IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. **18-11809-HH**

United States of America,

Appellee,

- versus -

Monty Grow,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES

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Of Counsel

United States v. Grow, Case No. 18-11809-HH

Certificate of Interested Persons

In compliance with Fed. R. App. P. 26.1 and 11th Circuit Rules 26.1 and 28-1, the undersigned certifies that the list set forth below is a complete list of the persons and entities previously included in the CIP included in the appellant's initial brief, and also includes additional persons and entities (designated in bold face) who have an interest in the outcome of this case and were omitted from the appellant's CIP.

American Equity Investment Life Insurance Company (AEL)

A.R.

B.A.

Bank of America, N.A. (BAC)

Bozorgi, Susan Katherine

Cannon, Aileen M.

C.H.

Colan, Jonathan D.

Darken, Kevin John

D.B.

Dillon, William D.

DiRosa, Phillip

United States v. Grow, Case No. 18-11809-HH

Certificate of Interested Persons (Continued)

Donlan, Maureen

Ewton, Michael

Fajardo Orshan, Ariana

Ferrer, Wifredo A.

Goodman, Hon. Jonathan

(Greenberg, Benjamin G.)[1]

Grove, Daren

Grow, Monty Ray

Hummel, Randy

I.P.

J.A.

J.B.

J.C.

J.K.W.

Juenger, Jon Milton

Larsen, Kevin

Lay, Ginger

[1] Former United States Attorney Benjamin G. Greenberg had been mistakenly added to the Certificate of Interested Persons. He was recused from participating in this matter and should be removed from the list of interested persons.

United States v. Grow, Case No. 18-11809-HH

Certificate of Interested Persons (Continued)

L.D.

L.G.

Marcus, Jeffrey David

Markus, David Oscar

M.E.

Meyers, Kathryn Ashley

M.K.

Moreno, Hon. Federico A.

National Financial Services, LLC. Subsidiary of Fidelity Brokerage Services LLC (FNF)

Noto, Kenneth

N.P.

O'Sullivan, Hon. John J.

Otazo-Reyes, Hon. Alicia M.

Patient Care of America

Pineiro, Michael Anthony

Powell, Nichole

Rambarann, Rosalinda

Rashbaum, Daniel

United States v. Grow, Case No. 18-11809-HH

Certificate of Interested Persons (Continued)

R.B.

R.R.

Simonton, Hon. Andrea M.

S.J.

Smachetti, Emily M.

Timberlake-Wiley, Deana

T.J.

Torres, Hon. Edwin G.

TriCare

Van Dusen, Susan Wright

Von Letkemann, Blair

White, Hon. Patrick A.

s/ Jonathan D. Colan
Jonathan D. Colan
Assistant United States Attorney

Statement Regarding Oral Argument

The United States of America respectfully suggests that the facts and legal arguments are adequately presented in the briefs and record before this Court and that the decisional process would not be significantly aided by oral argument.

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Statement of Jurisdiction

This is an appeal from a final judgment of the United States District Court for the Southern District of Florida in a criminal case. The district court entered judgment against Monty Ray Grow on April 23, 2018 (DE:2). The district court had jurisdiction to enter the judgment pursuant to 18 U.S.C. § 3231. Grow filed a timely notice of appeal on April 30, 2018 (DE:212); *see* Fed. R. App. P. 4(b). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and authority to examine Grow's challenge to his sentence pursuant to 18 U.S.C. § 3742(a).

Statement of the Issues

I. Whether sufficient evidence supported Grow's conspiracy to defraud Tricare and substantive health care fraud convictions.

II. Whether sufficient evidence established Grow's receipt of kickbacks and money laundering.

III. Whether Grow may challenge the district court's lack of element instructions on one object of a multi-object conspiracy in accordance with his own proposed instructions and agreement with the court's given instructions.

IV. Whether the district court abused its discretion by informing the jury it could report any partial verdicts it had reached during deliberations.

Statement of the Case

1. Course of Proceedings and Disposition in the Court Below

Appellant Monty Ray Grow and co-defendant Ginger Lay were indicted by a federal grand jury in the Southern District of Florida and charged in a superseding indictment regarding a scheme to defraud Tricare, a federal health insurance program covering United States military personnel, retirees, and dependents (DE:37).

Grow was charged with one count of conspiracy to commit health care fraud and wire fraud in that he conspired to (a) execute a scheme to defraud a health care benefit program, as defined in 18 U.S.C. § 24(b), in violation of 18 U.S.C. § 1347;

and (b) devise a scheme to defraud by means of materially false and fraudulent representations, and for the purpose of executing the scheme, did knowingly transmit and cause to be transmitted wire communications, in violation of 18 U.S.C. § 1343; all in violation of 18 U.S.C. § 1349 (Count 1) (DE:37:1-7). He was also charged with seven substantive counts of health care fraud in that he executed a scheme to defraud Tricare by causing the submission of fraudulent claims, in violation of 18 U.S.C. §§ 1347 and 2 (Counts 2-8) (DE:37:7-9).

Grow was charged with one count of conspiracy to pay and receive health care kickbacks in that he conspired to violate 42 U.S.C. §§ 1320a-7b(b)(1)(A), (b)(2)(A), and (b)(2)(B) by (a) soliciting and receiving kickbacks in return for referring Tricare beneficiaries to order and receive compounded medications; (b) offering and paying kickbacks to Tricare beneficiaries and patient recruiters in order to induce prescription referrals from beneficiaries for compounded medications, (c) submitting and causing the submission of claims to Tricare for compounded medications to those Tricare beneficiaries; and (d) diverting proceeds of claims of the recruited and referred beneficiaries for their personal use, the use and benefit of others, and to further the conspiracy; all in violation of 18 U.S.C. § 371 (Count 9) (DE:37:9-15). Grow was also charged with: 24 substantive counts of receiving kickbacks in connection with a federal health care program, in violation of 42 U.S.C.

§ 1320a-7b(b)(1)(A)) (Counts 10-33) (DE:37:15-17); 11 substantive counts of paying kickbacks in connection with a federal health care program, in violation of 42 U.S.C. § 1320a-7b(b)(2)(B) (Counts 34-44) (DE:37:17-18); and five counts of money laundering by engaging in financial transactions involving criminally-derived property greater than $10,000, specifically property derived from health care fraud and the receipt of kickbacks in connection with a federal health care benefit program, all in violation of 18 U.S.C. § 1957 (Counts 45-49) (DE:37:18-19).

Grow was further charged with two counts of causing to be dispensed misbranded prescription drugs in violation of 21 U.S.C. §§ 331(k) and 333(a)(1) and 18 U.S.C. § 2 (Counts 50-51) (DE:37:19-20).

The indictment also stated forfeiture claims regarding property and proceeds related to Grow's health care fraud and money laundering charges (DE:37:20-22). Prior to trial, co-defendant Lay pled guilty to Count 1's conspiracy charge (DE:64).

After a seven-day jury trial, Grow was convicted on Count 1 (conspiracy to defraud Tricare), Count 5 (substantive health care fraud), Count 9 (conspiracy to pay and receive health care kickbacks), Counts 10-14, 17-18, 20, 22, 23-26 (substantive receipt of health care kickbacks), and Count 45 (money laundering) (DE:115). He was acquitted on the remaining counts.

Grow filed post-trial motions for a judgment of acquittal on all counts (DE:165) and for a new trial (DE:166). After the parties exchanged further memoranda (DE:188, 192), the district court denied Grow's motion for a judgment of acquittal (DE:205) and his motion for a new trial (DE:175).

Following sentencing proceedings (DE:240), the district court entered judgment against Grow, sentencing him to serve a total term of 262 months' imprisonment, to be followed by three years of supervised release (DE:208). It also ordered Grow to pay a $1,700 special assessment and $18,856,744.00 in restitution (*id.*).

Grow filed a timely notice of appeal (DE:212) and is currently incarcerated.

Subsequently, while this appeal has been pending, Grow filed in the district court a second motion for a new trial, asserting purported new evidence of juror misconduct (DE:256). The parties have exchanged memoranda addressing the motion (DE:261, 263), but the district court has not ruled on the motion.

