No. 03-14099-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOHN F. TRIPLETT,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

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CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

In addition to those named in the Rule 26.1 Statement filed by the appellant, the following government attorneys have participated in this case in the district court and in this Court:

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STATEMENT REGARDING ORAL ARGUMENT

Appellee believes that oral argument may be helpful to the Court.

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STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 18 U.S.C. §3231. This Court has jurisdiction pursuant to 28 U.S.C. §1291 and 18 U.S.C. §3742(a).

STATEMENT OF ISSUES

l. Whether the district court clearly erred in enhancing defendant's sentence for abuse of trust.

2. Whether the district court clearly erred in enhancing defendant's sentence four levels as a leader/organizer of an activity involving five or more participants.

3. Whether the district court clearly erred in calculating the loss and ordering restitution.

4. Whether the district court clearly erred in including relevant conduct in the offense level.

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6. Whether there was a constructive amendment of the indictment.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS

On November 20, 2002, defendant John F. Triplett was indicted on one count of violating 18 U.S.C. §371 for conspiring to violate the mail fraud and wire

fraud statutes (18 U.S.C. §§1341, 1343, and 1346). The indictment charged that Triplett, as Senior Project Manager in the parts department of the Henry Pratt Company (Pratt), conspired to: (a) defraud Pratt; (b) obtain money from Pratt by means of false and fraudulent pretenses, representations, and promises; and (c) deprive Pratt of its right to Triplett's honest services. Triplett carried out the scheme by, among other things, concealing the true source of certain surplus equipment he arranged for Pratt to purchase, and by concealing the fact that he was receiving substantial kickbacks on those purchases. R1:4.[1]

On April 18, 2003, a jury convicted Triplett on all charges. R90.

On July 31, 2003, the district court sentenced him to 51 months in prison and a $10,000 fine, and ordered restitution in the amount of $86,512.02. R107.

Triplett filed a notice of appeal on August 7, 2003. R108. He did not seek bail pending appeal, and began serving his sentence on October 20, 2003.

B. STATEMENT OF FACTS

l. Background

Pratt manufactures valves used in water and wastewater treatment plants and nuclear power plants. R116:3. Nuclear valves are made to exacting specifications

[1] All cites are to the docket number in the clerk's record, followed by the page number(s).

set by the American Society of Mechanical Engineers (ASME), and all valves must be certified as complying with those specifications before they can be placed in use. R116:21-23.[2] Every nuclear valve made by Pratt has a unique serial number that is maintained by Pratt. Pratt also maintains records about the valve's "pedigree" (materials used and other information about the valve's manufacture and testing), and the plant where it is to be used. R116:23-25, 87-89; R123:165.

When a nuclear power plant needs to replace a Pratt valve, it can only use a Pratt valve that is of the same type as the original. The customer can have Pratt manufacture a new valve, which takes 42 to 52 weeks, or it can have Pratt refurbish, retest, and re-certify a surplus valve – a process that takes only four to eight weeks. Since time is often of the essence, power plant customers regularly order refurbished valves for replacement. This is done through Pratt's parts department. R116:5-6, 23-27, 73, 89-91; R124:390.

Pratt does not maintain an inventory of new replacement nuclear valves because there is limited demand for them. Nor does it maintain an inventory of surplus valves. Rather, surplus valves and valve parts are purchased when needed to meet a particular customer's requirements. R116:25-28; R124:388-90. As a

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[2] Nuclear valves control the flow of water in the cooling towers. They range in size from three inches in diameter, weighing 300-400 pounds, to 48 inches in diameter, weighing up to four tons or more. R116: 28.

practical matter, only Pratt can rebuild and recertify its own valves, and surplus Pratt valves are of no use to anyone but Pratt and its customers. R116:27-28, 32-33, 89; R124:412-13.

Triplett worked for Pratt for 30 years until his retirement on December 31, 1997. R116:6, 20. During the time covered by the indictment, Triplett was the Senior Project Manager in the parts department, reporting directly to the head of the department, Nick Polito. R116:7. Triplett was Pratt's expert on nuclear valves and related equipment, and he handled virtually all customer requests for such materials. R116:8, 23-24, 30; R124:384-86. Thus, Triplett was generally the first Pratt employee to learn that a nuclear power plant needed a replacement valve. R116:49; R124:386-87. Once Triplett found out that a nuclear plant needed a replacement valve, he had the responsibility to locate a surplus valve and obtain it at the lowest possible price. R116:32-33, 102; R123:113, 124-29. Triplett then would develop a "cost proposal," which recommended (l) a buying price and a supplier, and (2), a selling price (which included a gross profit margin) to the customer, that reflected the cost of the valve and other materials, and the cost to refurbish and recertify the valve. Although the cost proposal needed the approval of Polito and others at Pratt, Triplett's purchasing and pricing recommendations were routinely adopted because his superiors relied on his experience and

judgment. R116:33, 37-39, 93-4, 113-14 (Polito never once questioned the reasonableness of Triplett's price recommendations); also R124:382-84.

Pratt's targeted gross profit margins on nuclear products was 75% to 85%,[3] but it did not always achieve those levels because of market constraints. R116:74-75, 94-95, 116; R124:412. With respect to the valves involved in this case, Triplett's buying decisions and resulting cost recommendations yielded profit margins that fell far short of target levels. R116:106-18; GX 35, 37 (gross profit margin of 24.24%).[4]

As an employee of Pratt, Triplett was subject to the company's standards of conduct which prohibited employees from giving or receiving bribes, kickbacks or any other payments in exchange for purchasing decisions; prohibited employees from having relationships with suppliers that appeared to have or could cause a conflict of interest; and prohibited employees from personally profiting from a

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[3] Pratt incurred much larger overhead costs in manufacturing nuclear products and its target gross profit margins were significantly higher on those products as a result. R116:116-17.

[4] For example, Triplett and his co-conspirators charged Pratt $14,000 for a valve that Pratt then refurbished for an additional cost of $4,597.71. Pratt sold the valve to Duke Power Company for $24,550, yielding what was, for Pratt, an "extremely low" gross profit of 24.24%. R116:106-118; R123:163. Had Pratt purchased the valve at what the evidence showed to be a reasonable price of $1,000, Pratt would have saved $13,000 in costs and obtained a gross profit of 77.2% on the $24,550 sales price. R116:114-115; GX 37.

business opportunity. GX 28 at 3-6, 8-9. Triplett signed a certification that he was aware of and in compliance with these standards of conduct. GX 27. Triplett admitted at trial, however, that he knowingly violated these standards in the course of his employment by engaging in the acts charged in this conspiracy. R124:451-62.

2. The Conspiracy

Pumps, Valves & Equipment, Inc. d/b/a/ The Scruggs Company (Scruggs), owned and operated by Jimmy and Edwin (Ted) Scruggs, sold pumps, valves, and other water-related equipment in Texas. R123:139-41. Scruggs had been a commissioned sales representative and distributor of Pratt water and waste water treatment valves and products in Texas for many years. R116:57-59; R123:141-44.

Jimmy Scruggs had known Triplett for 30 years through his dealings with Pratt. Some time prior to January 1996, a representative of J & R Valve Products (J & R), a Texas company dealing in surplus valves, called Jimmy Scruggs to see if he would be interested in purchasing in excess of 100 surplus butterfly valves, which J & R had purchased at auction and valued at a million dollars, but was willing to sell for $250,000. R123:147-49; GX 105. When Jimmy Scruggs reviewed the list of valves, however, he realized they were nuclear valves

manufactured by Pratt. He then told J & R he was not interested because there were no nuclear power plants in Scruggs' Texas territory that used Pratt valves, and only Pratt or one of its nuclear power plant customers would have a use for such valves. R123:148-49, 207-08.

A few months later, however, Triplett told Jimmy Scruggs he was looking for a certain type of Pratt nuclear valve. Jimmy Scruggs remembered the list of valves he had received from J & R and let Triplett know what was on it. R123:149-50. Triplett told Jimmy they had "got a gold mine." R123:151. Triplett explained that the materials to make the original valves could not be purchased anymore and if a nuclear plant needed a valve in a hurry they could use these surplus valves, after having them recertified. R123:151-152. Jimmy told Triplett that J & R had indicated that the price for the valves was negotiable, and Triplett told Jimmy to see if they would take $10,000 to $12,000 for the lot. R123:152. Triplett offered to pay half. R123:153. Eventually they negotiated a price of $17,500 for the 100 or so valves in question. R123:153-54. Triplett told Jimmy Scruggs to take Triplett's half of the purchase price out of his profits on the subsequent sales. R123:157. Originally, they anticipated that they would sell the valves directly to Pratt's power plant customers who would then send the valves to Pratt to be refurbished. But Triplett later told Jimmy that the power plants did not

want to go through the process of setting up another authorized vendor (which could take weeks or months), so Triplett and Jimmy Scruggs agreed they would sell the valves to Pratt for resale to the power plants. R123:157-58; R121:8.

