No. 10-11077

In the United States Court of Appeals for the Fifth Circuit

UNITED STATES OF AMERICA,
Plaintiff–Appellee,

v.

MUHAMMED USMAN, A/K/A NASIR USMAN
Defendant–Appellant.

On Appeal from the United States District Court for the Northern District of Texas, Dallas Division No. 3:09-CR-146, Hon. Jorge Solis, Judge Presiding

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BRIEF OF APPELLANT MUHAMMED USMAN

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CERTIFICATE OF INTERESTED PARTIES

NO. 10-40502

UNITED STATES OF AMERICA,
Plaintiff–Appellee,

v.

MUHAMMED USMAN
Defendant–Appellant.

The undersigned counsel of record certifies the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate their possible recusal or disqualification.

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3. Honorable Jorge Solis – United States District Judge for the Northern District of Texas.

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STATEMENT REGARDING ORAL ARGUMENT

Appellant Muhammed Usman requests oral argument. Usman believes that oral argument would be of material assistance to the Court in evaluating, *inter alia*, whether loss determinations are properly calculated under U.S.S.G. §2B1.1 as the facial amount of submitted invoices when it is undisputed that Medicare and Medicaid pay only fixed amounts for a listed service.

In support of this request for oral argument, Usman notes that the district court itself recognized the unrealistic realization rates on the receivables for which Usman was being held responsible at the sentencing hearing, stating "You have got a bit of a nuance on that in that he wasn't expecting to receive above the schedule. I don't know that we have any testimony on that." RE.6.1972.

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The district court announced sentence on October 13, 2010, RE.7.1988-1989, and entered its amended final judgment on October 15, 2010, RE.3.[1] Usman filed a Notice of Appeal on October 19, 2010. RE.2.; FED. R. APP. P. 4(b)(1)(A), 4(b)(2). This Court has jurisdiction over Usman's appeal under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

[1] Docket entries 1-207 comprise the Record on Appeal. The pagination of the record containing documents begins at page 1 and are referred to herein as R. [Bates number]. Cites to the record excerpts are in the form RE.[tab number].[Bates number].

STATEMENT OF ISSUES FOR REVIEW

1. Whether, when a defendant knows that the amount he will receive from claims presented to Medicare/Medicaid are capped and he does not have the subjective intent to cause a greater loss, it is error to calculate his loss amount based upon the amount of the claims submitted instead of the amount that he knows Medicare/Medicaid will pay.

2. Whether a mass-marketing enhancement applies where a defendant does not direct the alleged mass-marketing activities at the victims of the offense.

3. Whether an owner of ambulance service company (who operates no such vehicles or prepares any run sheets about this operation himself) is in a trust relationship with Medicare/Medicaid for the purpose of applying an abuse of trust enhancement under the United States Sentencing Guidelines.

4. Whether even with the benefit of the downward variance afforded, a sentence is substantively unreasonable because the term of imprisonment imposed was more than 300% higher than that meted out to more culpable codefendants, one of whom exchanged sexual favors for new business.

STATEMENT OF THE CASE

On April 7, 2010, Usman and a former employee of Usman's named David McNac were charged in a Second Superseding Indictment with various types of health care fraud. RE.4. Count One charged Usman with conspiracy to commit health care fraud. *Id*. at 270. Counts 2-13 charged Usman and McNac with health care fraud and aiding and abetting.[2] Count 14 charged Usman with §1957 money laundering involving the purchase of a used Lexus LX. Counts 15 and 16 charged McNac alone with witness tampering.[3] The Indictment also provided Forfeiture Notice and a notice for substitute assets. *Id.*at 287-288.

McNac pled guilty on April 22; Usman's jury trial began before Judge Jorge Solis on April 27. R.585. On May 5, following 6 days of trial and two days of deliberations, the jury returned a verdict of guilty on all counts. RE.5.374-376.

