No. 22-1465

United States Court of Appeals
for the
Sixth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

TARIQ OMAR,
Defendant-Appellant.

On Appeal from the United States District Court for the
Eastern District of Michigan

No. 2:17-cr-20465-6 Hon. Denise Page Hood

DEFENDANT-APPELLANT TARIQ OMAR'S OPENING BRIEF

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Pursuant to FRAP 26.1 and Local Rule 26.1, Tariq Omar, who is the Appellant in the above captioned case, makes the following disclosure:

1. Is any party a publicly held corporation or other publicly held entity? NO.

2. Does any party have any parent corporations? NO.

3. Is 10% or more of the stock of any party owned by a publicly held corporation or other publicly held entity? NO.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? NO.

5. Is any party a trade association? NO.

6. Does this case arise out of a bankruptcy proceeding? NO.

October 6, 2022

/s/ Shon Hopwood
Shon Hopwood
Counsel for Tariq Omar

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STATEMENT REGARDING ORAL ARGUMENT

Dr. Omar requests oral argument. This appeal arises from a lengthy investigation of fifteen defendants that culminated in a fifteen-day, four-defendant trial, which was followed by substantial post-trial litigation. Dr. Omar respectfully submits that, in light of the depth and complexity of the record below, oral argument will aid the Court.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the district court erred by denying Dr. Omar's motion for new trial when the government committed prosecutorial misconduct by lumping together multiple co-defendants, conflating their conduct, and presenting improper evidence of Dr. Omar's wealth?

II. Whether the district court abused its discretion under Federal Rules of Evidence 401, 404(b), and 403 in admitting evidence of Dr. Omar's wealth?

III. Whether the district court's sentence was procedurally unreasonable where it included lawfully billed amounts of money in its calculation of total loss amount?

STATEMENT OF THE CASE

I. Introduction

This is a case about an honest doctor who found himself in the company of fraudsters. Appellant Tariq Omar ("Dr. Omar"), having been charged in a multi-defendant health-care fraud conspiracy, sought his day in court so that he could plead his case of good faith to a jury of his peers. But instead, Dr. Omar received a trial that was tarnished by the government's repeated lumping together of his conduct with that of his co-defendants. Over and over again, despite objections from defense counsel and admonitions from the court, the government referred to Dr. Omar and his co-defendants in the collective, illicitly imputing other defendants' conduct to Dr. Omar and making it virtually impossible for the jury to understand how comparatively small Dr. Omar's role was in the charged conduct.

As set forth below, the government presented ample evidence that Defendant Mashiyat Rashid ("Rashid") ran a pain clinic at which he hired multiple doctors to dispense medically unnecessary drugs, and at which Rashid and others intentionally overbilled Medicare for reimbursements. And the government presented evidence that Dr. Omar himself, as one of those doctors, dispensed medically unnecessary drugs. But there was *not* ample—or even strong—evidence of Dr. Omar's intentional participation in a scheme or artifice to *defraud*, which is what a health-care fraud conviction requires. That distinction is crucial, because Dr. Omar's only

hope of vindicating himself was to distinguish his conduct—his admittedly questionable conduct of dispensing medically unnecessary drugs—from the fraud committed by his co-defendants. Because the government's trial conduct denied Dr. Omar the opportunity to do that, this Court should reverse for a new trial.

II. The Conspiracy

In some ways, this was a garden-variety multi-defendant fraud conspiracy: Rashid recruited doctors who (either knowingly or unwittingly) agreed to dispense opioids to patients. In that role, from as early as 2008 through July 2017, Rashid operated Tri-County Physician Group, P.C. ("Tri-County"),[1] a pain clinic in Michigan, hiring doctors to provide back injections and to prescribe pharmaceuticals. During that time, Rashid sought over $132 million in reimbursements from Medicare. *See* Gov't Sentencing Mem., R. 618 at 4, PageID# 8483.[2] The evidence showed that Rashid recruited doctors by promising to pay them on a per-shift basis (and later, on a percentage basis) to come into the Tri-County clinic to treat patients, and that Rashid promised that "really experienced senior pain

[1] In 2016, Rashid changed the name of the clinic from "Tri-County" to "Tri-State" and fraudulently listed Defendant Spilios Pappas as the owner of Tri-State on documentation submitted to Medicare. *See* Tr. 6, R. 441 at 142-144, PageID# 5095-97 (Rashid Direct Ex.). Consistent with the district court's practice, and for simplicity's sake, this brief refers to the clinic only as "Tri-County" for the duration of the charged conduct.

[2] "R." refers to docket entry numbers in the district court's record. "App." refers to pages of the accompanying Appendix.

doctors who are trained in pain management" would train new recruits in how to manage patients' chronic back pain. Tr. 11, R. 446 at 138, PageID# 6161 (Omar Direct Ex.). Instead, Rashid and his quack honchos trained recruits to dispense medically unnecessary back injections to patients who agreed to receive those injections (and to submit to unnecessarily overinclusive urinalysis, for instance) only because they would then receive the prescription opioids that they sought. *See* Gov't Sentencing Mem., R. 618 at 5, PageID# 8484.

III. Dr. Omar's Work for Tri-County

Prior to Dr. Omar's unfortunate recruitment by Rashid, Dr. Omar had by all rights achieved the American Dream: born and married in Lahore, Pakistan, he immigrated to the United States with his wife and family in 1995, eventually settling down in the Detroit metropolitan area. *See* Sentencing Mem., R. 612 at 5-6, PageID# 8198-99. He completed a three-year residency at Mount Sinai and a three-year fellowship in critical care and pulmonary medicine at Wayne State University, after which he opened up his own pulmonology practice, became medical director of the psychiatric unit at Detroit's Sinai Grace from 2010 to 2013, and became a naturalized U.S. citizen. *Id.* at 6, PageID# 8199; Tr. 11, R. 446 at 135-36, PageID# 6158-59. Sadly, one of the hospitals for which Dr. Omar had been working closed in 2013, leading him to seek out other revenue sources, and one of Dr. Omar's colleagues claimed to have a friend—Rashid—who ran a pain clinic in need of

doctors. Tr. 11, R. 446 at 136-37, PageID# 6159-60.

In 2014, Dr. Omar joined Tri-County, believing, as he testified, that Rashid had successfully run the pain clinic for many years and that he employed senior doctors who had developed leading modes of chronic back-pain treatment. *Id.* at 138, PageID# 6161. Never before having treated chronic pain, he shadowed Tri-County doctors (including co-defendants Spilios Pappas ("Pappas") and Mohammed Zahoor ("Zahoor")) and then started working shifts, treating patients "exactly the way [he] was told." *Id.* at 144, PageID# 6167; Tr. 13, R. 448 at 105:24, PageID# 6327. In May 2016, on advice of counsel (following a state investigation prompted by the quantity of opioids Dr. Omar had prescribed), Dr. Omar stepped down. Tr. 13, R. 448 at 39-40, PageID# 6261-62. But in August 2016, Dr. Omar returned to work at Tri-County, staying on until December 2016, when he ultimately resigned, for good. *Id.* at 46-47, PageID# 6268-69.