2. Statement of the Facts

a. The Government's Case-in-Chief

Grow's Plan

Monty Ray Grow, using a network of patient/recruiters he managed through his company MGTEN Marketing Group, recruited patients covered by the

government's Tricare health insurance program to order compounded medications from Patient Care of America ("PCA"), a compounding pharmacy. Compounding pharmacies mix together active pharmacological ingredients with base creams and wetting agents to produce medications "specially made for each patient" (DE:232:49-56, 162). Tricare is a government health insurance program providing benefits to members of the military and their families (DE:229:225; 230:143). Grow sought "only Tricare beneficiaries because they were the only ones that were paying out at that time" (DE:231:37).

Grow worked with co-defendant Ginger Lay, who recruited and paid patients ostensibly for answering a survey about the effectiveness of medications she asked them to try, but really just for ordering the medications—the survey data was neither wanted or used for any purpose (DE:229:254, 270). Grow also recruited his own network of patient/recruiters who earned commissions for ordering the medications as well as percentages of the commissions earned by patient/recruiters they in turn recruited (DE:231:47-48, 106, 141-43; DE:232:29; GX62; GX137:6). Grow was paid 50% of the money Tricare reimbursed PCA for each ordered prescription, from which he in turn paid Lay and others for patients they recruited (DE:229:240, 267).

Grow also sold PCA a wetting agent, referred to as "Ethoxy Gold," that generated higher reimbursements from Tricare when used to mix the pain cream

instead of a cheaper and easier to use equivalent alternative (DE:229:228, 291; DE:232:57-58, 91-92). Instead of using the ingredient PCA's own lead pharmacy technician testified was no different medically, cost only 2.5 cents per milliliter, and came in bulk 4,000 milliliter jars, Grow had PCA use Ethoxy Gold, which cost PCA $12.50 per milliliter, and came in individual one-milliliter vials that forced PCA technicians to open "thousands of bottles" (DE:232:57-66, 91-92). This was because Tricare reimbursed PCA for Ethoxy Gold at between $55 and $60 per milliliter, whereas the equivalent ingredient would only be reimbursed between 10 to 15 cents per milliliter (DE:232:59-62). During the relevant time period, the alternative ingredient was never unavailable and PCA never had to purchase Ethoxy Gold out of necessity (DE:232:100). When Tricare reduced reimbursement for Ethoxy Gold to only 12 cents, PCA stopped using it (DE:232:67).

Grow's plan was to ensure that as many patients as they could recruit would "always" order the same, most-highly reimbursed cream formulas, so that he and his network would earn as much money as possible (DE:229:225, 241, 245-48, 259, 319; DE:230:56-57, 84-85; GX100:1).

Grow's Network

Grow was introduced to Ginger Lay, who had previously worked as a patient recruiter, through LinkedIn (DE:229:233, 310-11). Although they never met in

person, and only ever communicated by telephone or email, Grow explained to Lay how she could work for him as a recruiter targeting Tricare beneficiaries (DE:229:231-35, 295, 310-11). Lay's role was "[t]o find Tricare patients, … to market them the compounding prescriptions, to fill out the preprinted prescription pads that Monty sent me to send it into the telemedicine company that Monty set up and to get it to the pharmacy" (DE:229:226). Lay told the jury that these patients "did not" need these medications (*id.*).

Lay's contract with Grow stated that she should "not make any payments to any referral sources in order to induce any referrals," but she and Grow did not discuss the provision, and she and Grow did in fact pay for referrals (DE:229:239).

Grow paid Lay 40% of Tricare's reimbursements for her recruited patients' prescriptions, minus certain expenses (DE:229:227). Grow paid Lay's 40% out of the 50% he received from PCA (DE:229:227, 240). Grow explained that Tricare reimbursed their preferred scar cream for $15,000 to $17,000, pain cream for $8,000, and a metabolic vitamin for $6,000—so a single patient obtaining a 30-day supply of these medications would earn her 40% of $25,000, minus the costs of the goods and paying the prescribing doctors their consultation fees (DE:229:227, 235, 239). Lay would pay her sales reps out of her 40% (DE:229:315).

Grow wanted patients to know they did not have to pay any copays for their medications (DE:229:253). They might receive a copay bill from PCA, but they did not have to pay it (DE:229:253). The pharmacy would not seek to collect (DE:229:253). After PCA emailed Grow about a patient who complained that "he was told that he wouldn't have to pay anything for his meds," Grow texted Lay to "work something out" with him, reminding her that "[h]e doesn't have to pay" (DE:229:263-65; GX51, GX17-F). Lay convinced the patient not to cancel, saving their commissions of $2,910, $7,876, and $2,755 (DE:229:264, 266-67).

Lay's first check for $127,790 constituted the fruits of approximately 10-20 hours' worth of work signing up 10 to 15 patients (DE:229:242-44). During the time she worked for Grow, Lay received $6.3 million, some of which went to pay her business partner and employees (DE:229:254-55).

Grow explained to his own network of patient/recruiters that they would receive 7% commissions on Tricare reimbursements for prescriptions filled by their recruited patients, smaller commissions on prescriptions filled by patients their patients recruited, and so on (DE:231:37-38, 47-48, 106; *see also* DE:230:131-33; GX67).

Grow told them—and told them to tell their recruited patients—that they would not have to pay copays and to disregard any copay bills (DE:231:39, 52-53,

115; DE:232:25-26). A recruiter explained to the jury: "[T]hey might lean towards getting the products if they didn't have to pay anything out of their own pocket" (DE:232:26-27).

Grow Controlled the Prescriptions

Grow used telemedicine companies to prescribe the medications, generally "1st Care Med" and "House Calls 24/7" (DE:229:241). Grow paid the telemedicine companies $100 or $150, per telephone or video consultation (DE:229:239, 321-22; DE:231:44).

Some patients received the medications without ever talking to a doctor (DE:231:43, 111; DE:232:10-13). Others described how cursory the consultations could be: "maybe three minutes" (231:241); "about five minutes, if that," between flights while the doctor was at an airport (DE:23:111); "just confirm[ed] all the information that I had already given" (DE:230:117). Nichole Powell testified that when she did speak with a doctor, the doctor did not ask about the types of scars she had or the location, frequency, or duration of her pain, and did not discuss any medication allergies, set up a follow-up call, or give any contact information to call back if there was any bad reaction or problem (DE:231:111-12). She testified: "I just signed up. I didn't need the drugs" (DE:231:107).

Multiple patients testified they were not taking any prescription pain or scar medication at the time, nor were seeking to, before they signed up to receive them from Grow's recruiters (DE:230:95, 116; DE:231:240, 253, 264-65). Michael Ewton testified: "Did you sign up for these products because you needed them?" "No." (DE:232:118).

Patients told the jury specifically why they ordered the medications: "I was offered money to try out the product" and the offer of money "[a]bsolutely" motivated him (DE:230:115-16); "I got paid to do nothing…. I filled the prescription and not too much later I saw money in my checking account" (DE:231:266).

Patient/recruiter Rosalinda Rambarann testified about ordering the pain cream, scar cream, and vitamins for herself and signing up her husband and her son, and the jury was shown a picture of the large quantity of creams they received (DE:231:237-39; GX172). She testified: "There was probably a couple of squirts out of each one that we would have used" (DE:231:237-239). They were not seeking any actual treatment—"It was just a way that I could make some money" (DE:231:240-43).

Grow told Nichole Powell that ordering the medications "was a way to make money, and I needed to order the scar cream and the pain cream in order to do the business" (DE:231:107). "I signed up knowing that I needed to basically get the

products, so I got the products and then I signed my husband up" (DE:231:107). Powell used the scar cream, after a burn, "but the pain cream I never used and the vitamins I didn't use" (DE:231:113). Her husband did not use any of the medications (DE:231:113). She signed up several additional patients and "told them what Monty told me; [it] was the best way to make money…. [T]hey needed to get all three of the products, and it was an easy way to make money" (DE:231:114). Grow paid Powell $54,000 for her work (DE:231:115).