Triplett and Scruggs knew, however, that Pratt would not be willing to buy the valves from Scruggs. R123:158-160, 236-41; R124:403.[5] If Nick Polito, Triplett's boss, had known that Scruggs was the source of the valves, he would have wanted to find out from Jimmy Scruggs why he was selling the valves in the first place, and, knowing that Scruggs would have no other use for the valves except to sell them to Pratt, Polito would have been in the driver's seat to bargain down the price. R116:61-64.

Triplett and Scruggs did not tell Pratt that Triplett himself was part owner of the valves and would be receiving half the profits of the sales, because then they never would have been able to execute the scheme. R116:60; R123:176; R124:413. Indeed, Triplett knew that if Polito was aware of his involvement in these sales, he would probably have been fired. R116:60; R124:413, 461.

Triplett told Jimmy Scruggs to try to find a company that would front for

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[5] Scruggs was a Pratt distributor, as well as a commissioned agent. For a period of time, Pratt had suspended Scruggs as a commissioned agent (although Scruggs remained a distributor). Scruggs was reinstated as a commissioned agent in 1996. R123:141-44, 204-206; R116:58. Triplett and Jimmy Scruggs believed that some people at Pratt did not like Scruggs. R123:158; R124:403.

Scruggs by shipping the valves to Pratt and putting its name on the invoices. R123: 158-61, 236; R124:403. Jimmy's brother and partner, Edwin (Ted) Scruggs, then got in touch with his neighbor, Christopher Mealey. Mealy owned a business called Eurotech Industries, Inc. (Eurotech) that made machine parts. R117:2-3; R123:237-40. Ted explained to Mealy that Pratt would not deal with Scruggs directly and that they would get a better price for the valves if they were sold in Eurotech's name. R117:7-10; R123:240-41. Mealey agreed to ship and invoice the valves through Eurotech in exchange for five percent of the selling price. R123:161-162, 236-240; R117:7-10.

Triplett and Scruggs purchased the valves from J & R at an average price of $175. R123:163; GX 101. They then went over the list, valve by valve, and Triplett told Jimmy Scruggs what prices to charge Pratt for each item on the list. These prices ranged from $3400 for a 6" valve to $16,000 for a 24" valve. GX 105. Eventually 40 of these valves were sold to Pratt through Eurotech for a total price of $216,755. R123:165-66, 169; GX 9-25, 301.

Each time Triplett found a Pratt customer for one of the valves, he would notify Jimmy Scruggs who in turn would notify Pam Wayhan, who ran the office at Eurotech and had been apprised of the scheme (R118:3-4; R117:10-11), that a purchase order from Pratt would be forthcoming. Jimmy Scruggs would provide

Eurotech with the serial number of the valve to be shipped and the invoice price that Triplett and Scruggs had worked out. Pam Wayhan then prepared the invoice and arranged for the shipment. R123:166-75; R117:10-12; R118: 5-6; R124:405-06.

On each sale, Eurotech retained five percent of the selling price and remitted the remainder to Scruggs. R123:173; R118:8-12. Elaine Scruggs, the mother of Jimmy and Ted, and the bookkeeper for Scruggs, then transferred Triplett's half of those profits by wire from the Scruggs' bank in Texas to Triplett's bank in Illinois and, after Triplett moved to Georgia in 1998, to his bank in Georgia by wire and check. R123:176-86; GX 140, 141. Eurotech's profits on these sales totaled approximately $10,000. R117:12. Scruggs and Triplett received over $100,000 each. R118:12; R123:177-79; GX 140, 516.

In addition to these sales through Eurotech, there were occasions when Triplett learned from a Pratt customer that it needed a valve or part, and then arranged with Scruggs to sell the item directly to the customer, depriving Pratt of the sale and dividing between Triplett and Scruggs the profits that should have gone to Pratt. R123:186-192; GX 142 (sale of 84" Pratt butterfly valve to Carolina Power and Light for $35,000); GX 144, 145 (sale of "actuator"[6] purchased from J

[6] The "actuator" opens and closes the valve. R124:388.

& R valve for $150, and sold to City of Ft. Lauderdale for $3,045).

To refute Triplett's primary, indeed sole, defense that he did not "intend" to defraud Pratt, the government showed that Triplett had engaged in similar kickback schemes with other suppliers between 1994 and 1998. Triplett arranged with Jimmy Matheson of H * E Engineered Equipment Co. (H * E) to have H * E buy three valves for $1,500 each, which they later sold to Pratt for $13,500 each. Triplett received $17,250 from Matheson out of the profits. R124:303-305; GX 359. Matheson said that if Triplett were not getting half the profits, H * E would have sold the valves to Pratt for less. R124:306. Triplett also gave Kathy Cain of Environmental Consulting, Inc. (ECI) information as to where she could purchase a surplus valve and told her to offer $1,000 for it. R124:318, 323-24. Triplett then had Pratt buy the same $1,000 valve from ECI for $16,500, getting half the profit ($7,500) from Cain's employer as a kickback. R124:323, 367-68 (Triplett admitted scheming with ECI and admitted that if his superiors at Pratt knew ECI had paid $1,000 for the valve that is all Pratt would have paid); R124:420. And Triplett was paid a total of $21,400 by Industrial Valve Sales & Service, Inc. (IV) on sales that IV made to Pratt pursuant to Triplett's purchasing recommendations. R124:352-53; GX 260.

On other occasions, Triplett offered to reduce the price of Pratt parts to a

customer in exchange for receiving half the reduction as a kickback. R124:293-301; R124:420-21 (Triplett admitted such kickbacks); GX 356 (Triplett was paid $9,925.70 for reducing price on 16 "operators"[7] sold to H * E, and for a surplus Pratt ball valve sold to a Pratt customer by H * E at Triplett's direction); R124:318-19, 325-326; GX 407 (Triplett received $25,969 for the "discounts" he gave on the sale of Pratt parts to ECI and for the sale of a surplus valve back to Pratt); R124:458 (Triplett admitted receiving over $25,000 in kickbacks from Cain). Triplett sometimes even sent bills to these co-conspirators itemizing the money they owed him for these kickbacks; but he cautioned them to send the payments to his home rather than his business. R124:298-99, 320-22; GX 354, 408-09.

In finding Triplett guilty, the jury returned a special verdict form indicating they unanimously agreed that the government had proved all of the allegations in the indictment: that Triplett had conspired, through the use of both the U.S. mail and interstate wire transmissions, to defraud Pratt, to obtain money from Pratt by false and fraudulent representations, and to deprive Pratt of Triplett's honest services. R90.

SUMMARY OF ARGUMENT

[7] An "operator" is the same as an actuator. See supra note 6; R124:294.

Triplett did not dispute any of the relevant facts at trial. He admitted that he knowingly violated company standards of conduct by taking kickbacks on sales, and by divulging confidential company information to outsiders. He also admitted he had a conflict of interest by participating with Scruggs in the sale of valves to Pratt, and failing to divulge the fact that he and Scruggs were partners in the sales. Nor did Triplett dispute the amount – over $100,000 – that he received as a result of these schemes. His only purported defense was the false factual claim that Pratt did not suffer any "economic harm" because Pratt made a profit on each refurbished surplus valve it sold. The jury rightly rejected this defense. The court properly took the kickbacks received by Triplett and his co-conspirators into account in calculating Triplett's offense level under USSG §2F1.1. And, because Pratt lost almost $200,000 in profits that went into the pockets of Triplett and his co-conspirators, the court properly ordered restitution.

An abuse of trust enhancement was proper because Triplett admitted that he had abused Pratt's trust, and abuse of trust is not otherwise included in the offense level for fraud under USSG §2F1.1. The enhancement for role in the offense was required because the conspiracy involved five or more participants, including the two employees of Eurotech who, knowing of the conspiracy's objective to defraud Pratt of money by deceiving it as to the source of the valves, acted to further it.