At trial, Dr. Omar readily admitted that—following Tri-County's prescribed protocol—he dispensed significant quantities of opioids to patients, a realization he had after he had been indicted in this matter and learned the scale of Rashid's fraud. *Id.* at 44-47, PageID# 6266-69; *see, e.g.*, *id.* at 47:4-5, PageID# 6269 ("I realized that I was doing it wrong and I was writing more prescriptions than I should have"). And he admitted that he should not have "rel[ied] on the staff" at Tri-County to ensure, for instance, that patients were not doctor-shopping in order to obtain

duplicate opioid prescriptions from multiple pain clinics. *Id.* at 43-44, PageID# 6265-66. Dr. Omar further explained that the result of the state's investigation was a $15,000 fine and a two-year limitation on his medical license, pursuant to which Dr. Omar could continue to practice pulmonology (his field of expertise) but not work at a pain clinic. *Id.* at 49, PageID# 6271.

What Dr. Omar did *not* admit was that he was even *aware* of any fraud going on at Tri-County. *Id.* at 52-53, PageID# 6274-75. Difficult as it may seem to believe, Dr. Omar candidly and genuinely testified to the jury that he simply followed orders from his seniors as he had done for thirty-eight years of practicing medicine, and that he never suspected there was any fraud going on until he was indicted in this federal case. *Id.* at 53, PageID# 6275; *id.* at 105, PageID# 6327 ("I have no idea, that is what I'm telling you. I was taught by the physician, I was following whatever I was taught."). Dr. Omar testified that he never intended to defraud anyone, that he "was not involved in billing," and that, although he put his signature on Medicare forms when directed to do so by Tri-County staff, he "did not know what they [were] billing" and thus did not "knowingly present" false claims to Medicare. *Id.* at 54:7, PageID# 6276; *id.* at 111:17-18, PageID# 6333. In sum, Dr. Omar conceded that he had, factually, dispensed medically unnecessary drugs, but he vigorously challenged the allegation that, by doing so, he had knowingly participated in a conspiracy to commit health-care fraud.

IV. The Government's Case

Curiously, though Dr. Omar was charged with conspiracy to commit health-care fraud, the government's case proceeded against him as though he were on trial for medical malpractice, the bulk of his cross-examination being devoted either to attempts at impeachment or to proving what Dr. Omar had already admitted: that he had dispensed medically unnecessary drugs.[3] This stands in stark contrast to Dr. Omar's three co-defendants, who were alleged to have engaged in much more overtly fraudulent behavior. *See, e.g.*, Tr. 13, R. 448 at 140:1-3, PageID# 6362 (Government's closing) ("Defendants Pappas, Betro and Zahoor signed blank home health order forms and took kickbacks for each referral they made.").

And, although some of the most egregious conduct pertaining to *fraud* was alleged against only Dr. Omar's co-defendants, the government and its witnesses continually deployed the tactic of lumping Dr. Omar together with the other defendants at trial. *See, e.g.*, Tr. 5, R. 440, PageID# 4787 (office manager Yasser Mozeb testifying that Rashid and co-conspirators Pappas, Zahoor, and Betro—but not Dr. Omar—had conspired to beat pending law-enforcement investigations). Throughout the case, the prosecution consistently referred to "these defendants,"

[3] Even a cursory read through the Government's cross-examination of Dr. Omar reveals that the Government was not interested in a fair fight: after an initial attempt at impeachment was rebuffed, the prosecutor quipped, "Okay. Well, let's talk about some other lies you told." Tr. 13, R. 448 at 61:24, PageID# 6283. The retort was stricken, but the prosecutor's antics continued. *See id.* at 62-67.

"these doctors," and the things that "they" did at Tri-County, with the result that the jury was encouraged to believe that Dr. Omar participated in conduct that he was not present for and knew nothing about. Tr. 5, R. 440, PageID# 4745, 4756, and 4771. The government questioned witnesses to testify about things "we" or "the defendants" did, even when these actions did not involve Dr. Omar in any way—and even after objections to such testimony had been sustained. *See, e.g.*, Tr. 4, R. 439, PageID# 4521 (sustaining objection to Haq's use of "we"); *id.* at PageID# 4524–25, 4527–4628, 4538, 4541 (Haq continues to testify as to things "we" did at Tri-County); *id.* at PageID# 4621 (Haq testifies "we went on because of the easy business, easy money"); Tr. 8, R. 443, PageID# 5445–46 (Michael Petron testifies about how much the four defendants billed during the time they were at Tri-County, and he responded without dividing the amount by year or defendant, "They billed or referred $58 1/2 million dollars.").

The grouping of the four co-defendants as a unitary actor was especially pronounced during the testimony of the government's star witness, Rashid. In response to the government's question, "What did you realize about the control you had over the patients?" Rashid responded, "Oh, yeah, *we* had complete control because of the prescriptions." Tr. 6, R. 441, PageID# 4977 (emphasis added). Rashid was also asked about conversations with "the defendants" as if he talked to them all together, when he did not. *See id.* at PageID# 4980. Similarly, the government asked

Rashid about the doctors' intent, schedule, knowledge, patients, and paychecks as if they were all necessarily identical. *Id.* at PageID# 4994; *id.* at PageID# 5008; *id.* at PageID# 5015; *id.* at PageID# 5025; *id.* at PageID# 5027. The government's questions to Rashid enticed the jury to consider all the defendants as one group rather than as individuals.

Dr. Omar's counsel repeatedly objected to the government's failure to specify to which defendant or defendants it was referring to in questioning witnesses. *E.g.*, Tr. 3, R. 438, PageID# 4384; Tr. 4, R. 439, PageID# 4536; Tr. 5, R. 440, PageID# 4784; Tr. 14, R. 449, PageID# 6613. Despite these objections, the government continued to elicit such testimony "even after the Court sustained" Dr. Omar's objections. Order Denying New Trial, R. 694, PageID# 9821. Worse yet, the government's tactic of combining all defendants together as a group was also repeated in its summation, when the government repeatedly told the jury what "these defendants" did. *See* Tr. 13, R. 448, PageID# 6360 (referring to amounts billed by "the four defendants"); *id.* (talking about prescriptions written by "these defendants"); *id.* at PageID# 6361 ("From 2011 to 2017 they combined to bill Medicare for 299,668 bogus facet injections"); *id.* (repeated emphasis of what "they told you," "they billed," "they diagnosed"); *id.* at PageID# 6362 ("These defendants lied to their patients and they lied to Medicare so that they could get money that didn't belong to them and spend that money on luxury items and lavish lifestyles.");

id. at PageID# 6369–70 (arguing that evidence of billing changes in 2013, before Dr. Omar began working at Tri-County, shows a conspiracy because "[t]hese doctors, along with their other co-conspirators, were moving in unison to adjust what they were billing to Medicare to stay under the radar and get paid"); *id.* at PageID# 6375 (arguing intent was shown from a meeting in 2017, after Dr. Omar stopped working at Tri-County, in which "these defendants and their other conspirators had a meeting, and at the meeting they discussed how they were going to stay under the radar . . . ."); *id.* at PageID# 6378 (claiming that in January of 2017—after Dr. Omar's final departure—"they all got together in a room and said what are we going to do to make sure that we don't get caught"). These improper comments were extensive and highly prejudicial to Dr. Omar, and the district court never gave the jury any curative instruction addressing these inflammatory remarks.

