U.S. Department of Justice

United States Attorney
Eastern District of New York

271 Cadman Plaza East
Brooklyn, New York 11201

JPL/TJT:PJC
F. #2021R01058

June 21, 2024

By ECF

The Honorable Joanna Seybert
United States District Judge
Eastern District of New York
100 Federal Plaza
Central Islip, New York 11722

Re: United States v. Perry Frankel
Criminal Docket No. 22-180 (S-2) (JS)

Dear Judge Seybert:

The government respectfully submits this letter in anticipation of sentencing in the above-referenced case, which is currently scheduled for June 28, 2024. On February 6, 2024, Dr. Perry Frankel pleaded guilty before The Honorable James M. Wicks, United States Magistrate Judge, to misdemeanor theft in connection with health care, in violation of 18 U.S.C. § 669, in connection with his role as the owner of Advanced Cardiovascular Diagnostics PLLC ("ACD"), which submitted false and fraudulent claims for evaluation and management ("E&M") services that were not provided as claimed. Between September 2020 and March 2022, Frankel and ACD fraudulently billed Medicare, Medicare advantage programs, Medicaid managed care plans, and private insurance plans more than $17 million for E&M services and received approximately $3.5 million in payment for those claims.

In light of the seriousness of the offense and the harm caused to the federal and private health care programs, and in order to provide general and specific deterrence and to promote respect for the law, the government respectfully submits that a sentence within the effective United States Sentencing Guidelines ("U.S.S.G." or "Guidelines") range of 12 months' imprisonment is sufficient, but not greater than necessary, to achieve the goals of sentencing. See 18 U.S.C. § 3553(a). The government also respectfully requests that the Court order Frankel to pay restitution in the amount of $3,489,305.54 and to forfeit $3,489,305.54, as agreed to in his plea agreement.

I. Background

Claims for certain health care services are made using current procedural terminology codes ("CPT Codes"), which are five-digit codes with corresponding service

descriptions. (Pre-sentence Investigation Report ("PSR") ¶ 11.) E&M services, which are commonly referred to as "office visits," are separated into two sets of CPT Codes: 99202, 99203, and 99204, which correspond to increasingly complex E&M services for initial patient visits, and 99212, 99213, and 99214, which correspond to increasingly complex E&M services for established patients. (Id.) Separate CPT Codes exist for testing services, including COVID-19 testing services. (Id. ¶ 12.)[1] In general, E&M services require a medically appropriate history and/or examination, medical decision-making at the appropriate level for the complexity of the E&M service billed, and can be based on the time spent on the encounter, which increases with the E&M CPT Codes. (Id.) Time spent by the patient waiting for test results does not count towards justifying an E&M service. (Id.) During the pandemic, the Centers for Medicare and Medicaid Services ("CMS") issued guidance approving CPT Code 99211 for COVID-19 specimen collection at testing sites. (Id. ¶ 14.)

Health programs permit the billing of CPT Codes using a physician's national provider identifier ("NPI") number if the services are provided by a mid-level provider, including a nurse practitioner or physician assistant, under what are known as "incident-to" rules, if certain supervision requirements are met. (Id. ¶ 13.) Prior to the pandemic, "incident-to" rules required that the supervising physician was available in the same office suite as the mid-level provider, and during the pandemic, the physician needed to be available by real-time audio/video technology. (Id. ¶¶ 13-14.)

During the COVID-19 global pandemic, Frankel—through ACD—operated a range of mobile COVID-19 testing sites out of mobile vans, semi-permanent structures, and space within public school buildings. (Id. ¶ 5.) At ACD's COVID-19 testing sites, patients often arrived by car, provided their insurance information, completed forms, were swabbed for COVID-19 testing, and awaited the test results. (Id. ¶ 15.) Sometimes entire families were swabbed at once without exiting their vehicles, and patients did not have vital signs taken, were not examined with any diagnostic tools, and interacted, at most, with ACD staff for a few minutes. (Id.) Although some who went to ACD's testing sites were symptomatic, many used ACD's testing services to obtain negative screening tests for travel, for work, and to participate in school activities, which is why many were co-located at school districts. (Id. ¶ 17.)

ACD's COVID-19 testing sites were exceptionally busy. For example, on April 5, 2021, ACD submitted claims for 964 E&M services, and on the following day, it submitted claims for 748 E&M services. (Id. ¶ 16.) The sites were variously staffed with nurse practitioners, physician assistants, and medical assistants or unlicensed COVID-19 swabbers. (Id.) During the pandemic, ACD submitted all of its E&M claims from its COVID-19 testing sites using Frankel's NPI, meaning that he either performed the hundreds of claims for service each day or that he was representing that he was appropriately supervising those services. (Id. ¶ 14.)