Grow showed Lay how to fill out sample patient profile forms for the doctors, with email instructions to "[a]lways use p-01 for pain, sc-01 for scar" (DE:229:244-47; GX100:1). "Monty told me to … always choose sc-01 and Pain-01. He never gave an option to choose any other formulary [sic]" (DE:230:57-58; *see also* DE:230:84-85). The "suggested requested products" had these medications preprinted on the sample form (DE:229:247; GX100:2). For House Calls 24/7, the product selections were pre-made, but for 1st Care Med, the pre-selected products were recommended as suggestions (DE:229:256). At trial, Lay was shown a typical prescription and affirmed that she had checked off "p-01" and "sc-01," to be filled for a 30-day supply of 360 grams (DE:229:248-49; GX17-B). Grow instructed her to pre-select these formulas and amounts "because they paid the highest commission and reimbursement" (DE:229:245-48, 319).

Lay asked Grow what should happen if a patient did not have any scars (DE:229:259). "He said, everybody has scars…. [A]lways choose a scar cream" (DE:229:259). If she accidentally selected "sc-02" instead of "sc-01," Grow "would get it changed and get it sent into the pharmacy" (DE:229:259).

Their procedure was to make the product selections and then fax the forms to the telemedicine company, who would in turn fax them back after the telemedicine doctor signed the prescriptions (DE:229:249-51). Grow or Lay then faxed the prescriptions to PCA (DE:229:245, 256-58). Emails reflected that Grow asked the telemedicine companies to fix prescriptions to make sure that they included the highest-reimbursed pain cream and scar cream, as well as the vitamin, and that they ordered the largest quantities and refills (DE:229:259-62).

Emails between PCA's lead pharmacy technician, Armando Lozada, and Grow showed that prescriptions were being faxed back and forth between Grow and the doctors before Grow sent them to PCA, because, in Grow's words, "they are filled out wrong or the grams aren't checked off or no refills or signatures," and that is why, Grow wrote, he had the prescriptions "sent to me directly before you would ever see them to make sure they were done correctly by the time they got to you" (DE:232:70-72; GX85).

If a prescription came back and the doctor had not selected the most expensive pain medication, scar medication, and vitamin, "Monty would get upset and get it changed" (DE:229:258-59). Grow emailed 1st Care MD: "After your first doctor would not write a script for scar, I had my other telemed network go to work on it," but, "behold, its dr bansal again and he wrote sc-03" (DE:231:197; GX47). Grow asserted that sc-03 was "not available" (GX47). Grow concluded the email: "Do you have another dr in ny to consult this patient or do i need to pursue other avenues?" (DE:231:197; GX47). At trial, Dr. Ankush Kumar Bansal testified that it was his practice to order lesser amounts of medications, without pre-ordering refills, to make sure a medication is effective for a patient, before giving the patient a large supply of the medicine (DE:231:192-97). The next day, Grow sent PCA a "revised" prescription from Dr. Bansal ordering sc-01 (DE:231:207; GX49). Dr. Bansal testified that he had no discussions about sc-03 supplies being unavailable (DE:231:200). Grow later complained to 1st Care MD that Dr. Bansal was "terrible" and "doesn't write half the time and gives 0 refills" (DE:231:198; GX64).

Grow complained in another email to 1st Care MD: "I received 3 scripts back today from 2 different dr's and neither one of them wrote for 360 grams. This is a tremendous difference in reimbursement. Is there a way we can fix this?" (DE:231:200; GX110).

Matthew Smith, Vice President of Operations at PCA, instructed Lozada: "The Monty Grow and Ginger Lay Rx's must have their fax numbers blocked out prior to scanning" (DE:232:70; GX143). Lay explained: "The prescription had to look like it came from the doctor and not me. So when the prescription came to me, I would white it out and fax it to the pharmacy" (DE:229:251; *see also* DE:229:244).

Lay's Survey Program

Lay came up with the idea of recruiting patients with a survey offer, advertised to military families, purporting to seek data about the effectiveness of medications, but in fact the data "wasn't used for any reason" (DE:229:254, 268-70). The point of the survey was "[t]o refer more Tricare beneficiaries and get paid commissions" (DE:229:268, 270). Participants would be paid $1,000 (DE:229:271). Compensation for participating in the survey depended on the participant obtaining the medication, under Tricare benefits, and was paid each month they obtained a refill (DE:229:227, 270-74). The survey also offered participants the chance to earn additional money by referring more participants (DE:229:270-71).

Lay discussed the survey with Grow and sent him the consent form to review (DE:229:272-73; DE:230:7). PCA asked for changes to the consent form, including clarification that the compensation would not be paid by PCA (DE:229:273; DE:230:88). When Grow asked Lay why patients should be offered so much money,

she explained it was "to generate more money and more beneficiaries" (DE:229:277). Grow began using the survey to recruit patients in February 2015 (DE:229:274).

Lay testified that when patients called PCA asking about their payments, "Monty would call me and let me know … and I would let the reps tell the patients don't call the pharmacy" (DE:229:283). Emails showed that after one such patient inquiry to PCA ("not the first time"), PCA complained to Grow, and Grow emailed PCA, on March 3, 2015, that "the survey program is terminated" (DE:229:277-78; DE:232:198; GX129).

After Grow's March 3 email to PCA, Lay emailed her patients to let them know that the survey program had ended, but Grow instructed her to "continue to pay them" (DE:229:278-79). "[H]e told me in March to continue paying patients" (DE:230:43). Lay understood that Grow was concerned "[t]hat they would cancel and we would no longer get paid on their refills" (DE:229:278-79). No new patients would be enrolled, but she should continue to pay the existing patients for one more refill (DE:229:279-81). Lay testified that some of the patients were paid in May and she continued paying some into June, as compensation for their earlier participation in the survey program (DE:230:35-36, 89-90). Grow never asked Lay to return any of the commissions she earned during the survey program and continued to work

with her after the termination of the program (DE:230:90). He paid her commissions for her patients through April (DE:229:284).

Grow Converts Everyone to PCA Employees

In May 2015, Grow told Lay that "everybody had to become W-2 employees" of PCA (DE:229:284-85). Lay and several other of Grow's recruiters testified that they had no interviews or meetings with anyone at PCA and were given no training by PCA, before becoming employees—they simply filled out paperwork (DE:229:285-86, 291; DE:231:59, 117; DE:232:30). One recruiter explained: "I already had a job and it was strictly about getting another payment." (DE:232:119). The same commission structure continued (DE:231:118). "Nothing changed" (DE:231:119). When a recruiter called PCA about a commission, she was told to speak to Grow about it (DE:231:118).

Grow continued to submit commission claims for Lay to PCA after she became a PCA employee in May—for example, a May 22, 2015 email from Grow sought a $758,060.40 commission for his own network of recruiters for the prior two-week period and commissions for Lay and her network totaling 554,731.75 for the current period and $806,628.44 for the previous period, still relating to refills by patients in her survey program (DE:229:286-88; GX142). As W-2 employees of

PCA, PCA withheld tax payments from their commissions, but otherwise continued to pay Lay and her reps their commissions for existing patients (DE:229:290).