The government called only one patient at trial whom Dr. Omar had treated: Carla Watson. Watson testified that the injections she received did not help with her pain, and that she left the clinic because she did not agree with the treatment she received. Tr. 7, R. 442, PageID# 5273, 5277. But her medical records showed that she saw doctors from Tri-County for approximately four years, and that she left only after she was told not to come back due to the presence of multiple illicit drugs in her urine tests. *Id.* at PageID# 5279–81, 5285–86; PageID# 5553–41 (noting that 25% of Watson's drug screens showed use of other drugs including cocaine).

Watson also admitted that she did not dissuade her father and uncle, who also went to Tri-County, from receiving treatment there. *Id.* at PageID# 5276, 5290. Watson's testimony hardly established that Dr. Omar had intent to commit fraud.

Finally, the government's case against Dr. Omar included an old-fashioned character attack: the prosecution elicited testimony from Rashid that Dr. Omar shared his expensive tastes and pointed out that Dr. Omar had withdrawn $250,000 in cash from his bank accounts over a period of time, even though there is nothing illegal about withdrawing cash. Tr. 6, R. 441, PageID# 5023; Tr. 8, R. 443, PageID# 5462–63; *see* GX 74, App. A3. And the prosecution presented evidence from analyst Michael Petron that Dr. Omar used money that was "almost all" from Tri-County to pay off balances on a Porsche and a Mercedes-Benz: vehicles that Dr. Omar had purchased in 2010 and 2011, respectively, long before he went to work at Tri-County. Tr. 8, R. 443, PageID# 5463-64; *see* GX 72, 73, App. A1-A2. The prosecution later emphasized this testimony in summation. Tr. 13, R. 448, PageID# 6396–97; *see also* Tr. 14, R. 449, PageID# 6591:

> [W]hat were they intending when they left their mansions, when they left their indoor basketball courts, when they left their luxury pools, when they got into their porches [*sic*] and luxury vehicles, when they drove as far away as Ohio, as in Defendant Pappas' case, all the way downtown to write opioids and administer injections in downtown Detroit[?]

The government had ample evidence that Rashid perpetrated a massive health-care fraud. But it lacked ample evidence that Dr. Omar was a knowing

conspirator. Instead, the government's case against Dr. Omar sought to connect the dots between his medical unprofessionalism and his alleged participation in a federal health-care fraud by lumping him in with his co-defendants and by inflaming the jury against him on account of his wealth.

V. The Verdict and Post-Trial Litigation

Ultimately, despite the scant evidence of Dr. Omar's criminal intent, the jury returned a guilty verdict against all defendants on all counts. Tr. 15, R. 450, PageID# 6665-66. And, after it had been pending for more than two years, the district court denied Dr. Omar's motion for new trial. Order Denying New Trial, R. 694, PageID# 9804. In that denial, the district court itself failed to distinguish Dr. Omar from his co-defendants, concluding in a crucial paragraph that "incriminatory emails and text messages discussing the intricacies of the fraud" established each defendant's knowledge of the fraud. Order Denying New Trial, R. 694 at 9, PageID# 9812. But none of the cited exhibits, GX 702-705 and 802-872, show Dr. Omar's knowledge of the fraud. App. A4-A20 (GX 702-705), App. A24-A162 (GX 802-839, 841-869).[4] None of the text messages cited (GX 702-705) even include Dr. Omar, and the other

[4] The district court cited GX 802-872 for its proposition concerning emails. The Appendix filed with this brief contains all of those exhibits with the exception of GX 840, 870, 871, and 872. There was no GX 840. As for GX 870-872, these do not appear to exist in trial counsel's electronic files, so they are not included in the Appendix. But the trial transcripts make clear that these documents pertain only to co-defendant Betro and not to Dr. Omar. *See* Tr. 10, R. 445 at 72-73, 111-12, PageID# 5856-5857, 5895-5896.

(uncited) text messages that do include him (GX 706, App. A21-A23) contain only benign banter. Likewise, none of the emails cited (GX 802-872) are from Dr. Omar.

The district court sentenced Dr. Omar to 96 months of imprisonment. Judgment, R. 702, PageID# 9913-14. The district court arrived at this sentence by calculating a Sentencing Guidelines range of 262 to 327 months of imprisonment based on the government's alleged intended loss amount of $77,666,168, which reflected the total amount billed by Tri-County to Medicare between January 2014 and December 2016 (roughly the dates of Dr. Omar's service).[5] *See* Sentencing Tr., R. 749 at 29:22-23, PageID# 10298 (Guidelines calculation), Gov't Sentencing Mem., R. 618 at 11, PageID# 8490 (loss amount explanation). The district court then varied downward to 96 months, in large part because "it [did] not appear to [the court] that [Dr. Omar] had any ownership interest" in the fraud. Sentencing Tr., R. 749 at 30, PageID# 10299.

Relevant to this appeal, the district court rejected Dr. Omar's argument that the loss amount should have been reduced by the fair market value of *lawfully* billed services pursuant to U.S. Sentencing Guidelines § 2B1.1 cmt. n. 3(E)(i). Dr. Omar argued that, because the fraudulently dispensed back injections amounted—according to the government—to at most 69% of the amounts billed, his loss amount

[5] Of this amount, Medicare paid $24,243,603. Gov't Sentencing Mem., R. 618 at 11 n.2, PageID# 8490.

should have been reduced by 31%. This would have resulted in a fraud loss amount under $65,000,000 and thus in a lower Guidelines sentencing range. The district court rejected this argument on the grounds that, "but for the giving of the 69 percent related to the injections, there would not likely be any 31 percent and so that objection is denied." Sentencing Tr., R. 749 at 7:23-25, PageID# 10276.

Following imposition of sentence, Dr. Omar timely filed notice of appeal. R. 703, PageID# 9921. This appeal follows.