The PSR grouped all counts pursuant to §3D1.1. (Doc. No. 129; ¶60; 62). The most pivotal conclusion urged by PSR was an intended loss

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[2] Another of Usman's former employees, Shaun Outen, had been named in the two predecessor indictments. R.19; 120. Although not listed as a defendant in the Second Superseding Indictment because he pled guilty to the First Superseding Indictment on March 24, Outen was nevertheless still listed as a co-defendant in Count 9. RE.4.282.

[3] Usman moved to have his case severed because of McNac's unilateral involvement with Counts 15 ad 16. R.144-147. The Court denied this motion. R.167-168. Ultimately, McNac pled guilty and only Usman went to trial.

amount of $3.6 million, *Id*. at ¶49, despite the fact that Usman's two companies only submitted false claims to Medicare and Medicaid in the amount of $1.57 million. *Id*. at ¶51. Less than $550,000 of this $1.5 million sum was actually paid. *Id*. In other words, Usman was held responsible for $3.6 million even though his actual realization rate on these billings was 34%.

The Base Offense Level derived from §2S1.1(a), which is in turn a function of the economic loss guideline, §2B1.1. Starting from the 6 points assigned by (a)(2), the intended loss amount of $3.6 million corresponded to an 18-level increase pursuant to §2B1.1 (b)(J). An additional 2 points were assessed for "mass marketing" under §2B1.1(b)(2)(A)(ii) because Usman's companies left "ink pens and mouse pads which displayed the companies logos as advertisement." *Id*. at ¶64. One additional point was assessed because Count 14 was prosecuted under 18 U.S.C. 1957. *Id*. at ¶65.

A total of six points were added for role: 4 points were assessed for being an organizer or leader under §3B1.1(a). *Id*. at ¶67. Conspicuously, paragraph 67 speaks at length about things Usman was told by others; only a stray statement, "'do what it takes' to receive the funds" was offered in justification of this adjustment. Another 2 points were added for abuse of position or trust under §3B1.3. *Id*. at ¶68. The justification for this

adjustment derives from Usman's neglected responsibilities to his own companies. Another 2 points were assessed because Usman testified in his own defense and was deemed to have thereby committed perjury. *Id*. at ¶69. The Total Offense Level was therefore 35 (6+18+2+1+4+2+2).

Usman's criminal history was twofold from Tarrant County state court: In 1998, he pleaded guilty and was placed on 12 months deferred adjudication probation for theft between $50-$500. *Id*. at ¶73. In 2007, Usman was placed on 3 years probation for a drunk driving incident near his home. *Id*. at ¶74. Because the federal convictions in the instant case occurred during the probationary period of the drunk driving incident, an additional two criminal history points were assessed pursuant to ¶4A1.1(d). *Id*. at ¶74. Four criminal history points yield a Criminal History Category of III. *Id*. For this reason, the two state court convictions (for petty theft and intoxication) formed a combined recidivism effect raising Usman's Guidelines range from 168-210 to 210-262 months.

Usman filed lengthy objections as to loss amount, role in the offense, mass marketing, leader/organizer, obstruction of justice, and abuse of position of trust. Doc. No. 160 ("Memorandum in Aid of Sentencing"). In a separate filing, Usman also challenged the part of his Criminal History score involving the 1998 petty theft conviction on the grounds that this conviction

was ordered non-disclosed under a relatively obscure Texas state procedure, TEX. GOV'T CODE § 411.081, similar to the relatively more familiar expunction mechanism of TEX. CODE CRIM. PROC. art. 55.01. Doc. No. 157("Objections and Reply to Presentence Report Addendum").