The district court did not clearly err in counting as relevant conduct for purposes of sentencing similar kickback schemes that Triplett engaged in with other suppliers of Pratt valves that took place immediately before and during the time of the charged offense. The obstruction of justice enhancement was required because Triplett admitted at trial that he had destroyed evidence of his secret agreement with Jimmy Scruggs after learning that the FBI was investigating his kickback activities, and because the district court's findings that Triplett attempted to influence the testimony of potential witnesses about these dealings were not clearly erroneous.

There was no constructive amendment of the indictment because the evidence at trial relating to Pratt's lost profits and Scruggs' costs was used to prove the charges in the indictment that Triplett defrauded Pratt of money and his honest services.

ARGUMENT

STANDARD OF REVIEW

Decisions on sentence enhancements are reviewed for clear error. United States v. Poirier, 321 F.3d 1024, 1035-36 (11th Cir. 2003) (obstruction of justice and aggravating role enhancements); United States v. Blanc, 146 F.3d 847, 851 (11th Cir. 1998) (relevant conduct).

The calculation of loss under United States Sentencing Commission, Guidelines Manual, §2F1.1 (Nov. 1997) "is a factual determination that [is reviewed] for clear error." United States v. Yeager, 331 F.3d 1216, 1224 (11th Cir. 2003). An order of restitution is reviewed for abuse of discretion, "but the legality of that order is reviewed de novo." Yeager, 331 F.3d at 1227 (citation omitted).

"In evaluating whether the indictment was constructively amended [this Court] review[s] the district court's jury instructions and the prosecutor's summation 'in context' to determine whether an expansion of the indictment occurred either literally or in effect." United States v. Castro, 89 F.3d 1443, 1450, 1453 (11th Cir. 1996) (citation omitted). Where the defendant did not object at trial to the court's charge or the prosecutor's comments, the Court reviews the record under a "plain error" standard. United States. v. Rutherford, 175 F.3d 899, 906 (11th Cir. 1999); United States v. Andrews, 850 F.2d 1557, 1559 (11th Cir. 1988).

I THE DISTRICT COURT PROPERLY APPLIED A TWO-LEVEL ENHANCEMENT FOR ABUSE OF TRUST

Triplett claims that the court improperly applied a two-level enhancement under USSG §3B1.3 because abuse of trust was included in the base offense level, or as a specific offense characteristic of, the "honest services" fraud of which he was convicted. Def. Br. 9-11. But the six-question special jury verdict confirms that Triplett was convicted of conspiring to use the mails and interstate wires to defraud his employer, and to obtain money from his employer by false and fraudulent pretenses, in addition to depriving his employer of his honest services. Because Triplett does not claim that abuse of trust is included in the base offense level for schemes to defraud and obtaining money by false and fraudulent pretenses, the abuse of trust enhancement was properly applied for that fraud.

Moreover, the sentencing guidelines and cases on which Triplett relies also plainly show that an abuse of trust enhancement was properly applied even if Triplett had only been convicted of "honest services" fraud. USSG §3B1.3[8] requires a two-level sentence enhancement when "the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense." The adjustment "may

[8] The 1997 Guidelines were used in sentencing.

not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic." In this case, the enhancement was appropriate because (1) Triplett abused a position of trust "in a manner that significantly facilitated the commission or concealment of the offense," and (2) abuse of trust is not "included in the base offense level or specific offense characteristic" for fraud.

A. Triplett held a position of trust with Henry Pratt and abused that trust "in a manner that significantly facilitated the commission . . . of the offense." USSG §3B1.3. A 30-year veteran employee, Triplett was considered by Pratt to be its expert on nuclear valves, a highly regulated and unique product. He was generally the first to learn of a customer's need for surplus valves and, because Pratt trusted him, Triplett had the responsibility to secure the appropriate valves at the lowest cost. He knew he was prohibited from taking kickbacks: indeed, because of his special position of authority and trust, he was one of a limited number of Pratt employees required to sign an affidavit saying he had not taken kickbacks. GX 27, 28, see supra pp. 5-6.

Triplett, however, used the proprietary customer information he obtained from his job as Pratt's nuclear expert to orchestrate purchases by Pratt from his co-conspirators who paid him kickbacks, knowing that his recommendations as to cost

and supplier would be adopted by his supervisors virtually without question.[9] And he deliberately concealed from Pratt his interest in the sale of surplus valves to Pratt. Thus, Triplett abused his position of trust to effectuate a scheme that would not have been possible in the absence of his position and Pratt's trust. And in signing an affidavit denying that he received any kickbacks on these sales, he helped ensure that his scheme would go undetected. As this Court held in United States v. Liss, 265 F.3d 1220, 1229 (11th Cir. 2001), an abuse of trust enhancement properly applies if (l) the defendant is in a "position of trust with respect to the victim of the crime," and (2) the position of trust "contributed in some significant way to facilitating the commission or concealment of the offense" (relying on United States v. Garrison, 133 F.3d 831, 837 (11th Cir. 1998)). "Significant facilitation" means that "the person in the position of trust has an advantage in committing the crime because of that trust and uses that advantage in order to commit the crime." United States v. Barakat, 130 F.3d 1448, 1455 (11th Cir. 1997).

These factors were clearly present here, as they were in United States v.

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[9] That Triplett did not have final decision making authority is not determinative on the question whether he had a position of trust and abused it. Poirier, 321 F.3d at 1033. He did exercise "substantial discretionary judgment that [wa]s ordinarily given considerable deference." USSG §3B1.3 comment. (n.1).

Poirier, 321 F.3d 1024 (11th Cir. 2003). In that case, defendants were convicted of corrupting the process by which Fulton County selected an underwriter for a bond refunding project by bribing the County's financial advisor to help ensure the award of the underwriting contract. The Court held that, since the defendant financial advisor was "hired to serve as a fair and unbiased . . . advisor," and the victim "put him in a position to do that," "[w]ith that position came . . . trust, and [defendant] clearly abused it." The abuse of trust enhancement was therefore warranted. Id. at 1033.[10]

In contrast to Poirier, the cases on which Triplett relies – Garrison and United States v. Broderson, 67 F.3d 452 (2d Cir. 1995) – do not involve a defendant who occupied a position of trust with respect to the victim. Garrison, 133 F.3d at 837 (Garrison was a home care nursing provider that defrauded Medicare); Broderson, 67 F.3d at 456 (Broderson was a Grumman Data Systems Corp. executive who submitted false documents to the government). Garrison

[10] In the district court, Triplett claimed that Poirier was distinguishable because in Poirier the jury had not reached a verdict as to whether defendants had deprived their employers of the "right to honest services," having convicted only for "money or property" fraud. This attempt to distinguish Poirier is unavailing, however, because the availability of §3B1.3 depends not on the elements of the offense of conviction but on whether abuse of trust is already taken into account in the relevant guideline, here §2F1.1. The offense level for fraud is calculated the same way for honest services fraud as it is for money and property fraud.

stated, however, that §3B1.3 would properly be applied "where the defendant steals from his employer, using his position in the company to facilitate the offense," or "where a 'fiduciary or personal trust relationship exists' . . . and the defendant takes advantage of the relationship to perpetrate or conceal the offense." 133 F.3d at 837-38 (citations omitted); also 133 F.3d at 839 (abuse of trust enhancement applies "where the *defendant has abused discretionary authority entrusted to the defendant by the victim,*" distinguishing "arm's-length business relationships" (emphasis in original), citing United States v. Jolly, 102 F.3d 46, 48 (2d Cir. 1996)); accord, Broderson, 67 F.3d at 456 (abuse of trust would be warranted if the defendant had accepted bribes to defraud his employer).[11] That is exactly what Triplett did in this case. Accordingly, the district court correctly applied the abuse of trust enhancement.

B. Triplett is also wrong in claiming that an abuse of trust is included in the base offense level or specific offense characteristic for his honest services fraud. Def. Br. 9. In United States v. Buck, 324 F.3d 786, 792-793 (5th Cir. 2003), the Fifth Circuit explained that the fraud guidelines set the offense level for a "breach"

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[11] As the Fifth Circuit pointed out in United States v. Buck, 324 F.3d 786, 793 & n.13 (5th Cir. 2003), both this Circuit and the Second Circuit have affirmed abuse of trust enhancements for fraud convictions in cases decided after Broderson, and Garrison, citing Liss.

of a duty of honest service, but do not take into consideration the more serious offense considered in §3B1.3 which is an "abuse" of that duty to effectuate or conceal a crime. Thus, the courts distinguish between a "breach of trust" and an "abuse of trust, which requires more egregious conduct." 324 F.3d at 792-93.