SUMMARY OF THE ARGUMENT

This Court should grant Dr. Omar a new trial because the proceedings below were tainted by the government's repeated misconduct of lumping Dr. Omar's conduct together with that of his co-defendants and presenting improper, prejudicial evidence of Dr. Omar's wealth. Under this Court's caselaw, a two-step approach applies to claims of prosecutorial misconduct. First, the government's remarks must be improper; here, they were improper because the prosecution repeatedly referred to Dr. Omar and his three co-defendants as though "they" were a unitary actor even when discussing conduct that occurred during periods of time when Dr. Omar was not working at Tri-County. The prosecution also presented improper evidence of Dr. Omar's wealth and car ownership. Second, the government's remarks were misleading, prejudicial, repeated, and deliberate, and the evidence of Dr. Omar's intent to perpetuate a health-care fraud was not strong.

The prejudice to Dr. Omar was twofold: first, the jury was led to believe that Dr. Omar participated in discussions of Medicare fraud that occurred before he joined Tri-County, after he left, or when he was not present. Second, the evidence showed that Dr. Omar simply did not play the same role as his co-defendants in discussing fraudulent billing practices; although there was certainly evidence of Dr. Omar's questionable *medical* practices, there was no strong evidence that Dr. Omar was even aware of a fraud until after he was indicted in this matter. In fact, none of

the texts and emails that the district court cited as grounds for denying Dr. Omar's motion for new trial even implicated Dr. Omar—they implicated only his co-defendants. But the government repeatedly lumped Dr. Omar in with the bunch, blurring the distinction for the jury between Dr. Omar's conduct and that of his co-defendants, repeatedly over the course of the four-week trial. Dr. Omar deserves a retrial free from the taint of this misconduct.

Alternatively, this Court should reverse for retrial because the government presented evidence of Dr. Omar's wealth that was improper under Federal Rules of Evidence 401, 404(b), and 403.

Finally, the district court imposed a procedurally unreasonable sentence because it failed to deduct lawfully billed sums of money from Dr. Omar's total loss amount as is required by Comment Note 3(E)(i) to Section 2B1.1 of the United States Sentencing Guidelines. So, at the very least, this Court should reverse and remand for resentencing consistent with the Guidelines.

ARGUMENT

I. THE DISTRICT COURT ERRED BY DENYING DR. OMAR'S MOTION FOR A NEW TRIAL WHEN THE GOVERNMENT COMMITTED PROSECUTORIAL MISCONDUCT BY LUMPING TOGETHER MULTIPLE CO-DEFENDANTS, CONFLATING THEIR CONDUCT, AND PRESENTING IMPROPER EVIDENCE OF DR. OMAR'S WEALTH.

This case is a textbook example of the perils of joint criminal trials. In a multi-defendant conspiracy such as this, the government understandably has an interest in efficiency that militates in favor of prosecuting a joint trial. But its decision to do so comes at potentially great risk to the defendants' right to a fair trial. As Justice Jackson wrote in his concurring opinion in *Krulewitch v. United States*:

> A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrong-doing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other.

336 U.S. 440, 445 (1949) (Jackson, J., concurring).

Rather than conducting Dr. Omar's trial in manner befitting of the United States Government—that is, in a manner that distinguished each defendant from the others and preserved each defendant's individual dignity—the government here committed prosecutorial misconduct in two respects. First, the government encouraged the jury to consider the defendants as one unit and not merely as co-conspirators, by consistently referring to them as if they all had the same intent, the

same medical background, the same practices, and the same results. Throughout the case, the government consistently referred to "these defendants," "these doctors," and the things that "they" did at Tri-County—even when referring to things that happened prior to Dr. Omar's work at Tri-County, after his departure, or outside his presence. Tr. 5, R. 440, PageID# 4745, 4756, 4771. The government repeated those comments while questioning its witnesses and during its summation. Second, the government improperly appealed to class prejudice by encouraging the jurors to view Dr. Omar as a greedy, rich doctor who set out to live a lavish lifestyle through fraud. These comments were also improper. The district court erred in denying Dr. Omar's motion for a new trial on the basis of repeated and improper prosecutorial statements lumping the co-defendants, including Dr. Omar, into a singular group, and on the basis of the prosecution's illicit presentation of evidence of Dr. Omar's wealth.

A. Standard of Review

This Court reviews Dr. Omar's claim of prosecutorial misconduct de novo to the extent that the claim arises from instances of misconduct to which Dr. Omar objected. *See United States v. Boyd*, 640 F.3d 657, 669 (6th Cir. 2011) (holding this Court reviews "claims of prosecutorial misconduct that were objected to in the trial court de novo"). Dr. Omar's counsel repeatedly objected to the government's failure to specify to which defendant or defendants it was referring to in questioning

witnesses. *E.g.*, Tr. 3, R. 438, PageID# 4384 (objecting to admission of statements made by another doctor to Rashid after Omar left Tri-County); Tr. 4, R. 439, PageID# 4536 (objecting to testimony that document was shown to "everybody"); Tr. 5, R. 440, PageID# 4784 (objecting to question about what "defendants" agreed); Tr. 14, R. 449, PageID# 6613 (objecting to rebuttal summation because "he kept referring to they, they, they, and there were time periods when he was referring—excuse me, he was referring to time periods when Dr. Omar was not even at the clinic"). Dr. Omar also objected to admission of evidence of his wealth. Tr. 8, R. 443 at 13-16, PageID# 5430-5433. This Court reviews at least that portion of the claim de novo.

But Dr. Omar's counsel failed to raise an objection to the government's comments during closing argument, so the portion of Dr. Omar's claim arising from closing argument is reviewed for plain error. *See Boyd*, 640 F.3d at 669. Under the plain-error standard, this Court should reverse if (1) the district court made an error that was not "affirmatively waived" by the appellant; (2) the error was "clear or obvious, rather than subject to reasonable dispute"; (3) the error "affected the appellant's substantial rights"; and (4) the error affected the "fairness" or "integrity" of the trial. *United States v. Aguirre*, 605 F.3d 351, 356-57 (6th Cir. 2010) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009), and *United States v. Mayberry*, 540 F.3d 506, 512 (6th Cir. 2006)).

B. The Government Repeatedly and Improperly Lumped Together the Defendants and Their Conduct, Thereby Poisoning the Jury.

This Court applies a two-step approach when a defendant raises a prosecutorial misconduct claim:

> Under this approach, a court must first consider whether the prosecutor's conduct and remarks were improper. If the remarks were improper, the court must then consider and weigh four factors in determining whether the impropriety was flagrant and thus warrants reversal. These four factors are as follows: (1) whether the conduct and remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the conduct or remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally made; and (4) whether the evidence against the defendant was strong.

United States v. Carter, 236 F.3d 777, 783 (6th Cir. 2001) (cleaned up).

This Court has provided guidance as to what constitutes improper conduct or remarks on the part of the prosecution. A prosecutor's remark is improper if it: (1) "refers to facts not in evidence or the prosecutor's personal opinion," *United States v. Uwazurike*, 580 F. App'x 440, 449 (6th Cir. 2014); (2) "misstate[s] evidence," *Carter*, 236 F.3d at 785; or (3) bolsters or vouches for testimony, *United States v. Bailey*, 547 F. App'x 756, 761 (6th Cir. 2013).