At sentencing, the district court overruled all of Usman's objections, RE.6.1972-1974, but nevertheless granted an opposed downward variance for 2 levels to alleviate part of the sentencing disparity between Usman and his co-defendants, Outen and McNac, both of whom were facing a maximum of 60 months' imprisonment. *Id*. at 1987-1988; Doc. No. 168, p. 3 (Statement of Reasons). Punishment was set at 5 years imprisonment on Count One and a 10 year consecutive sentence on Count 2. RE.3.476. Additional 10 year sentences were imposed on Counts 3-14 to run concurrently with the sentences on Counts One and Two, *id*., to be followed by a three-year period of supervised release. *Id*. at 478. In addition, a $1,400 special assessment was imposed augmented by restitution in the amount of $1,317,179.30. *Id*. at 480. Lastly, forfeiture was entered in the amount of $1,216,673,11, less a $100,506.19 sum that the Government has already acquired through the administrative forfeiture process. *Id*. at 482.

Amended Judgment was entered on October 15, 2010. RE.3. Usman timely filed his Notice of Appeal on October 19, 2010. RE.2. The court-

appointed trial lawyer moved to withdraw concomitant with the filing of the Notice of Appeal. R.485. On December 7, new counsel was appointed to prosecute the instant appeal. R.492.

STATEMENT OF THE FACTS

I. Background

Appellant Muhammed Nasiru Usman is a native of Nigeria who immigrated to the United States in 1989 and became a citizen in 1996. R.1801. This case centers on the operations of two ambulance companies owned by Usman, Royal Ambulance and First Choice EMS. Both companies specialized in the transportation of patients to and from dialysis treatment sessions. R.722. These businesses were formed in 2003 and 2005, respectively, yet grew so quickly that Usman was soon named "Who's Who Businessman of the Year named by the National Republican Committee." RE.6.1978.

II. Usman Places Operation Control in the Hands of Subordinates

The ascent of Usman's companies was especially remarkable because as a pharmacist by training in Nigeria, Mr. Usman entered this industry despite having no formal medical experience. R.1802-03. At their zenith,

these companies employed sixty emergency medical technicians. R.1867. As any business of this scale would necessarily require managerial oversight; Usman vested operation authority in different directors of operations.

One such director was a woman named Josie Horn, who also worked for a separate home health care facility within Usman's family of companies. R.1610-1611. Horn inveighed upon Usman to hire her brother, David McNac, into his organization. R.1611. From April 2004 until July 2007, McNac served as a director of Royal and First Choice. From 2004 to 2005, another man, Shaun Outen, served as director of operations for Royal; from May-November 2006, Outen served as director of operations for Royal and First Choice.

By all accounts, Usman placed an unusually high degree of trust and authority in Horn, McNac, and Outen, as well as the dozens of EMTs who operated his ambulances and facilitated patient transport. Usman's faith in his employees afforded substantial time away from the Royal and First Choice offices in which Usman tended to other businesses, such as Gloval & Associates, a home healthcare facility for mentally challenged children, R.1611, and Kash Auto Sales, an automobile export firm. R.67; 508; 535. In addition to his multi-faceted entrepreneurial endeavors, Usman regularly

travelled to Nigeria for family matters. One such family-related illness kept him in Nigeria for a period of three months. R.1806.

III. Run Sheets

The EMTs were responsible for completing a medical document referred to as a "run sheet" to memorialize pertinent information about each patient transport. R.700. A run sheet was generated for a patient's trip to the dialysis facility and another run sheet was generated for the return trip home. *Id.* So, for example, a dialysis patient who attends three dialysis sessions a week will generate six run reports for the week. The EMTs logged details about the patient for each trip, including a narrative portion describing the patient's condition and the method by which he or she was assisted or transported to the ambulance.

Unbeknownst to Usman, many of his companies' run sheets were false. Some run sheets suffered from the problem of "multiple loading" where more than one person was transported on the same ambulance trip. R.1372; 1771. Compounding this problem, these multiple transports were atomized so as to bill for multiplicitous trips. Other patients were ill, yet still sufficiently ambulatory so as to be unqualified for transportation by ambulance. R.1658.