Moreover, the fallacy of Triplett's claim is evident by comparing the fraud guidelines in Chapter Two, Part F, under which Triplett was sentenced, to numerous other offenses in Chapter Two that specifically contain the proviso: "Do not apply § 3B1.3" -- because abuse of trust has already been considered in formulating the offense level for those crimes.[12] Thus, when the Sentencing Commission meant to exclude application of §3B1.3 for a particular offense, it knew how to say so. No similar prohibition against application of §3B1.3 exists for any §2F1.1 offenses, and for good reason: §2F1.1 offenses do not take abuse of trust into account in calculating the base level.

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[12] See Application Note 3 to §§2A3.1(b)(3), 2A3.2(b)(1); Note 4 to §2A3.4(b)(3) (sex offenses involving a defendant who is victim's custodian or care giver); Note 3 to §2C1.1 (bribery involving public official); Note 1 to §2C1.5 (payments to obtain public office); Note 4 to §2C1.7 (frauds by public officials); Note 5 to §2E5.1(b)(1) (bribes involving employee welfare or pension plans); Note 1 to §2F1.2 (insider trading offenses); Note 6 to §2G1.1(b)(3) and Note 3 to §2G2.1(b)(2) (promotion of prostitution or sexual exploitation by a parent or guardian); Note 5 to §2H1.1(b)(1) (civil rights violation by a public official); and Note 3 to §2P1.1(b)(4) (assistance by law enforcement official in escape from a correctional institution).

Thus, the critical question is not whether the defendant's conduct in committing "honest services fraud" is the same conduct on which an abuse of trust enhancement is based (Def. Br. 11), but, rather, whether that conduct contains the aggravating factors – the use of a position of trust to facilitate or conceal the commission of a crime – that warrant a §3B1.3 enhancement. Here the aggravating factors were present and the district court correctly applied an abuse of trust enhancement.

II THE DISTRICT COURT PROPERLY APPLIED A FOUR-LEVEL ENHANCEMENT FOR TRIPLETT'S ROLE IN THE OFFENSE

The district court properly applied a four-level enhancement under USSG §3B1.1(a) because Triplett was both the organizer and leader of a criminal activity that involved five or more participants. R121: 19. The district court's finding that the conspiracy involved more than five participants – Jimmy and Ted Scruggs, their mother Elaine Scruggs (the Scruggs bookkeeper who processed all of the paperwork involved in the fraudulent transactions, had the bank make wire transfers to Triplett's account, and mailed a kickback check to Triplett), Chris Mealey and Pam Wayhan of Eurotech, and Triplett himself (R121:19) – is not clearly erroneous.[13]

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[13] Alternatively, the government had argued that a four-level enhancement was required because Triplett was an organizer or leader of a criminal activity that

Triplett does not deny his role as leader or organizer: he originated the scheme, he recruited the Scruggs company and directed Jimmy Scruggs to find a front company to sell the parts to Pratt at the significantly inflated prices that he determined; he also initiated related schemes to buy and sell parts to Pratt or Pratt customers that deprived Pratt of profits and yielded Triplett kickbacks on those sales.

Indeed, Triplett only challenges the inclusion of Mealey and Wayhan. He claims that they cannot be counted as participants because they "denied all criminal culpability," they did not know that a Pratt employee was receiving kickbacks as part of the scheme, and they could not be held to have knowledge that they were aiding a scheme to deprive Pratt of money or property. Def. Br. 13-14. These claims are false and/or legally irrelevant.

First, neither Mealey nor Wayhan "denied all criminal culpability."[14] Indeed, Mealey pleaded Eurotech guilty to the charged conspiracy of defrauding Pratt, understanding that his company was guilty of a crime, and that it could be

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was "otherwise extensive." USSG §3B1.1(a). Because the court found "five or more participants," it did not reach this alternative ground.

[14] Mealey and Wayhan testified on cross-examination that, at the time of the activity, they did not know they were committing any crime. R117:18-19; R118:17. Ignorance of the law, however, is not a defense to criminal liability.

assessed a sizeable fine and ordered to pay restitution. R117:13-14, 21; GX 550. Mealey and Wayhan were both testifying pursuant to Eurotech's plea agreement. R117:14; R118:16; GX 550.

Second, whether or not they knew of Triplett's involvement in the scheme is irrelevant. Mealey and Wayhan knew of the scheme to defraud Pratt and knowingly acted to further it. That is all that is necessary to hold a participant liable for conspiracy under 18 U.S.C. §371. "[A] common scheme or plan may be inferred from the conduct of the participants or from other circumstances. The government is not required to prove that a defendant knew every detail or that he participated in every stage of the conspiracy." United States v. Diaz, 190 F.3d 1247, 1254 (11th Cir. 1999). "A [person] may be found guilty of conspiracy if the evidence demonstrates that he knew the 'essential objective' of the conspiracy, even if he did not know all its details or played only a minor role in the overall scheme." United States v. Guerra, 293 F.3d 1279, 1285 (11th Cir. 2002).

Mealey and Wayhan knew the essential objective of the conspiracy – to disguise the true source of the valves so that Pratt would pay higher prices. They knew that Scruggs was a Pratt distributor, that Scruggs wanted Eurotech to front the sales of the valves actually owned by Scruggs by shipping them to Pratt and billing them in Eurotech's name. R117:7-10. Mealey agreed to participate in the

scheme and, with the help of his sister-in-law, Pam Wayhan, who "ran the office [] did the paperwork, accounts payable, receivable . . . everything," they carried it out. R117:11; R118:3. Mealey told Wayhan they would be receiving valves from Scruggs that would be shipped to Pratt and invoiced in Eurotech's name. Wayhan knew that the valves did not belong to Eurotech but that they were simply doing "a favor" for Scruggs, for which they retained five percent of the sales price before forwarding Pratt's payments to Scruggs. R118:4-8. Scruggs told Wayhan what valves to ship, what price to charge, and that a purchase order would be forthcoming from Pratt. R118:6. Wayhan then prepared the invoices, knowing that they contained "incorrect" information about the name of the seller of the valves. R117:17 ("except for the issue of the name," information was not "incorrect") (emphasis added). Eurotech never had any ownership interest in the valves, although Mealey and Wayhan purported to "sell" them to Pratt. R117:12; R118: 5.

Mealey and Wayhan were thus participants in a scheme to defraud Pratt. They did not have to know that Triplett was involved in the scheme, or know whether any of the participants had a "fiduciary interest" with Pratt. They certainly knew that their transactions were not "above board." See Def. Br. 14. They knew that by mailing false invoices they were abetting a plan to deceive Pratt as to the

source of the valves so that Pratt would pay inflated prices, allowing them to profit along with others. With Mealey and Wayhan the scheme had more than five participants and §3B1.1(a) was properly applied.

In addition to the six participants specifically named by the district court, there are other participants that can be counted under §3B1.1(a). As the Introductory Commentary to Chapter Three, Part B - Role in the Offense indicates, "[t]he determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct) . . . and not solely on the basis of elements and acts cited in the count of conviction." Thus, offenses that "were part of the same course of conduct or common scheme or plan as the offense of conviction," *i.e.*, offenses connected by a "common factor, such as common victims, . . . common purpose, or similar modus operandi," are to be included in determining Chapter Three adjustments. USSG §1B1.3(a)(2), and Application Notes 9(A),(B). Because Triplett recruited Kathy Cain of ECI, Frank Goodman of IV, and Jimmy Matheson of H * E, to pay him kickbacks in similar, uncharged, schemes between 1994 and 1998 that deprived Pratt of money and honest services (see infra pp. 34-43), these individuals are also appropriately counted under

§3B1.1 as "participants" in the criminal activity organized and led by Triplett.[15]

On these facts, the four-level enhancement under §3B1.1(a) was required.

III THE DISTRICT COURT DID NOT ERR IN CALCULATING LOSS UNDER USSG §2F1.1 OR IN ORDERING RESTITUTION FOR THE VICTIM'S LOSS

Triplett claims that, although he knowingly violated the standards of conduct governing his employment and put over $100,000 in his own pocket that should have and would have gone to his employer, the district court improperly increased his sentence under USSG §2F1.1(b)(1) because "Pratt did not . . . sustain any loss." Def. Br. 16, 14-21. However, the court did not calculate the increase in offense level based on Pratt's losses, but on the more than $200,000 in gain to Triplett and his co-conspirators from the scheme – a value that Triplett does not challenge. Moreover, Pratt did sustain substantial losses.