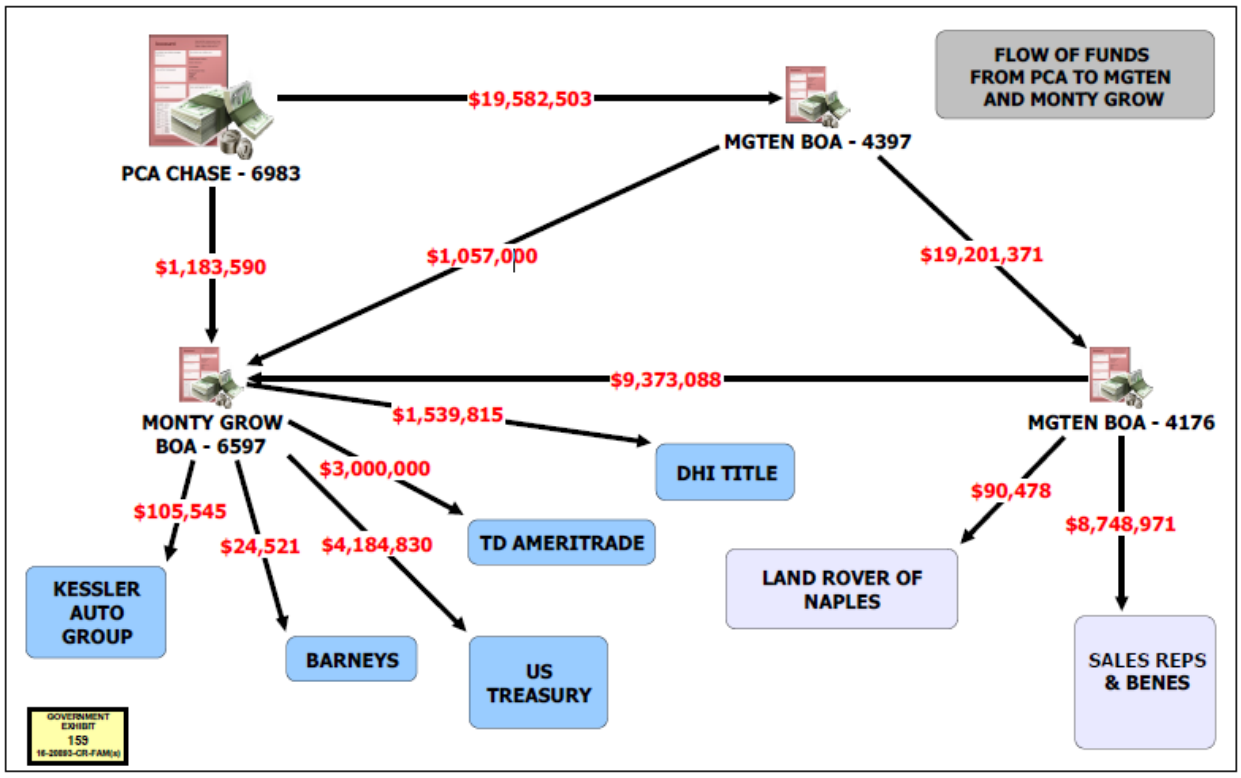
After only approximately six to eight weeks following the conversion of all of Grow's sales reps to PCA employees, they were all terminated, because Tricare stopped paying for the prescriptions and their "business ceased to exist" (DE:234:178-79).

Grow's Transactions Involving Tricare Reimbursements

Special Agent Jennifer Klein, with the Department of Defense Criminal Investigative Service (DE:230:129-30), compiled data regarding Tricare claims for PCA patients recruited by Grow, using a list that Grow himself prepared to track commissions (DE:230:131-33; GX67). Government Exhibit 170 was a spreadsheet compiled from this data, including the date patient prescriptions were filled, the amount billed to Tricare by PCA, and the amount Tricare paid (DE:230:134-35, 146; GX170).[2] Special Agent Klein identified approximately 676 beneficiaries and 4,449 claims, yielding a total amount billed to Tricare of $48,320,259.38 and a total amount paid by Tricare of $39,408,499.02, between November 2014 and August 2015 (DE:230:135-36; GXS170A-D).

[2] Although the pharmacy was listed in the spreadsheet as DCRX, that was another name used by PCA (DE:230:135).

Financial investigator Lisa Klitz examined PCA's bank records, Grow's bank records, and the records of MGTEN Marketing Group (Grow's corporate entity) (DE:230:165-66) and traced the funds going into and out of those accounts between October 2014 and July 2015 (DE:230:173-74); she testified at trial regarding summaries of that information she compiled (DE:230:170). Using a chart she prepared, she explained to the jury that the records showed that PCA transferred funds to Grow directly and through two MGTEN corporate accounts that he solely controlled totaling $11,613,678 (DE:230:166-74).



(GX159).[3] The chart showed the purchases made and taxes paid from those accounts, including $105,545 paid from Grow's account to Kessler Auto Group (DE:230:175).[4] The government also introduced the check from Grow, dated February 3, 2015, paying Kessler Auto Group for the purchase of a Porsche automobile from this account (DE:230:181; GXS 8, 165).

Klitz walked the jury through other summary exhibits showing the total payments from MGTEN's account (ending in number 4176) to sales reps and beneficiaries, and the exhibits documenting the individual payments, listing their dates, whether they were made by wire or direct deposit, and which count charged

[3] Klitz explained that the chart showed PCA's electronic transfers of $19,582,503 to MGTEN's Bank of America account number ending in 4397, but a total of $20,258,371 was shown coming out of that account because an additional approximately $425,000 was deposited by check through a teller and a little over $200,000 came from InforMD (DE:230:172-73).

[4] This $105,545 transfer from Grow's account to Kessler Auto Group is the subject of Count 45's money laundering conviction, one of the offenses of conviction at issue in this appeal.

in the indictment they related to (DE:230:176-80).[5] She also explained exhibits documenting other transactions involving Grow's accounts (DE:230:182-85).[6]

At the close of the government's case-in-chief, the district court denied Grow's motion for a judgment of acquittal, except as to count 51 (misbranded drugs) for which it granted the motion (DE:232:130, 141, 147, 149, 157).

b. Grow's Defense Case

PCA's corporate lawyer, David Corcoran, testified that under Grow's original arrangement with PCA, Grow was not an employee of PCA, but rather, MGTEN helped promote PCA's products, and PCA filed a 1099 statement of earnings form for MGTEN for tax purposes (DE:232:187-90, 206). Later, in December 2014, when Corcoran learned that PCA was providing prescriptions to Tricare beneficiaries, he advised that PCA consult "specialty health care counsel" (DE:232:191-92). That new counsel recommended that Grow and his people "be brought on as employees," in order to comply with the federal Anti-Kickback Statute (DE:232:193-94). That

[5] Government exhibit 163 itemized the payments from PCA to Grow, charged in the receipt of kickback counts (Counts 10, 11, 12, 13, 14, 17, 18, 20, 22, 23, 24, 25, and 26), for which Grow was convicted and which are at issue in this appeal (DE:230:179-80; GX163).

[6] Although in evidence, these transactions involve counts of conviction for which Grow was not convicted, and are therefore not discussed in detail, here.

process began in January 2015 (DE:232:194, 201). PCA continued its operations "while it was trying to convert [everyone because it] didn't want to withdraw from the business" (DE:232:212-13). It took until April 2015 to complete the transition to W-2 employees (DE:232:214). Corcoran denied having any involvement with or ever reviewing Ginger Lay's survey forms (DE:232:203).

On cross-examination, Corcoran conceded that he never gave any legal advice to Grow (DE:232:204-05). He did advise PCA that they could not pay doctors (DE:232:205). Corcoran's own self-described "rule" was "don't bill a Federal health care program, makes your life a lot simpler" (DE:232:210). When asked if "paying someone like Mr. Grow 50 percent of the profits for referrals from Federal health care programs" was "just something you know is wrong," Corcoran replied: "No, it's something that I don't want to think about" (DE:232:210).

Monty Grow testified in his own defense (DE:232:254). Grow testified he got involved with marketing compounded prescription medications (at first marketing to physicians) in early 2014, through a company called InforMD (DE:232:265-67; DE:233:7).

Grow testified he became acquainted with PCA when one of his sales reps presented a medical product to PCA's Matthew Smith (DE:233:19-20). He created MGTEN and "took the same structure that I had at InforMD [but] started marketing

directly to patients" (DE:233:22). Starting with three sales reps, MGTEN grew to "130 maybe" sales reps, enrolling "[a]pproximately 650" patients (DE:233:26-27). Grow attributed this fast success to the "great job" the sales reps did (DE:233:26).

He testified that only four patients were paid for ordering their own medications (not as recruiters of others) and that only happened by mistake (DE:233:32). He claimed: "That wasn't part of our program at all. Nobody was offering or trying to bribe nobody to get medications. These were products that we presented to people, they wanted them, they spoke to a physician and the physician, you know, wrote them if they deemed it necessary" (DE:233:30). He testified that he reversed payments that he knew about but claimed that he did not know about all of them (DE:233:32). He testified he only paid the telemedicine companies a flat fee, he never changed anyone's prescriptions, and "[i]t was always the doctor's decision on what they prescribed to the patient" (DE:233:38-44).

Grow claimed that he had no idea Ginger Lay was using the survey program to pay patients who ordered the prescriptions and that he demanded she stop after he found out about it in February 2015 (DE:233:118-20). He testified that the first time he found out that Lay was continuing to pay patients past March 2015 was "[i]n this trial" (DE:233:129).