The government here repeatedly engaged in improper conduct by treating all four defendants as a single actor during questioning of witnesses and repeatedly arguing during its summation about what "these defendants" did. *See* Tr. 13, R. 448, PageID# 6360 (referring to amounts billed by "the four defendants"); *id.* (talking about prescriptions written by "these defendants"). The result was repeated

"misstate[ments]" of the evidence so as to confuse and prejudice the jury. *Carter*, 236, F.3d at 785. The government questioned witnesses to testify about things "we" or "the defendants" did, even when these actions did not involve Dr. Omar in any way—and even after objections to such testimony had been sustained. *See, e.g.*, Tr. 4, R. 439, PageID# 4521 (sustaining objection to Haq's use of "we"); *id.* at PageID# 4524–25, 4527–4628, 4538, 4541 (Haq continues to testify as to things "we" did at Tri-County); *id.* at PageID# 4621 (Haq testifies "we went on because of the easy business, easy money"); Tr. 8, R. 443, PageID# 5445–46 (Michael Petron testifies about how much the four defendants billed during the time they were at Tri-County, and he responded without dividing the amount by year or defendant, "They billed or referred $58 1/2 million dollars.").

The grouping of the four co-defendants as a unitary actor was especially pronounced during Rashid's testimony. When the government asked, "What did you realize about the control you had over the patients?" Rashid responded, "Oh, yeah, *we* had complete control because of the prescriptions." Tr. 6, R. 441, PageID# 4977 (emphasis added). Rashid was also asked about conversations with "the defendants" as if he talked to them all together, when he did not. *See id.* at PageID# 4980 ("What did you tell the defendants about how much money the Tri-County Clinics were making? . . . What did you tell the defendants about how much money the doctors at Tri-County were making?").

Similarly, the government asked Rashid about the doctors' intent, schedule, knowledge, patients, and paychecks as if they were all necessarily identical. *Id.* at PageID# 4994 ("And how many days would these doctors be working, these defendants?"); *id.* at PageID# 5008 ("Did the defendants know that the people you hired to operate the machine had no medical training?"); *id.* at PageID# 5015 ("After you communicated the diagnosis codes to the defendants, what did they diagnose the patients with?"); *id.* at PageID# 5025 ("Would it be possible for the defendants to see each patient for 45 minutes or 40 minutes within the amount of time they had in the clinic? . . . "Would it be possible for them to have seen each patient for 25 minutes during the amount of time they were in the clinic?"); *id.* at PageID# 5027 ("Did you speak about [*sic*] the defendants about this additional revenue stream?"). The government's questions to Rashid enticed the jury to consider all the defendants as one group rather than as individuals. In all these ways, the government repeatedly and improperly "misstated [the] evidence," proceeding as though Dr. Omar had been a part of the conspiracy for its entire duration and to its entire extent. *Carter*, 236 F.3d at 785; *see also Washington v. Hofbauer*, 228 F.3d 689, 700 (6th Cir. 2000) ("Misrepresenting facts in evidence can amount to substantial error because doing so may profoundly impress a jury and may have a significant impact on the jury's deliberations.") (cleaned up) (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 646 (1974)). *Cf.* AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE

PROSECUTION FUNCTION AND DEFENSE FUNCTION 3–5.8(a) (3d ed. 1993) ("The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.").

Grouping the four co-defendants together was no accident; it was a tactic the government deployed throughout the trial, perhaps because the government lacked conventional evidence of Dr. Omar's intent to commit healthcare fraud. By lumping all the defendants together, the government persuaded the jury that if it convicted any defendant, it must convict all. *See United States v. Gallo*, 763 F.2d 1504, 1526 n.7 (6th Cir. 1985) (noting that a "spillover" or "guilt transference" effect may occur in trials involving multiple defendants); *United States v. Causey*, 834 F.2d 1277, 1287 (6th Cir. 1987) (noting that courts may properly deny a motion for severance if "a jury can properly compartmentalize the evidence as it relates to the appropriate defendants"). In sum, the government's tactic of lumping all the defendants together involved "specific and compelling prejudice" that would "mislead and confuse the jury in the absence of a separate trial." *United States v. Fields*, 763 F.3d 443, 458 (6th Cir. 2014).

C. The Government Improperly Introduced Evidence of Dr. Omar's Wealth.

The prosecution presented evidence from analyst Michael Petron that Dr. Omar made car payments for a Porsche and a Mercedes-Benz with money Petron said was "almost all" from Tri-County based on Petron's methods of tracing money.

Tr. 8, R. 443, PageID# 5463–64. The prosecutor later emphasized this testimony in summation. Tr. 13, R. 448, PageID# 6396–97. The prosecution also implied that Dr. Omar was doing something wrong because he withdrew $250,000 in cash from his bank accounts over a period of time. Tr. 8, R. 443, PageID# 5462–63. Although there is nothing illegal about the cash withdrawals, the government told the jury that these cash withdrawals were also evidence of Dr. Omar's intent to commit fraud because he "was a man of expensive taste." Tr. 13, R. 448, PageID# 6396–97.

The appeals to class prejudice were further compounded by the prosecution's treatment of all defendants as a group, as noted above. The government presented evidence of Dr. Omar's co-defendants' expenditures on items like in-home basketball courts, gold bars, and vacation houses. See Tr. 8, R. 443, PageID# 5460–62 (eliciting testimony from Petron and showing photographs of gold bars and house in New York purchased by Dr. Betro); *id.* at PageID# 5466–68 (eliciting testimony about and showing pictures of Dr. Zahoor's houses, including one with an indoor basketball court). The evidence about Dr. Omar's luxury cars, and of his co-defendants' extravagant homes, stacks of gold, rare and expensive jewelry, and courtside NBA tickets, painted a picture for the jury: that Dr. Omar had the intent to defraud to support his financial stature. *See* Tr. 6, R. 441, PageID# 4965. The government's rebuttal summation also illustrates its attempt to appeal to class prejudice in order to secure a conviction:

> [W]hat were they intending when they left their mansions, when they left their indoor basketball courts, when they left their luxury pools, when they got into their porches [*sic*] and luxury vehicles, when they drove as far away as Ohio, as in Defendant Pappas' case, all the way downtown to write opioids and administer injections in downtown Detroit[?]

Tr. 14, R. 449, PageID# 6591.

