centers involved in the fraud scheme. One of the India-based co-defendants with whom Patel communicated about the scheme was Sagar “Shaggy” Thakar, a payment processor that Indian authorities arrested in April 2017 in connection with call center fraud. After moving to the United States in 2015, Patel continued to promote the conspiracy by recruiting runners

³¹ U.S. SENTENCING GUIDELINES MANUAL § 3B1.1(a) (U.S. SENTENCING COMM’N 2016).

to liquidate fraud proceeds. Patel was held accountable for laundering between \$3.5 and \$9.5 million dollars for the scheme.

- Viraj Patel, 33, of California, was sentenced to serve 165 months in prison followed by three years of supervised release on one count of money laundering conspiracy. According to his plea, Patel participated in the scheme both while overseeing a scam call center in India and after moving to the United States and participating in laundering victim funds generated by the scheme. The court entered a stipulated judicial order to remove Patel to India at the conclusion of his sentence.
- Sunny Joshi, a/k/a Sharad Ishwarlal Joshi, a/k/a Sunny Mahashanker Joshi, 47, of Texas, was sentenced to serve 151 months in prison on the charge of money laundering conspiracy, and 120 months in prison on the charge of naturalization fraud to run concurrent followed by three years of supervised release.³² According to the factual basis of his plea agreement, Joshi was a member of a Houston-based crew of runners that he co-managed with his brother, co-defendant Mike Joshi, aka Rajesh Bhatt. Sunny Joshi communicated extensively with India-based co-defendants about the operations of the scheme, and was held accountable for laundering between \$3.5 and \$9.5 million. Additionally, in connection with his sentence on the immigration charge, the court entered an order revoking Joshi's United States citizenship and requiring him to surrender his certificate of naturalization.

Each of the defendants in the *Joshi* case were held jointly and severally liable for restitution of \$8,970,396 payable to the fully identified victims of their crimes. Additionally, the court entered individual preliminary orders of forfeiture against the defendants for assets that were seized in the case, and money judgments totaling more than \$72,942,300. The money judgments incorporated two seizures from Green Dot Corporation of nearly \$800,000 in fraud proceeds located on Green Dot cards traced to the scheme. One of the defendants had his United States citizenship revoked, and the court entered stipulated judicial orders of removal or recommended

³² Joshi was previously indicted in the Eastern District of Louisiana on the naturalization charge, which was subsequently transferred to the Southern District of Texas and incorporated into his global guilty plea. *See* United States v. Joshi, No. 2:16-cr-00143 (E.D. La. 2016).

deportation back to India for ten of the defendants at the conclusion of their prison sentences.

H. Conclusion

Through carefully coordinated, aggressive efforts of a nationwide team of law enforcement agents, prosecutors, and other key contributors, the *Joshi* case helped effect a significant disruption of the India-based call center scam industry. The case contributed to the shutdown of numerous call center groups engaging in the scheme in India, while effectively eliminating the associated network of conspirators operating across the United States who were responsible for disappearing many millions of dollars bilked from elderly and other vulnerable victims. In spite of these successes, many foreign defendants remain at large and the Department and its law enforcement partners will continue to vigorously pursue bringing the foreign fugitives to justice and holding them accountable for their crimes, whether in United States courts or abroad. Likewise, the agent and prosecution team remain actively involved in providing advice and assistance to various United States Attorney's Offices and law enforcement agency field offices to help further similar investigations, and provide a blueprint for successful prosecutions of other Indian scam call center networks engaging in these schemes.

While the *Joshi* case contributed to significant declines in the number of victim reports to the IRS and other government agencies³³ and generated significant national and foreign press that raised awareness of these schemes, impersonation scams continue to proliferate. Numerous spinoff scams involving impersonation of government officials from other agencies, as well as other types of telefraud and money laundering schemes, continue to victimize United States residents at high rates. Little evidence exists to suggest that the Indian government will successfully prosecute and impose significant sentences on the perpetrators of these call center scams operating within Ahmedabad and elsewhere within India.³⁴ For these

³³ According to TIGTA, in the months following the October 2016 indictment and takedown in this case, the average number of reported scam calls per week dropped sharply, from as many as 45,000 calls and 300 victims per week pre-indictment to approximately 2,500 calls and 15–20 new victims per week afterwards.

³⁴ To date, the United States government has not received any information concerning the investigation, arrest, or prosecution by Indian authorities of

and many other reasons, it is critical to continue to educate the public concerning how these schemes work to prevent the unwary from being victimized, while also sending a strong deterrence message to those involved in India-based call center fraud. The scope of the prosecution and significant sentences imposed in this case should signal to the criminal actors, the victims, and to the public that persons involved in these types of crimes, at all levels of the criminal conspiracy, will be prosecuted vigorously by the Department and face lengthy jail terms, substantial financial penalties, immigration consequences, and other serious repercussions for their actions.

III. The Costa Rica Telemarketing Fraud Case

Hello, may I please speak with Mary Smith? Good afternoon Ms. Smith. I'm calling from the Federal Consumer Protection Agency in Washington, DC. We are established by the Federal Government to monitor the activities of sweepstakes companies and of course to assist with the receipt of awards. According to our records, you were notified by the mail a little over 30 days ago that you won the 2nd place of \$450,000 in a sweepstakes drawing, and, for the first year, your city, state, and federal taxes are waived. Wow— Congratulations! You must be thrilled! Now, the computer shows you have a delivery scheduled for tomorrow between the hours of 4 and 5 p.m. Now, let me just verify your address. [PROVIDE ADDRESS.] You will be home, right? Because you'll need to provide proper identification upon delivery. Then make sure to check the package. You should find an official bank

31 of the India-based defendants charged as part of the public indictment in this case for their alleged criminal conduct. The one and only defendant in this case known to have been prosecuted in India in relation to his involvement in similar Indian call center fraud, hailed in the Indian press as a “mastermind” of these schemes, was released from an Indian jail on bail after only 14 months of incarceration. *See Arvind Walmiki, After 14 Months, Thane Call Centre Scam mastermind ‘Shaggy’ Granted Bail*, HINDUSTAN TIMES (June 19, 2018).

check from Bank of America for \$450,000 and a tax exempt form stating that all of your taxes have been paid. The courier will then give you an additional check refund for the delivery insurance, and you will need to sign a release form stating you received the award check and refund. Now, the computer shows that all regulations have been followed for delivery of your award, except, it looks like you still have not posted the refundable delivery insurance, which allows the courier to carry this check to you. This information was part of the initial notification. Is there some reason you have not taken care of this? Well, not to worry, you have at least 24 hours to get this done. And, my job, as part of the Federal Government is to help you and make sure you're following the law and your money is protected. Now, my phone calls are being recorded, and I do need you to confirm that you're still accepting delivery of the \$450,000 award tomorrow. And as far as the delivery insurance, the amount is 1% of the prize amount. That is \$4,500. And, as I said, this amount will be refunded to you when you receive the sweepstakes; this just helps makes sure the sweepstakes prize gets to you. Now, go get a pen and paper and write this down, so there are no mistakes. First write down tomorrow's date, the time of delivery, and your award amount of \$450,000 tax free." [SMALL TALK ABOUT WHAT THE PERSON WILL DO WITH THE MONEY.] Now, regarding the refundable fee, for your protection, please do not give me credit card information or send any checks or money orders. The safest and fastest way to send the money is through a wire transfer through Western Union or MoneyGram. The only way you can show that you are insured is to insure everything as soon as possible through a bonded trustee from Lloyds of London. You've heard of them, right? If I can find an agent available, can you take care of wiring the fee to the insurance agent today? Ok, let me put you on hold for a couple of minutes. [HOLD] I'm back. Thankfully, I was able to convince an agent to work quickly on this, so you can get your prize tomorrow. Here is the name and address of

your agent for you to write down. Read that back to me to make sure you have that right. Now there are a couple of ways to make the refundable deposit. You can go to your local Western Union with the cash, or you can call Western Union at 1-800-325-6000 and use your credit card from the privacy of your own home. So now that you have all of the information, why don't you work on taking care of that. I will call you back in a couple of hours to register you in my computer. That should give you plenty of time to care of this. When I call you back, I'll need the information that Western Union will be giving you—the fee amount, and a 10 digit MTCN number, so we can track everything properly. So make sure to keep the receipt in a safe place. Just a couple more things. We are required to inform you that, for your protection, we do not release any information on your award to any investment or brokerage firm, telemarketing firm, or any media. Obviously the last thing you need is to have a lot of people know you have won a lot of money. You need to understand that Western Union has been known to sell names and phone numbers of award winners to telemarketers. So, and this is, again, very important for your protection, if they ask you what the wire transfer is for, just tell them it is for personal reasons. It is none of their business that you just won a huge prize! Do you have any questions? Great. Well, congratulations again, and I will call you back in a couple of hours to make sure everything is set for your delivery tomorrow.

This sample script, otherwise referred to as a “pitch,” is a common introductory call to a victim of fraudulent telemarketing sweepstakes schemes. If the victim bites and sends money, this first call is followed by additional calls, convincing the target victim that he or she has now won first prize and, therefore, needs to send more money, or there has been some other, previously overlooked duty or fee that the victim needs to pay before the sweepstakes prize can be sent. This pattern continues until the victim cannot or will not pay anymore or law enforcement is engaged.

A. Background

Fraudulent telemarketing is a growing epidemic in the United States that is vastly underreported. The schemes involve call centers that are often based in other countries, such as Costa Rica, and target individuals across the United States. The fraud takes many forms and, particularly with advancements in modern technology, is difficult to detect. Like the India-based call center scam case discussed above, these schemes prey on vulnerable persons, particularly the elderly. The script above is a real telemarketing “pitch” delivered from a Costa Rica-based call center to vulnerable victims in the United States. Thousands of vulnerable victims sent money—totaling tens, if not hundreds, of millions of dollars—in response to such calls.

Since at least 2006, the Fraud Section has been involved in a coordinated operation with various law enforcement agencies, United States Attorneys’ Offices, and international partners to investigate and prosecute these fraudulent sweepstakes telemarketing schemes and combat this nationwide problem. The partners include United States Attorney’s Offices for the Western District of North Carolina, Middle and Southern Districts of Florida, Eastern District of New York, and the Northern District of North Dakota. Our law enforcement and department and agency partners include the United States Postal Inspection Service; Internal Revenue Service Criminal Investigation; Federal Bureau of Investigation; the Federal Trade Commission; the Department of Commerce; and United States Immigration and Customs Enforcement’s Homeland Security Investigations. The Fraud Section also relies upon the assistance of the Department of Justice Criminal Division’s Office of International Affairs; the United States State Department’s Diplomatic Security Service and Bureau of Consular Affairs; with critical assistance from Interpol and government authorities from Costa Rica and other countries.

Historically, the Fraud Section has prosecuted the owners, managers, callers, and individuals involved in the transfer and collection of money for these fraudulent sweepstakes telemarketing schemes. In just the past five years, this has resulted in 16 cases, with charges brought against almost 80 defendants, and over

65 convictions through jury verdicts or guilty pleas.³⁵ In recent years, in an effort to further combat these terrible crimes, the Fraud Section has also begun to prosecute individuals who provide necessary services to these operations, including customer contact information (“leads”), which is the source of victim contact information,³⁶ and VoIP technology, which allows telemarketers to conceal their location and identities when making these fraudulent calls to victims.³⁷ Below is a discussion of the investigation and prosecution of fraudulent sweepstakes telemarketing schemes arising out of call centers in Costa Rica.

B. Overview of the scheme

1. Organization

Fraudulent telemarketing sweepstakes schemes based in Costa Rica are devised and executed through call centers. These call centers operate out of a house, an apartment, or a vacant room and are set up with desks and phones that transmit calls over the internet through VoIP technology. Call centers often change locations for convenience of the owner, to expand to multiple centers, to upgrade the facilities, and/or to avoid detection from law enforcement.

³⁵ These statistics are based on information from Fraud Section Costa Rica sweepstakes telemarketing cases based out of the Western District of North Carolina, and *United States v. Willocks, et al.*, No. 4:12-cr-175 (D.N.D. 2012), a Jamaican sweepstakes telemarketing case. The United States Attorney’s Office for the Western District of North Carolina prosecuted the Costa Rica sweepstakes telemarketing case, *United States v. Coble*, No. 3:12-cr-00106 (W.D.N.C. 2012).

³⁶ *See, e.g.*, *United States v. Nanry*, No. 17-cr-0538 (E.D.N.Y. 2017) (prosecution of defendants involved in selling individuals’ personal information—names, phone numbers, and addresses (collectively called “leads”)—to fraudulent telemarketing schemes, knowing they are going to be used for fraudulent schemes); *United States v. Mendleski*, No. 2:16-cr-109 (M.D. Fla. 2016) (same).

³⁷ *See, e.g.*, *United States v. Dodt*, No. 3:15-cr-213-MOC-DSC-13 (W.D.N.C. 2015) (charging Dodt as a co-conspirator in a fraudulent sweepstakes telemarketing scheme; indictment alleging that he provided VoIP technology used to disguise the phone numbers and source location of the calls from Costa Rica as coming from Washington, D.C. or New York, knowing the technology was being used to facilitate the fraudulent scheme).

Individuals are recruited and hired to work for a call center through various methods, including Craigslist, other employment postings, or simply word of mouth. There is an extensive network of fraudulent sweepstakes telemarketing call centers and people are known to be involved in “sweeps,” as the fraudulent practice is generally called among those who participate. Individuals with American accents are most sought after for recruitment into the call centers, as victims are more suspicious of callers with foreign accents.

The call centers generally maintain the following organizational structure:

- *Owner/manager.* The owner/manager sets up and oversees operations of the call center, including setting up the room and assigning phone numbers, purchasing and distributing “leads,” protecting leads from theft,³⁸ monitoring calls, coordinating runners and the collection of victim payments, and allocating and making payments to co-conspirators from victim proceeds. Managerial responsibilities can be taken over or otherwise shared by others who are not the initial “owner” of the room.
- *Opener.* An opener is the telemarketer who initially calls the victim and makes the opening pitch, stating the victim won a prize and is required to pay a refundable insurance cost or other fee to claim the prize.
- *Loader or Re-loader.* A loader is the telemarketer who re-solicits the same victim to send additional money by telling the victim the prize has increased due to the disqualification of the grand prize winner and the corresponding insurance, fees, taxes, or custom duties have increased, or an issue occurred, such as the package got stuck in customs, that requires additional payments.
- *Runner.* A runner is the co-conspirator located in Costa Rica that collects victim payments sent from the United States. If the payment is made through Western Union or MoneyGram, the runner’s name is provided to the victim to identify on the wire. The call centers generally employ multiple runners at any given time, and sometimes telemarketers also act as runners.

³⁸ It is not uncommon for telemarketers to “back door” victims that paid, and continue to pay, a lot of money. With this practice, the telemarketers call the victims on the side and keep the victim payments for themselves rather than reporting the payments to the call center owner or manager and sharing the proceeds.

- *Bridge*. A bridge is an individual in the United States who receives victim funds and forwards them to Costa Rica. Sometimes the bridges are co-conspirators who know that the funds are from victims in connection with a fraudulent sweepstakes scheme. Sometimes the bridges are victims, who tell telemarketers that they cannot afford the fees or duties to claim the prize, so the telemarketers convince them that they can collect and transfer payments from others to satisfy the fee or other obligation. These victim bridges are provided false stories about the source of these payments and the reason they need to help make the transfers to Costa Rica.