Grow testified that he learned from Matthew Smith that PCA's new lawyer wanted everyone to become PCA employees to comply with the law and that he was "not happy about" how long it took to complete the "onboarding process" (DE:233:143-45). After everyone became PCA employees, "we were all terminated" because "they shut down the business" when Tricare stopped reimbursing for compounded medications (DE:233:148).

Grow testified that he "[a]bsolutely [did] not" intend to violate any federal laws (DE:233:154). On cross-examination, he conceded that he never hired his own lawyer to ensure he was complying with relevant laws and that he never asked for an opinion letter from PCA ensuring that his work with them complied with the law (DE:234:179-82).

Grow also admitted previously signing forms agreeing to abide by the Anti-Kickback Statute and not to submit false claims (DE:234:54-60; GX2). He also acknowledged that he knew from previous medical marketing work that he could not pay patients (DE:234:65-66).

He conceded that he knew in the period of October 2014 to June 2015 that it was illegal to pay Tricare patients (DE:234:36). He acknowledged that, in February and March 2015, when he claimed four patients were paid by mistake, they were not

at that time PCA employees but "independent representatives for MGTEN Marketing Group" (DE:234:39-48).

He agreed that paying patients thousands of dollars to obtain prescriptions would be a "corrupt influence" on the patients, but he claimed that when he found out about Ginger Lay paying patients, he stopped the survey program (DE:234:195) He did not feel that it was necessary to fire her, however (DE:234:195-97). He claimed that PCA still made her an employee, because "Ms. Lay was very convincing in letting us know that no one had ever been paid" (DE:234:199).

Grow did not dispute the government's evidence showing that he and MGTEN received approximately $19 million from PCA as commissions for the prescriptions obtained by patients he referred between November 2014 and April 2015 (DE:234:41-42). He conceded that he was paid 50% commissions for the prescription reimbursements and that he was not an employee of PCA at that time (DE:234:42).

Grow also acknowledged and did not dispute the government's evidence showing examples of how much he made on individual prescriptions (DE:234:48-51). For example, for a vitamin prescription that cost PCA $76.90 to fill, and was reimbursed by Tricare for $6,164.31, Grow was paid a 50% commission on the reimbursement amounting to $3,043.70, for every month that the prescription was

filled, less the downstream commissions that he paid to his sales reps (DE:234:49-51). Similarly, a pain cream prescription that cost PCA approximately $700 to fill, was reimbursed by Tricare for $16,000, of which $7,800 was paid to Grow and his sales reps (DE:234:50-51).

Grow conceded that the purchases he made, documented in the government's summary chart, were made with money he received from PCA (DE:234:202-03).

c. The Government's Rebuttal Case

Jonelle Coronado testified that when Grow personally marketed the products to her, he told her that "if you signed up … you would receive the products and then you would also get a commission from even your own products," in addition to commissions for signing up other Tricare-covered friends (DE:234:244). She subsequently did receive a payment of approximately $1,800 after she obtained her prescriptions (DE:234:246-48). She was paid again after receiving a second order (DE:234:248).

At the close of the government's rebuttal case, the district court denied Grow's renewed motion for a judgment of acquittal (DE:234:286-87, 301-02; DE:235:20-36).

d. Post-Trial Motions

Grow's post-trial motion for a judgment of acquittal renewed his challenges to the sufficiency of the evidence establishing his guilt on the health care fraud and kickback conspiracy and substantive charges, as well as the resulting money laundering conviction (DE:165). His motion for a new trial challenged the district court's instructions regarding kickbacks and its statements while advising the jury about the deliberations schedule that it could return any partial verdicts it had reached, as well as issues not raised on appeal (DE:166). The district court denied Grow's motions (DE:175; DE:205; DE:240:14).

3. Standards of Review

This Court "review[s] whether there is sufficient evidence to support the jury's guilty verdicts de novo, looking at the evidence in the light most favorable to the government and resolving all reasonable inferences and credibility evaluations in favor of the verdict." *United States v. Crabtree*, 878 F.3d 1274, 1284 (11th Cir. 2018) (internal quotation omitted).

"[D]istrict courts have broad discretion in formulating jury instructions provided that the charge as a whole accurately reflects the law and the facts." *United States v. Williams*, 526 F.3d 1312, 1320 (11th Cir. 2008).

In assessing whether a charge was coercive, this Court "consider[s] the language of the charge and the totality of the circumstances under which it was delivered." *United States v. Woodard*, 531 F.3d 1352, 1364 (11th Cir. 2008).

Summary of the Argument

Ample evidence established Grow's conspiracy to defraud Tricare by obtaining reimbursements for medications that beneficiaries themselves did not believe they needed and sometimes did not even use. The jury was entitled to credit the testimony establishing Grow's intent to defraud Tricare and to hold his contrary explanations as substantive evidence of his guilt.

Grow concedes he was paid handsomely by PCA a percentage of the resulting Tricare reimbursements and that he used those proceeds to make the transaction underlying his money laundering conviction.

Grow invited any error in the district court's Count 1 conspiracy instructions, by submitting instructions lacking the same wire fraud elements he is now barred from raising on appeal. Even if this issue were amenable to plain error analysis, Grow cannot show his substantial rights were affected, because the jury's guilty verdict on Grow's health care fraud counts necessarily included the use of wire communications.

The district court did not abuse its discretion over the management of jury deliberations by informing the jury that it could report partial verdicts while continuing to deliberate.

Argument

I. Sufficient Evidence Supported Grow's Tricare Fraud Convictions.

Grow argues (Br. at 25) that insufficient evidence supported his conspiracy and substantive health care fraud convictions (Counts 1 and 5). Though he argues that all submitted claims were for medications prescribed by a doctor, the evidence shows Grow conspired to and did in fact orchestrate the submission of claims for prescriptions that patients did not need, using medically-unnecessary formulas designed to maximize Tricare's reimbursements.

Count 1 charged Grow with conspiring, in violation of 18 U.S.C. § 1349 to defraud Tricare in violation of 18 U.S.C. § 1347 and to knowingly transmitting and causing to be transmitted wire communications to execute the fraudulent scheme in violation of 18 U.S.C. § 1343 (DE:37:4). Count 5 involved one such submitted claim.

Section 1347 makes it a crime to "knowingly and willfully execute[] … a scheme or artifice":

(1) to defraud any health care benefit program; or

> (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program,
>
> in connection with the delivery of or payment for health care benefits, items, or services ….

18 U.S.C. § 1347(a). Tricare is a health care benefit program under 18 U.S.C. § 24(b). Wire fraud involves the "use of the interstate wires in furtherance of the scheme [to defraud]." *United States v. Hasson*, 333 F.3d 1264, 1270 (11th Cir. 2003). To sustain the conspiracy conviction, the government had to establish that: (1) a conspiracy existed to commit health care fraud under 18 U.S.C. § 1347; (2) Grow knew of the conspiracy; and (3) Grow knowingly and voluntarily joined it. *United States v. Gonzalez*, 834 F.3d 1206, 1214 (11th Cir. 2016). A multi-object conspiracy can be affirmed if there was sufficient proof of any object. *United States v. Medina*, 485 F.3d 1291, 1301 (11th Cir. 2007).

"[I]n a health care fraud case, the defendant must be shown to have known that the claims submitted were, in fact, false." *Medina*, 485 F.3d at 1297. The government can establish that claims were false through evidence that "patients were not legitimately prescribed" medications "or that a patient did not need what was delivered." *Id.* at 1299. *See also Gonzalez*, 834 F.3d at 1214 ("A person makes a false claim if the treatments that were billed were 'not medically necessary….'" Quoting *Medina*, 485 F.3d at 1304). Grow's fraudulent intent could be shown by

evidence that he acted with "reckless indifference" as to the truth of whether the prescribed medications were medically necessary. *United States v. Clay*, 832 F.3d 1259, 1311-12 (11th Cir. 2016).