A. USSG §2F1.1(b)(1) provides for an eight-level increase for a loss of more than $200,000. Application Note 7 to the guideline provides that "[a]s in

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[15] Two corporations – Scruggs and Eurotech – were also involved in the conspiracy and could be counted as "participants" in the offense. Application Note 1 to §3B1.1 defines a "participant" as a "person who is criminally responsible for the commission of the offense," and the term "person" generally refers to both individuals and collective entities such as corporations. See, e.g., USSG §8A1.1, comment. (n.1); 18 U.S.C. §18; 18 U.S.C. §2510(6); 18 U.S.C. §224(c)(3). To the extent that United States v. Gross, 26 F.3d 552 (5th Cir. 1994), suggests otherwise, the decision is inconsistent with the plain language of the guidelines.

theft cases, loss is the value of the money, property, or services unlawfully taken" (emphasis added). Similarly, Application Note 8 provides that "[f]or the purposes of subsection (b)(1), ... [t]he offender's gain from committing the fraud is an alternative estimate . . . . " (emphasis added). In this case, the district court calculated the loss based on the offenders' gain. R121:38-46, 39 ("In fact, I'm going to give him the benefit of the doubt and say, I'll do it on what he actually received"). Triplett conceded that the offenders' gain amounted to more than $200,000 on the sales at issue. R121:39-40 ("I have no quibble with the figures" or the court's "arithmetic calculation"). Therefore, the district court properly increased the offense level by eight, using the money taken by Triplett and his co-conspirators as an approximation of Pratt's true loss.

In United States v. Yeager, 331 F.3d 1216, 1224 (11th Cir. 2003), this Court upheld a §2F1.1(b)(1) enhancement based on defendant's gain, and rejected defendant's contentions that the court did not and could not find that the victim suffered a loss from his fraudulent conduct. Misrepresenting himself as a mail order pharmacy, defendant drug distributor obtained drugs at a low price offered under a special contract with the manufacturer, promising to sell the drugs only to specific customers. Defendant, however, diverted sales to distributors who resold the drugs at a market advantage, effectively undercutting the manufacturer's

distribution scheme. 331 F.3d at 1219. This Court rejected Yeager's claim that the manufacturer made a substantial profit from its relationship with Yeager and therefore there was no "loss" to be considered in sentencing. 331 F.3d at 1224-25. The Court held that the defendant's "theft" of distribution privileges, converting a restrictive distribution license into an unrestricted license, caused an actual loss to the manufacturer. And it was not clear error for the district court to accept the profit defendant made from the unrestricted sales as a reasonable estimate of that loss.

In United States v. Parrish, 84 F.3d 816 (6th Cir. 1996), the court held that a fraud calculation was properly based on $362,000 paid to defendant as "commissions" by an outside printing service in exchange for defendant's recommendation that her employer use that printing service. Although there was no evidence that the employer paid higher prices than it otherwise would have for the printing services, the court held that, by not telling the employer of the "commissions" and arrangement, the defendant breached a fiduciary duty and, had the employer known of the arrangement, it either could have taken the kickbacks for itself or tried to negotiate a lower price for the printing service. "Under either scenario, [defendant's] fraud resulted in a loss to [her employer]." 84 F.3d at 819.

Yeager and Parrish demonstrate that schemes like Triplett's – whereby an

employee takes illegal "commissions" in exchange for steering business toward a supplier, or whereby a defendant fraudulently diverts sales from the victim to himself – causes a loss to the victim that can be calculated under §2F1.1(b)(1) based on defendant's gain from the fraud.

B. Even if we ignored the guideline commentary authorizing a loss calculation based on defendant's gain, Pratt did in fact sustain a loss. Triplett's claim of "no loss" to his victim has three alternative, but equally fallacious, bases: (l) because Pratt resold all the valves at a profit, it could not have "lost money;" (2) because Pratt sought an 85% profit margin on every sale, it made more money on higher priced valves than lower priced valves, and hence made "more money" as a result of Triplett's fraud; and (3) even if Pratt did make less profit, lost profits are "intangibles" that cannot be considered "losses" to a victim.

With respect to the first claim, whether or not Pratt resold the valves acquired from Eurotech at a loss is irrelevant. Triplett diverted to his own pocket profits on those sales that would have and should have gone to Pratt. In at least three other cases, moreover, Triplett and Scruggs sold valves and related items directly to Pratt's customers, earning more than $22,000 in profits, while depriving Pratt of any profit at all on the sales – profits that should have and would have gone to Pratt but for Triplett's misuse of confidential customer information and

fraud on his employer. GX 141-145; see supra pp. 10-11. All of these losses are properly considered under a §2F1.1 adjustment. Parrish; Yeager, 331 F.3d at 1226 (diverted profits are "not merely an opportunity-cost loss but rather [are] definite losses for which sentencing adjustments are appropriate").

The cases on which Triplett relies (Def. Br. 15-18) do not call for a different result. In United States v. Khan, 969 F.2d 218 (6th Cir. 1992), no money was "taken" by the defendant, so there was no loss.[16] United States v. Wilson, 993 F.2d 214, 217 (11th Cir. 1993), held that, although "incidental or consequential injury" could not be included in the fraud loss calculation, "the value of the property taken . . . is an indicator of both the harm to the victim and the gain to the defendant" for purposes of the fraud enhancement (quoting the sentencing guidelines). In the remaining cases on which Triplett relies, the courts found that the district court had erred in its method of calculating the loss, but not in the fact of loss itself.[17] Here,

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[16] Khan noted that it had before it "the rare case where, in the face of complete success, the fraud generated no loss" because, although the defendant attempted to defraud the Social Security Administration of money by filing a false death claim, no money was paid out to defendant because he had not worked the required number of quarters to qualify for survivor benefits. 969 F.2d at 219-20.

[17] United States v. Smith, 951 F.2d 1164, 1167 (10th Cir. 1991), held that the proper measure of loss is the "net" value of what was taken; United States v. Tatum, 138 F.3d 1344 (11th Cir. 1998), held that the district court failed properly to apply Application Note 7(b), which applies to "Fraudulent Loan Application and Contract Procurement Cases" (frauds irrelevant to Triplett here), because the

Triplett conceded that the district court's loss calculations were correct. R121:39-40.

Triplett's second argument – that his scheme in fact earned Pratt "more money" for Pratt because the more Pratt paid for a valve the more profit it made (Def. Br. 18-20) – ignores the record. While Pratt's targeted profit levels were 85%, the profits Pratt realized on the valves at issue here were significantly less because of the inflated cost of the valves, coupled with market constraints that limited the price Pratt could charge its customers for refurbished valves. R116:116. For example, in one case Pratt had followed Triplett's recommendation to pay $14,000 for a "Eurotech" valve and resell the valve to the customer (after being refurbished at a cost of about $4,600), for $24,550. This yielded a 24.24% profit, not an 85% profit. Had Pratt paid what the record showed to be a reasonable price for the valve, Pratt would have made a 77.2% profit on the same

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calculation of loss was based on gross amount of monies paid on the contract, without deducting for benefits received; United States v. Schneider, 930 F.2d 555, 557 (7th Cir. 1991), held that the amount bid for a contract procured by fraud and rescinded before any money is paid on the contract is not the proper measure of loss, but did not hold that no loss was suffered; United States v. Renick, 273 F.3d 1009, 1025, 1028 (11th Cir. 2001), affirmed that part of a loss calculation that was shown to be money paid out to defendant as part of a fraudulent medicare scheme.

sale, and earned $13,000 more. GX 37 and supra note 4.[18] This was an "economic loss" to Pratt. And for this reason, it is not "illogical" (Def. Br. 20), but entirely sensible that, as Polito testified at trial, Pratt sought to purchase surplus valves at the lowest possible cost. See supra p. 4.

In fact, Triplett's counsel conceded in closing argument that Pratt lost profits as a result of his scheme. R125:532 (in absence of scheme, Pratt was "just going to get [valves] at a lower price to make even more money, to make even more money"), also R125:541. Triplett argued to the jury, however, (as he argues here), that for merely depriving Pratt of "even more money," he should not be found guilty. Id. The jury, correctly applying the law and using its common sense to view the facts, rejected this purported defense.

Despite Triplett's disingenuous assertions to the contrary, lost profits are "losses" for which Pratt is entitled to reimbursement. Yeager. Triplett cites no authority for his claims that lost profits are non-compensable, like "interest" on money the defendant has taken or "intangible property interest[s]." Def. Br. 21. To the contrary, "profits" are "income," and income is "a gain" that is usually "measured in money." Webster's Third New International Dictionary (unabr.) at

[18] GX 37 was used as an example of one sale at trial. Triplett did not rebut the government's evidence with respect to lost profits on GX 37 or attempt to show that any other sale yielded Pratt any greater profits.