Raw run sheets are not submitted to Medicare or Medicaid. To the contrary, run sheets are submitted to outside billing companies with whom Royal and First Choice had contracted. The billing companies purported to retain experts who would review the run sheets, translate the narrative into the appropriate Medicare/Medicaid code number for the qualified service performed, and submit the coded bills to Medicare/Medicaid for payment. Four different billing companies were hired for this purpose: Health Claims Plus, R.753-754, Experts Billing, R.1330-1331, Execumed, R.1381, and Medigain, R.1075. Some of these billing companies expressed concerns that the run sheets contained irregularities.

Usman and Outen had a falling out over the run sheets; thereafter Outen left Usman's employ. McNac later testified, "When [Outen] left the company [multiple patient transport] stopped." R.1588. Outen's personal conduct was offensive in other ways. McNac testified that Outen engaged in sexual relations with a woman from whom he was trying to elicit new business for the very purpose of furthering that effort. R.1552; 1553.

Nevertheless, Outen pled guilty early on in this prosecution. McNac pled guilty on the eve of trial, notwithstanding overt lies he had told investigators initially. R.1658-1659. Both Outen and McNac enjoyed the

benefits of plea deals with 5 years caps on imprisonment. RE.6.1975. By contrast, Usman received a 15 year sentence for going to trial.

SUMMARY OF THE ARGUMENT

I. WHEN A DEFENDANT KNOWS THAT THE AMOUNT HE WILL RECEIVE FROM CLAIMS PRESENTED TO MEDICARE/MEDICAID ARE CAPPED AND HE DOES NOT HAVE THE SUBJECTIVE INTENT TO CAUSE A GREATER LOSS, IT IS ERROR TO CALCULATE HIS LOSS AMOUNT BASED UPON THE AMOUNT OF THE CLAIMS SUBMITTED INSTEAD OF THE AMOUNT THAT HEKNOWS MEDICARE/MEDICAID WILL PAY

This Court has recently reversed and remanded a Medicare/Medicaid fraud case virtually identical to Usman's, instructing:

> We now explicitly apply this standard to the health care fraud context, adopting the approach taken by the Fourth Circuit in *United States v. Miller*, 316 F.3d 495 (4th Cir. 2003): the amount fraudulently billed to Medicare/Medicaid is 'prima facie evidence of the amount of loss [the defendant intended to cause,' but 'the amount billed does not constitute conclusive evidence of intended loss; the parties may introduce dditional evidence to suggest that the amount billed either exaggerates or understates the billing party's intent.'

United States v. Isiwele, 635 F.3d 196, 2011 U.S. App. LEXIS 4425, *16 (5th Cir. March 7, 2011).

Usman presented a distinct argument that his intended loss was only the $1.3 million "scheduled reimbursement amount" rather than the $3.6 million sum propounded in the PSR. Nevertheless, the district court stated at sentencing, "I am not sure what Mr. Usman was expecting to receive,

frankly." RE.6.1972. The district court also stated, "The Fifth Circuit has upheld using that figure as the amount of loss, so I think that is the proper amount of loss." *Id.* These statements are in unequivocal conflict with the holding in *Isiwele*, as well as the doctrinal cases upon which this most recent instruction from this Court was built.

II. A MASS-MARKETING ENHANCEMENT DOES NOT APPLY TO THE DISSEMINATION OF INK PENS AND MOUSE PADS

The victims of all of the alleged offenses in this case were Medicare and/or Medicaid. No "marketing" was directed at these two entities. Nevertheless, while printed advertisements or brochures have qualified as for the mass marketing enhancement, no case has ever extrapolated the concept as wide as pens and mousepads emblazoned with the company logo.

III. AN OWNER OF AN AMBULANCE SERVICE PROVIDER (WHO OPERATES NO SUCH VEHICLES OR PREPARES RUN SHEETS ABOUT THIS OPERATION HIMSELF) IS NOT IN A TRUST RELATIONSHIP WITH MEDICARE/MEDICAID FOR THE PURPOSE OF APPLYING AN ABUSE OF TRUST ENHANCEMENT UNDER U.S.S.G. §3B1.3

Usman raises this argument to preserve it for possible future review.