Grow is incorrect (Br. at 26) in asserting that medical necessity was not at issue. Grow quotes the government's opening statement that "[e]ven if these are wonder drugs, … you can't pay kickbacks to encourage people to order things they don't need" (Br. at 7, quoting DE:229:212). The government made the same point in its closing (DE:235:46). The drugs did not have to be ineffective, generally, for these claims to be fraudulent. These claims were fraudulent because the medications were prescribed for patients who did not need them. As the defense correctly argued, "this case is really … about intent" (DE:229:213). The evidence showed that Grow intended the doctors to always prescribe the same medications and the patients to order them irrespective of whether they needed them, just to profit from Tricare's reimbursements. He also persuaded PCA to use a medically-unnecessary inactive ingredient, just to maximize Tricare's reimbursements. Whether the medications are generally effective was irrelevant, because it was irrelevant to *Grow's intent* that these drugs should "always" be ordered, in the stated amounts and formulas, *because* that was most profitably to him and his co-conspirators (DE:229:244-48, 319; GX100:1; DE:230:56-57, 84-85).

Blair Von Letkemann, the patient named in Count 5's substantive health care fraud count of conviction, told the jury why he ordered the medications: "It was an easy way to make a little bit of extra money and if it worked, it worked. If it didn't, it didn't" (DE:230:107).

The jury heard Grow's exculpatory testimony: "Nobody was offering or trying to bribe nobody to get medications. These were products that we presented to people, they wanted them, they spoke to a physician and the physician, you know, wrote them if they deemed it necessary" (DE:233:30). The evidence showed that every one of those statements was false.

The jury heard from patients who did not need or sometimes even use the medications (DE:231:107; DE:230:95, 116; DE:231:113, 237-240, 253, DE:231:264-65), about patients who did not speak to a physician (DE:231:43, 111; DE:232:12-13), and about Grow controlling what the doctors prescribed (DE:229:245-51, 258-62, 319; DE:231:197-200, 207; DE:232:70-72).

Michael Ewton testified succinctly: "Did you sign up for these products because you needed them?" "No." (DE:232:118). Josie Brundige received pain cream, scar cream, and the vitamin, but never spoke to a doctor, had no scars, and received payment after ordering the drugs (DE:232:12-13). If a doctor did not

prescribe the most expensive pain or scar cream, "Monty would get upset and get it changed" (DE:229:258-59).

"[T]he jury was … entitled to disbelieve [Grow's] testimony and to consider it substantive evidence of guilt, especially on the question of his intent." *United States v. Kramer*, 73 F.3d 1067, 1072 (1996). The jury's disbelief of a defendant's testimony that prescriptions were medically necessary may add to the proof of his health care fraud. *United States v. Mateos*, 623 F.3d 1350, 1362 (11th Cir. 2010).

A. Grow orchestrated submissions of claims for unneeded medications, using the most expensive formulas.

Grow conspired to submit claims for medications the patients did not need, in formulas chosen not for their efficacy but to maximize reimbursements. Lay's survey patients were one part of the conspiracy (as exemplified by Blair Von Letkemann, discussed below), but other sales reps worked independently of Lay for a percentage of their own medications and those of the patients they recruited in turn (DE:231:141-43).

That Grow was acquitted on the substantive counts alleging the payment of kickbacks to patients does not the negate the evidence that patients were paid for ordering their own prescriptions (DE:230:115-18; DE:231:107, 266; DE:232:116-18; DE:234:244-48), much less other evidence that patients were induced to order prescriptions through promises they would pay no copay to receive them

(DE:229:253; DE:231:39, 52-53, 115; DE:232:25-27) and could earn money recruiting others to order them (DE:231:114-15, 240-43; DE:232:16). Indeed, Grow was convicted in Count 9 for conspiring to "[o]ffer and pay kickbacks to induce a person to refer an individual to a person for the furnishing of any item and service paid by a Federal health care program" (DE:115:2). *See United States v. Hogue*, 812 F.2d 1568, 1578 (11th Cir. 1987) (a not guilty verdict is not a finding of any facts).

The evidence at trial went beyond the sort of "paying kickbacks alone" evidence deemed insufficient in *Medina*. *See* 485 F.3d at 1298. Here, there was evidence that, despite the existence of prescriptions, "the prescriptions at issue prescribed medications … that the patients did not need." *See id.* at 1299. Nichole Powell testified that she did not even use her pain cream or vitamins, and her husband did not use any of the medications they received (DE:231:113). She told the jury, specifically, that she "didn't need the drugs" and only ordered them because it was part of signing up to be one of Grow's reps (DE:231:106-07).

PCA's lead pharmacy technician testified that Grow's preferred wetting agent (an inactive ingredient, not one of the pharmacologically active ingredients the doctors' require), Ethoxy Gold, had no medical advantage over a cheaper, easier to use alternative (DE:232:57-65). Grow persuaded PCA to use his ingredient because

"the reimbursement … is advantageous"—$4,248 for a 360-gram medication (DE:234:89-90).

Grow's intent to profit from reimbursements for prescriptions the patients did not need is clear from the pre-selections he sent to the doctors and his angry response when the highest-reimbursement prescriptions and refills were not ordered ("do i need to pursue other avenues?" (DE:231:197; GX47)).

Grow's fraudulent intent is also shown by his and PCA's efforts to obscure the fact that he reviewed the doctors' prescriptions before sending them to PCA (DE:229:249-52; DE:232:70). Grow testified that he instructed Lay to white-out fax headers to make it appear that the prescriptions were not coming through their office simply in response to PCA's patient privacy concerns, even though he was entitled to view patient information under HIPAA (DE:229:244-45). Grow was unable to explain, during cross-examination, how *obscuring* the fact that the doctors faxed the prescriptions to him to forward to the pharmacy protected patient privacy; he merely testified that PCA asked him to do it (DE:234:166-67). Emails between PCA and Grow reflected, however, that he wanted prescriptions sent through him, because, in his words, "they are filled out wrong or the grams aren't checked off or no refills or signatures," and he wanted them "sent to me directly before you would ever see them to make sure they were done correctly by the time they got to you" (DE:232:70-71;

GX85). Moreover, PCA's email to Grow citing "HIPPA concern[s] [sic]" *also* cited "patient brokering concerns [regarding] scripts not coming directly from the MD" (DE:234:167-69; GX80)). Patient privacy may have been one concern, but a reasonable jury could conclude that obscuring Grow's role in the generation of the prescriptions evidenced the conspirators' fraudulent intent.

The jury was properly instructed that it had to find that Grow acted willfully and that "'[g]ood faith' is a complete defense to a charge that requires intent to defraud" (DE:235:165). Ample evidence supported the jury's decision to reject Grow's exculpatory testimony and find him guilty.

That Grow took steps to make this operation appear legitimate and avoided paying the doctors directly would not stop a reasonable jury from finding that the evidence established his true intent—to profit handsomely from conspiring with recruiters, recruited patients, willing doctors, and the pharmacy to bill Tricare for medications that the patients did not need or want until they were offered money for ordering them. It may have happened that sometimes a doctor refused to prescribe the medication, but "[i]t was rare" (DE:231:99). Grow acknowledged approximately 97% of the patients received prescriptions (DE:234:114).

Even if some of the patients might have coincidentally needed, or even benefited from some of the medications—though there was direct evidence that

some patients did not need them at all—Grow orchestrated the submission of claims with "reckless indifference as to the truth" of whether the patients needed the prescribed medications, and that is sufficient to establish his "intent to defraud," as the jury was instructed (DE:235:150). *See Clay*, 832 F.3d at 1311.

B. Count 5's substantive conviction typified a patient who did not need what he was recruited to order.

Count 5's substantive health care fraud conviction was supported by the patient's own testimony that he earned "a little bit of extra money" by ordering medication he himself believed he did not need (DE:230:107). Blair Von Letkemann testified that he was approached by a fellow Marine who told him he could make some money testing out a cream and taking a survey (DE:230:105). Although Von Letkemann testified he was undergoing physical therapy for a knee injury, he was only taking Motrin for it and did not believe he needed any prescription pain or scar medication ("I wouldn't really say a need, no") (DE:230:107). He testified why he ordered the medications: "It was an easy way to make a little bit of extra money and if it worked, it worked. If it didn't, it didn't" (DE:230:107).