Although not as common among Costa Rica-based call centers, some call centers involve guns, other weapons, or threats of physical violence to enforce the structure and rules of the call center and prevent participants from stealing leads or money.

These schemes often operate for a number of years. While certain telemarketers may come and go, or the location of the physical call center may change, the same core conspiracy often remains in effect and continues to operate for years. For example, the defendants and their co-conspirators in *United States v. Smith, et al.*,³⁹ discussed below, operated multiple call centers from in or about 2007 until in or about June 2014. While the physical location of the call center and certain members and management changed over time, the charged conspiracy continued throughout the identified time period, as demonstrated by the consistent involvement of many of the same conspirators, the same manner and means of the scheme, and many of the same victims.

2. Calls

When making calls to victims, the telemarketers use a number of deceptive tactics to convince victims to send money. The telemarketers use unique “phone names” (that is, aliases) when communicating with the victims. The names are intended to be generic-sounding, American names to shield the telemarketers’ true identities and location. The telemarketers coordinate a pitch with other members of the call center, often providing a name and phone number of another telemarketer that a victim calls back for verification and further instruction. The telemarketers often misrepresent that they are

³⁹ *United States v. Smith, et al.*, No. 3:14-cr-0082 (W.D.N.C. 2014).

government officials from a United States agency, such as the Consumer Protection Bureau, Treasury Department, or Federal Trade Commission, to convince the victims that they are credible, and the victims' money and financial information are protected. The call centers use VoIP technology to further conceal their identity and location. For example, when the telemarketers misrepresent that they are agents of a United States agency through the use of VoIP technology they can manipulate the originating phone number to make it appear to victims that the call is originating from Washington, D.C., where many of these agencies are based, instead of Costa Rica.

The telemarketers are trained to exploit victims' trust and vulnerabilities. As part of the prepared scripts, the telemarketers are prepared with responses to victims' questions or concerns. In addition, the telemarketers prey upon victims' emotions and engender trust by developing relationships with the victims. For example, telemarketers frequently congratulate victims for winning the prize, act like they are in awe of such luck, and engage in discussions about what the victims will do with the large sweepstakes prize. The telemarketers also engage in personal discussions about the victims' lives, families, etc. Many of the elderly whom the telemarketers call are lonely and look forward to this human interaction. Victims who are repeatedly "reloaded" have so many conversations with the telemarketers that they begin to think of and refer to the telemarketers as their "friends," whom they trust. They are shocked to learn that they are being defrauded by these people with whom they often have conversations multiple times per day. In fact, law enforcement often has to repeatedly instruct many victims not to send more money, and try to convince them that there is no prize and these telemarketers are not people who can be trusted.

Some telemarketers take a different approach and instill fear in the victims, telling them they will suffer negative consequences if they do not send the payments. Moreover, the telemarketers consistently advise victims not to disclose to whom they are sending the money or the reason for the payment, explaining that victims do not want others to know that they will be receiving a huge windfall because those people will try and take advantage of them. Such an approach often results in the victims isolating themselves from trusted friends and family, which facilitates further victimization and delayed law enforcement detection.

These are just some examples of the tactics the telemarketers use to prey upon the vulnerabilities of the victims to convince them to send money, but they are constantly looking for new methods to facilitate their scheme.

3. Victim payments

Victims send money in response to the telemarketing fraud through a variety of means, including wire transfers, bank direct deposits, checks, postal money orders, and cash mailings. Many call center victims wire their money by Western Union or MoneyGram directly to Costa Rica, where the call center “runners” retrieve the victims’ funds. Runners are unique to specific call centers because owners and managers want to be able to trust the individuals who are collecting the money and are privy to key victim information.

Often, there are victims who are reluctant or unable to wire money to Costa Rica. For example, certain victims are suspicious of sending money overseas, or they do not have the financial resources to pay the requested amount. For these victims, the call center arranges for “bridges” in the United States who receive and forward the victims’ funds to Costa Rica. As identified above, these “bridges” may be knowing members of the schemes. Call centers may have “bridge cells” set up in different geographic locations, with a number of individuals employed as bridges in a particular location to collect victim money and transfer the money to Costa Rica. For example, in *United States v. Smith*,⁴⁰ referenced above, defendant Andrew Smith recruited an individual named Osman Bah and, over time, 10–15 of Bah’s associates in the Baltimore, Maryland area to serve as bridges by collecting victim money and transferring it to Costa Rica. All of these individuals knew that they were facilitating a fraudulent scheme. Each day, Bah would provide Smith the names of the people working to collect victim money. Smith would then provide those individuals’ names to the telemarketers on calls with victims, so the victims could identify the bridge’s name on the Western Union or MoneyGram wire. The bridges would then arrive at the Western Union or MoneyGram office, show picture identification, pick up the wire, and subsequently send it to Costa Rica. Sometimes the bridges would first convert the wire to cash before sending it.

⁴⁰ No. 3:14-cr-0082 (W.D.N.C. 2014).

As mentioned above, some victims served as bridges without knowing that they were facilitating a fraudulent scheme. For example, the victim may be unable to afford the required insurance fee to claim the prize. The telemarketers would then convince the victims that they would help them by, for example, letting them assist in collection and submission of others' fees. Or the telemarketer would provide some other false reason as to why these victims would be receiving cash or other forms of currency to then transfer to Costa Rica. The victims would receive cash in unmarked envelopes or interspersed in the pages of magazines. Some victims would even agree to provide their bank account information for money to be wired into their bank account and then they could direct a subsequent wire of the funds to a bank account in Costa Rica.

Whether a knowing scheme participant or a victim bridge, the "bridges" retained a percentage of all victim funds that they transmitted as payment for their services.

4. Use of proceeds

These fraudulent sweepstakes telemarketing schemes receive millions of dollars from victims. Recent cases have identified loss amounts ranging to upwards of \$16 million.⁴¹ The money orders are often laundered through sports books, which are legal in Costa Rica.

The scheme proceeds are used to pay the conspirators and fund the continued operation of the call centers. Generally, the call centers keep track of how much each victim pays, and the owner, manager, opener, loader, and runner associated with each victim receive a percentage of that victim's payments. For example, in the case of *United States v. Smith*,⁴² the owner/manager kept approximately 40–50% of everything that came into the room; the openers receive 40%, reloaders receive 20%, closers receive 30%, and runners receive 5% of any funds they pick up from Western Union or MoneyGram. While these specific percentage allocations may vary, the relative range among the various roles is often similar for all call centers based on the relative degree of involvement.

⁴¹ See, e.g., *United States v. Smith*, No. 3:14-cr-0082 (W.D.N.C. 2014); *United States v. McCulloch*, 3:15-cr-18 (W.D.N.C. 2015) (loss amount of \$7,010,000); *United States v. Rosenberg*, 3:14-cr-121 (W.D.N.C. 2014) (loss amount of \$8,838,594.93); *United States v. Adkins*, 3:12-cr-259 (W.D.N.C. 2012) (loss amount \$2,419,706.68).

⁴² See *id.*

Because the victim proceeds are often converted to cash, complete tracing and recovery of the assets is difficult in these cases.

C. Investigation of the scheme

Each of the call center schemes are investigated and prosecuted separately, with the scope of each conspiracy often defined based on the following components: owner/manager, telemarketers, runners, bridges, geographic location, victims, and any other characteristics unique to one particular scheme or call center as distinct from another. The investigation team may commonly refer to the particular conspiracy as a particular owner or manager's "room," which is the entire scheme under that person's direction, not the physical scope or location. This is just one factor in defining the scope of the conspiracy.

The investigation of each scheme involves the collection and evaluation of the following types of evidence. These categories of evidence are analyzed together to identify the scope of the conspiracy, including the time period, participants, victims, and loss amount.

1. Cooperation from co-conspirators

Once arrested, many co-conspirators decide to cooperate. For the government to consider making a motion for cooperation credit, it requires the cooperator to be truthful and fully forthcoming with the information about the charged conspiracy, any other call centers and conduct involving sweepstakes telemarketing fraud, and any other information the government may find useful, whether or not related to sweepstakes telemarketing fraud.

Interviews are often conducted under the Fraud Section's standard proffer agreement, often referred to as a "queen for a day" agreement. Under this agreement, as long as the co-conspirator is truthful, the government cannot use the information provided during the proffer session against the co-conspirator, but the government may use the information for further investigative purposes, to cross-examine the defendant, or rebut any defenses, evidence, or argument offered on the co-conspirator's behalf. If the government learns that the co-conspirator is not being truthful, the government may use the information and statements for any purpose.

During these interviews, the government collects information about the conspiracy, including the length; location; various participants; pitch scripts and any other information about the misrepresentations made to victims; nature of financial transactions; provider of necessary services such as leads, VoIP, and money laundering;

location of co-conspirators and assets; names of victims; amount victims paid; allocation of victim payments; and any other relevant information about the participants and practices of the call center. Regarding victim information, cooperators often remember the names and other identifying information of victims who paid significant sums of tens if not hundreds of thousands of dollars, commonly referring to these victims as “whales.”

The cooperators are also asked to review a photo array, identify any individuals involved in “sweeps,” and describe what the cooperator knows about the individuals identified. Some cooperators also voluntarily consent to providing access to Facebook, cell phone, or other electronic platforms for law enforcement use.

2. Electronic evidence

Through the use of search warrants and voluntary consent, law enforcement collects relevant information from Facebook, cell phones, email, and other electronic applications. Such information includes photographs of individuals involved in these fraudulent schemes and information about the co-conspirators’ relationships with each other and other “sweeps” participants; communications relating to the schemes from Facebook, text message, WhatsApp, and emails; and information about financial transactions.

3. FTC database

The FTC maintains a database of victim complaints relating to these fraudulent telemarketing schemes that includes information about the victim, caller, pitch delivered, money paid, etc. Information from these various complaints, when analyzed together and with other evidence, can be very useful in identifying other members of schemes, phone names, and other victims.

4. Financial records and information

Through subpoenas or voluntary productions, law enforcement has collected a vast amount of financial information from Western Union, MoneyGram, the United States Postal Service, and various financial institutions in the United States and Costa Rica in an effort to identify and trace victim payments to these schemes and for further use in identifying participants in the respective schemes.

5. Victim evidence

In addition to FTC complaints, law enforcement collects useful information from victim interviews and any records the victim has maintained, including notes of calls, any written communications, and records of payments. Timely collection and recording of this information is important, given the victims' ages and potential memory issues as time goes on.

6. Travel and international evidence

As described below, the investigation team relies heavily on domestic and foreign partners in addressing international issues and the collection of evidence and other information abroad. Our partners help provide critical information concerning travel, foreign financial transactions and account information, and other evidence about particular call centers and participants, including any evidence collected in raids of such facilities.

D. International cooperation

The Fraud Section works with United States Immigration and Customs Enforcement's Homeland Security Investigations, the Department of Justice Criminal Division's Office of International Affairs (OIA), the United States State Department's Diplomatic Security Service and Bureau of Consular Affairs, and the international legal attaches of domestic law enforcement agencies on international and foreign affairs issues, including MLAT and extradition issues. These relationships help facilitate partnerships and cooperation with our international partners.

To that end, on these Costa Rica sweepstakes telemarketing schemes, the Fraud Section works closely with law enforcement and prosecutor counterparts in Costa Rica, as well as the International Criminal Police Organization (Interpol). These organizations provide critical assistance with the collection of evidence, the identification and seizure of assets, raids and cessation of active call centers, and the arrest and extradition of non-Costa Rican nationals pursuant to the United States and Costa Rica Extradition Treaty. In addition, Costa Rican law enforcement has taken an increased interest in the investigation and prosecution of these schemes and are more focused on their own prosecution of Costa Rican nationals engaged in these fraudulent schemes that target victims in the United States. The Fraud Section has provided information and assistance in the Costa

Rican law enforcement's investigations and prosecutions as well. Because Costa Rican and United States nationals engage in these fraudulent telemarketing schemes together, successful cooperation with Costa Rican law enforcement has and will continue to facilitate the respective investigations and prosecutions and, ultimately, result in helping protect victims in the United States and hopefully deterring future schemes.

E. Prosecution

Historically, these cases were brought in the Western District of North Carolina, given the location of Western Union and the call centers' use of Western Union transfers to facilitate the schemes. Defendants are generally charged with wire and or mail fraud, conspiracy to commit wire and/or mail fraud, international money laundering, and conspiracy thereof.

The indictment describes the nature of the scheme, including the time period, participants who are often charged as co-defendants, their respective roles, and an approximate loss amount for the duration of the scheme. The loss amount is determined based on an analysis of victim, runner, and financial information that is collected and organized over time. The information for the victim payments that make up this calculation, including victim and telemarketer names, time period, etc., are corroborated based on other evidence collected as described above.

Once charged, the government identifies and arrests the defendants located in the United States. It also works with OIA and international counterparties to identify, arrest, and extradite United States nationals still located in Costa Rica or elsewhere outside the United States. Sometimes conspirators are identified when traveling to a country that will extradite to the United States.

Once they arrive in Charlotte, North Carolina, they are scheduled for an arraignment and a detention hearing before a magistrate judge. Many defendants in these cases, particularly those that have been extradited, are detained pending trial because they are unable to show they are not a risk of flight, given the ties to Costa Rica and often minimal, if any, ties to the United States and the Western District of North Carolina in particular.

F. Plea agreements and cooperation

Regardless of the plea at initial arraignment, the majority of defendants in these cases ultimately plead guilty, and many cooperate

with the government in hopes that the government will recommend a downward departure based on the defendant's cooperation. Through review of the discovery they receive after arraignment, they are able to review the evidence against them, including identification from co-conspirators, victim statements, financial records, and electronic and other records tying them to the scheme. In addition, they appreciate the exposure to a significant sentence if convicted, particularly after trial, as described more fully below. In plea discussions, the government will negotiate the charges to which the defendant must plead guilty, the applicable sentencing guidelines, including any adjustments favorable to the defendant, and the proposed loss amount attributable to the defendant. Under *Pinkerton v. United States*,⁴³ the defendant is responsible for all of the conduct and resulting loss of co-conspirators from the time the defendant joined the conspiracy until the time of withdrawal; however, the government may be willing to negotiate the scope of this time period and corresponding loss amount in plea discussions.

G. Trials

Given the significant exposure, many conspirators involved in these fraudulent schemes are not willing to go to trial. Sometimes, however, you end up with defendants willing to roll the dice.

The most recent trial involving a Costa Rica fraudulent sweepstakes telemarketing scheme was against Defendants Andrew Smith and Christopher Griffin in *United States v. Smith*, Western District of North Carolina, Charlotte Division.⁴⁴ Defendants Smith and Griffin were charged in a 21-count Superseding Indictment with conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349, wire fraud and aiding and abetting wire fraud in violation of 18 U.S.C. § 1343, conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h), and international money laundering in violation of 18 U.S.C. § 1956(a)(2)(A) for their roles as owner/manager and opener/loader, respectively, in a Costa Rica-based fraudulent sweepstakes call center beginning in or about 2007 until in or about June 2014. The call center was originally owned by Lionel Perkins, with Andrew Smith serving as one of the managers. Andrew Smith subsequently took over and relocated the call center once Lionel

⁴³ *Pinkerton v. United States*, 328 U.S. 640 (1946).

⁴⁴ *United States v. Smith*, No. 3:14-cr-0082 (W.D.N.C. 2014).