1811 (profit defined, inter alia, as "gain," "valuable return esp. in financial matters," "the excess of returns over expenditure," "net income"); id. at 1143 (defining "income"). Lost profits, therefore, are compensable losses.

C. Because the district court properly concluded that Pratt suffered a loss attributable to Triplett's conduct, the court properly ordered restitution. Yeager, 331 F.3d at 1227. United States v. Apex Roofing, 49 F.3d 1509 (11th Cir. 1995), relied on at Def. Br. 26, is irrelevant because there the Court concluded that, unlike Pratt in this case, the victim had not sustained any loss. And because Triplett did not and does not challenge the amount of restitution, but only the finding of loss (R121:47), the order of restitution should be affirmed.

IV. THE DISTRICT COURT DID NOT CLEARLY ERR IN INCLUDING RELEVANT CONDUCT IN CALCULATING THE OFFENSE LEVEL

The district court did not clearly err in including uncharged relevant conduct (see supra pp. 11-12) when calculating the offense level.[19]

Under USSG §1B1.3(a)(2), a "defendant may be held accountable at sentencing for illegal conduct not in furtherance of the offence of conviction if that conduct was 'part of the same course of conduct or common scheme or plan' as the offense of conviction." United States v. Gomez, 164 F.3d 1354, 1356 (11th Cir.

[19] Virtually all the relevant conduct evidence had been introduced under Fed. R. Evid. 404(b) at trial.

1999), citing guideline. "This Court broadly interprets the provisions of the relevant conduct guideline." United States v. Behr, 93 F.3d 764, 765 (11th Cir. 1996). Thus, when a district court finds "that [conduct not constituting the offense of conviction] was 'part of the same course of conduct or common scheme or plan'" the offense level "would have . . . to" be based on that conduct as well as the charged conduct. Edwards v. United States, 523 U.S. 511, 514-15 (1998); United States v. Fuentes, 107 F.3d 1515, 1523 (11th Cir. 1997) ("offense level '*shall* be determined on the basis of' all relevant conduct") (emphasis in original, quoting guideline).

"For two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi." §1B1.3, comment. (n.9(A)). Citing this commentary, this Court held in Fuentes, 107 F.3d at 1525, that two of these common factors were present and so the offenses constituted a common scheme, but it added that "only one [factor] is required." (emphasis added.) Fuentes also noted that offenses form the same course of conduct if they are part of an "*ongoing series of offenses.*" Id. (emphasis in Fuentes), quoting comment. (n.9(B)). "Factors . . . to be considered . . . include the degree of similarity of the offenses, the regularity (repetitions) of the

offenses, and the time interval between the offenses." Comment. (n.9(B)). Thus, in determining whether uncharged conduct is "relevant conduct" for purposes of §1B1.3, this Court "will evaluate the 'similarity, regularity, and temporal proximity' between [defendant's] counts of conviction and the extrinsic [] offense." United States v. Maxwell, 34 F.3d 1006, 1011 & n.34 (11th Cir. 1994).

Three of the four factors enumerated in the guideline commentary are present in this case. There was a common victim: Pratt. There was a common purpose: to obtain kickbacks by depriving Pratt of sales and profits. And there was a similar modus operandi. In each case Triplett was the architect and initiator of the conduct, and the method for obtaining the kickbacks was the same or similar. Thus, like his agreement with Scruggs, (1) Triplett arranged for Kathy Cain of ECI to sell a valve to Pratt for $16,500 after telling her where she could purchase the valve for $1,000 so that Triplett could take back half the $15,000 overcharge; (2) Triplett arranged for Frank Goodman of IV to sell parts to Pratt at inflated prices, and Triplett took $21,400 in kickbacks on those sales; and (3) Triplett arranged with Jimmy Matheson for H * E to buy three surplus Pratt valves for $1,500 each, which Triplett then had H * E sell to Pratt for $13,500 each, and Triplett received half the profits in kickbacks. See supra pp. 11-12. And, like the charged conspiracy with Scruggs where Scruggs sold some valves directly to Pratt

customers (see supra pp. 10-11), Triplett arranged for H * E to sell Pratt equipment directly to a customer, receiving over $5,000 in kickbacks on the sale, and depriving Pratt of the sale entirely. GX 300, 350-59.[20]

In addition, there was a "similarity" between the charged and uncharged conduct. Maxwell, 34 F.3d at 1011. There was also a "temporal proximity" and a "regularity" with which Triplett initiated his fraudulent kickback schemes. Id.. The charged conspiracy in this case began in January 1996 and continued at least through May 1998. GX 9-25, 139-40. The ECI transactions occurred from 1994 into at least December 15, 1995, when Triplett was still billing Cain for remaining unpaid kickbacks. GX 408. See United States v. Simpson, 228 F.3d 1294, 1301-1302 (11th Cir. 2000) (schemes temporally connected where relevant conduct took place in late 1995 and charged conduct in May-June of 1996). The scheme with IV took place in 1997 and into 1998 (GX 260), the same time that the conspiracy with Scruggs was occurring. And Triplett was receiving kickbacks from Jimmy Matheson of H * E between May 30, 1995 and December 31, 1997 (GX 300, 350-359), from the time of the Cain conspiracy through the period covered by the

[20] In similar arrangements with Cain and Matheson, Triplett provided for ECI and H * E to get illegal "discounts" on purchases they made from Pratt, and then took back half the discounts in kickbacks. See supra pp. 11-12.

charged conspiracy.[21]

The district court did not clearly err, therefore, in finding that the uncharged conduct was part of a common scheme by Triplett to obtain kickbacks and illegal payments by diverting profits from Pratt. The diverted profits were achieved through overcharges to Pratt and diverted sales and profits that were similar to those involved in the charged Triplett/Scruggs/Eurotech scheme; and the related conduct occurred immediately before and, for the most part, during the time of the offense of conviction.[22]

Triplett's challenges to the inclusion of relevant conduct consist primarily of conclusory allegations that lack legal foundation. He first claims that because the relevant conduct at issue is not the same offense (it has different participants, consists of transactions that are different from those charged in this case, and is even the subject of other indictments), it is therefore a "discreet [sic], identifiable

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[21] ECI kickbacks totaled $25,969; IV totaled $21,400; H * E kickbacks and diverted sales totaled $37,371.30; Triplett had similar arrangements with Jerry Wickliffe but, because Wickliffe ultimately did not pay the agreed-on kickbacks, the court did not add these amounts to its loss calculations. R121:38,40.

[22] The test is not whether there are some insignificant differences in the modus operandi of the various schemes (for instance, that Triplett did not have an ownership interest in the valves ECI sold to Pratt, or that Triplett took his kickbacks in the form of discounts to buyers rather than overcharges by suppliers, Def. Br. 25), but whether the general modus operandi and purpose, victims, or other factors are sufficiently similar to suggest a common plan or scheme.

unit" that cannot be taken into account in sentencing. Def. Br. 22. If this were an accurate interpretation of the guidelines and the cases, no relevant conduct could be considered under §1B1.3. The Seventh Circuit specifically rejected such a claim in United States v. Petty, 132 F.3d 373, 381 (7th Cir. 1997) ("to the extent Petty argues that relevant conduct is only conduct that for some reason could not have been separately charged . . . he is simply incorrect." The guidelines require the courts to "take into account 'the full range of related conduct,' whether it be charged or not").

The government need not claim that ECI, H * E, and IV were part of the same single conspiracy charged in this indictment. Rather, the premise of §1B1.3 is that relevant conduct is not the same conduct, but conduct that is "sufficiently connected or related to each other as to warrant the conclusion that they are part of . . . *ongoing series of offenses.*" Fuentes, 107 F.3d at 1525. The question is whether the conduct constitutes "discrete, identifiable units' apart from the offense of conviction." Maxwell, 34 F.3d at 1010-11 (emphasis added).