Tricare claims data compiled from Grow's own patient list (DE:230:131-33), documented in an summary exhibit to which Grow had no objection and the accuracy of which he did not dispute at trial (DE:230:129; GX170), showed that Von Letkemann had three prescriptions filled on February 20, 2015, one of which being

the charged Loperamide (an active ingredient in the p-01 pain cream (DE:232:52-54)), for which Tricare was billed $7,014.68 and for which it reimbursed PCA $6,031.37 (GX170:114).

The six "[p]retty large tubes" of medicated cream he received "seemed like a lot more than you would need for 30 days" (DE:230:106-08). He did not believe the pain cream worked or that the scar cream worked "any better than lotion" (DE:230:107).

Von Letkemann was recruited through Lay's survey program that she testified she discussed with Grow in advance, and that both he and PCA approved after asking her to revise the language at the insistence of PCA's lawyers (DE:229:272-73, 277; DE:230:7, 88). Grow notes the timing of an April payment to Von Letkemann, a month after Grow told Lay to terminate the survey program; though, according to Lay's testimony, Grow also instructed her to keep paying existing patients for refills (DE:229:279-81; DE:230:43). Nevertheless, Count 5 is not a kickback offense.

Count 5's substantive § 1347 fraud count charged the claim to Tricare for the February prescription. Even so, Von Letkemann testified he was paid for that February prescription "a couple of weeks after" receiving and filling out the survey "[a]bout 30 days" after receiving the medications, which would have been around

April (DE:230:108). Grow's termination of the survey program in March has no bearing on the fraudulent claim submitted to Tricare in February.

Grow claims he had no knowledge of Lay's payments to survey patients (something Lay's testimony expressly disputes (DE:229:277)), but even Grow admits that Lay was recruiting patients for him—indeed that she was his most productive recruiter and that he paid her higher commissions as a result (DE:234:37-38). Grow enlisted Lay to find Tricare patients and get them to order prescriptions they did not need (DE:229:226). He showed her how to use pre-made prescription selections, instructing her to "[a]lways use p-01 for pain, sc-01 for scar" "because they paid the highest commission and reimbursement" (DE:229:244-48, 319; GX100:1). "It was never left blank. It never gave anybody a choice to make, whether they would choose" (DE:230:58). Grow disclaims his responsibility for Lay's patients, but when Matthew Smith at PCA asked what his responsibility was to Lay for her patients, Grow emailed that Lay's "agreement is with me"—"You pay me 50 percent on all her sales and I will pay her" (DE:229:239-40; GX102).

The jury was free to resolve any testimonial disputes in Lay's favor, but even without Grow's knowledge that Lay was paying survey patients, he conspired with her to recruit patients like Von Letkemann and is substantively responsible for his February claim to Tricare. *See United States v. Sosa*, 777 F.3d 1279, 1292-93 (11th

Cir. 2015) (defendant may be guilty of aiding and abetting a health care fraud if he committed affirmative acts in furtherance of that offense with the intent of facilitating the offense's commission).

II. Ample Evidence Established that Grow Willfully Received and Laundered Kickbacks for Orchestrating the Submission of False Claims to Tricare.

Grow argues that "[t]he record fails to prove that [he] specifically intended to pay or receive illegal kickbacks or conspired to do so," because, he claims, he "never intentionally broke the law" (Br. at 37). The trial evidence supported the jury's rejection of Grow's testimony that he acted in good faith.

Grow was convicted in Count 9 for conspiring to "[s]olicit and receive kickbacks in exchange for referring individuals to a person to arrange for furnishing prescription medication" and to "[o]ffer and pay kickbacks to induce a person to refer an individual to a person for the furnishing of any item and service paid by a Federal health care program," in violation of 42 U.S.C. §§ 1320a-7b(b)(1)(A) and (b)(2)(A) (DE:115:2). He was also convicted for 13 substantive counts of receiving kickbacks "in return for referring an individual to a person for the furnishing and arranging for the furnishing of any item and service for which payment may be made in whole and in part under a Federal health care program, this is, Tricare," in violation of 42 U.S.C. § 1320a-7b(b)(1)(A) and 18 U.S.C. § 2 (Counts 10, 11, 12,

13, 14, 17, 18, 20, 22, 23, 24, 25, and 26) (DE:37:15-17; DE:115:). Grow's substantive counts occurred between November 7, 2014 and April 27, 2015 (*id.*). His sole money laundering conviction (Count 45) concerns a transaction he made on February 3, 2015 with funds derived from "health care fraud … and the solicitation and receipt of kickbacks in connection with a Federal health care benefit program" (DE:37:18-19; DE:115:6).

For Grow to be guilty of receiving and paying these kickbacks, the government had to show that he (1) knowingly and willfully, (2) received or paid money, directly or indirectly, (3) to induce himself or others to refer individuals to PCA for the furnishing of compounded medication, (4) paid for by Tricare; the conspiracy count required proof that he knowingly and voluntarily joined a conspiracy to do so. *See United States v. Nerey*, 877 F.3d 956, 967-68 (11th Cir. 2017); *Sosa*, 777 F.3d at 1290-92; *United States v. Vernon*, 723 F.3d 1234, 1273 (11th Cir. 2013)).

Grow's money laundering conviction required proof that he knowingly engaged in the charged transfer to Kessler Auto Group of funds greater than $10,000 derived from the specified unlawful activity, in this case either the health care fraud in violation of 18 U.S.C. § 1347 or the receipt of kickbacks in violation 42 U.S.C. § 1320a-7b(b)(1)(A). *See* 18 U.S.C. § 1957; *United States v. Johnson*, 440 F.3d 1286,

1289 (11th Cir. 2006); *see also United States v. Moran*, 778 F.3d 942, 964 (11th Cir. 2015); *Medina*, 485 F.3d at 1300-01 (recognizing health care fraud and payment of kickbacks as specified unlawful activities).

Grow conceded that he conducted the noted transactions, including the $105,545 transfer from his account to Kessler Auto Group, from proceeds he derived from referring patients to PCA (DE:234:202-03). He merely disputes that his activity constituted illegal health care fraud or receipt of kickbacks. That Grow knowingly and willfully engaged in health care fraud with PCA is discussed above. His receipt of 50% commissions as proceeds from the fraudulent claims PCA submitted to Tricare demonstrates that his funds were also the result of criminally-derived kickbacks.

Grow argues that he "believed in good faith that the commissions he paid and received were legal, just as the pharmacy's executives and lawyers assured him" (Br. at 38). The evidence belies Grow's claim that he ever sought, received, or relied on legal advice from PCA's lawyers. Grow conceded that he never hired his own lawyer and never asked for an opinion letter from PCA ensuring that his work with them complied with the law (DE:234:179-82). PCA's lawyer, David Corcoran, testified that that he never gave any legal advice to Grow (DE:232:204-05).

Grow testified that he relied on PCA's consulting with health care lawyer Gary Walker to ensure that its business was conducted legally, but he conceded that he never told Walker about Ginger Lay paying patients or about telling patients that they did not have to pay anything to receive their prescriptions (DE:234:184-85). In fact, Walker only consulted with PCA in late February 2015, after the kickbacks charged in Counts 10, 11, 12, 13, 14, 17, and 18 had already occurred (DE:234:280-81).

Walker testified that he did not represent Grow, that he did not feel he was given all the facts needed to render opinions, and that in fact he "didn't render any opinions" (DE:234:281-83). Walker testified that all he told Grow and PCA was that "a bona fide employee … is eligible to receive a percentage commission and an independent contractor … should not be receiving one" (DE:235:9). Walker did not recall being told the details of Grow's operation and offered no advice about the propriety of Grow's recruitment of patients who did not need medication, either before or after Grow and his reps became PCA employees (DE:235:10-11).

Grow's trial counsel assured the district court that "[a]dvice of counsel is not our defense," explaining that the government "point blank asked Mr. Grow numerous times did you have a lawyer in this case, and he said no" (DE:234:294).

Grow's counsel argued: "It's a good faith defense. It's not an advice of counsel defense" (DE:234:294).