Perkins was convicted and imprisoned on murder charges unrelated to the call center. Many of the same telemarketers and runners remained with the call center after its relocation, they continued to target many of the same victims, and the purpose, means, and manner of the conspiracy remained the same.

The Superseding Indictment alleged that telemarketers in Costa Rica made calls to victims in the United States, misrepresenting that the victims won a sweepstakes prize and needed to pay fees to claim the prize. The call center employed many of the usual deceptive tactics to convince the victims to send money—use of aliases, VoIP technology, and misrepresenting that they were government officials. The call center also employed bridge cells in the United States to collect victim payments in the United States and transfer them to Costa Rica. As described above, a bridge cell managed by Andrew Smith was coordinated through Osman Bah in the Baltimore, Maryland area. Another bridge cell was managed by co-defendant Christopher Griffin and coordinated through his associate Paul Toth out of Ohio. The Ohio bridge cell involved approximately five individuals who operated as bridges at Griffin’s direction through Paul Toth. Over the course of the entire scheme, Defendants and their co-conspirators collected approximately \$16 million from victims, which they used for their own personal benefit and the continued operation of the call center.

On February 5, 2018, Defendants appeared for a jury trial. The government’s case involved the presentation of evidence from which the jury would learn the nature of the crime, how it operated, and the Defendants’ respective roles, the victims that were harmed by this scheme, and the financial loss, including amount of loss attributable to each of the Defendants.

In support of its case, the government presented testimony of cooperating co-conspirators Marco Hernandez, Margaret Harris, Winston Brissett (Smith’s brother), Osman Bah, Ercell Carey (who worked in the Baltimore bridge cell with Osman Bah), and various members of the Ohio bridge cell. Hernandez, Harris, Brissett, and Bah had all pled guilty to various charges for their participation in this scheme. Each of these and the other cooperating co-conspirators described the call center and its operations, identified one or both of the Defendants, and described their roles in the scheme, confirming that Andrew Smith served as manager and then owner/manager of the room, and Griffin was one of the telemarketers who called victims.

Given their common names, Defendants at times used their own names when communicating with victims. Through their testimony, the government was able to paint the scene for the jury as to how this scheme operated, the various deceptive tactics employed to deceive victims into sending money, and how the call center coordinated the payment, transfer, and collection of victim funds.

The government also presented testimony from multiple victims (including parties to certain of the charged wires) and certain relatives of victims no longer able to testify. The victims were very elderly—some required the assistance of a wheelchair to get to the witness box. As a practical matter, coordinating the travel of these elderly victims from all over the country was a significant undertaking. In addition, the victims were still experiencing the shame and embarrassment from falling for the scheme or were afraid to face Defendants directly, and, as a result, many were extremely reluctant to testify. The government, however, believed it was critical for the jury to see these victims first hand to appreciate who had been victimized by this scheme and to understand who could fall for what many would view as an unbelievable premise—not only that the person won a large prize, but that the person must pay multiple fees to claim it. Ultimately, the victims appreciated the importance of their testimony and appeared and testified in support of the government’s case. The victims testified about the multiple calls and misrepresentations that convinced them to send money and the large amounts of funds that they sent as a result. They testified that they trusted the callers and simply followed instructions, including about how to get more money to cover the purported fees, such as through an early advance on a tax return or borrowing money, and how to keep the reason for sending the money secret. Testimony of one elderly victim who could not remember or explain the various transfers in and out of his bank account, including transfers to Costa Rica, was powerful, demonstrating that these victims simply did what was told without comprehending their actions. Victims’ family members testified to learning their relative had fallen victim to the scheme, finding records of multiple payments totaling thousands of dollars, and bearing witness to the nonstop phone calls from telemarketers that had filled their loved one with such anxiety and fear. Some of the victims had notes and records to corroborate their testimony, which were not only helpful to refresh their recollection where memory failed them but also served as critical evidence in

support of the government's case. For example, notes identifying "Andrew" and "Chris" as callers to whom payments should be sent or wire transfer confirmations identifying "Christopher Griffin" as payee. This victim evidence was extremely powerful in not only corroborating other information about the particular victims tied to this scheme but in putting real faces to those harmed by these terrible crimes.

The government also presented evidence of a Western Union representative who explained how Western Union wires work, and testimony from bank representatives who had tried to prevent an elderly couple from sending transfers to Costa Rica. The elderly couple was evasive, lied when asked the reason for the transfer and to whom the money was being sent, and disregarded the bank teller's warnings that they were being defrauded. When the bank teller refused to make the transfer, the elderly couple advised that they would simply go to another bank.

Finally, the government presented testimony from an IRS Criminal Investigation Special Agent. The IRS-CI Special Agent testified regarding the investigation and analysis of the flow of funds from the victims (including from those victims identified as parties to the charged wires), through the various bridge cells, and to the scheme in Costa Rica, and the methodology used to quantify the loss amount. He identified victim payments sent directly to Andrew Smith and Christopher Griffin or through the bridge cells that they managed. He also testified about the total loss of \$16 million incurred as a result of call center operations during the entire course of the conspiracy as well as the loss amount attributable to each Defendant. Specifically, Special Agent Kost testified that the loss attributable to Smith for the time he was involved in the conspiracy from November 2008 until his arrest in May 2016 totaled over \$11 million, and the loss attributable to Griffin for his participation from February 2009 until his arrest in May 2016 totaled over \$10 million.

Neither Defendant chose to testify. Instead, through cross-examination and opening and closing statements, Defendants attempted to suggest a defense that there were multiple conspiracies, and their clients were not involved in the conspiracy charged and being tried before the jury. They pointed to the fact that not every co-conspirator could identify both Defendants and, on cross-examination, were able to illicit testimony that there were times Defendants were absent from the call center, including when they were engaged in travel out of the country. However, this defense was

overcome by pointing to the irregular schedules of the co-conspirators, frequent drug use that may cloud certain memories, that multiple locations operated simultaneously as part of the same scheme, and that the physical location of certain call centers had different rooms, such that the telemarketers may not always see each other every day. Moreover, as a matter of law, to withdraw from a conspiracy, there needs to be an affirmative withdrawal and disavowal of the conspiracy, such as reporting to law enforcement, and there was no evidence that occurred in this case.

On February 7, 2018, the jury found Defendants guilty on all counts.⁴⁵ The jury also found that the offenses victimized ten or more persons over the age of 55, and that the offenses were in connection with the conduct of telemarketing. The jury further determined that the offenses did not target persons over the age of 55.

Defendants are awaiting sentencing as of the date of this article.

H. Victim identification and impact

The Costa Rica telemarketing cases often involve hundreds of victims. These victims are identified through the investigation process described above—through the analysis of victim complaints, runner information, financial transaction information, and co-conspirator statements.

The impact of these fraudulent schemes on the victims, many of whom are elderly, is significant. First, the schemes have a large financial impact on the victims. Victim losses range from hundreds of dollars to hundreds of thousands of dollars per person. Many victims have suffered substantial, if not complete, losses to retirement investment accounts and life insurance policies, often incurring penalties for early withdrawals, and other life savings, resulting in limited means to pay for basic necessities. Many victims can no longer pay their mortgages, resulting in the loss of their homes, and some victims take out additional mortgages on their homes or sell their cars or other large assets to fund the purported fees needed to claim the non-existent sweepstakes prizes. Other victims take on debt to pay for the sweepstakes fees by borrowing money, including through friends and family to whom they often lie about the reason for the loan, and

⁴⁵ United States v. Smith, No. 3:14-cr-0082 (W.D.N.C. 2014), ECF Nos. 171, 172; *see also id.* at ECF Nos. 165, 166 (granting the government's motion, before trial, and dismissing four counts of the superseding indictment).

maxing out their credit. Because, of course, there is no sweepstakes prize, many victims are unable to pay back any debt incurred and end up filing for bankruptcy.

In addition, the effects of this substantial financial hardship are only further compounded by the emotional toll this scheme takes on the victims. In one particularly terrible case, a victim—an elderly woman who was almost 90 years old—was receiving daily, nonstop calls. The victim had depleted her substantial wealth and savings paying for the various fees in an effort to claim the purported sweepstakes prize. The victim had turned to family members for money—asking for thousands of dollars at a time—making up stories as to why the money was needed, including for medical appointments and treatment, taking advantage of the family members' concern for her wellbeing to convince them that the money was necessary. Ultimately, the anxiety grew to be too much and the victim committed suicide.

Other victims experience significant emotional ramifications as well. The victims' trust is broken. Many victims are deprived of their independence when family members or guardians learn of the payments to the scheme and either take control of the victims' finances, or, if the victim no longer has any money, fund the victims' lifestyle going forward. Many victims have identified experiencing sleep loss, anxiety, appetite loss, depression, shame, and embarrassment. They identify experiencing these reactions during the time they were being defrauded, often based on their increasing inability to pay the various fees while simultaneously becoming unable to pay bills, mortgages, and for basic life necessities. The victims also experience these reactions after they learn that the sweepstakes is not legitimate and they are victims of a crime. Often the shame and embarrassment results in victims not reporting these crimes to law enforcement. Many victims have fallen so deep into the web of lies, they require repeated communications from law enforcement to reinforce that these calls are not legitimate and they should not send any more money. The telemarketers disguising themselves as government officials and law enforcement, even using the names of agents known to be involved in the investigation of these schemes, demonstrates how these schemes undermine the public trust in, and cooperation with, the government and makes these efforts particularly challenging for our law enforcement efforts.

Even after engagement of law enforcement, many victims continue to be concerned that their financial and personal information remains at risk. Many fear for their physical wellbeing, knowing that the telemarketers have their names, phone numbers, addresses, and potentially other information provided during these phone calls.

In sum, the impact on these victims is not just a loss of one or even multiple payments. There are long-term consequences for these victims that are often difficult for law enforcement to combat, and, in some extremely unfortunate cases, impossible to overcome.

I. Sentencing

Courts take these cases very seriously, particularly given the victimization of the elderly and other vulnerable populations. As a result, the sentences can be significant.

For example, defendants Glen Adkins and William Tonsing, Jr. were tried and convicted as a loader and opener, respectively, in connection with a Costa Rica telemarketing scheme with a loss amount of \$2,419,706.68.⁴⁶ Adkins was sentenced to 25 years, Tonsing was sentenced to 12 years. Defendant Ian McCulloch pleaded guilty to charges based on his role as an opener and loader in a Costa Rica telemarketing scheme with a loss amount of \$7,010,000.⁴⁷ He was sentenced to 63 months. Defendant Elliot Rosenberg pleaded guilty to charges based on his role as an owner of multiple call centers in Costa Rica, with a loss amount of \$8,838,594.93 (This loss amount increased to approximately \$14 million for his co-conspirators who continued to work in the call centers after Rosenberg's arrest and were subsequently separately indicted).⁴⁸ He was sentenced to 102 months.

These are only examples of sentences that have been imposed over the years, some of which reflect significant downward departures based on cooperation with the government. Most of the sentences, however, involve application of the following statutes, the sentencing guidelines, and interpretive principles.

First, as an initial matter, because the underlying conduct of the conspiracy to commit mail or wire fraud, wire fraud, and mail fraud charges is committed in connection with the conduct of telemarketing and the offense victimized ten or more persons over the age of 55 or

⁴⁶ *United States v. Adkins et al.*, No. 3:12-cr-259 (W.D.N.C. 2012).

⁴⁷ *United States v. McCulloch*, No. 3:15-cr-18 (W.D.N.C. 2015).

⁴⁸ *United States v. Rosenberg*, No. 3:14-cr-121 (W.D.N.C. 2014).

targeted persons over the age of 55, the maximum term of imprisonment is increased ten years under 18 U.S.C. § 2326. This brings the maximum penalty for these charges to 30 years imprisonment. The effect of this increase becomes most apparent when defendants choose to go to trial.

In calculating the applicable guidelines, the loss amount is often very high, generally exceeding at least \$3.5 million, so it is common for the base offense level to be increased by 18 or 20 levels. In addition, the following guidelines are generally applied based on the conduct characteristics and resulting consequences to victims discussed above:

- offense conduct resulted in substantial financial hardship to 25 or more victims, resulting in a six-level increase in offense level under U.S.S.G. § 2B1.1(b)(2)(C);⁴⁹
- the offense involved a misrepresentation that the defendant was acting on behalf of a government agency, resulting in a two-level increase in offense level under U.S.S.G. § 2B1.1(b)(9)(A);⁵⁰
- a substantial part of the fraudulent scheme was committed from outside the United States resulting in a two-level increase in offense level under U.S.S.G. § 2B1.1(b)(10)(B);⁵¹
- vulnerable victim adjustment of two- to four-level increase under U.S.S.G. § 3A1.1;⁵² and
- the defendant was convicted under 18 U.S.C § 1956 resulting in a two-level increase under U.S.S.G. § 2S1.1(b)(2)(B).⁵³ Because of the Guidelines' grouping provisions and the requirement that the highest offense level be applied, the increased offense level based on the application of the money laundering guidelines ends up being the offense level used for purposes of sentencing.⁵⁴

⁴⁹ U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(2)(C) (U.S. SENTENCING COMM'N 2016).

⁵⁰ § 2B1.1(b)(9)(A).

⁵¹ § 2B1.1(b)(10)(B).

⁵² § 3A1.1.

⁵³ § 2S1.1(b)(2)(B).

⁵⁴ Pursuant to U.S.S.G. § 3D1.1, a Defendant convicted of more than one count shall have closely related counts grouped. *See* § 3D1.1. Sentences calculated under U.S.S.G. § 2B1.1 (theft and fraud offenses) and § 2S1.1 (money laundering offenses) are to be grouped pursuant to § 3D1.2(d). *See* §§ 2B1.1; 2S1.1; 3D1.2(d). Section 3D1.3(b) requires that, for counts grouped

Moreover, the defendant's role in the scheme may result in an upward or downward adjustment under U.S.S.G. § 3B1.1⁵⁵ (aggravating role) and U.S.S.G. § 3B1.2⁵⁶ (mitigating role). The aggravating role adjustment is generally applied to owners and managers, and any mitigating role adjustment is generally applied only to runners. In the past, defendants who serve as openers or loaders for short periods of time attempt to argue for a mitigating role adjustment; however, courts have often declined to apply this adjustment for such roles, finding that these roles are significant in facilitating the scheme and continued victimization of the victims, regardless of the amount of time the particular defendants were engaged in the activity.

Of particular relevance to these cases is the application of the vulnerable victim adjustment, which results in an offense level increase if the defendant knew or should have known that a victim of the offense was a vulnerable victim, and an even further increase if the offense involved a large number of vulnerable victims. The vulnerable victim enhancement has been the subject of litigation across circuits when applied in telemarketing schemes. The Fourth Circuit recently interpreted the vulnerable victim enhancement in a case involving a Costa Rica telemarketing fraudulent sweepstakes scheme. Sharing the views of its sister circuits, including the Second, Third, Sixth, Seventh, Ninth, and Eleventh Circuits, the Fourth Circuit held that the “reloading process”—targeting people who have already fallen victim to the scheme at least once, if not repeatedly—is sufficient to support a finding that the victims were unusually vulnerable and that the defendants targeted them because of their vulnerability for the vulnerable victim enhancement to apply.⁵⁷

together under section 3D1.2(d), the offense guideline that produces the highest offense level is to be applied. *See* § 3D1.2(d).