IV. USMAN'S SENTENCE WAS SUBSTANTIVELY UNREASONABLE

The 2-level downward variance to ameliorate sentencing disparity vis-à-vis his codefendants who entered pleas was not large enough to serve that purpose.

STANDARDS OF REVIEW

Sentencing Guidelines

"We review a district court's interpretation or application of the Guidelines *de novo* and its factual findings for clear error." *United States v. Conner*, 537 F.3d 480, 489 (5th Cir. 2008).

Intended Loss

In cases involving intended loss, "our case law requires the government prove by a preponderance of the evidence that the defendant had the subjective intent to cause the loss that is used to calculate his offense level." *United States v. Sanders,* 343 F.3d 511, 527 (5th Cir. 2003).

Procedural Error

This court first determines whether the district court committed any procedural error. *United States v. Delgado-Martinez*, 564 F.3d 750, 753 (5th Cir. 2009). Significant procedural errors are those such as failing to calculate the Guideline range correctly. *Id*.

Substantive Reasonableness

Substantive reasonableness review entails consideration of the totality of the circumstances surrounding the offense. *Gall v. United States*, 552 U.S. 38 (2007).

ARGUMENT

I. THE DISTRICT COURT'S INTENDED LOSS CALCULATION WAS FUNDAMENTALLY MISPOSITIONED SINCE THE SCHEDULED REIMBURSEMENT AMOUNT WAS HALF AS MUCH AND USMAN KNEW HE WOULD NEVER BE PAID THE FACIAL AMOUNT OF THE INVOICES

A. This Precise Argument Was Made In Objections to the PSR

Usman's sentencing memorandum argued:

> What the government and probation officer fail to consider is that unlike the government sting operation where the actor is unaware that his scheme will fail or is impossible or unlikely to occur, the culpable mental state of defendant Usman could only be that he *knew* that the billed amount would never be paid under any circumstances. Therefore, his *intended* loss was the amount that he believed would be fraudulently paid, *i.e.* the scheduled reimbursement amount.

Doc. No. 160, p. 2 (emphasis in original).

Usman further posited an alternative intended loss amount and expounded on the correlative effect it would have on his Guidelines range:

> Defendant Usman's objections to the loss figure of $3.6 million which was neither intended, expected or possible should be sustained and his argument that the figure should be no more than the $1.3 million actually paid and therefore lost under the fully understood reimbursement schedule should be used resulting in no more than a 16 level increase as opposed to an 18 level increase as proposed.

Id. at 4.

B. This Precise Argument Was Reiterated at the Sentencing Hearing

Usman recognizes that in *United States v. Ubak-Offiong,* 364 Fed. Appx. 859, 2010 WL 44408 *5 (5th Cir. Feb. 2, 2010) (unpublished), this Court found that the district court did not clearly err when determining the intended loss was the amount defendant billed Medicare where defendant presented no countervailing evidence showing some other figure was appropriate. However, *Ubak-Offiong* is entirely inapposite in this case because Usman not only offered the alternative $1.3 million amount quoted immediately above, Usman renewed this argument at his sentencing hearing:

> It is different in those cases I think where the impossibility of getting the intended loss is not a barred adding those points in those instances where the actor, the defendant, is unaware he is going to be unsuccessful. I think it should be abundantly clear that Mr. Usman, and everybody involved in this operation, were abundantly aware they are going to get the scheduled amount and nothing more. That is the argument on that.

RE.6.1962.

Both sets of Usman's arguments operationalized hornbook legal principles on intended loss:

> The impossibility or economic infeasibility of actually obtaining the sum sought or claimed by a defendant during a fraud may be relevant to assessing the defendant's subjective intent. For example, a defendant familiar with insurance billing practices may realize that actual payout will be only a specified fraction of the billed amount. In such case, the amount

> fraudulently billed would be evidence of the amount of loss intended, but might not necessarily be dispositive of the point.