Frankel did not generally work at the COVID-19 testing sites, and his cellphone location data showed he was not in New York on 46 days during the scheme—41 of which ACD

[1] There is no allegation that any COVID-19 testing ACD provided was not performed as claimed.

billed for E&M services at the COVID-19 testing sites. (Id. ¶¶ 16-17.) Although Frankel purported to be supervising the COVID-19 testing sites, employees confirmed that his office administrator—who was not a licensed medical provider of any kind—was overseeing the sites, and there were instances when she needed to reach Frankel because of medical issues at the sites and could not get in contact with him. (Id. ¶ 17.)

Frankel pleaded guilty to a specific execution of his health care fraud scheme. On October 4, 2021, Frankel and ACD submitted a claim to private health insurer Anthem using CPT Code 99212 for an E&M service that was not provided, and Anthem paid Frankel and ACD $41.91 for that fraudulent claim. (Id.) Overall, ACD submitted more than $17 million worth of similar claims and was paid approximately $3.5 million for them. (Id. ¶ 4.)

Frankel used at least some of the fraud proceeds to enrich himself and his family. As charged in the superseding indictment, Frankel used fraud proceeds to purchase a $300,000 Bentley Bentayga luxury sport utility vehicle and used $125,000 of the fraud proceeds to pay for equestrian stable fees. (See ECF No. 50, ¶ 41; PSR ¶ 18.)

II. Procedural History

On April 19, 2022, the Grand Jury returned an indictment charging Frankel with engaging in a health care fraud scheme and three counts of health care fraud, in violation of 18 U.S.C. § 1347. (ECF No. 1.) On June 27, 2023, the Grand Jury returned a superseding indictment charging Frankel with two additional counts of health care fraud, as well as two counts of engaging in unlawful monetary transactions, in violation of 18 U.S.C. § 1957, in connection with his purchase of a Bentley luxury vehicle and the payment of equestrian stable fees. (ECF No. 35.)

On February 6, 2024, Frankel pleaded guilty before Judge Wicks, pursuant to a plea agreement, to a superseding information charging misdemeanor theft in connection with health care. (ECF No. 50, 53.) On February 21, 2024, Your Honor accepted Frankel's guilty plea. (ECF No. 57.) In his plea agreement, Frankel agreed to forfeiture in the amount of $3,489,505.54 and restitution in the amount of $3,489,505.54 to the following victims:

Victim	Amount
CMS	$146,931.06
Aetna Inc.	$783,806.27
United Healthcare	$1,637,417.84
Anthem	$490,858.02
Emblem Health	$427,907.69
Health First	$508.50
MVP Health	$1,876.16

(Plea Agreement ¶¶ 1(e), 1(g), 6-13.) Frankel further agreed to voluntarily refrain from submitting claims to Federal health care programs for a three-year period from the date of his guilty plea. (Id. ¶ 14.)

III. The Defendant's Guidelines Range

The government agrees with the PSR's calculation of Frankel's Guidelines range, which is the same as what the government estimated in his plea agreement and is as follows:

Base offense level (U.S.S.G. § 2B1.1(a)(2))	6
Loss exceeding $9.5 million (U.S.S.G. § 2B1.1(b)(1)(K))	+20
Federal health care offense involving loss exceeding $1 million (U.S.S.G. § 2B1.1(b)(7)(B)(i))	+2
Abuse of trust (U.S.S.G. § 3B1.3)	+2
Zero-point offender (U.S.S.G. § 4C1.1)	-2
Acceptance of responsibility (U.S.S.G. § 3E1.1(a), (b))	-3
Total offense level	25

(PSR ¶¶ 23-33.) Based on a Criminal History Category I and a total offense level of 25, Frankel's Guidelines imprisonment range is 57-71 months. (Id. ¶ 65.) However, since the offense of conviction is a misdemeanor, the maximum term of imprisonment is 12 months, and the effective Guidelines range is 12 months' imprisonment. (Id.)

IV. A Guidelines Sentence is Appropriate

A. Legal Standard

In United States v. Booker, the Supreme Court held that the Guidelines are advisory and not mandatory, and the Court made clear that district courts are still "require[d] . . . to consider Guidelines ranges" in determining sentences, but also may tailor the sentence in light of other statutory concerns. 543 U.S. 220, 245 (2005); see 18 U.S.C. § 3553(a). Subsequent to Booker, the Second Circuit has held that "sentencing judges remain under a duty with respect to the Guidelines . . . to 'consider' them, along with the other factors listed in section 3553(a)." United States v. Crosby, 397 F.3d 103, 111 (2d Cir. 2005). Although the Second Circuit declined to determine what weight a sentencing judge should normally give to the Guidelines in fashioning a reasonable sentence, it cautioned that judges should not "return to the sentencing regime that existed before 1987 and exercise unfettered discretion to select any sentence within the applicable statutory maximum and minimum." Id. at 113.