⁵⁵ U.S. SENTENCING GUIDELINES MANUAL § 3B1.1 (U.S. SENTENCING COMM'N 2016).

⁵⁶ § 3B1.2.

⁵⁷ *United States v. Shephard*, 892 F.3d 666, 670 (4th Cir. 2018) (citing *United States v. Llamas*, 599 F.3d 381, 388 (4th Cir. 2010)); *see* *United States v. Lloyd*, 807 F.3d 1128, 1172–73 (9th Cir. 2015); *United States v. Hoffecker*, 530 F.3d 137, 201–02 (3d Cir. 2008); *United States v. Day*, 405 F.3d 1293, 1295–96 (11th Cir. 2005); *United States v. Coe*, 220 F.3d 573, 582 (7th Cir. 2000);

Accordingly, not only is this adjustment supported by the defendant's knowledge that the victims were elderly, but it is also supported by the victimization through the reloading process.

At sentencing for defendants who cooperated, the government will make a motion for a downward departure. The government's determination of how much of a departure to recommend is based on the level of cooperation and unique and helpful information provided by defendant.

J. Conclusion

In sum, through a coordinated operation of United States departments and agencies and cooperation with our international partners, we have made great strides in the investigation, prosecution, and dismantling of various Costa Rica-based fraudulent sweepstakes telemarketing schemes and have seen cognizable deterrent effects. However, these crimes continue to be a severe problem, targeting victims in the United States with significant consequences. It is important that we remain steadfast in our continued commitment to investigating and prosecuting these schemes, given the victimization of the most vulnerable among us and the impact the impersonation of government officials has on the public's trust in, and effectiveness of, law enforcement and government protection against these schemes.

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United States v. Brawner, 173 F.3d 966, 972–73 (6th Cir. 1999);
United States v. O'Neil, 118 F.3d 65, 75–76 (2d Cir. 1997).

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In addition to Farer, former Fraud Section Senior Trial Attorney Peter Loewenberg, former Fraud Section Senior Litigation Counsel Patrick Donley, Senior Trial Attorney William Bowne, and Trial Attorneys Anna Kaminska, Gustav Eyler, and Caitlin Cottingham have prosecuted the Costa Rica Sweepstakes Telemarketing Fraud schemes, with supervision from various Fraud Section management and assistance from Supervisory Paralegal Specialist Pamela Johnson and attorneys from the United States Attorney's Office for the Western District of North Carolina. Special thanks to all of our agents and other partners from the departments, agencies, and international authorities identified throughout the article for their critical support and assistance in investigating and prosecuting these cases.

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Senior Corps and the Department of Justice: Working Together to Prevent Elder Fraud and Abuse

Deborah Cox-Roush
Director
Senior Corps

I. Introduction

Reaching the golden years of life should bring respect and comfort to those who have worked hard and sacrificed to enjoy retirement. Unfortunately, many unscrupulous actors see seniors as prey for scams and schemes that can add undue stress to a time when it is most unexpected. In February 2018, the Corporation for National and Community Service's Senior Corps program announced a partnership with the United States Department of Justice's Elder Justice Institute (EJI) to battle those who would defraud America's seniors.

II. A growing and vulnerable population

America's seniors are ripe targets for scam artists. The vulnerabilities of older Americans, along with the large and growing size of this cohort, are likely to attract more than their share of bad actors. When these stories come to light, they are horrifying.

- A former manager of Stan Lee, the famous creator of Marvel superheroes, was accused of blocking the comic mastermind from medical care and family member visits, and embezzling or misappropriating \$5 million in assets.¹
- Children of "American Top 40" host, DJ Casey Kasem, endured a long legal battle with Kasem's wife Jean, who the children claim barred them from seeing the ailing radio personality for a long period of time before his death.²
- April Parks was indicted on more than 200 charges including racketeering, theft, exploitation, and perjury for actions she

¹ The Associated Press, *Stan Lee Elder Abuse Allegations: Daughter Triumphs In Court Over Former Manager*, USA TODAY (July 6, 2018).

² Carol Robinson, *Daughter of Radio Legend Casey Kasem Talks Elder Abuse, Prevention at Alabama Crime Vigil*, AL.COM (Apr. 4, 2017).

performed as a Nevada private professional guardian³ of clients like Rudy and Rennie North, whom she had removed from their home and placed in an assisted living facility before selling their possessions without their permission.⁴

The factors behind these tales closely trail the challenges of a growing senior population: demographic trends, wealth accumulation, and decreased cognitive abilities.

The United States Census Bureau highlighted the continued growth of the senior population in its 2017 National Population Projections.⁵ More than 10,000 Baby Boomers reach age 65 each day. Yet, as they reorient to the expectations of retirement and aging, the Baby Boomer generation (born between 1946 and 1964) continues its outsized influence on the nation's culture. By the time the last Baby Boomers turn 65 in 2030, one of every five U.S. residents will be of retirement age,⁶ expanding from 14.9 % in 2015.⁷ This will mark a major shift in the composition of the U.S. population:⁸

“The aging of baby boomers means that within just a couple decades, older people are projected to outnumber children for the first time in U.S. history,” said Jonathan Vespa, a demographer with the U.S. Census Bureau. “By 2035, there will be 78.0 million people 65 years and older compared to 76.7 million . . . under the age of 18.”⁹

Susceptibility to these exploits increases as people age and their cognitive abilities decrease. Attempts to defraud and abuse seniors can come from the usual suspects—criminals and scammers bent on

³ Colton Lochhead, *Grand Jury Indicts Nevada Guardian On More Than 200 Charges*, LAS VEGAS REV. J. (Mar. 8, 2017).

⁴ Rachel Aviv, *How the Elderly Lose Their Rights*, THE NEW YORKER (Oct. 9, 2017).

⁵ U.S. CENSUS BUREAU, *Population Projections*, <https://www.census.gov/programs-surveys/popproj.html> (last visited Oct. 29, 2018).

⁶ Press Release, U.S. Census Bureau, Older People Projected to Outnumber Children for First Time in U.S. History (Mar. 13, 2018, rev. Sept. 6, 2018).

⁷ Press Release, U.S. Census Bureau, U.S. Population Aging Slower than Other Countries, Census Bureau Reports (Mar. 28, 2016).

⁸ U.S. CENSUS BUREAU, *supra* note 5.

⁹ *Id.*

manipulating the vulnerable—along with those they should be able to trust: health care workers, financial advisers, counselors, friends, and even family members. Some estimates attribute almost 60% of elder abuse and neglect incidents to family members.¹⁰

Elder abuse is widespread, each year affecting one in ten seniors age 60 and older, a statistic that is likely higher than the collected data suggests.¹¹ Studies have found that about one in 14 cases of abuse are reported to authorities. And, the Federal Trade Commission estimates that only 1 in 24 elder financial crime is reported.¹²

Elder abuse incidents come at a great financial cost to the victims, victims' families, and the economy. A widely reported figure from the 2011 MetLife Study of Elder Financial Abuse concluded that this fraud class costs families \$3 billion annually.¹³ Yet, the steep costs of elder financial abuse are extremely hard to determine. *Consumer Reports* re-examined the MetLife figures in 2015 and found reports from various sources that placed the toll of elder financial abuse ranging from \$2.9 billion to as high as \$36 billion, before throwing up their hands in frustration.¹⁴ Regardless of the total amount, the costs are too high.

Seniors are regularly targeted because they are often isolated socially and may be more trusting and open to approaches that prey on vulnerabilities, including desires to form romantic relationships, the lure of get-rich-quick schemes, constant harassing calls about false criminal penalties or contest winnings, or intimidation through threats of physical violence.

Shame and embarrassment are two likely culprits in the underreporting of these crimes, and the costs extend beyond the financial realm to the emotional toll that they take on the victims, the

¹⁰ J. Peterson, et al., *Financial Exploitation of Older Adults: A Population-Based Prevalence Study*, 29 J. GEN. INTERN. MED. 1615, 1615–23 (Dec. 2014).

¹¹ METLIFE MATURE MARKET INSTITUTE, *THE METLIFE STUDY OF ELDER FINANCIAL ABUSE: CRIMES OF OCCASION, DESPERATION, AND PREDATION AGAINST AMERICA'S ELDERS* (June 2011).

¹² *Under the Radar: New York State Elder Abuse Prevalence Study* 24–49 (Lifespan of Greater Rochester, Inc., et al., May 2011).

¹³ METLIFE MATURE MARKET INSTITUTE, *supra* note 11.

¹⁴ Toby Stanger, *Financial Elder Abuse Costs \$3 Billion a Year. Or is it \$36 Billion?*, CONSUMER REPORTS (Sept. 29, 2015).

victims' families, and their advocates as they work to repair the damage.

These challenges highlight the importance of vigilance and the maintenance of caring communities that are willing to protect our elders from those who would prey on their weaknesses.

III. Department of Justice Elder Justice Initiative

The Department of Justice Elder Justice Initiative (EJI) was created to support and coordinate the Department's enforcement and programmatic efforts to combat elder abuse, neglect, financial fraud, and scams that target our nation's seniors. Through the building of federal, state, and local capacity to fight elder abuse with training and resources for law enforcement professionals, judges, prosecutors, and others, promoting justice for older Americans, supporting research to improve elder abuse policy and practice, and helping the victims and their families, the EJI represents a coordinated effort to take on this problem on multiple fronts.

The EJI outlined five primary areas of vulnerability for seniors:¹⁵

- *Physical Abuse*: An act, rough treatment, or punishment that may result in injury, pain, or impairment.
- *Psychological Abuse*: Psychological, verbal, or emotional abuse causing suffering, emotional pain, or distress.
- *Financial Exploitation*: Illegal or improper use of an older person's money or property.
- *Sexual Abuse*: Sexual contact or non-contact of any kind with an older person without agreement from that person.
- *Neglect and Abandonment*: Intentional or unintentional failure or refusal to provide care or help to an older adult—an extreme form of neglect.

During February 2018, the Department of Justice coordinated the largest sweep of elder fraud cases in history, involving more than 250 defendants around the world who victimized more than a million

¹⁵ *Elder Justice Initiative, Older Adults, Families, and Caregivers*, U.S. DEP'T OF JUST., <https://www.justice.gov/elderjustice/victims-families-caregivers> (last visited Sept. 24, 2018).

Americans, most of whom were elderly.¹⁶ This sweep was part of ongoing efforts by federal, state, and local prosecutors working as partners with law enforcement and agencies that serve the elderly to protect our seniors from those who seek to abuse and defraud them.

IV. Preventing elder abuse through national service

The Corporation for National and Community Service's (CNCS) Senior Corps program is proud to partner with EJI to prevent elder abuse in all its forms. Collaborative efforts like these give communities across the country more opportunities to identify situations where seniors may be in peril and prevent their exploitation.

With more than 220,000 volunteers serving through Senior Corps' three signature programs—Senior Companions, RSVP, and Foster Grandparents—the initiatives are a valuable resource to educate groups and individuals about preventative measures, and become sentinels watching for warning signs of abuse and imperiled seniors. Each year, Senior Corps makes more than 1,100 grants to local communities supporting the implementation of the three program models at more than 28,000 service locations. As Senior Corps has deepened its work with the EJI, it has utilized its training sessions to amplify the education it has been providing as to the full spectrum of elder abuse issues.

Senior Corps' three programs have unique directives that guide their service:¹⁷

- *Senior Companions*: Senior Companions provide assistance and friendship to older adults who have difficulty with daily living tasks, such as shopping or paying bills. This program helps these adults remain independent in their homes instead of having to move to more costly institutional care. Senior Companions also offset the responsibilities that typically fall on family members or professional caregivers by providing respite services.

¹⁶ Press Release, U.S. Dep't of Justice, Justice Department Coordinates Nationwide Elder Fraud Sweep of More Than 250 Defendants (Feb. 22, 2018).

¹⁷ See *Senior Corps*, CORP. FOR NAT'L & CMTY. SERV., <https://www.nationalservice.gov/programs/senior-corps/> (last visited Oct. 29, 2018).

- *RSVP*: The outgrowth of a pilot project developed from the passage of the Older Americans Act of 1965, RSVP officially launched in 1971 and is one of the largest volunteer networks in the nation for people 55 and over. RSVP volunteers use the skills and talents learned during their careers, or develop new ones, while serving in a variety of volunteer activities to meet the needs of the communities they serve and expand the capacity of their programs.
- *Foster Grandparents*: Since 1965, Foster Grandparents has focused on tutoring, mentoring, and supporting school students with special or exceptional needs. This program provides a way for volunteers to stay active by serving children and youth in their communities for 15–40 hours a week. While the volunteers are in the program, time is also devoted to volunteer in-service training, learning about scams and schemes, and education about how to better protect themselves from abuse. Additionally, Foster Grandparents provides a platform for seniors to socialize and build the relationships that give others at schools and community centers an opportunity to observe their well-being.

CNCS recently identified 157 RSVP and Senior Companion projects that devote a portion of their grant-supported activities to the prevention and detection of financial scams and other elder abuses.

Senior Companion volunteers, who perform the most one-on-one visits, are specially trained to recognize the signs of elder abuse, but all Senior Corps volunteers learn how to engage in this oversight to identify concerns that may go undetected in their communities. Senior Corps volunteers also educate their peers and caregivers about how to recognize fraud and abuse, as well as provide techniques to protect themselves from becoming victims of the various types of frauds and schemes.

One real world example of the way these programs work comes from the Senior Companion program operated through the Mental Health Association (MHA) of South Central Kansas in Wichita.

Forty-two South Central Kansas Senior Corps MHA volunteers were trained as gatekeepers under the Senior Reach evidence-based program model. These volunteers are trained in the prevention of elder abuse and asked to report any suspected incidences of abuse or neglect. In fiscal year 2017, they identified 12 clients receiving Senior Corps services as being at-risk for becoming victims of abuse, neglect, or exploitation.

One incident involved a concerned Senior Companion volunteer who called her program director regarding a close friend who she felt was being neglected and exploited. A referral was immediately made to MHA's Mid-Kansas Senior Outreach (MKSO) Program, and the Nurse Care Coordinator went to the man's home to evaluate him and his living situation.

Upon arrival, it was apparent that both his caregiver and his appointed representative payee¹⁸ were exploiting the man. Additionally, there was evidence of neglect with the caregiver being absent for long periods of time. The nurse worked with officials, including the Wichita Police Department, to have the man resettled into a Veterans Affairs Foster Home where he could receive care in safe surroundings.

Additionally, the Wichita Police Department turned both the payee and the caregiver in to the Internal Revenue Service for tax fraud. While there was not enough evidence to prosecute, the Wichita Police Department is now aware of these individuals and will be watching to ensure they do not victimize another senior in the future. Meanwhile, the man is healthy and happy in his new home and will soon be receiving the services of a Senior Companion volunteer.

V. Taking on elder financial exploitation

The aging of America signals movement of the largest holders of wealth from the workplace to retirement, as the 65 and older population lead all age groups in home ownership levels¹⁹ and median net worth.²⁰ We know that while one does not have to be wealthy to attract the attention of criminals, it can certainly be a factor.

¹⁸ Representative payees manage bill and expense payments for those incapable of managing their Social Security or Supplemental Security Income (SSI) payments. These people can be family members or friends but can also come from qualified organizations. *When People Need Help Managing Their Money*, SOC. SEC. ADMIN., <https://www.ssa.gov/payee/> (last visited Sept. 24, 2018).