Courts do not look to whether conduct is a "discrete, identifiable unit" to the exclusion of the other relevant factors. Nor do they use it to negate other factors relevant in determining whether conduct is part of a "course of conduct" or

"ongoing series of offenses."[23] When courts find uncharged conduct to be a "discrete, identifiable unit," it is because the uncharged conduct is not sufficiently similar to the charged conduct to be part of a common scheme. See Maxwell, 34 F.3d at 1010-11 (conspiracy to distribute dilaudid distinct from cocaine distribution scheme involving none of the same parties and temporally remote); United States v. Sykes, 7 F.3d 1331, 1336-37 (7th Cir. 1993) (lack of "distinctive similarities" and "[t]he lengthy time interval here tend[] to indicate conduct that can easily be separated into 'discrete, identifiable units,' rather than behavior that is part of the same course of conduct or common scheme or plan"); United States v. Pinnick, 47 F.3d 434, 438 (D.C. Cir. 1995) ("[w]here the defendant's offense of conviction and the acts offered as relevant conduct could be 'separately identified' and were of a different 'nature,' we have found that the conduct was not part of the same course of conduct") (emphasis added). Indeed, in United States v. Blanc, 146 F.3d 847, 853-54 n.1 (11th Cir. 1998), relied on by Triplett (Def. Br. 24), the Court evaluated the "similarity, regularity, and temporal proximity" of the uncharged

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[23] The phrase is taken from the background commentary to §1B1.3, which explains that "[s]ubsections (a)(1) and (a)(2) adopt different rules because offenses of the character dealt with in subsection (a)(2) (i.e., to which §3D1.2(d) applies) often involve a pattern of misconduct that cannot readily be broken into discrete, identifiable units that are meaningful for purposes of sentencing" (emphasis added). This does not mean that discrete, identifiable units can never be included as relevant conduct if they otherwise meet the (a)(2) test.

fraudulent conduct to the charged fraudulent conduct. But the Court concluded that, because the frauds were of a "wholly distinct nature," involving different victims, different subject matter, none of the same parties, and a temporal separation of a few years, they were "discrete, identifiable units apart from the offense of conviction." Id. at 852, emphasis added. In contrast, as discussed above, the relevant conduct in Triplett's case was so similar and temporally related as to be part of a common scheme or plan.

Indeed, conduct that could loosely be termed "discrete" by Triplett's definition, because it could be charged as a separate count or a separate offense, is routinely the kind of conduct that courts consider for purposes of relevant conduct, as demonstrated even in the cases on which Triplett relies. Def. Br. 22, citing United States v. Bethley, 973 F.2d 396, 400-401 (5th Cir. 1992); United States v. Chatman, 982 F.2d 292, 294 (8th Cir. 1992) (drug transactions that were subject of state court charges were properly considered relevant conduct); accord, e.g., Simpson, 228 F.3d at 1302.

Triplett also claims, without any citation, that "if alleged relevant conduct is not relevant to all conspirators, except purportedly one, then surely it . . . is not relevant to any conspirator." Def. Br. 23. To the contrary, however, the provisions of §1B1.3 must be applied to each defendant individually, even when all

defendants are tried together. See comment. (n.2) ("relevant conduct is not necessarily the same for every participant"). For example, a defendant cannot be held liable under the guidelines for conspiratorial acts done before he joined the conspiracy. §1B1.3, comment. (n.2).

An underlying assumption of the relevant conduct provisions is that all defendants and all of the separate schemes will not be charged in one indictment, and perhaps could not or should not be charged in one indictment. See Maxwell, 34 F.3d at 1010 ("The [guideline] commentary . . . makes clear that relevant conduct may include uncharged conduct," and conduct that "is not an element of the offense of conviction"). Thus, it is irrelevant that the participants in the various limited schemes that made up Triplett's overall common plan to defraud his employer could not themselves be held accountable for all of the conduct charged to Triplett.[24] Minor participants in a broad conspiracy or plan are subject to different evaluation and treatment under the sentencing guidelines. Triplett forgets that the sentencing court knew it would be improper to hold another defendant

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[24] That Triplett was not named as a co-defendant in the IV or Matheson criminal informations is irrelevant. Def. Br. 24. In those cases, IV and Matheson were pleading guilty to the charges that they conspired with an unnamed Pratt employee (Triplett) to defraud Pratt. Triplett did not have to be separately indicted for every crime with which he could have been charged, or have all his conduct included in one overarching charge.

accountable for conduct that was neither known to him nor reasonably foreseeable. See R121:36. Neither IV, Matheson, nor Eurotech could be chargeable under the guidelines for Triplett's wrongdoing with the others because they did not know and could not reasonably foresee that Triplett was engaging in similar activity with many others. USSG §1B1.3(a)(l) and comment. (n.2).[25]

Because the relevant conduct meets the criteria established in the guideline commentary and the factors that this Court considers under the guidelines, the district court did not clearly err in including that conduct in its guidelines calculations.

V. THE COURT PROPERLY APPLIED AN ENHANCEMENT FOR OBSTRUCTION OF JUSTICE

The court properly applied a two-level enhancement because Triplett "willfully obstructed or impeded" and "attempted to obstruct or impede, the administration of justice during the investigation [and] prosecution . . . of the instant offense." USSG §3C1.1

Triplett admitted during his cross-examination at trial that he destroyed

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[25] Nor is it relevant whether the statute of limitations on Cain and ECI has "long expired." Def. Br. 24. The ECI conduct, of course, continued right up to the start of the charged conspiracy. And, in any event, relevant conduct may include criminal conduct that occurred outside of the statute of limitations period. Behr, 93 F.3d at 765-66.

documents concerning his dealings with the Scruggs Company after he knew he was under investigation for taking illegal kickbacks. R124:448-450; 367-68; GX 148, pp. 1-2 (tape recording of conversation with Jimmy Scruggs).[26] This, by itself, required a two-level enhancement under §3C1.1, comment. (n.3(d)) (destroying material evidence).

In addition, the trial court properly concluded, after hearing Triplett's taped telephone conversations with Jimmy Scruggs and reviewing the transcript of Jerry Wickliffe's grand jury testimony, that Triplett had encouraged these potential witnesses to cover up the conspiracy. R121:22-28.[27] Although Triplett purports not to understand "what 'conversations' and 'witnesses' the court was referring" to when it made this finding (Def. Br. 28 n.12), the sentencing record establishes that defense counsel fully understood that the conversations and witnesses referred to were Jerry Wickliffe and Jimmy Scruggs. R121:21-26. Both conversations occurred after the FBI's December 15, 1998 visit to Triplett's home – a visit that

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[26] The tape transcript was part of the record submitted to the Probation Office and was entered in the district court docket on August 25, 2003 without a docket number. See infra note 28.

[27] The government also argued that Triplett should receive an obstruction enhancement under USSG §3C1.1, comment. (n.3(b)) because he had committed perjury at trial by denying he had defrauded Pratt after he had admitted defrauding Pratt in a December 15, 1998 FBI interview. R121:28; R124:364, 369. The court rejected this argument, however.

prompted Triplett's concern that his schemes with Pratt might be uncovered. Wickliffe at 109-111;[28] GX 148 at 1-2; R123:192-202; R124:363-64 (FBI questioned Triplett about ECI kickbacks). Thus, Triplett's claim that the timing of these conversations was "unclear" (Def. Br. 28 n.12) is also false.

Triplett's only objection to the obstruction enhancement is one that was never raised below (see R121:21-22), and cannot serve as a basis for reversal in the absence of plain error. He belatedly claims that the document destruction referred to in his conversation with Jimmy Scruggs after the FBI visited his home, did not occur "during the course of the investigation . . . of the instant offense." Def. Br. 29-30. The only basis for this contention is that the agent did not ask any questions about Eurotech and Scruggs at that interview, "which no doubt he would have, had the Government at that time been investigating the instant matter." Id. at 29.

The fact that in December 1998, the FBI did not ask Triplett about his dealings with the Scruggs brothers does not negate the fact that the interview was part of an investigation into the conduct with which Triplett was ultimately charged. In the early stages of an investigation the government does not of course

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[28] The Wickliffe transcript is Exhibit 1F to the government's letter of August 21, 2003, to the Probation Office. These documents were entered in the district court docket on August 25, 2003 "per order by Judge Pannell," but were not given a docket number.

have all – or even many – facts. The obstruction guidelines, quite properly, do not require that obstruction occur at any particular stage of an investigation and, indeed, as is demonstrated by the facts here, obstruction may occur (and might be more egregious) at early stages of an investigation before the government has gathered significant information and when potential defendants have the most to gain by destroying evidence before it can be uncovered.[29]

The documents that Triplett destroyed included the sheet listing the valves that he and Scruggs had purchased and proposed to sell to Pratt. The fact that Triplett destroyed a document that is at the very heart of this case as a result of the FBI interview strongly suggests that he knew the investigation concerned this conduct, or would lead to uncovering this conduct, and that he wanted to prevent the investigators from discovering his fraud. It was precisely because Triplett hoped the FBI did not yet have this information that he took steps to destroy the evidence that could lead to the detection of the scheme and his conviction.[30] This is a classic example of conduct that warrants an obstruction enhancement.