Subsequently, in Gall v. United States, 552 U.S. 38 (2007), the Supreme Court elucidated the proper procedure and order of consideration for sentencing courts to follow: "[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." Gall, 552 U.S. at 49 (citation

omitted). Next, a sentencing court should "consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party. In so doing, [the Court] may not presume that the Guidelines range is reasonable. [The Court] must make an individualized assessment based on the facts presented." Id. at 50 (citation and footnote omitted).

Title 18, United States Code, Section 3553(a) provides numerous factors that the Court must consider in sentencing the defendant. These factors include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to (a) reflect the seriousness of the offense, to promote respect for the law and to provide just punishment, (b) afford adequate deterrence to criminal conduct, (c) protect the public from further crimes of the defendant, and (d) provide the defendant with appropriate education or vocational training; (3) the kinds of sentences available; (4) the Guidelines range; (5) pertinent policy statements of the Sentencing Commission; (6) the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution.

B. Application of Law

The government respectfully requests that the Court impose a sentence within the effective Guidelines range of 12 months' imprisonment because such a sentence is sufficient, but not greater than necessary, to achieve the goals of sentencing. See 18 U.S.C. § 3553(a). Specifically, the seriousness of the offense, the history and characteristics of the defendant, the need to promote respect for the law and to provide just punishment, and the need for general deterrence warrant a Guidelines sentence.

Frankel significantly enriched himself during the COVID-19 pandemic by tacking millions of dollars in fraudulent claims for E&M services on to claims for COVID-19 testing that was desperately needed. These claims were for E&M services that he did not provide or supervise and that were largely for healthy individuals who only needed COVID-19 testing and not an examination. He took advantage of the health care program and abused the trust placed in him by society as a doctor, and his conduct requires serious punishment.

1. The Nature and Circumstances of the Offense and the History and Characteristics of the Defendant Warrant a Guidelines Sentence

The nature and circumstances of the offense warrant a Guidelines sentence. While the New York City region was grappling with a deadly pandemic, Frankel saw an opportunity to make significant money. He quickly scaled up his operations and placed mobile COVID-19 testing sites across Long Island, and significant insurance reimbursements began flowing into ACD. Each decision to open another testing site was driven by greed for more and more money. While many health care providers were in the field addressing the pandemic face-to-face, rather than see patients himself or supervise those who were doing so, as was required, Frankel was frequently traveling and leaving his unlicensed office manager in charge. He also used the fraud proceeds to support his lavish lifestyle, buying a $300,000 Bentley and paying

$125,000 in equestrian fees. This manipulative and self-serving conduct requires serious punishment.

Frankel's fraud was not victimless. It affected a wide range of insurers, including Medicare, Medicare Advantage, Medicaid managed care, and numerous private insurers. Nor is the seriousness of the offense lessened by the fact that it was insurers, rather than individual patients, who suffered financial losses. Private insurers are funded by contributions from ordinary citizens, who may incur higher premiums or changes in covered due to fraud, and federal health insurance programs are funded by ordinary citizen's tax dollars. By deciding to commit his crime, Frankel unilaterally decided that their money should be in his own pockets.

The nature and characteristics of the defendant only emphasize the seriousness of the conduct. He is a medical doctor. He held a position of trust in society. He had no reason to commit this brazen theft other than to satisfy his own greed. A probationary sentence would not sufficiently credit the nature and circumstances of the offense, but rather would suggest that monetary penalties are sufficient punishment for professional defendants who enrich themselves by committing fraud during the COVID-19 pandemic. For all of these reasons, a Guidelines sentence is appropriate here.

2. A Guidelines Sentence Appropriately Reflects the Seriousness of the Offense, Promotes Respect for the Law, and Provides Just Punishment

Offenses involving fraud against health care programs are unquestionably serious. That this fraud occurred during the COVID-19 pandemic and in connection with claims associated with COVID-19 health care services only further elevates the seriousness of the offense. While the pandemic is largely behind us, it is important that the punishment for this offense—and all offenses that take advantage of public programs—adequately account for the seriousness of the offense. To allow Frankel to be punished through only economic penalties, like forfeiture and restitution, would undermine the seriousness of the offense and not provide just punishment. The Guidelines here are sufficient, but not greater than necessary, to reflect the seriousness of the offense, promote respect for the law, and provide just punishment to the defendant.