¹⁹ *Housing Vacancies and Homeownership (CPS/HVS)* (Table 19), U.S. CENSUS BUREAU, <https://www.census.gov/housing/hvs/data/histtabs.html> (last visited Sept. 24, 2018).

²⁰ *Wealth and Asset Ownership: 2011* (Table), U.S. CENSUS BUREAU <https://www.census.gov/data/tables/2011/demo/wealth-and-asset-ownership-2011.html> (last visited Sept. 24, 2018).

However, even those receiving modest retirement or Social Security checks can be targeted.

Many Senior Corps RSVP volunteers are trained to teach the “Money Smart for Older Adults”²¹ curriculum (Money Smart curriculum), which was developed jointly by the Federal Deposit Insurance Corporation (FDIC) and the Consumer Financial Protection Bureau (CFPB). In addition to financial literacy education, these volunteers provide social support and refer seniors to resources that help deter and/or prevent elder abuse.

The Money Smart curriculum includes components about “Common Types of Elder Financial Exploitation,” “Scams Targeting Veterans,” “Identity Theft,” “Medical Identity Theft,” “Scams that Target Homeowners,” “Planning for Unexpected Life Events,” and “How to be Financially Prepared for Disasters.” In addition to financial literacy education, volunteers also provide social support and refer seniors to resources that prevent elder abuse and enable them to maintain independent living arrangements.

One RSVP volunteer of Greene County, who is also a financial advisor, guided adults at a senior housing complex in Carmichaels, Pennsylvania, through the Money Smart curriculum. His expertise in the field enhanced the presentation and helped participants learn techniques to prevent identity theft, common fraud, and scams while giving the residents a forum to ask questions about their own concerns.

Another example comes from the Clinton County RSVP in Plattsburg, New York, which conducts a money management program. The program provides bill payer assistance to seniors, spots and reports signs of financial exploitation, and raises consciousness in outreach presentations about senior scams, identity theft, and fraud. RSVP is also the coordinator of Clinton County Elder Abuse Multidisciplinary Team²² (MDT) that meets monthly and is part of a

²¹ CONSUMER FIN. PROT. BUREAU, MONEY SMART FOR OLDER ADULTS: PREVENT FINANCIAL EXPLOITATION (PARTICIPANT/RESOURCE GUIDE) (June 2013).

²² Multidisciplinary teams are a hallmark of elder abuse prevention programs that reflect the consensus that no single agency has all the resources or expertise needed to effectively resolve all forms of abuse and neglect. Teams may be involved in a variety of collaborative activities, including advocacy, service coordination, professional training, resource development and outreach.

national study about MDTs being conducted by Stanford University. Additionally, the Clinton County RSVP participates in many training opportunities about elder justice and was a presenter at the most recent Adult Abuse Training Institute in Albany, New York in November 2017.

Many of our Senior Corps projects are also using the Federal Trade Commission's "Pass It On" campaign materials to help train their volunteers and other community residents about financial schemes and fraud.²³ Senior Corps volunteers also support Administration for Community Living's Senior Medicare Patrol program²⁴ that helps prevent Medicare fraud—as well as the ombudsman program, which advocates for those elderly in assisted living and other institutions.

VI. Health benefits of Senior Corps volunteering

CNCS has long known that volunteering has positive health benefits for older Americans. The programs and the initiatives it supports have been found to improve health for seniors, exceeding other factors including income, education level, and marriage.²⁵

These benefits are important to our aging population and have been one of the basic attractions and benefits of our Senior Corps programs. CNCS, through the work of its Research and Evaluation staff, found that service in the Senior Corps' Foster Grandparent and Senior Companion programs has significant health benefits that mitigate health problems that result from physical inactivity and cognitive decline.

To contribute to the growing conversation around the health benefits of volunteering for older adults, CNCS launched two longitudinal studies in 2015 to assess the impact of service on Foster Grandparent and Senior Companion volunteers and the caregivers of

²³ Federal Trade Commission Consumer Information, *Pass it On*, <https://www.consumer.ftc.gov/features/feature-0030-pass-it-on> (last visited Oct. 29, 2018).

²⁴ *Senior Medicare Patrol (SMP)*, ADMIN. FOR CMTY LIVING, <https://www.acl.gov/index.php/programs/protecting-rights-and-preventing-abuse/senior-medicare-patrol-smp> (last visited Sept. 24, 2018).

²⁵ *Senior Corps and Health Benefits*, CORP. FOR NAT'L & CMTY SERV., <https://www.nationalservice.gov/programs/senior-corps/senior-corps-and-health-benefits> (last visited Sept. 24, 2018).

Senior Companion clients.²⁶ Data from the first year of the study found that Senior Corps volunteers reported improved health after just one year of service. Volunteers reported decreased anxiety and depression, decreased loneliness and social isolation, enhanced physical capacity, and higher life satisfaction.

After just one year of service, the researchers reported:²⁷

- Nearly 1/2 of Senior Corps volunteers reported improved health and well-being, and more than 1/3 who initially reported they were in good health, reported improved health at the end of the one-year period;
- Almost 2/3 of Senior Corps volunteers reported a decrease in feelings of isolation, and 67% of those who first reported they “often” lack companionship, reported improved social connections; and
- 70% of Senior Corps volunteers who initially reported five or more symptoms of depression reported fewer symptoms at the end of the first year, while 63% of volunteers initially reporting three or four symptoms of depression also report fewer symptoms.

Caregivers who receive Senior Companion respite services also reported a positive impact in their health and well-being:²⁸

- Nearly 76% of caregivers in the critical-needs²⁹ group reported Senior Companion respite services helped them “a lot” with both “personal time” and “household management”;
- Approximately 60% of caregivers with critical needs reported that Senior Companion services helped them “a lot” or a “great deal” and allowed them to be more involved in social activities and enjoy time with their friends or relatives;
- Most caregivers (92% with critical needs, 86% with essential needs, and 93% with moderate needs) reported they were

²⁶ Initial study results can be found online. See *Senior Corps & Health Benefits*, CORP. FOR NAT'L & COMMUNITY SERV., <https://www.nationalservice.gov/programs/senior-corps/senior-corps-and-health-benefits>.

²⁷ See *id.*

²⁸ See *id.*

²⁹ Caregivers were grouped into critical, essential, and moderate categories based on personal and family needs. Those in the critical-needs group were the ones with the highest needs.

satisfied with the respite services received from the Senior Companion program; and

- Approximately 40% of caregivers who rated their health as fair or poor before respite support, now rate their health as good.

The benefits of improved mental and physical health for older Americans cannot be overstated. The ability for seniors to be the first line of defense against abuse and fraud is a net positive for our society.

VII. Conclusion

The people power of the 220,000 Senior Corps volunteers across the country increase a culture of awareness around elder abuse and also help alleviate some of the serious abuses older adults experience. And, as the research demonstrates, as they are helping their peers prevent and mitigate the effects of elder abuse, they are also helping to improve their own health.

CNCS knows that the engagement of volunteers and national service are innovative and cost-effective strategies for addressing a wide array of issues, including combatting elder abuse, which can impact overlooked populations and underserved communities. As a tool, volunteerism is an affordable source of human capital that is widely available to agencies—public and federal—at all levels.

Elders have earned the right to enjoy their golden years safe, secure, and protected from fraud and abuse. CNCS thanks the Department of Justice for its effort to protect seniors and promote collaboration through the Elder Justice Institute to combat and prevent elder abuse in all its forms.

About the Author

Deborah “Debbie” Cox-Roush was appointed by President Donald Trump in June 2017 as Director of Senior Corps for the Corporation for National and Community Service (CNCS). As Director of Senior Corps, Ms. Cox-Roush leads the Foster Grandparent, Senior Companion, and RSVP programs that, together, engage 220,000 Americans age 55 and over in volunteer service that meets pressing needs in communities across the nation. She has made it a priority to deepen the evidence base for Senior Corps through continued rigorous research and evaluation of the three Senior Corps program models.

Debbie brings more than 30 years of high level professional experience in management, advocacy, and volunteer coordination. She has a long

history of involvement with community, nonprofit, and philanthropic causes related to women, economic empowerment, small business development, and job creation. Before joining Senior Corps, she served as Special Assistant to the Secretary at the United States Department of Education.

Responding to Elder Abuse and Neglect in American Indian and Alaska Native Communities

Leslie A. Hagen

National Indian Country Training Coordinator

Executive Office for United States Attorneys

The earliest teaching to most Native children is that they must respect and honor their elders. Such a lesson must never be lost through time or merely because one ‘grows up.’ There is a deep, lengthy tradition of respect for an elder’s experience, maturity, age and wisdom.¹

Mary is 63 years old and suffering with Stage Four breast cancer that has metastasized to her spine. She has a prescription for powerful narcotics to help ease the pain; however, her adult son sometimes steals the drugs from her and either takes the pills himself or sells them on the street. Consequently, Mary is wracked with pain and frequently in agony. She will not tell her doctor or anyone else about the problem for fear her son will get in trouble and will not be available to help her.

Joe is 75 years old and receives a small per capita payment each month from the tribe. The money is just enough to cover basic needs for the month. His two adult daughters and their children live with him in a two-bedroom house on the reservation. One daughter has two children and the other daughter has three children. All of the children are under 15 years of age. Each daughter and her children has one of the bedrooms. Joe sleeps on the couch. His adult daughters are frequently out late at night, leaving Joe to care for his five grandchildren. The entire household lives on Joe’s meager income. Joe loves having his family close to him and believes it is his responsibility to do all he can for them.

Sarah is 55 years old and the common-law wife of Thomas. They have been together for 18 years. Thomas has a drinking problem. He was sober for the past 12 years, but he recently started to drink again. When he is intoxicated, he sometimes forces Sarah to have sex with

¹ NAT’L INDIAN COUNCIL ON AGING, USING YOUR TRIBAL VALUES TO DEVELOP AN ELDER PROTECTION CODE: A STEP-BY-STEP GUIDE FOR CMTYS. 10 (2008).

him. If she refuses, he hits her. She does not want to report him to the authorities because the tribal housing code forbids the use of alcohol. Sarah is concerned that if anyone finds out about Thomas's drinking, she will be kicked out of tribal housing and become homeless.

Assuming each of the adults is American Indian or Alaska Native and that each scenario occurred in Indian Country² or an Alaska Native village, has a crime constituting elder abuse been committed? If so, which government (federal, state, or tribal) has the legal authority to address the problem? Is a 55-year-old person old enough to be an elder? If a competent adult voluntarily lets many family members live with him, is that abuse? Does it make a difference if the elder is typically the sole caregiver of his grandchildren and the only one in the family with an income? Does the fact that he willingly does these things make it non-abusive?

Elder abuse can be very complicated. Defining and addressing elder abuse in a tribal community or Indian Country can be complex. Resources are frequently very limited, programs seen in other communities to help the elderly may not exist in tribal communities, and several jurisdictions may have the authority to respond if a crime was committed.

This article will provide information about the problem of elder abuse in tribal communities, federal and tribal laws, and programs and resources that may be available to assist with the problem of elder abuse. The article will also emphasize the need for jurisdictions to work collaboratively if the problem of elder abuse is to be successfully remedied. Furthermore, the article will point out existing frameworks or models for collaboration that can be expanded to incorporate the criminal justice and social service problem of elder abuse and exploitation.

I. Statement of the problem

According to an April 2018 document published by the Administration on Aging (AOA):

In the United States, the population age 65 years and over numbered 49.2 million in 2016 (the most recent year for which data are available). [Those over 65 years of age] represented 15.2% of the population,

² 18 U.S.C. § 1151.

[approximately] one in every seven Americans. The number of older Americans increased by 12.1 million or 33% since 2006, compared to an increase of 5% for the under-65 population.

...

The [over-65 population] has increased [33%] from 37.2 million in 2006 to 49.2 million in 2016 and is projected to almost double to 98 million in 2060. By 2040, there will be about 82.3 million older persons, over twice their number in 2000. [In 2016,] people age[d] 65 and over represented 15.2% of the population [. . .], but [they] are expected to grow to 21.7% of the population by 2040. [Additionally,] [t]he [age] 85 and over population is projected to more than double in size from 6.4 million in 2016 to 14.6 million in 2040 (a 129% increase).

[Further,] racial and ethnic minority populations have increased from 6.9 million in 2006 (19% of the older adult population) to 11.1 million in 2016 (23% of older adults) and are projected to increase to 21.1 million in 2030 (28% of older adults). Between 2016 and 2030, the white (not Hispanic) population age 65 and over is projected to increase by 39% compared to 89% for older racial and ethnic minority populations, including Hispanics (112%), African-Americans (not Hispanic) (73%), American Indian and Native Alaskans (not Hispanic) (72%) and Asians (not Hispanic) (81%).³

Currently, there are 573 federally recognized tribes in the United States. According to the Bureau of Indian Affairs (BIA):

Approximately 56.2 million acres are held in trust by the United States for various Indian tribes and individuals. There are approximately 326 Indian land areas in the U.S. administered as federal Indian reservations (i.e., reservations, pueblos, rancherias, missions, villages, communities, etc.). The largest [such

³ ADMIN. ON AGING, U.S. DEP'T HEALTH & HUM. SERV., 2017 PROFILE ON OLDER AMERICANS 2–3 (2018).

land area] is the 16 million-acre Navajo Nation Reservation located in Arizona, New Mexico, and Utah. The smallest is a 1.32-acre parcel in California where the Pit River Tribe's cemetery is located. Many of the smaller reservations are less than 1,000 acres.⁴

According to the 2010 Census, the total U.S. population was 308.7 million.⁵ Of that total, 2.9 million or 0.9% were American Indian or Alaska Native (AIAN).⁶ An "additional 2.3 million people [0.7%] reported [AIAN] in combination with one or more other races."⁷ In total, 5.2 million people (1.7%) identify, at least in part, as AIAN.⁸ In fact, the AIAN population increased nearly twice as fast as the total U.S. population.⁹

As the aging AIAN population increases, it is important to remember that it faces many health disparities. For example, AIAN "elders experience a higher prevalence of chronic diseases, such as obesity, diabetes, and cardiovascular disease, than white elders."¹⁰ In addition, prevalence estimates for all chronic disease risk factors, including sedentary lifestyles, obesity, cigarette smoking, and diabetes, are higher for AIAN elders.¹¹ The age-adjusted heart disease mortality rate is higher for the AIAN population than the rest of the United States. While the heart disease mortality rate has declined over time for the U.S. population, it has remained constant for the past 20 years for the AIAN population.¹²

In Indian Country, there has rightfully been significant attention paid to the high rates of domestic and sexual violence occurring in some tribal communities. There has been less public attention paid to the abuse or exploitation of elders living in tribal communities. The Elder Justice Roadmap defines elder abuse as "physical, sexual or

⁴ *Frequently Asked Questions*, U.S. DEP'T INTERIOR, BUREAU INDIAN AFFAIRS, <https://www.bia.gov/frequently-asked-questions> (last visited Oct. 3, 2018).

⁵ TINA NORRIS ET AL., U.S. CENSUS BUREAU, *THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010* (2012).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Briana Anisko, *Elder Abuse in American Indian Communities*, 33 AM. INDIAN CULTURE & RES. J. 43, 44 (2009).