It was improper for the prosecution to argue repeatedly to the jury that Dr. Omar was greedy or corrupt simply because he drove a certain brand of automobile or had cash in his pocket instead of in his bank account. Such appeals to the jury on the basis of class or wealth are inappropriate. *See United States v. Jackson-Randolph*, 282 F.3d 369, 377 (6th Cir. 2002) (noting that, in some cases, "prosecutorial appeals to wealth and class biases can create prejudicial error"); *Sizemore v. Fletcher*, 921 F.2d 667, 671 (6th Cir. 1990) (reversing after prosecutor made statements during closing arguments based on wealth and class and invited jury to view defendant's ability to hire several attorneys with suspicion); *United States v. Abboud*, 438 F.3d 554, 584-85 (6th Cir. 2006) (holding that government's closing arguments in which it referred to the defendant's expensive home, his recent purchase of a Mercedes Benz, that he shopped at an expensive department store, and sent his children to an elite private school "were improper"); *United States v. Stahl*, 616 F.2d 30, 32 (2d Cir.1980) (court reversed in case where the record indicated that the prosecutor "intend[ed] to arouse prejudice against the defendant because of his

wealth and engaged in calculated and persistent efforts to arouse such prejudice throughout the trial").

D. The Government's Misconduct Was Material and Deliberate, and the Evidence Against Dr. Omar Was Not Strong.

All four *Carter* factors favor reversal here: (1) the government's improper comments misled the jury and prejudiced Dr. Omar; (2) the comments were made repeatedly; (3) the comments were made deliberately; and (4) the evidence against Dr. Omar was not strong. *See Carter*, 236 F.3d at 783.

1. The Government's Comments Were Misleading and Prejudicial

The government's improper remarks were prejudicial to Dr. Omar. Improper prosecutorial comments are particularly damaging to a defendant's right to a fair trial when they are made in front of the jury. *See Uwazurike*, 580 F. App'x at 449. Improper comments made during closing arguments are also prejudicial, given their proximity to jury deliberations. *See Carter*, 236 F.3d at 788 (noting that a prosecutor's improper comments made during closing arguments left a "lasting impression that certainly remained with the jury" as they "were the last words from an attorney heard by the jury before deliberations"). All the improper statements made by the prosecutors in this case were made in front of the jury, and they were made or repeated during the government's closing argument, unduly prejudicing the jury against Dr. Omar.

As noted above, the government's failure to separate the witness testimony and its arguments against each defendant doctor misled the jury and was prejudicial to Dr. Omar. The prejudice was at least twofold. First, unlike his co-defendants, Dr. Omar began working at Tri-County in 2014 and left the clinic in 2016. Tr. 11, R. 446, PageID# 6164; Tr. 13, R. 448, PageID# 6268. The charged conspiracy covered the period from 2008 through 2018, *see* Superseding Indictment, R. 242, PageID# 2019, and Dr. Omar's co-defendants worked at the clinic both before and after he did. As a result of the government's improper comments, Dr. Omar was lumped together with the other co-defendants for which the government's evidence was more robust because those defendants worked for Tri-County for the entire duration of the conspiracy.

Second, the evidence showed that Dr. Omar did not have the same role as his co-defendants in discussing fraudulent billing practices. The government argued at closing, for instance that Dr. Omar's co-defendants—*not* Dr. Omar—"signed blank home health order forms and took kickbacks." Tr. 13, R. 448 at 140:1-3, PageID# 6362. Office manager Yasser Mozeb testified that Rashid and Dr. Omar's co-defendants—*not* Dr. Omar—conspired to beat law-enforcement investigations. Tr. 5, R. 440, PageID# 4787. And even the texts and emails that the district court used as support for its denial of Dr. Omar's motion for new trial showed that Dr. Omar's co-defendants—*not* Dr. Omar—were discussing Tri-County's fraudulent billing

practices. *See* Order Denying New Trial, R. 694 at 9, PageID# 9812 (listing incriminating evidence as including the text messages in GX 702-705 and the emails in GX 801-872); *compare* GX 702-705, App. A4-A20 (text messages among Rashid, Pappas, Betro, and others discussing "overbilling") *with* GX 706, App. A21-A23 (text messages between Rashid and Dr. Omar such as "You are the man Dr. O!"); *see* GX 802-839, GX 841-869, App. A24-A162 (email correspondence, none of which is from Dr. Omar, and none of which establishes Dr. Omar's awareness of fraudulent billing practices).

Given the extent to which this tactic was used by the government, the district court's instruction was insufficient to mitigate the prejudice caused by the conflation of Dr. Omar's conduct with his co-defendants' conduct. And it was insufficient to mitigate the spillover effect of the testimony against his co-defendants that would not have otherwise been admissible against Dr. Omar. *See* Tr. 14, R. 449, PageID# 6629 (instruction); *Gallo*, 763 F.2d at 1526 n.7 (noting that jury must be able to "give each defendant the separate and individual consideration of the evidence against him to which he [is] entitled"). The jury heard four weeks of evidence and was provided thousands of pages of exhibits, and it could not be expected to parse out the evidence as to each defendant based on one jury instruction when the government made no effort to segregate the evidence as it pertained to each individual defendant.

2. The Government's Comments Were Made Repeatedly

While "even a single misstep on the part of the prosecutor may be so destructive of the right of the defendant to a fair trial that reversal must follow," *Carter*, 236 F.3d at 788-89, the government's improper comments and remarks here were extensive.

The government's improper comments included the questioning of multiple witnesses and those comments were repeated throughout the summation. The government questioned witnesses to testify about things "we" or "the defendants" did. *See* Argument I.B, *supra*. The government repeated this tactic of combining all defendants together as a group in its summation, when the government repeatedly told the jury what "these defendants" did. *See id.*; *see also* Tr. 13, R. 448 at PageID# 6361 ("From 2011 to 2017 they combined to bill Medicare for 299,668 bogus facet injections"); *id.* (repeated emphasis of what "they told you," "they billed," "they diagnosed"); *id.* at PageID# 6362 ("These defendants lied to their patients and they lied to Medicare so that they could get money that didn't belong to them and spend that money on luxury items and lavish lifestyles."); *id.* at PageID# 6369–6370 (arguing that evidence of billing changes in 2013, before Dr. Omar began working at Tri-County, shows a conspiracy because "[t]hese doctors, along with their other co-conspirators, were moving in unison to adjust what they were billing to Medicare to stay under the radar and get paid."); *id.* at PageID# 6375 (arguing intent was

shown from a meeting in 2017, after Dr. Omar stopped working at Tri-County, in which "these defendants and their other conspirators had a meeting, and at the meeting they discussed how they were going to stay under the radar . . . ."); *id.* at PageID# 6378 (claiming that in January of 2017 "they all got together in a room and said what are we going to do to make sure that we don't get caught"). The government's evidence of Dr. Omar's wealth was also repeated in the government's summation. Tr. 13, R. 448, PageID# 6396–97.

3. The Government's Comments Were Made Deliberately

A prosecutor's repeated improper conduct is evidence that such conduct is deliberate and not accidental. *See Carter*, 236 F.3d at 791. The prosecution's consistent comments here were deliberate and part of a tactic to discredit Dr. Omar through treating him and all his co-defendants as a single greedy unit, thus misstating the evidence the jury was required to consider. *See Bates v. Bell*, 402 F.3d 635, 648 (6th Cir. 2005) ("The intentionality of the prosecutor's improper remarks can be inferred from their strategic use.").