3. A Guidelines Sentence Affords Deterrence and Protects the Public

A Guidelines sentence is also appropriate to deter medical professionals and opportunists from engaging in similar schemes and to protect the public from the pilfering of health programs. Similar health care fraud schemes, which are common in this District and across the United States, must be deterred because they drain the health care system's limited resources, undermine public trust in our institutions, and require substantial resources to identify, investigate, and prosecute. Indeed, because of the overwhelming amount of COVID-19 pandemic fraud, the U.S. Department of Justice established a COVID-19 Fraud Enforcement

Task Force, which to date has charged more than 3,500 individuals and recovered over $1.4 billion in fraud proceeds.[2]

As the Second Circuit has noted, significant sentences are particularly appropriate in white collar crimes to promote general deterrence. See, e.g., United States v. Goffer, 721 F.3d 113, 132 (2d Cir. 2013) (noting that some feel that white collar crimes are a "game worth playing"). "'Persons who commit white-collar crimes like [d]efendant's are capable of calculating the costs and benefits of their illegal activities relative to the severity of punishments that may be imposed. A serious sentence is required to discourage such crimes.'" United States v. Vrancea, 136 F. Supp. 3d 378, 392 (E.D.N.Y. 2015) (quoting United States v. Stein, No. 09-CR-377, 2010 WL 678122, at *3 (E.D.N.Y. Feb. 25, 2010) (Weinstein, J.)). The Eleventh Circuit has similarly recognized that "[d]efendants in white collar crimes often calculate the financial gain and risk of loss, and white collar crime can therefore be affected and reduced with serious punishment." United States v. Martin, 455 F.3d 1227, 1240 (11th Cir. 2006). Frankel undoubtedly made this calculation as he opened more and more COVID-19 testing sites that he knew he was not working at or supervising.

Further, health care fraud is a complicated crime involving difficult questions at the interstices of the medical and legal professions. For these and other reasons, the likelihood of detection is relatively low. See Diane E. Hoffmann, Physicians Who Break the Law, 53 St. Louis U.L.J. 1049, 1052 (2009) (pointing to empirical research showing that professionals believe the probability of getting caught committing a white-collar crime is low and that fraud is "relatively easy to hide and hard to detect" because the acts involved "tend to be made up of complex, sophisticated, and relatively technical actions" that are "intermingled with legitimate behavior") (internal quotations and citations omitted)). Indeed, in this case Frankel's illegitimate billing for E&M services was intermingled with his legitimate billing for COVID-19 testing services. This unique circumstance contributes to some defendants' calculus that white collar might be worth committing because the risk of being caught is minimal and the likelihood of only financial penalties is great. By imposing a Guidelines sentence, the Court will show other would-be fraudsters that white collar crimes come with substantial penalties and are not worth the risk.

Even though Frankel's older age may make him less likely to recidivate, that does not undermine the fact that general deterrence remains an important consideration. A Guidelines sentence is appropriate to signal to other opportunistic fraudsters that these schemes carry more punishment than just the potential requirement to repay the fraud proceeds if one is caught.

V. Restitution and Forfeiture

Under 18 U.S.C. § 3663A, the Court must impose restitution. In United States v. Zangari, 677 F.3d 86, 93 (2d Cir. 2012), the Second Circuit held that restitution must be measured according to the victim's actual loss, not the defendant's gain. Moreover, in calculating restitution, "these losses need not be mathematically precise," and "[a] reasonable

[2] https://legalnewsline.com/stories/657650414-attorney-general-garland-reports-on-covid-19-fraud-enforcement-task-force-2024-findings.

approximation will suffice, especially in cases in which an exact dollar amount is inherently incalculable." United States v. Rivernider, 828 F.3d 91, 115 (2d Cir. 2016) (internal quotation marks omitted). The government respectfully submits that the Court should order the defendant to pay restitution in the amount of $3,489,305.54, which was agreed to in his plea agreement and which represents the amount of money various health care programs paid for E&M services that were not provided as claimed.

In addition, and as agreed to in his plea agreement, Frankel obtained and acquired $3,489,305.54 that is subject to forfeiture, which reflects his share of the proceeds from the offense of conviction. Accordingly, the government respectfully requests that the Court issue the proposed forfeiture order and incorporate the order into the judgment of conviction.

VI. Conclusion

For the foregoing reasons, and based on a balancing of the Section 3553(a) factors, the Court should impose a sentence within the effective Guidelines range of 12 months' imprisonment, as well as order the defendant to pay restitution in the amount of $3,489,305.54 and enter a forfeiture money judgment in the amount of $3,489,305.54.

Respectfully submitted,

BREON PEACE
United States Attorney
Eastern District of New York

GLENN S. LEON
Chief
Criminal Division, Fraud Section
U.S. Department of Justice

By: /s/
Patrick J. Campbell
Trial Attorney
Criminal Division, Fraud Section
U.S. Department of Justice
(202) 262-7067

cc: Clerk of Court (JS) (via email)
Timothy Sini, Esq. (via ECF)
Steven Guttman, U.S.P.O. (via email)