¹¹ *Id.*

¹² *Id.*

psychological abuse, as well as neglect, abandonment, and financial exploitation of an older person by another person or entity, that occurs in any setting (for example, home, community, or facility), either in a relationship where there is an expectation of trust and/or when an older person is targeted based on age or disability.”¹³

There is no single legal definition of who is an elder or who is elderly. The designation of elder can change depending on the culture. Typically, in Western societies, a person is deemed elderly when he or she retires or reaches 67 years of age and is eligible for full Social Security benefits. In tribal communities, the terms “elder” or “elderly” may have a distinct meaning. For example, the designation of elder in some Native communities means the person is seen as a teacher, mediator, advisor, medicine person, steward of the land, and/or keeper of the culture.¹⁴

Approximately 4–6% of older adults report being the victim of elder abuse, neglect, and/or exploitation.¹⁵ In 58% of the reported cases, the abuser was a spouse, and in 24% of the cases, an adult child was the perpetrator.¹⁶ Females suffer abuse more commonly than do males.¹⁷ Like many crimes committed within the family, elder abuse is underreported. Few studies about the rates of elder abuse in tribal communities exist. One study of urban Indian elders reported that 10% suffered from “definite or probable mistreatment.”¹⁸ This figure did not include other frequent types of elder abuse “such as psychological, financial abuse, or neglect,” hence the study likely underrepresents overall elder abuse.¹⁹ Studies of the Northern Cheyenne Tribe and Navajo Nation showed that a significant percentage of elders, 19 and 16% respectively, experience physical mistreatment.²⁰ Again, these studies omitted psychological and

¹³ MARIE-THERESE CONNOLLY ET AL., U.S. DEP’T OF JUSTICE, THE ELDER JUSTICE ROADMAP: A STAKEHOLDER INITIATIVE TO RESPOND TO AN EMERGING HEALTH, JUSTICE, FINANCIAL AND SOCIAL CRISIS 3.

¹⁴ LAUREN J. LITTON ET AL., NAT’L CLEARINGHOUSE ON ABUSE IN LATER LIFE, RECLAIMING WHAT IS SACRED: ADDRESSING HARM TO INDIGENOUS ELDERS AND DEVELOPING A TRIBAL RESPONSE TO ABUSE IN LATER LIFE 6.

¹⁵ Anisko, *supra* note 10, at 45.

¹⁶ Anisko, *supra* note 10, at 45.

¹⁷ Anisko, *supra* note 10, at 45.

¹⁸ Anisko, *supra* note 10, at 45.

¹⁹ Anisko, *supra* note 10, at 45.

²⁰ Anisko, *supra* note 10, at 45.

financial abuse and neglect; thus, the percentages reported are likely far below reality.

In AIAN communities, the most prevalent form of abuse is neglect.²¹ The reasons for neglect include the “number of hours of care that families provide [to the elder], the psychological conditions of the [elder in question], the speed with which an elderly person become[s] dependent on [others for] care, the [family’s attempts] to share caregiving [responsibility], and the extent to which a family crisis [may ensue if care is not] provided.”²² It makes complete sense that the primary abuser of an elderly person is the daily caregiver. Contributing factors to mistreatment include caregiver alcohol or drug use, mental health issues in the caregiver’s home, domestic violence or marital conflict, financial dependence of the caregiver on the elder, multiple caregivers, and medication noncompliance.²³

There are many reasons that contribute to the underreporting of elder abuse. The elderly person may not view themselves as a victim or even comprehend what constitutes abuse or neglect.²⁴ Many elders want to protect the family member or loved one who is hurting them. They may also be afraid to speak about the abuse. They may be concerned that if they report abuse or neglect “they will be institutionalized, abandoned, or killed.”²⁵ Many elderly people worry about losing their independence or being concerned they will be forced to live outside of their tribal community. An inability to report the neglect or abuse due to a lack of cognitive skills, physical limitations, or extreme isolation are also reasons for silence.²⁶

National organizations focused on the AIAN population, too, have begun to address the issue of abused and exploited tribal elders. The National Congress of American Indians (NCAI) was established in 1944; it is the oldest and largest national organization of AIAN tribal governments.²⁷ In 2006, NCAI passed a resolution recognizing that “Tribal Elders are the keepers of our heritage, culture and language. It is recognized that Tribal Elders have molded our Tribal Nations

²¹ Anisko, *supra* note 10, at 45.

²² Anisko, *supra* note 10, at 45.

²³ Anisko, *supra* note 10, at 45.

²⁴ Litton et al., *supra* note 14, at 8.

²⁵ *Id.* at 8.

²⁶ *Id.* at 8.

²⁷ NAT’L CONGRESS OF AM. INDIANS, <http://www.ncai.org/> (last visited Oct. 22, 2018).

and strengthened the foundation for future generations. It is paramount that Tribal Governments in collaboration with the states, their Tribal communities, and local resources to come together to design a community-based system and laws to protect the health and dignity of Tribal Elders.”²⁸ The NCAI resolution affirmed the necessity of taking a proactive stance toward identifying and responding to potential elder abuse. It explicitly addressed the need for tribes to establish laws and procedures and to support efforts to provide professional and family training opportunities on the topic of elder abuse. NCAI also encouraged collaboration among tribes, the federal government, tribal justice systems and community agencies in providing needed services for victims and offenders living in tribal communities.²⁹

II. Federal law: Programs for Older Americans Act

The Programs for Older Americans Act is found in Chapter 35 of Title 42 of the United States Code. Here, Congress declares that it is the responsibility of the federal, state, and tribal governments “to assist our older people to secure equal opportunity to the full and free enjoyment” of ten objectives:

- (1) An adequate income in retirement in accordance with the American standard of living.
- (2) The best possible physical and mental health which science can make available and without regard to economic status.
- (3) Obtaining and maintaining suitable housing, independently selected, designed and located with reference to special needs and available at costs which older citizens can afford.
- (4) Full restoration services for those who require institutional care, and a comprehensive array of community-based, long-term care services adequate to appropriately sustain older people in their

²⁸ *Developing a Comprehensive Tribal Response to Elder Abuse*, NAT’L CONGRESS AM. INDIANS, RESOLUTION #SAC-06-073 (2006), <http://www.ncai.org/> (last visited Oct. 22, 2018).

²⁹ *Id.*

communities and in their homes, including support to family members and other persons providing voluntary care to older individuals needing long-term care services.

- (5) Opportunity for employment with no discriminatory personnel practices because of age.
- (6) Retirement in health, honor, dignity—after years of contribution to the economy.
- (7) Participating in and contributing to meaningful activity within the widest range of civic, cultural, education and training and recreational opportunities.
- (8) Efficient community services, including access to low-cost transportation, which provide a choice in supported living arrangements and social assistance in a coordinated manner and which are readily available when needed, with emphasis on maintaining a continuum of care for vulnerable older individuals.
- (9) Immediate benefit from proven research knowledge which can sustain and improve health and happiness.
- (10) Freedom, independence, and the free exercise of individual initiative in planning and managing their own lives, full participation in the planning and operation of community-based services and programs provided for their benefit and protection against abuse, neglect, and exploitation.³⁰

Sadly, many elderly AIANs do not have available to them all of the programs, nor are they able to enjoy the benefits outlined above. Congress has found that older individuals, who are AIAN, “are a vital resource entitled to all benefits and services available and that such services and benefits should be provided in a manner that preserves and restores their respective dignity, self-respect, and cultural identities.”³¹ Congress has further found, in part, that older AIANs:

- (1) are a rapidly increasing population;

³⁰ 42 U.S.C. § 3001.

³¹ 42 U.S.C. § 3057a.

- (2) suffer from high unemployment;
- (3) live in poverty at a rate estimated to be as high as 61 percent;
- (4) have a life expectancy between 3 and 4 years less than the general population;
- (5) lack sufficient nursing homes, other long-term care facilities, and other health care facilities;
- (6) lack sufficient Indian area agencies on aging;
- (7) frequently live in substandard and over-crowded housing;
- (8) receive less than adequate health care.³²

Within the Office of the Secretary of Health and Human Services (HHS), there exists an Administration on Aging office that is headed up by an assistant secretary.³³ Within the Administration on Aging there is an Office for American Indian, Alaskan Native, and Native Hawaiian Aging.³⁴ The director of this office is tasked with the following responsibilities:

...

- (B) serve as the effective and visible advocate in behalf of older individuals who are Native Americans within the Department of Health and Human Services and with other departments and agencies of the Federal Government regarding all Federal policies affecting such individuals, with particular attention to services provided to Native Americans by the Indian Health Service;
- (C) coordinate activities between other Federal departments and agencies to assure a continuum of improved services through memoranda of agreements or through other appropriate means of coordination;
- (D) administer and evaluate the grants provided under this chapter to Indian tribes, public agencies and nonprofit private organizations serving Native Hawaiians;

³² 42 U.S.C. § 3057b.

³³ 42 U.S.C. § 3011.

³⁴ *Id.* § 3011(c)(3).

- (E) recommend to the Assistant Secretary policies and priorities with respect to the development and operation of programs and activities conducted under this chapter relating to older individuals who are Native Americans;
- (F) collect and disseminate information related to problems experienced by older Native Americans, including information (compiled with assistance from public or nonprofit private entities, including institutions of higher education, with experience in assessing the characteristics and health status of older individuals who are Native Americans) on elder abuse, in-home care, health problems, and other problems unique to Native Americans;
- (G) develop research plans, and conduct and arrange for research, in the field of American Native aging with a special emphasis on the gathering of statistics on the status of older individuals who are Native Americans

...³⁵

In short, this position is tasked with serving as an effective and visible advocate on behalf of older individuals who are Indians, Alaskan Natives, and Native Hawaiians to promote the enhanced delivery of services and implementation of programs and other federal acts.

Anyone working on elder justice issues in tribal communities should familiarize themselves with grant programs in the Programs for Older Americans specifically designated for the AIAN population. In subchapter X of the Programs for Older Americans Act, there is a section titled Indian Program³⁶ and one titled Native American Caregiver Support Program.³⁷ There may be federal dollars available to fund a critical need for elders in a tribal community.

³⁵ 42 U.S.C. § 3011(c)(3)(B)–(G).

³⁶ 42 U.S.C. § 3057b–f.

³⁷ 42 U.S.C. § 3057(k)-11.

III. The response of tribal governments to elder abuse

Tribal governments' response to elder abuse varies across the country. Some tribes rely on state and county protective service programs to respond to issues of abuse. However, some tribes have developed their own response system and tribal codes. Some of these codes deal with issues such as mandatory reporting obligations, designating an agency to investigate claims or reports of abuse, or the mechanism for offering assistance to a family in need.³⁸ Some tribes enacting an elder abuse code or developing a community response to the problem of elder abuse have adapted their systems "to reflect Indian values and traditional approaches to resolving conflicts."³⁹

In 1984, the Lakota Sioux became among the first tribes to develop an elder abuse code.⁴⁰ Their code had provisions, such as who has to report abuse, which agency is responsible for investigating abuse, and penalties, similar to the state's code.⁴¹ However, there were also some unique features reflecting the traditions and culture of the tribe. For example, "duly credited practitioners," those individuals treating elders through spiritual means, were provided protection so that their practices would not be viewed as abusive or neglectful.⁴² The Lakota Sioux elder abuse code also provided for the creation of an "elder protection team" to respond to certain cases.⁴³ Once the tribe's code was enacted, the tribe launched a public education campaign. In addition, workshops were held to familiarize tribal members with the new law, and special tributes to elders, like a "Tribal Elder Day," were held.⁴⁴

The Yakama Tribe was another of the early tribes to develop an elder abuse code. Its code provided for the deferment of criminal prosecution in certain cases to a panel, which was charged with

³⁸ David Baldrige et al., *A Review of the Literature: Elder Abuse in Indian Country: Research, Policy, and Practice* 13 (Nat'l Indian Council on Aging 2004).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 13–14.

⁴² *Id.* at 14.

⁴³ *Id.*

⁴⁴ *Id.*

helping the parties resolve conflicts using methods based on tribal traditions and customs.⁴⁵

The Navajo Nation passed the Dine Elder Protection Act in 1996.⁴⁶ The Act defines an elder as anyone over the age of 55 and delineates the responsibilities of different tribal agencies, like the Navajo Nation Family Court and the Navajo Area Agency on Aging.⁴⁷ The Act provides a process for removing elders from abusive or dangerous situations. It also allows for the removal and/or restraint of abusers and can require abusers to pay restitution for the harm they cause.⁴⁸ The code also allows for the appointment of guardians and the naming of representative payees; it also states that if financially able to, an elder, his/her family, or caregivers must pay for some or all of the cost of services provided to the elder.⁴⁹

The National Indigenous Elder Justice Initiative (NIEJI) maintains a website and one of the links on the site takes the reader to a list of currently enacted tribal elder abuse codes. The NIEJI was created to address the lack of culturally appropriate information and community education materials on elder abuse, neglect, and exploitation in Indian Country. NIEJI is located within the Center for Rural Health at the University of North Dakota School of Medicine and Health Sciences. As of October 2018, NIEJI's website provides hyperlinks to approximately 50 tribal elder abuse codes.⁵⁰ The website also has a toolkit available for tribes interested in developing an elder abuse code.⁵¹

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ NAT'L INDIGENOUS ELDER JUST. INITIATIVE, <https://www.nieji.org/codes> (last visited Oct. 3, 2018).

⁵¹ *Developing Tribal Elder Abuse Codes*, NAT'L INDIGENOUS ELDER JUST. INITIATIVE, <https://www.nieji.org/tribal-elder-protection-team/3/code-development> (last visited Oct. 3, 2018).

IV. Nursing home facilities in Indian Country

According to a 2016 document published by the Department of Health & Human Services, Centers for Medicare & Medicaid Services (CMS), there will be 2.5 times as many AIAN elders in 2030 than there were in 2012.⁵² Sadly, there are a number of common health issues plaguing many tribal communities: poor nutrition, obesity, substance use disorders, violence, and injuries. These issues, combined with delayed health care access due to geographic isolation, poverty, and insurance issues, frequently result in many AIAN seniors suffering deteriorating health conditions while seeking care during later stages of an illness.⁵³ The unfortunate reality is that nursing homes serving the AIAN population are frequently far away from the reservation or tribal community the elder calls home. This results in AIAN elders in need of care being forced to leave their families, support systems, and potentially their culture and traditions. All of these factors can lead to high rates of elder loneliness and isolation. Elders who do not speak English are at an even higher risk of feeling alienated.⁵⁴

Because of this loss of connectedness and potential delayed seeking of healthcare, some tribes are working toward developing their own long-term care facilities. This would allow elders to stay in their own communities and remain better connected to their family and culture. According to CMS, as of March 2018, there are 18 tribally operated nursing home facilities (NHF) operating in the United States;⁵⁵ each of these facilities is Medicaid or Medicare certified. Ten of these facilities have been in operation for more than 20 years.⁵⁶ These 18 facilities, broken out by region, are as follows:

- *Alaska Region:* Maniilaq Association; Norton Sound Health Corporation; Yukon Kuskokwim Health Corporation;

⁵² DEP'T OF HEALTH AND HUMAN SERV., CTRS. FOR MEDICARE & MEDICAID SERV., LTTS RESEARCH: NURSING HOME FACILITY INVENTORY: NURSING HOMES IN INDIAN COUNTRY 2 (2016).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ DEP'T HEALTH & HUMAN SERV., CTRS. FOR MEDICARE & MEDICAID SERV., TRIBAL NURSING HOME DIRECTORY (2018).