Roger W. Haines, Jr., Frank O. Bowman, III, Jennifer C. Woll, *Federal Sentencing Guidelines Handbook,* pp. 368-39 (Thomson West 2008).

C. The District Court Acknowledged The "Nuance" of Usman's Argument But Overruled The Objection Based on Uncertainty About the Realization Rate on These Receivables

The District Court rejected Usman's argument based on expressed and acknowledged uncertainty about the expected realization rate:

> The amount of loss, and I appreciate your argument. The Fifth Circuit, of course, has upheld using the billed amount as the amount of the loss. **You have got a bit of a nuance on that in that he wasn't expecting to receive above the schedule.** I don't know that we have any testimony on that. **And I am not sure what Mr. Usman was expecting to receive, frankly.** I know he billed that amount, and the Guidelines do specifically allow for providing in the loss amount any intended pecuniary harm that was unlikely to be obtained, so I think the amount of loss is properly calculated by the Probation Office. The Fifth Circuit has upheld using that figure as the amount of loss, so I think that is the proper amount of loss.

RE.6.1972 (emphasis added).

D. Lack of Intent Pretermits Impossibility or Unlikeliness Under §2B1.1

Intended loss is defined in U.S.S.G. §2B1.1 comment 3(A)(ii):

> 'Intended loss' (I) means the pecuniary harm that was intended to result from the offense; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur

> (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

The word "and" is conjunctive. Without an intended loss amount, the impossibility or unlikelihood of payment is nugatory. The District Court itself acknowledged, "I am not sure what Mr. Usman was expecting to receive, frankly."

E. *Isiwele* Compels Reversal

A virtually identical situation necessitated reversal in *United States v. Isiwele*, 635 F.3d 196; 2011 U.S. App. LEXIS 4425 (5th Cir. March 7, 2011):

> A close reading of the record below leaves us uncertain as to what the district court understood the law to be. **There is some evidence in the record on the basis of which the court could have concluded that Isiwele intended to receive only the lower capped amount.** However, the determination of the factual predicate for Isiwele's sentence is best made by the district court in the first instance. We remand for resentencing on this issue consistent with the standard set forth above. The district court may take additional evidence if it deems it necessary.

Id. at *17 (emphasis added).

Not only did Usman adduce "some evidence" that he only intended to receive payment for half of the facial amounts of the invoices, he reiterated this argument on three different occasions. *See* Part I.A-B, *supra*. Moreover, the District Court was clear that, "I am not sure what Mr. Usman

was expecting to receive, frankly." RE.6.1972. This situation cries out for the taking of "additional evidence" even more loudly than did that necessitating reversal in *Isiwele*. *Accord United States v. Fallah*, 2008 WL 5102281, *1 (S.D. Tex. 2008) ("the amount of loss is properly measured by what Medicare or Medicaid either allowed or paid, as opposed to the larger billed amount." (Rosenthal, J.).

II. THE DISTRICT COURT ERRED IN APPLYING THE MASS MARKETING ENHANCEMENT

A. Pens and Mouse Pads

The PSR justified a two-level enhancement, pursuant to U.S.S.G. § 2B1.1(b)(2)(A)(ii) for an offense "committed through mass marketing" as follows: "During the solicitation of the facility, the supervisor would have face-to-face meetings with the facility representative, and would leave ink pens or mouse pads which displayed the company's logo as advertisement." Doc. No. 129; ¶64.

B. The 'Facilities' At Issue Were Not Victims

Although the facilities visited by McNac and Outen were not victims, Usman recognizes that this Court rejected a similar 'targeting' argument in *Isiwele*. 2011 U.S. App. LEXIS, at *20-21.

C. Usman Was Not Present for Dissemination of the Pens and Mouse Pads

Usman also recognizes that although McNac testified that Usman did not join in attendance on any marketing ventures, R.1621[5], a defendant need not have actively participated in mass marketing techniques to receive the enhancement. *United States v. Mauskar*, 557 F.3d 219 (5th Cir. 2009).