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[29] There is no suggestion that the FBI's visit to Triplett in 1998 was part of a "separate investigation," and that a wholly new investigation was begun into the conduct giving rise to the charges in this case.

[30] This conclusion is buttressed by the fact that Triplett told a potential witness he had taken steps to be sure the FBI would not find out about his dealings with the Scruggs brothers. R121:24; Wickliffe at 109-11 (see supra note 28).

The district court's factual findings are not clearly erroneous, and there was no plain error in imposing an obstruction of justice enhancement.[31]

VI. THERE WAS NO CONSTRUCTIVE AMENDMENT OF THE INDICTMENT

Contrary to Triplett's claim (Def. Br. 30-34), the essential elements of the offense charged in the indictment were not broadened at trial.

A constructive amendment of an indictment "occurs when the essential elements of the offense contained in the indictment are altered to broaden the possible bases for conviction." United States v. Castro, 89 F.3d 1443, 1452-53 (11th Cir. 1996), quoting United States v. Keller, 916 F.2d 628, 634 (11th Cir. 1990). The government does not have to set forth all of its evidence in the indictment. United States v. Williams, 334 F.3d 1228, 1231-32 (11th Cir. 2003).[32] And a constructive amendment does not occur simply because the government relies on acts at trial that were not listed in the overt acts section of the indictment.

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[31] In United States v. Bagwell, 30 F.3d 1454, 1458 (11th Cir. 1994), in contrast, this Court reversed an obstruction enhancement because the district court had "expressly found that [defendant] hindered law enforcement's investigation of the Smith/Pardue drug conspiracy – an offense other than that of Bagwell's conviction."

[32] To the extent an indictment alleges facts that are not elements of an offense, it is mere surplusage, an amendment of which is not *per se* reversible error. Williams, 334 F.3d at 1231-32.

United States v. Gold, 743 F.2d 800, 813 (11th Cir. 1984). See also United States v. Flynt, 15 F.3d 1002, 1005-07 (11th Cir. 1994).[33]

Triplett's claim that the government amended the indictment at trial by arguing that he had defrauded Pratt of "profits" ignores the express language of the indictment. The indictment charged that Triplett conspired to "obtain money from . . . Pratt . . ." Evidence that Triplett deprived Pratt of profits was used to prove that charge, *i.e.,* Triplett obtained money from Pratt by diverting profits from Pratt to himself. Proof of facts that, although not mentioned in the indictment, "are entirely consistent with its allegations," is not a basis for reversal. Gold, 743 F.2d at 813. Thus, a discussion of lost profits did not amend the indictment.

Similarly, Triplett mistakenly claims that the government amended the indictment by introducing and relying on evidence that he concealed from Pratt the fact that Scruggs paid an average price of $175 each for the valves. Such evidence

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[33] A constructive amendment must be distinguished from a "variance," which occurs when the evidence at trial establishes facts materially different from those alleged in the indictment, but the essential elements of the offense are the same. Keller, 916 F.2d at 633-34. Triplett expressly denies that he is claiming a variance in this case. Def. Br. 34. That is not surprising. To prove reversible error from a variance, Triplett would have to show, not only that the evidence was "materially different" from what was charged, but also that he actually suffered "substantial prejudice." United States v. Caporale, 806 F.2d 1487, 1499 (11th Cir. 1986) (variance reversible only when it "actually prejudices the defendant"); United States v. Starrett, 55 F.3d 1525, 1553 (11th Cir. 1995).

was not an element of the offense or a material fact that had to be included in the indictment. But the fact that the valve sold to Pratt for $14,000 was one of the valves that Scruggs bought for an average price of $175 was relevant to undermine Triplett's claims that Pratt did not suffer any economic harm from his taking kickbacks. Over the government's objection (R34), the court permitted Triplett to show that Pratt made a profit on every sale. Triplett used that evidence to argue throughout trial (as he does in this appeal) that, since Pratt made a profit, it was not economically harmed by Triplett's scheme. To rebut that claim, the government rightly sought to show that Pratt indeed lost substantial profits by paying exorbitant overcharges for the Scruggs valves, thus depriving Pratt of profits that were directly diverted to Triplett and Scruggs.[34] The only objection Triplett raised at that time was that the evidence exceeded the scope of his cross-examination of Nick Polito and should have been offered during the government's direct case. R116:103-106. This evidence did not amend the indictment or broaden the basis for conviction. Rather, this evidence was relevant to rebut Triplett's factually false defense that, notwithstanding his fraud, Pratt had not suffered any economic harm.

[34] Similarly, the government's reference in its closing to the $175 cost to which Triplett now objects, Def. Br. 31-32, came in rebuttal after Triplett's counsel had argued that he should be acquitted because Pratt made money on every valve sale.

Triplett's mistaken use of terms of art such as "right" and "material fact" (Def. Br. 32-34) – words that the government never used and that the court never charged in reference to Pratt's lost profits – cannot transform accurate observations concerning relevant evidence into an amendment of the indictment.[35] The indictment states (R1:5-6):

> The Henry Pratt Company had a right to rely on DEFENDANT TRIPLETT to conduct his work on the company's behalf in an honest fashion so as to benefit his employer, including his work in securing equipment at the best possible price for resale by the company. The Henry Pratt Company employees were prohibited from taking kickbacks from customers, suppliers or potential suppliers in return for favorable treatment . . . . Instead of acting to obtain the best possible prices for purchases by the Henry Pratt Company, DEFENDANT TRIPLETT arranged for the Henry Pratt Company to buy, at inflated prices, certain surplus equipment obtained by [Scruggs] so the DEFENDANT TRIPLETT could receive kickbacks from [Scruggs] based on its profits from the equipment sales.

The government's proof and argument about which Triplett complains plainly track the indictment. As an employee of Pratt, Triplett was obligated to

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[35] The government never argued that Triplett defrauded Pratt "of the right to make greater profits that it otherwise made," see Def. Br. 31; indeed, it never used the term "right" at all. Nor did the government claim that Pratt had a legal right to monopoly profits, Def. Br. 32, or that the cost Scruggs and Triplett paid for the valves was a "material fact to Pratt as Pratt was entitled to make greater profits." Def. Br. 33 (providing a record cite, but failing to quote the government's actual language). What the government argued was that Triplett failed to tell his boss what he paid for the valves so that he could be the "one that made the money," instead of Pratt. R119:4.

buy items for it at the cheapest prices and not take kickbacks. Triplett's fraud deprived Pratt of Triplett's honest services and money that belonged to Pratt, not Triplett. Pratt made less money because Triplett took money that belonged to it.

More important, Triplett cannot show prejudice or legal error from the government's introduction of and reliance on the evidence concerning the price Scruggs paid for the valves. Triplett has not challenged any portion of the court's charge, and does not dispute that the court correctly instructed the jury that the government was required to prove the crimes and elements as charged in the indictment beyond a reasonable doubt. Specifically, the court repeatedly instructed the jury as to what the "[i]ndictment charges," R120:7, 8, 11, 16, 23, including the "means or methods" by which the conspiracy was alleged to have been carried out. R120:24. The court told the jury (emphasis added) that it must find beyond a reasonable doubt that the defendant committed "the acts charged in the Indictment," (R120:22) and that "[e]ach juror must agree with each of the other jurors . . . that the same means or method alleged in the Indictment was, in fact, engaged in or employed by the defendant in committing the crime charged in the Indictment." R120:25. The court finally cautioned, once again, that "you are here to determine from the evidence in the case whether the defendant's guilty or not guilty, and the defendant is on trial only for the specific offense alleged in the

Indictment." Id. (all of above emphasis added.)

Reviewing the government's actual statements (rather than Triplett's characterization of them), the district court's instructions, and the evidence proffered at trial in context, the jury could not have convicted Triplett on a charge not contained in the indictment. See Castro, 89 F.3d at 1453.

CONCLUSION

The conviction and sentence should be affirmed.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,541 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect 10.0 in 14-point Times New Roman.

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Dated: November 26, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of November, 2003, I served two copies of the accompanying BRIEF FOR APPELLEE UNITED STATES OF AMERICA, by United States overnight mail on:

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