⁵⁶ *Id.*

- *Northwest Region*: Blackfeet Nation; Confederated Tribes of the Colville Reservation; Shoshone Tribe of the Wind River Reservation;
- *Southwest Region*: Gila River Indian Community; Navajo Nation; Tohono O’odham Nation; Pueblo of Laguna; Mescalero Apache Tribe;
- *Midwest Region*: Red Lake Band of Chippewa Indians; Omaha Tribe of Nebraska; Oglala Sioux Tribe; Rosebud Sioux Tribe; Oneida Nation; and
- *East Region*: Mississippi Band of Choctaw Indians; Eastern Band of Cherokee Indians.⁵⁷

Uniting Nursing Homes in Tribal Excellence (UNITE) is a collaborative of tribal nursing home stakeholders who network, discuss best practices, promote evidence-based education and trainings, and work on quality improvement initiatives. The collaborative was formally organized in October 2015. The group meets on a monthly basis and has a website with recordings of meetings and a list of best practice documents that have been developed.⁵⁸ For example, UNITE posted on its website a best practices document for incorporating traditional foods into the nursing home diet.⁵⁹

As noted by CMS, the operation of a nursing home facility is financially challenging, and “obtaining the necessary certifications has been a long-standing barrier to tribal communities in the development of health care services and facilities culturally and financially.”⁶⁰ The establishment of UNITE provides an excellent opportunity for existing NHF’s to discuss emerging and critical issues with one another, establish best practices, and serve as a ready source of information for other tribes contemplating establishing their own NHF’s.

⁵⁷ *Id.*

⁵⁸ *The Tribal Nursing Home Collaborative*, CTRS. FOR MEDICARE & MEDICAID SERV., DEP’T OF HEALTH & HUMAN SERV., <https://www.cms.gov/Outreach-and-Education/American-Indian-Alaska-Native/AIAN/LTSS-TA-Center/the-tribal-nursing-home-collaborative.html> (last visited Oct. 10, 2018).

⁵⁹ DEP’T OF HEALTH & HUMAN SERV., CTRS. FOR MEDICARE & MEDICAID SERV., TRIBAL NURSING HOME BEST PRACTICES: TRADITIONAL FOODS (Dec. 15, 2016).

⁶⁰ LTSS Research: Nursing Home Facility Inventory, Nursing Homes in Indian Country, *supra* note 52, at 6.

V. Bureau of Indian Affairs Adult Protective Services

BIA provides the Adult Protective Services program to Indian people as mandated by 25 C.F.R., Part 20, which allows for the provision of certain services to Indians over the age of 18.⁶¹ Financial assistance may be provided so long as the Indian adult is not eligible for any other state, federal, or tribal assistance as documented in the case file, and they require non-medical personal care and supervision due to advanced age, infirmity, physical condition, or mental impairment.⁶² Protective services to the elderly may be provided through the social work skills of casework, group work, or community development to assist in solving social problems involving children, the elderly and families; these services do not include money payments.⁶³ BIA's assistance under this part to eligible Indians is only available "when comparable financial assistance or social services are either not available or not provided by state, tribal, county, local or other federal agencies."⁶⁴ BIA's financial and social service assistance is also subject to the agency's annual appropriations from Congress.⁶⁵

BIA's services to the elderly, as well as children and families, may include the following: "(a) [a]ssistance in solving problems related to family functioning and interpersonal relationships; (b) [r]eferral to the appropriate resource for problems related to illness, physical or mental handicaps, drug abuse, alcoholism, and violation of the law; and (c) [p]rotective services."⁶⁶ Additional services may include economic opportunity and money management.⁶⁷ BIA is to provide adult protective services when the adult is deprived temporarily or permanently of needed supervision by responsible adults; is neglected, abused, or exploited; needs services when they are mentally or physically handicapped or otherwise disabled; or is under the supervision of BIA in regard to the use and disbursement of funds in the adult's Individual Indian Money (IIM) account.⁶⁸

⁶¹ 25 C.F.R. § 20.100.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ 25 C.F.R. § 20.102(b).

⁶⁵ *Id.* § 20.102(c).

⁶⁶ 25 C.F.R. § 20.401.

⁶⁷ *Id.*

⁶⁸ 25 C.F.R. § 20.402.

Protective services provided to an elderly person is documented in case files and may include the following:

- (1) Providing responses to requests from members of the community on behalf of children or adults alleged to need protective services;
- (2) Providing services to children, elderly, and families, including referrals for homemaker and day care services for the elderly and children;
- (3) Coordinating with Indian courts to provide services, which may include, but are not limited to, the following:
 - (i) Investigating and reporting on allegations of child abuse and neglect, abandonment, and conditions that may require referrals (such as mental or physical handicaps);
 - (ii) Providing social information related to the disposition of a case, including recommendation of alternative resources for treatment; and
 - (iii) Providing placement services by the court order before and after adjudication.
- (4) Coordinating with other community services, including groups, agencies, and facilities in the community. Coordination can include, but are not limited to:
 - (i) Evaluating social conditions that affect community well-being;
 - (ii) Treating conditions identified under paragraph (b)(1) of this section that are within the competence of social services workers; and
 - (iii) Working with other community agencies to identify and help clients to use services available for assistance in solving the social problems of individuals, families, and children.
- (5) Coordinating with law enforcement and tribal courts, to place the victim of an alleged and/or substantiated incident of abuse, neglect or exploitation out of the home to assure safety while the allegations are being investigated. Social services workers may remove individuals in life threatening situations. After a social services assessment, the individual must be either returned

to the parent(s) or to the home from which they were removed or the social services worker must initiate other actions as provided by the tribal code; and

- (6) Providing social services in the home, coordinating and making referrals to other programs/services, including Child Protection, and/or establishing Multi-Disciplinary Teams.⁶⁹

A social services assessment includes the gathering of information about the client and members of his or her household, the client's resources, and information about the circumstances that justify special services, including ability of the client to handle his or her financial affairs and to conduct day-to-day living activities.⁷⁰

According to the CFR, the following factors should be considered: age; developmental disability; chronic alcoholism or substance abuse; lack of family assistance or social support systems or abandonment; self-neglect; financial exploitation or abuse; physical exploitation, neglect, or abuse; senility; and dementia.⁷¹ The social service assessment should also include documents supporting the need for assistance; for example, "medical reports, police reports, court orders, letters from interested parties, prior assessments or evaluations, diagnosis by psychologist/psychiatrist."⁷²

In September 2013, the Director of BIA released the Adult Protective Services Handbook for human service providers. A copy of the Director's memorandum and the handbook is available online.⁷³ The handbook includes helpful information such as signs and symptoms of elder abuse.

The handbook describes a collaborative effort, named Operation Golden Shield, spearheaded by the Anadarko Agency BIA Office of Justice Services (OJS) and Agency Social Services; the goal of the initiative is to address elder abuse and neglect and to ensure the safety and well-being of vulnerable adults in and around the jurisdiction of the Anadarko agency.⁷⁴ The former police chief for that

⁶⁹ 25 C.F.R. § 20.403.

⁷⁰ 25 C.F.R. § 20.404(a)–(d).

⁷¹ *Id.* § 20.404(d).

⁷² *Id.* § 20.404(e).

⁷³ U.S. DEPT OF INTERIOR, BUREAU OF INDIAN AFFAIRS, ADULT PROTECTION SERVS. HANDBOOK (2013).

⁷⁴ *Id.* at 18.

area asked his officers to make random social visits to vulnerable adults living in that area.⁷⁵ An interagency effort led to the compilation of a list of 27 vulnerable adults in the territorial jurisdiction of the Anadarko Agency. The Anadarko Agency Branch of Social Services and the OJS dispatch center maintain this list. The list is updated at a monthly meeting of the Adult Protective Services Multidisciplinary Meeting or as needed.⁷⁶ OJS officers “take three to four names from the list of vulnerable adults and visit them during their shift.” Participating officers have reported that they “enjoy visiting with the elders.”⁷⁷

If suspected criminal activity such as physical, emotional, psychological, or financial abuse is detected, the activity is reported to the agency with criminal jurisdiction and the appropriate social services office for assessment.⁷⁸ The BIA OJS takes the appropriate steps to ensure the health, safety, and well-being of the vulnerable adult. The handbook cites to a successful collaborative effort of the team that resulted in an exploited at-risk adult being spared the theft of approximately \$45,000.⁷⁹

Operation Golden Shield also has a component of giving back to elders in the community. For example, BIA OJS officers, social services personnel, and tribal staff delivered a Thanksgiving meal to 53 elders. The tribal staff volunteered to cook and deliver the food.⁸⁰ In 2011, the BIA/Anadarko Agency Social Services had a Golden Angel tree project. The tree contained 50 names of vulnerable elders. Gifts were donated from volunteers and delivered to the elders.⁸¹ Clearly, having consistent contact from trained professionals may reduce the risk of a vulnerable elder being preyed on by others. And, if a circumstance arises that puts the elder at risk, having a professional who can quickly identify the problem and mobilize a response may result in the elder being able to remain in their home longer. Operation Golden Shield is an example of a successful project that other Native communities may consider replicating.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 19.

⁸¹ *Id.*

VI. Federal criminal jurisdiction in Indian Country

The two main federal statutes governing federal criminal jurisdiction in Indian Country are 18 U.S.C. §§ 1152 and 1153. Section 1153, known as the Major Crimes Act, gives the federal government jurisdiction to prosecute certain enumerated offenses, such as murder, manslaughter, rape, aggravated assault, and child sexual abuse, when they are committed by Indians in Indian Country.⁸² Section 1152, known as the General Crimes Act, gives the federal government exclusive jurisdiction to prosecute all crimes committed by non-Indians against Indian victims in Indian Country.⁸³ Section 1152 also grants the federal government jurisdiction to prosecute minor crimes by Indians against non-Indians, although that jurisdiction is shared with tribes and provides that the federal government may not prosecute an Indian who has been punished by the local tribe.⁸⁴

To protect tribal self-government, section 1152 specifically excludes minor crimes involving Indians when the crimes fall under exclusive tribal jurisdiction.⁸⁵ The federal government also has jurisdiction to prosecute federal crimes of general application, such as drug and financial crimes, when they occur in Indian Country, unless a specific treaty or statutory provision provides otherwise. On a limited number of reservations, the federal criminal responsibilities under sections 1152 and 1153 have been ceded to the States under “Public Law 280” (P.L. 280) or other federal laws. In 1953, Congress passed P.L. 280; it provided that criminal jurisdiction and limited civil jurisdiction over Indian Country was delegated from the federal government to six states: Alaska (with the exception of the Metlakatla Indian Tribe), California, Minnesota (with the exception of the Red Lake Reservation), Nebraska, Oregon (with the exception of the Warm Springs Reservation), and Wisconsin. P.L. 280 is codified in statute at 18 U.S.C. § 1162.

The United States Constitution, treaties, federal statutes, executive orders, and court decisions establish and define the unique legal and

⁸² 18 U.S.C. § 1153.

⁸³ 18 U.S.C. § 1152.

⁸⁴ *Id.*

⁸⁵ *Id.*

political relationship that exists between the United States and Indian tribes. The Federal Bureau of Investigation (FBI) and the United States Attorneys' Offices (USAOs) are two of many federal law enforcement agencies with responsibility for investigating and prosecuting crimes that occur in Indian Country. FBI jurisdiction for the investigation of federal violations in Indian Country is statutorily derived from 28 U.S.C. § 533, pursuant to which the FBI was given investigative authority by the Attorney General.⁸⁶ In addition to the FBI, the BIA plays a significant role in enforcing federal law, including the investigation and presentation for prosecution of cases involving violations of 18 U.S.C. §§ 1152 and 1153.

VII. USAO operational plans and tribal liaisons

In 2009, Department of Justice leadership began a series of listening sessions with tribal leaders, culminating with then-Attorney General Holder participating in a nationwide tribal leader summit in St. Paul, Minnesota. At these events, many tribal leaders spoke passionately about the high rates of violence plaguing their people and communities. The Department's response to violent crime in Indian Country was a primary focus of these conversations. However, a second significant thread was the desire of tribal leaders to be provided the opportunity and resources to exercise their sovereign authority and to hold offenders accountable in tribal justice systems.

On January 11, 2010, then-Deputy Attorney General (DAG) David Ogden issued a memorandum to all United States Attorneys with districts that included Indian Country, declaring that "public safety in tribal communities is a top priority for the Department of Justice."⁸⁷ The DAG noted a number of challenges confronting tribal criminal justice systems: scarce law enforcement resources, geographic isolation, vast reservations, and insufficient federal and state resources dedicated to Indian Country.⁸⁸ Yet, "[d]espite these challenges, tribal governments have the ability to create and institute

⁸⁶ 28 U.S.C. § 533.

⁸⁷ See Memorandum for United States Attorneys with Districts Containing Indian Country, U.S. Dep't of Justice (Jan. 11, 2010).

⁸⁸ *Id.*

successful programs when provided with the resources to develop solutions that work best for their communities.”⁸⁹

In an effort to advance the work of the United States in Indian Country, the DAG memorandum directed that: (1) every USAO with Indian Country in its district, in coordination with its law enforcement partners, engage at least annually in consultation with the tribes in that district, and (2) every newly confirmed United States Attorney in such districts must conduct a consultation with tribes in his or her district and develop or update the district’s operational plan within eight months of assuming office.⁹⁰ The subject matter of each district’s plan will vary depending on whether the district is a P.L. 280 (criminal jurisdiction delegated by statute to the state) or non-P.L. 280 (federal government has criminal jurisdiction in Indian Country depending on the Indian/non-Indian status of the suspect and victim and the type of crime committed) jurisdiction, the number of tribes in the district, and the unique history and resource challenges of the tribes. Districts were instructed that operational plans should include topics like “a plan to develop and foster an ongoing government-to-government relationship, a plan to improve communication, and a plan to initialize a tribal Special Assistant United States Attorneys’ (SAUSA) program.”⁹¹ To assist with the development of district operational plans, the DAG instructed the Executive Office of United States Attorneys (EOUSA) to develop and provide model approaches for district tribal consultations and operational planning to the USAOs.⁹²

A report by the Department of Justice also addresses the important work done by a particular group of Assistant United States Attorneys (AUSAs), known as Tribal Liaisons.

All USAOs with Indian country responsibilities have at least one Tribal Liaison to serve as the primary point of contact with Tribes in the district. Tribal Liaisons are integral to the USAOs’ efforts in Indian country. The Tribal Liaison program was established in 1995 and codified with the passage of TLOA. Tribal Liaisons play a critical and multi-faceted role. In addition to their

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

duties as prosecutors, Tribal Liaisons often coordinate with and train Federal and Tribal law enforcement agents investigating violent crime, including sexual abuse cases, in Indian country.

Tribal Liaisons often function in a role similar to that of a local district attorney in a non-Indian country jurisdiction, and are accessible to the community in ways not required of other Assistant United States Attorneys (AUSAs). The unique nature and circumstances of the Tribes in their districts often influence the job duties of Tribal Liaisons. They serve as the primary points of contact between the USAO and the Indian Tribes located in their districts. Tribal Liaisons have relationships and frequent contact with Tribal governments, including Tribal law enforcement officers, Tribal leaders, Tribal courts, Tribal prosecutors, and social service agency staff.