The government's comments were no accident. The government repeatedly questioned witnesses to testify about things "we" or "the defendants" did, even when these actions did not involve Dr. Omar in any way—and even after objections to such testimony had been sustained. *See, e.g.,* Tr. 4, R. 439, PageID# 4521; *id.* at PageID# 4524–25, 4527–4628, 4538, 4541; *id.* at PageID# 4621. In one instance,

despite a repeated objection, the government continued referring to Dr. Omar as part of the collective during a time when Dr. Omar was not there. *See* Tr. 5, R. 440 at 107:15-108:20, PageID# 4784-85. The government continued to misstate the evidence—by lumping Dr. Omar's conduct with the other co-defendant doctors—in its closing arguments. *See* Tr. 13, R. 448, PageID# 6360–6362, 6369–6370. The government also made improper comments about Dr. Omar's wealth throughout the trial. Although the district court concluded that the government's comments were "not flagrant," Order Denying New Trial, R. 694, PageID# 9829, it failed to consider the government's repeated prejudicial statements or how those repeated statements furthered the government's tactics of relying on appeals to class and wealth and of lumping the defendants into a unitary group in order to convict them more easily.

4. The Evidence of Dr. Omar's Criminal Intent Was Not Strong

Nor was the evidence against Dr. Omar particularly strong. Dr. Omar took the stand in his own defense and testified regarding his good faith intentions and reasons for following the protocol that he was taught by the other doctors. Dr. Omar also testified that he simply signed the pre-filled Medicare forms without reading them. Tr. 13, R. 448, PageID# 6243 (Dr. Omar signed forms "without thinking"); *id.* at PageID# 6255 (Dr. Omar "signed so many forms" and did not recall signing an audit questionnaire).

Rashid testified that Dr. Omar continued to give patients injections solely to protect his own income. But he also admitted that, "I didn't say it in those many words, but he kind of understood that he would be free to [do fewer injections] but that there would be [payment] adjustments." Tr. 6, R. 441, PageID# 5108. And while Manish Bolina testified that patients said Omar told them he would increase their opioid prescription amounts, he also testified that patients who are looking for drugs might make up stories about their pain to get their drugs, and they may have made up stories about what Dr. Omar said to them to get their drugs. Tr. 3, R. 438, PageID# 4449–4451.

In short, although the evidence certainly showed that Dr. Omar provided questionable medical treatment, the evidence was far from clear that he had the criminal intent to defraud. And it was certainly not so overwhelming that the prosecutorial misconduct was harmless. The government could not show one text message, one email, or one meeting between Dr. Omar and the defendants actually committing the Medicare fraud that showed Dr. Omar's criminal intent to perpetuate a fraud—so the government made the one play that all but guaranteed a conviction: it lumped Dr. Omar in with the others, repeatedly blurring the distinction between his conduct and theirs over the course of the four-week trial. The four *Carter* factors favor reversal.

Moreover, to the extent that plain-error review applies to part of this claim, the district court's error was plain. Applying the plain-error standard from *Aguirre*, (1) Dr. Omar did not affirmatively waive the error, (2) the repeated misconduct was clear, rather than disputed, (3) the misconduct affected Dr. Omar's "substantial rights" by prejudicing him as set forth above, and (4) the misconduct undermined the fairness of Dr. Omar's trial. *Aguirre*, 605 F.3d at 356-57. The government's misconduct undermined the fairness of Dr. Omar's trial because this was precisely the kind of case where, after four weeks of dense testimony and thousands of pages of exhibits, jurors were "ready to believe that birds of a feather are flocked together"—and the government led the jurors straight to that belief. *Krulewitch*, 336 U.S. at 445 (Jackson, J., concurring).

As the Fifth Circuit has said, "joint trials, and especially those involving many defendants, carry substantial risks of manifest unfairness. At the same time, it is beyond question that such trials are now an accepted and even necessary aspect of our judicial system. This is because our system will tolerate the risk of unfairness so long as *careful efforts* are made to ensure that the inequities are kept in check." *United States v. McLaurin*, 557 F.2d 1064, 1074 (5th Cir.), *cert. denied*, 434 U.S. 1020 (1977) (emphasis added). Here, the government failed to take the "careful efforts" that were necessary to afford Dr. Omar a fair day in court. This injustice should not be tolerated. This Court should reverse.

II. THE DISTRICT COURT ABUSED ITS DISCRETION UNDER FEDERAL RULES OF EVIDENCE 401, 404(B), AND 403 BY ADMITTING EVIDENCE OF DR. OMAR'S WEALTH.

A. Standard of Review

This Court reviews evidentiary rulings such as those under Federal Rules of Evidence 401, 404(b), and 403, for abuse of discretion. *United States v. Hazelwood*, 979 F.3d 398, 408 (6th Cir. 2020). "An abuse of discretion occurs when the district court relies on clearly erroneous facts, uses an erroneous legal standard, or improperly applies the law." *Id.*

B. Evidence of Dr. Omar's Wealth Was Irrelevant Under Rule 401.

The district court abused its discretion in admitting Government Exhibits 72, 73, and 74 and in permitting analyst Michael Petron to testify regarding those exhibits and the "tracing" of Dr. Omar's cash withdrawals and car payments to money received from Tri-County. *See* Tr. 8, R. 443 at 45-47, PageID#5462-64, *see* GX 72-74, App. A1-A3.

Under Federal Rule of Evidence 401, evidence is relevant "if it has any tendency to make a fact more or less probable than it would be without the evidence," and if "the fact is of consequence in determining the action." Fed. R. Evid. 401. "This threshold is low, and evidence is relevant if it 'advance[s] the ball' one inch." *United States v. Lang*, 717 F. App'x 523, 538 (6th Cir. 2017) (quoting *Dortch v. Fowler*, 588 F.3d 396, 401 (6th Cir. 2009)). But that does not mean the

rule is toothless. *See, e.g.*, *United States v. Blackwell*, 459 F.3d 739, 753-54 (6th Cir. 2006) (affirming exclusion of expert testimony as irrelevant where defendant proposed that expert would explain how individuals learned about a trading opportunity through "leakage" rather than through insider trading).