D. Promotional Items Are Far Removed from Brochures Or Advertisements

Usman also recognizes that placing ads in a newspaper, *United States v. Magnuson*, 307 F.3d 333 (5th Cir. 2002), or using printed advertisements and brochures, *United States v. Deming*, 269 F.3d 107 (2d Cir. 2001), to solicit potential victims constitutes mass marketing.

However, pens and mouse pads are not at all analogous to these other forms of advertising. Printed advertisements or brochures impart details (specifics or generalities) about the goods or services a company produces. By contrast, a simple logo is impacted with no such product specifics.

III. THE DISTRICT COURT ERRED IN APPLYING THE ABUSE OF TRUST ENHANCEMENT

Usman acknowledges that this Court has held that a medical services provider does, in fact, have a "trust" relationship with Medicare/Medicaid

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[5] Q: Mr. Usman didn't go on these ventures did he, sir?
A: No, Mr. Usman did not.

and qualifies for an "abuse of trust" enhancement if he or she is convicted of submitting false claims to Medicare/Medicaid. *United States v. Miller*, 607 F.3d 144, 148-50 (5th Cir. 2010). Still, opinions from other circuits are to the contrary. *See, e.g., United States v. Williams*, 527 F.3d 1235, 1251 (11th Cir. 2008). *Cf. United States v. Hayes*, 574 F.3d 460, 478-81 (8th Cir. 2009).

Recognizing that, absent an intervening Supreme Court decision, one panel of this Court cannot overrule another, Usman raises this issue on appeal to preserve it for en banc and/or Supreme Court review. *Accord Isiwele*, at *22-23 (recognizing same).

IV. SUBSTANTIVE REASONABLENESS

In light of the Guidelines errors detailed above, this Court should not need to analyze Usman's sentence for substantive reasonableness. "[A] sentence would not be 'reasonable,' regardless of length, if legal errors, properly to be considered on appeal, led to its imposition." *United States v. Crosby,* 397 F.3d 103, 114 (2d Cir. 2005); *United States v. Delgado-Martinez*, 564 F.3d 750, 753 (5th Cir. 2009) ("If a procedural error is significant, *i.e.,* not harmless, it usually requires reversal.").

If, however, this Court finds no procedural error, reversal is still warranted because of the insufficiency of the downward variance afforded. Even after the 2-level decrease predicated under 3553(a)(6), Usman still

received a sentence at least 300% higher than those meted out to his codefendants. McNac testified that Outen engaged in sexual relations with a woman from whom he was trying to elicit new business for the very purpose of furthering that effort. R.1552; 1553. No trial testimony ascribed to Usman such venality. For these reasons, a greater downward variance is necessary.

CONCLUSION

Usman's sentences must be vacated and remanded for resentencing. Even if this Court only found in Usman's favor on the loss determination, prevailing on same would have reduced his enhancement from 18 to 16 levels. However, this reduction is not rendered nugatory by the fact that the district court afforded a 2-level variance. The Statement of Reasons was clear that such was granted to mitigate the sentencing disparity between Usman (15 years) and his codefendants who were, at the time, facing 5-year maximums. There is every reason to think that the district court would employ the same variance rationale (and percentage decrease) but starting from a lower point of embarkation so as to decrease the aggregate sentence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 4,279 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).
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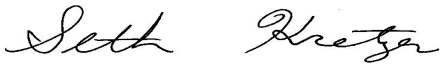

Date: May 11, 2011

Seth H. Kretzer

CERTIFICATE OF SERVICE

I certify that the Brief of Appellant was filed with the Court by U.S. Mail, and in electronic format through the ECF system, on the 11th day of May, 2011. An electronic copy of the brief was served on counsel of record through the E.C.F. system, on the same date.

Seth H. Kretzer

CERTIFICATE OF SERVICE

I certify that one copy of the Brief of Appellant was served on Muhammed Usman, Register No. 38671-177, on the 11th day of May, 2011, at the address listed below, by U.S. Mail:

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