Tribal Liaisons continued to play a critical role in USAO implementation of TLOA and the Violence Against Women Reauthorization Act of 2013 (VAWA 2013) by fulfilling the need for skilled, committed prosecutors working on the ground in Indian country. In particular, Tribal Liaisons assisted Tribes in organizing multi-disciplinary teams (MDTs) that primarily address child abuse cases, and SARTs that deal with sexual violence. Both MDTs and SARTs consist of Federal, Tribal, and state partners. In addition, Tribal Liaisons performed outreach in Tribal communities to educate Tribal members on various issues involving substance abuse and violent offenses in an effort to reduce crime and trained Tribal law enforcement on legal issues such as search and seizure. Tribal Liaisons also helped foster and cultivate relationships among Federal, state, and Tribal law enforcement officials by convening meetings to discuss jurisdictional issues and developing inter-agency law enforcement taskforces. In addition, Tribal Liaisons worked to coordinate and collaborate among Federal, Tribal, and state law enforcement agencies and prosecutors to discuss the merits of the prosecution of offenses committed within Indian country

and to determine the appropriate venue for matters to be prosecuted. These relationships enhanced information sharing and assisted the coordination of all criminal prosecutions.

Although Tribal Liaisons may be the most experienced Federal prosecutors of crimes in Indian country, the large volume of cases from Indian country requires these prosecutions to be distributed among numerous AUSAs in many districts. Table 8 contains a list of all USAOs with Indian country responsibility.⁹³

VIII. The Tribal Law and Order Act of 2010

The Tribal Law and Order Act (TLOA) was signed into law by the President on July 29, 2010.⁹⁴ In section 202 of TLOA, Congress reiterated earlier acknowledgements by the President and Congress that tribal law enforcement is typically the first responder to crime on the reservation and that a tribe's own justice system is often the most appropriate venue for maintaining law and order in Indian Country.⁹⁵ With the passage of TLOA, Congress, in part, intended to empower tribal law enforcement agencies and tribal governments. For example, Subtitle A of TLOA is titled "Federal Accountability and Coordination" and it specifically addresses the prosecution of crimes in Indian Country, to include the appointment of AUSAs as tribal liaisons and the appointment of SAUSAs.⁹⁶

Concerning tribal liaisons, TLOA amended The Indian Law Enforcement Reform Act to require the appointment of at least one tribal liaison in every federal judicial district with Indian Country responsibility. By statute, the duties of the tribal liaison shall include the following:

- (1) Coordinating the prosecution of Federal crimes that occur in Indian country.
- (2) Developing multidisciplinary teams to combat child abuse and domestic and sexual violence offenses against Indians.

⁹³ U.S. DEP'T OF JUSTICE, INDIAN COUNTRY INVESTIGATIONS AND PROSECUTIONS 16–17 (2017).

⁹⁴ Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2261.

⁹⁵ *Id.*

⁹⁶ *Id.*

- (3) Consulting and coordinating with tribal justice officials and victims' advocates to address any backlog in the prosecution of major crimes in Indian country in the district.
- (4) Developing working relationships and maintaining communication with tribal leaders, tribal community and victims' advocates, and tribal justice officials to gather information from, and share appropriate information with, tribal justice officials.
- (5) Coordinating with tribal prosecutors in cases in which a tribal government has concurrent jurisdiction over an alleged crime, in advance of the expiration of any applicable statute of limitation.
- (6) Providing technical assistance and training regarding evidence gathering techniques and strategies to address victim and witness protection to tribal justice officials and other individuals and entities that are instrumental to responding to Indian country crimes.
- (7) Conducting training sessions and seminars to certify special law enforcement commissions to tribal justice officials and other individuals and entities responsible for responding to Indian country crimes.
- (8) Coordinating with the Office of Tribal Justice, as necessary.
- (9) Conducting such other activities to address and prevent violent crime in Indian country as the applicable United States Attorney determines to be appropriate.⁹⁷

To increase coordination and communication among federal and tribal jurisdictions and to empower tribal governments with the authority, resources, and information necessary to safely and effectively do justice in their own communities, TLOA amends two statutes to provide for the appointment of SAUSAs. First, the Indian Law Enforcement Reform Act was amended to provide that each United States Attorney in an Indian Country district is authorized and encouraged to appoint SAUSAs “to prosecute crimes in Indian country as necessary to improve the administration of justice.”⁹⁸ The addition of a SAUSA is especially encouraged where either “the crime

⁹⁷ 25 U.S.C. § 2810(b).

⁹⁸ *Id.* § 2810(d)(1)(A).

rate exceeds the national average crime rate” or “the rate at which criminal offenses are declined to be prosecuted exceeds the national average declination rate.”⁹⁹ United States Attorneys are instructed by 25 U.S.C. § 2810 to do the following:

...

- (B) to coordinate with applicable United States district courts regarding scheduling of Indian country matters and holding trials or other proceedings in Indian country, as appropriate;
- (C) to provide to appointed Special Assistant United States Attorneys appropriate training, supervision, and staff support; and
- (D) to provide technical and other assistance to tribal governments and tribal court systems to ensure that the goals of this subsection are achieved.¹⁰⁰

TLOA also amended Title 28 of the United States Code, entitled “Judicial Code and Judiciary.” Accordingly, “the Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires, including the appointment of qualified tribal prosecutors and other qualified attorneys to assist in prosecuting federal offenses committed in Indian country.”¹⁰¹ In this section, Indian Country is defined by 18 U.S.C. § 1151. Once appointed, these SAUSAs can be granted the authority to perform all the functions that an AUSAs can perform, or specific limited actions, as desired by the United States Attorney.¹⁰² Per Department of Justice policy, SAUSAs are named to temporary appointments, not to exceed two years. The appointment can be extended indefinitely. SAUSAs are federal employees as defined by 5 U.S.C. § 2015.

Any otherwise-eligible attorney may be appointed as a SAUSA. SAUSAs are subject to essentially the same conditions of employment as other Department of Justice employees, including personnel security and suitability requirements, citizenship, and standards of conduct. All SAUSAs may be terminated at any time for any reason.¹⁰³

⁹⁹ *Id.*

¹⁰⁰ *Id.* § 2810(d)(1)(B)–(D).

¹⁰¹ 28 U.S.C. § 543(a).

¹⁰² *See* JUSTICE MANUAL § 3-4.213.

¹⁰³ 28 U.S.C. § 543(b).

Tribal liaisons and SAUSAs should, as appropriate, receive training on elder abuse in tribal communities, including on how to address the special needs of AIAN elderly victims of crime.

IX. Office for Victims of Crime—national strategy to enhance the response to sexual violence in AIAN communities

In 2012, the Office for Victims of Crime (OVC) launched its AIAN Sexual Assault Nurse Examiner-Sexual Assault Response Team (SANE-SART) Initiative.¹⁰⁴ In furtherance of the Initiative, OVC, the Office on Violence against Women (OVW), the Indian Health Service (IHS), and the FBI formed a collaborative partnership to develop the Strategy for Enhancing the Response to Sexual Violence in AIAN Communities (the Strategy). As part of the process of developing the Strategy, the federal partners hosted focus groups and conducted consultations where they solicited guidance from a broad range of federal and tribal practitioners, subject matter experts, allied professionals, and others. The federal partners used the information gathered from these sources to convene three federal working groups focused on: (1) Child Sexual Abuse; (2) Alaska Native Issues; and (3) First Responders. Each working group was tasked with providing direction for the Strategy so that its content reflects the voices of AIAN child and adult survivors of sexual violence.

In June 2014, the National Coordination Committee (Committee) on the AIAN SANE-SART Initiative submitted their final report and recommendations to the U.S. Attorney General.¹⁰⁵ The 14 Committee members constituted a diverse group with significant expertise and experience with AIAN issues, including representatives from diverse national tribal organizations; experts in forensic nursing, tribal courts, Alaska Native issues, and child sexual abuse; and representatives from five federal agencies with responsibility for law enforcement, prosecution, health care, and victim services.¹⁰⁶ Throughout the Committee's final report, it stated that

¹⁰⁴ *AI/AN Sane-Sart Program Initiative*, OFF. OF JUST. PROGRAMS, <https://www.ovc.gov/AIANsane-sart/index.html> (last visited Oct. 12, 2018).

¹⁰⁵ U.S. DEP'T OF JUSTICE, OFF. FOR VICTIMS CRIME, REPORT TO THE U.S. ATTORNEY GENERAL ON IMPROVING FEDERAL AGENCY RESPONSE TO SEXUAL VIOLENCE IN TRIBAL NATIONS: ISSUES AND RECOMMENDATIONS (2014).

¹⁰⁶ *Id.* at 3.

implementation of their recommendations will improve the effectiveness and efficiency of the federal system's response to adult and child victims of sexual violence in tribal nations. In addition, implementation of the recommendations was believed to ensure that the progress made on this issue will be institutionalized throughout DOJ and will lead to lasting, systemic change that will survive transitions between administrations.¹⁰⁷

On June 27, 2016, then-Attorney General Loretta Lynch issued a memorandum to United States Attorneys with Indian Country responsibility highlighting the Committee's eight key recommendation areas focusing on the difficulty in combating sexual violence and the need for continued and increased cooperation between federal and tribal partners to coordinate a unified response.¹⁰⁸ Accordingly, her June memorandum tasked United States Attorneys to take action in two specific areas. First, by August 12, 2016, all United States Attorneys with jurisdiction to prosecute crimes in Indian Country based on 18 U.S.C. §§ 1152 and 1153 had to meet with federal partners (FBI, BIA, and IHS) and tribal partners to develop written sexual violence guidelines that detail specific responsibilities of each federal partner.¹⁰⁹ These guidelines were to be implemented by September 9, 2016.¹¹⁰ Also, United States Attorneys in P.L. 280 jurisdictions were to discuss federal sexual violence response with their tribal partners and federal partners as appropriate during annual consultations.¹¹¹ Elders in Indian Country are victim of sexual assault. USAOs may want to specifically address the needs of elderly victims of sexual assault in their sexual violence guidelines.

X. Current DOJ and USDA joint efforts

On June 15, 2018, also known as World Elder Abuse Awareness Day, the Department of Justice and the Department of Agriculture (USDA) issued a joint statement declaring the formation of a working group "to focus on ways to empower and to support rural and tribal

¹⁰⁷ *Id.*

¹⁰⁸ See Memorandum for all United States Attorneys, U.S. Dep't of Justice (June 27, 2016).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

communities to combat elder abuse and financial exploitation.”¹¹² The working group’s stated mission is to collaboratively “work with older Americans in this Nation to improve their quality of life as envisioned by the Report to the President from the Task Force on Agriculture and Rural Prosperity.”¹¹³ A copy of the Task Force’s report to the President can be found online.¹¹⁴ Since the Task Force authored its report, collaboration within the Executive Branch to address this mission has only increased, including at DOJ’s Rural Elder Justice Summit, which took place November 2018 in Des Moines, Iowa, and will continue beyond.¹¹⁵

XI. Conclusion

*May you live as long and as good a life as I have and when you grow old may the young ones treat you with honor and respect.*¹¹⁶

At this time, there are numerous systemic barriers that may make it difficult for AIAN victims of elder abuse in tribal communities to receive help. These barriers may include, in part, the following:

- The failure of elder abuse prevention programs to affect the conditions leading to abuse, like poverty.
- An absence of elder protection or mandatory reporting statutes at the tribal level.
- Insufficient funding for programs. A tribe may lack the resources to prosecute abusers.
- Jurisdictional confusion about which government(s) has the legal authority to pursue a case against a

¹¹² Press Release, U.S. Dep’t of Justice and U.S. Dep’t of Agriculture, Joint Statement of Action to Promote Elder Justice in Rural America by the United States Department of Justice and the United States Department of Agriculture (June 15, 2018).

¹¹³ *Id.*

¹¹⁴ Sonny Perdue, *Report to the President of the United States from the Task Force on Agriculture and Rural Prosperity* (U.S. Dep’t of Agric. 2017), <https://www.usda.gov/sites/default/files/documents/rural-prosperity-report.pdf>.

¹¹⁵ *Id.*

¹¹⁶ Justin Seigler, *Injustice in Indian Country: The Need for a Serious Response to Native American Elder Abuse*, 19 *ELDER L.J.* 415, 416 (2012) (citing *Esselen Tribe of Monterey County*, THIS WE BELIEVE, <http://www.esselen.com/believe.html> (last visited Oct. 23, 2018)).

defendant or which government is responsible for providing services to a victim of elder abuse.

- The lack of training or awareness about elder abuse by professionals or community members.
- Existing programs may not work for elders in the community. For example, if the program materials are in English and the elder speaks only their native language, the elder will be unable to access services.
- Some existing programs have an age criteria of 60 or 65 for participation; however, the tribal community may recognize as an elder someone who is 55 years of age.¹¹⁷

While systemic barriers can exist for vulnerable elders in tribal communities, the good news is that the federal government, and particularly the Department of Justice, has made the issue of elder justice a priority.¹¹⁸ Moreover, the Department of Justice has made fighting violent crime and public safety initiatives in tribal communities a priority.

Each of the individuals in the vignettes at the beginning of this article fits the legal definition of an abused or exploited adult in one or more jurisdictions with legal responsibility for safeguarding the elder's public safety, health, and well-being. The key is for jurisdictions, federal, state, and tribal, to work together to ensure that when abuse is alleged that a competent investigation is conducted, and that a criminal case, if warranted, is brought. Each government has a role in facilitating the provision of culturally appropriate social services to the AIAN elder and potentially the entire family unit so that the risk of harm is reduced and the elder is allowed to live safely. Federal agencies like HHS's Administration on Aging and the BIA have an important role to play.

¹¹⁷ Baldrige et al., *supra* note 38, at 21.

¹¹⁸ *Elder Justice Initiative*, U.S. DEP'T. OF JUSTICE, <https://www.justice.gov/elderjustice> (last visited Oct. 12, 2018).

In addition, the USAOs, and particularly the tribal liaisons, should be aware of issues like the abuse and exploitation of elders as they work to draft and update the office's operational plan. Everyone has a role to play to ensure that AIAN elders live out their days treated with honor and respect.

About the Author

Leslie A. Hagen serves as the Department of Justice's first National Indian Country Training Coordinator. In this position, she is responsible for planning, developing, and coordinating training in a broad range of matters relating to the administration of justice in Indian Country. Previously, Ms. Hagen served as the Native American Issues Coordinator for the Executive Office of United States Attorneys. In that capacity, she served as EOUSA's principal legal advisor on all matters pertaining to Native American issues, provided management support to the USAOs, and coordinated and resolved legal issues. She also served as a liaison and technical assistance provider to Department of Justice components and the Attorney General's Advisory Committee on Native American Issues. Ms. Hagen started with the Department of Justice as an Assistant United States Attorney in the Western District of Michigan. As an Assistant United States Attorney, she was assigned to Violent Crime in Indian Country and handled federal prosecutions and training on issues of domestic violence, sexual assault, child abuse, and human trafficking affecting the 11 federally recognized tribes in the Western District of Michigan.

Note from the Editor-in-Chief

We are pleased to publish this issue of the DOJ Journal on Elder Justice. Protecting the elderly is an important goal of the Department of Justice and a priority of the Acting Attorney General. Our sincere thanks to Antoinette Bacon (ODAG) and Jason Fliegel (EOUSA) who served as Points of Contact and mentors for this issue. This is the longest issue of the DOJ Journal (formerly USABulletin) that the Office of Legal Education has published since it first started publishing the USABulletin in 1953. Toni and Jason formed the focus of the issue, recruited the authors, and directed much of the editing process. Their work made this issue possible.

Thank you,

K. Tate Chambers