Here, Exhibits 72 through 74 were utterly irrelevant to whether Dr. Omar participated in a health-care fraud. Exhibits 72 and 73 showcase Dr. Omar as the owner of a Porsche and a Mercedes-Benz that he bought in 2010 and 2011, respectively, several *years* before he started working at Tri-County. That he finished paying off the balances owed on those cars while he was later working for Tri-County is not logically probative of anything relevant to the criminal charges. Likewise, the fact that Dr. Omar withdrew cash from his bank accounts proves nothing except that Dr. Omar had and withdrew money. That fact itself is not probative of any fact of consequence in this prosecution. Further, there is nothing illegal about withdrawing cash from ATMs, and even withdrawing $250,000 between March 2014 and October 2016, though a large sum, amounts to no more than withdrawing $600 to $700 every couple of days. That does not move the ball one micron on whether Dr. Omar participated in a health-care fraud. Moreover, unlike in *Jackson-Randolph*, in which evidence of wealth was admissible "to create 'the inference that the defendant does not possess a legitimate source of income to support his affluent lifestyle and, therefore, the income must originate from narcotics

operations,'" the argument here was simply to smear Dr. Omar as a rich, greedy doctor. 282 F.3d at 377 (quoting *Carter*, 969 F.2d at 201). The district court abused its discretion in admitting Exhibit 74 and in allowing Michael Petron to testify regarding these exhibits.

C. Evidence of Dr. Omar's Wealth Was Improper Evidence of Specific Instances of Conduct Under Rules 404(b) and 403.

Even if the evidence of Dr. Omar's wealth was probative, it was improper evidence of specific conduct under Rule 404(b), and its risk of unfair prejudice dwarfed any probative value it had. Rule 404(b) prohibits the use of other-acts evidence except for a permissible non-character purpose such as "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). Evidence is admissible under Rule 404(b) only if "(1) the evidence is offered for an admissible purpose, (2) the purpose for which the evidence is offered is material or 'in issue,' and (3) the evidence is probative with regard to the purpose for which it is offered." *United States v. LaVictor*, 848 F.3d 428, 445–46 (6th Cir. 2017).

The district court, in its order denying Dr. Omar's motion for new trial, found that the evidence of wealth was probative of motive. Order Denying New Trial, R. 694 at 30, PageID# 9833. But Dr. Omar bought the cars in question several years *before* he began working at Tri-County; the fact that he paid off small remaining balances on the cars after receiving funds from Tri-County does not show that Dr.

Omar's work at Tri-County was carried out *in order to* pay off those balances. Nor did the court explain how his withdrawals of cash showed his motive or intent to commit fraud. Even if this evidence were probative of motive, that probative value is far outweighed by the clear "unfair prejudice" inflicted on Dr. Omar when the jury saw Exhibits 72 through 74, showcasing Dr. Omar as just another one of the bunch of rich, greedy doctors. Thus, at the very least, the district court should have excluded the evidence under Rule 403. The district court's failure to do so was an abuse of discretion.

III. THE DISTRICT COURT IMPOSED A PROCEDURALLY UNREASONABLE SENTENCE BECAUSE IT FAILED TO DEDUCT LAWFULLY BILLED AMOUNTS FROM BILLS WHEN CALCULATING DR. OMAR'S FRAUD LOSS AMOUNT.

A. Standard of Review

This Court reviews a sentence for abuse of discretion. *Gall v. United States*, 552 U.S. 38 (2007). An abuse of discretion includes an error, such as failing to apply a provision of the Sentencing Guidelines, that renders a defendant's sentence "procedurally unreasonable." *United States v. Anders*, 333 F. App'x 950, 955 (6th Cir. 2009) (reversing sentence where district court failed to credit the "fair market value" of "services rendered" against the defendant's loss amount, pursuant to U.S.S.G. § 2B1.1, cmt. n.3(E)(i) ("Note 3(E)(i)")).

B. The Sentence Imposed Was Procedurally Unreasonable.

Under Note 3(E)(i), "the amount of loss must account for the fair market value of the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected." *United States v. Mahmood*, 820 F.3d 177, 193 (5th Cir. 2016). Here, the district court abused its discretion, and thus imposed a procedurally unreasonable sentence, in failing to credit against Dr. Omar's loss amount the fair market value of the lawfully billed services performed by Tri-County during the applicable time period.

Prior to sentencing, Dr. Omar argued that his loss amount should have been reduced by 31% to credit the fair market value of lawfully billed services. *See* Sentencing Tr., R. 749 at 7, PageID# 10276. This was based on the contention, according to the government, that facet joint injections that were alleged to be fraudulent accounted for at most 69% of the bills submitted for medical services performed by Dr. Omar. *Id.* The remainder included fees for office visits and other potentially non-fraudulent medical treatment billed according to Medicare's reimbursement schedule. *Id.* Because Dr. Omar's loss amount was $77,666,168, a 31% reduction would bring the revised loss amount down to $53,589,656, which is below the next loss-amount threshold in the Guidelines, such that Dr. Omar's Guidelines offense level would then be lower by two. *See* Gov't Sentencing Mem.,

R. 618 at 11, PageID# 8490 (loss amount); U.S.S.G. § 2B1.1(b)(1)(L-M) (fraud loss table).

The district court cursorily rejected this argument, however, reasoning that "but for the giving of the 69 percent that related to the injections, there would not likely be any 31 percent and so that objection is denied." Sentencing Tr., R. 749 at 7, PageID# 10276. The district court implicitly invoked a superficially reasonable rule: as the district court would have it, there is no credit for loss amount if the lawfully billed services were provided in tandem with fraudulently billed services. But that's not the rule in the Guidelines, which state that loss amount "shall be reduced" by "the fair market value" of "the services rendered." U.S.S.G. § 2B1.1, cmt. n.3(E)(i). The district court abused its discretion in replacing this rule with a rule of its own creation. Thus, this Court should, at the very least, reverse and remand for resentencing after application of the credit contemplated by Note 3(E)(i).

CONCLUSION

For the foregoing reasons, this Court should reverse Dr. Omar's conviction and sentence and remand for a new trial. Alternatively, this Court should reverse and remand for resentencing after application of the credit contemplated by Note 3(E)(i).

Date: October 6, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with Fed. R. App. P. 27 and 32 because it contains 9,410 words and was typed in 14-point Times New Roman font.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 6, 2022, I electronically filed the foregoing Brief, notice of which was sent via ECF to all parties.

Respectfully submitted,

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ADDENDUM

DESIGNATION OF RELEVANT RECORD DOCUMENTS

District Court Docket Entry No.	Description	PageID# Range
242	Superseding Indictment	2008-2041
438	Trial Transcript Day 3	4296-4486
439	Trial Transcript Day 4	4487-4677
440	Trial Transcript Day 5	4678-4953
441	Trial Transcript Day 6	4954-5181
442	Trial Transcript Day 7	5182-5417
443	Trial Transcript Day 8	5418-5560
445	Trial Transcript Day 10	5785-6023
446	Trial Transcript Day 11	6024-6181
448	Trial Transcript Day 13	6223-6434
449	Trial Transcript Day 14	6435-6658
450	Trial Transcript Day 15	6659-6681
612	Dr. Omar's Sentencing Memo	8194-8275
618	Government's Sentencing Memo	8480-8508
694	Order Denying New Trial	9804-9847
702	Judgment	9913-9920
703	Notice of Appeal	9921-9922
749	Sentencing Hearing Transcript	10270-10308