The district court instructed the jury that it had to find that Grow "knowingly and willfully solicited or received remunerations such as a kickback or bribe … in order to induce the referral of an individual to a person or entity for the furnishing or arranging … of any item or service [the payment of which] may be made in whole or in part under a Federal health care program" (DE:235:155-56). The jury was also instructed that in order for it to find that Grow acted willfully, it must find that his acts were "committed voluntarily and purposely with the intent to do something the law forbids; that is, with the bad purpose to disobey or disregard the law" and that "'[g]ood faith' is a complete defense to a charge that requires intent to defraud" (DE:235:165).

The jury could not have found Grow guilty without finding that he acted with the purpose to break the law—his purported good faith that he acted legally would have negated that intent. *See United States v. Hill*, 643 F.3d 807, 854 (11th Cir. 2011) (court's willfulness instruction required jury to rule out the defendant's good faith belief in his actions' legitimacy)

Grow's argument (Br. at 45) that the district court "misstated the law" in instructing the jury regarding the kickbacks is incorrect. The district court used the

statutory language in instructing the jury that "'[r]emuneration' is a payment - such as a kickback, bribe, or rebate - made directly or indirectly, overtly or covertly, in cash or in kind" but did "not include any amount paid by an employer to an employee, who has a good faith ('bona fide') employment relationship with the employer, for employment in the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program" (DE:112:18; DE:235:156; *see also* DE:237:43-44). *See* 42 U.S.C. § 1320a-7b(b)(1) and (3)(B). This language did not negate Grow's good faith defense, which was covered by the district court's willfulness instruction.

The evidence supported the jury's findings that he received kickbacks in connection with a federal health care program with intent to disobey or disregard the law. The jury heard that Grow had previously signed forms acknowledging his compliance with the Federal Anti-Kickback Statute and the prohibition on submitting false claims (DE:232:256-59; DE:234:54-60) and had known that it was illegal to pay patients and doctors (DE:231:57-58; DE:234:65-66). Robin Halliburton, one of Grow's co-conspirators, testified that, from her experience in the medical marketing field, it is widely known in the industry that paying and receiving kickbacks for referrals is illegal, and she knew what she was doing with Grow was wrong (DE:231:35-37, 49, 58-59, 88, 143).

The evidence demonstrated that Grow orchestrated the submission of false claims to Tricare so that he could receive back, in turn, a percentage of Tricare's reimbursements. Whether Grow believed receiving commissions itself was legal is irrelevant because he knew he was receiving commissions for fraudulently inflated claims. That Grow paid and received payment openly does not absolve him. "[F]urtive activity" is not required to establish willfulness under the Anti–Kickback statute. *Vernon*, 723 F.3d at 1259.

That the jury acquitted him of receiving kickbacks after he became a W-2 employee of PCA does not negate his willful violation of the law. The jury may have been persuaded that Grow believed in good faith his actions were legal after he became an employee, but Grow's acquittal on some counts is not a finding that contradicts his guilt on other counts. *See Hogue*, 812 F.2d at 1578

Even accepting Grow's argument that he relied on Walker (Br. at 42-43) and believed he became a bona fide employee (and not just a paper employee) during the March to April "onboarding" process (DE:233:145), PCA's consultation with Walker on February 26, 2015 could not have retroactively supplied Grow with a good faith belief on February 3, 2015—the date of the charged transaction—that he had legally derived his percentage of Tricare reimbursements to PCA paid prior to that date. *See Vernon*, 723 F.3d at 1270-71 (evidence that the hiring party did not

control the manner and means of the work supports jury's rejection of safe harbor defense).

The jury was properly instructed regarding the money laundering count (DE:235:161-64) and "[a]mple evidence demonstrated the existence of [the] monetary transaction[] in excess of $10,000 related to the above-discussed health care fraud." *Moran*, 778 F.3d at 963.

III. Grow Invited Any Error in Count 1's Conspiracy Object Instructions and Cannot Establish Substantial Prejudice Even If It Is Amenable to Plain Error Review.

Grow argues that the district court erred by not instructing the jury regarding the elements of one of the two charged objects of Count 1's conspiracy to commit health care fraud and wire fraud offense. Grow invited any error by proposing Count 1 instructions that likewise omitted the elements of wire fraud and by repeatedly affirming his satisfaction with the district court's draft instructions and given instructions. Such invited error is not cognizable on appeal. Even if amenable to plain error review, however, Grow cannot meet his burden to show prejudice as the record demonstrates the jury agreed Grow conspired to commit the other object (health care fraud).

The district court's instructions regarding Count 1's conspiracy to commit health care fraud and wire fraud charge are found at pages 146 to 151 of Docket

Entry 235. Like the instruction ultimately given, Grow's own proposed offense instructions regarding Count 1's conspiracy charge contained an explanation of the elements of health care fraud but not an explanation of wire fraud (DE:79:11-16). When the district court discussed the jury instructions with the parties (DE:233:165-86) and circulated copies of its draft instructions (DE:235:5, 102-05, 136-38), Grow neither objected nor requested that the jury be given the elements of wire fraud.[7] Nor did Grow object to the district court's draft verdict form, which did not request the jurors to indicate whether they had agreed on only one or both objects of Count 1's conspiracy charge (DE:235:103).

Ultimately, when instructing the jury, although the district court described Count 1 as charging Grow "with conspiracy to commit health care fraud and wire fraud" and informed the jury that "[i]t is a Federal crime to knowingly and willfully conspire or agree with someone else to do something that, if actually carried out, would result in the crime of health care fraud or wire fraud" (DE:235:146-47), the district court only then reviewed the elements of health care fraud (DE:235:148-51). It did again inform the jury that "the Indictment charges in Count 1 that the defendant conspired to commit health care fraud and to commit wire fraud" and instruct them:

[7] The district court entered into the record its denials of Grow's requested instructions (DE:102).

> The Government does not have to prove that a defendant willfully conspired to commit all the crimes charged in each conspiracy. It is sufficient if the Government proves beyond a reasonable doubt that a defendant willfully conspired to commit one of the objects previously discussed in crimes alleged in each conspiracy.
>
> But to return a verdict of guilty, you must all agree on which of the crimes or objects of the conspiracy the defendant agreed to commit.
>
> For Count 1, we're talking about health care fraud and wire fraud.

(DE:235:153). After these instructions were given, Grow was twice asked if he had any objections or additions, and he did not (DE:235:168-69; DE:236:9).

Although both the government and Grow had submitted special verdict forms that would have asked the jury to find which object or objects of Count 1's charge Grow conspired to commit (DE:97:1; DE:100:1), the verdict form used by the district court did not (DE:115:1). The jury did, however, find Grow guilty of both Count 1's conspiracy to commit health care fraud and wire fraud and one substantive count of health care fraud (Count 5) (DE:115:1).

"[W]hen a party responds to a court's proposed jury instructions with the words 'the instruction is acceptable to us,' such action constitutes invited error." *Unites States v. Margarita Garcia*, 906 F.3d 1255, 1279 (11th Cir. 2018) (quoting

United States v. Silvestri, 409 F.3d 1311, 1337 (11th Cir. 2005)). "These words serve to waive a party's right to challenge the accepted instruction on appeal." *Id.*

In *Silvestri,* this Court refused to consider a similar challenge to the district court's omission "from its jury instructions on the conspiracy charge definitions of (1) the specified unlawful activity of mail and wire fraud and (2) the conspiracy object of promotional money laundering." *Silvestri,* 409 F.3d at 1337.

Here, Grow not only accepted the district court's draft instructions before and after they were read, his own proposed offense instructions omitted the elements of the wire fraud conspiracy object (DE:79:11-16). *See Reid v. Neal*, 688 F. App'x 613, 616 (11th Cir. 2017) (court accepted proposed instructions and defense had no objection when instructions were read).

Grow did not even raise the failure to include the elements of wire fraud as an argument in his post-verdict motion for a new trial (DE:166). His only reference to it, below, was in a footnote to his argument in his post-verdict motion for a judgment of acquittal that the government failed to offer sufficient proof of his guilt on Count 1 (conspiracy) and Count 5 (substantive health care fraud) (DE:165:3 n.1). This issue should be deemed waived as invited error. *See United States v. Taylor*, 731 F. App'x 945, 946 (11th Cir. 2018) (refusing to address whether the district court erred by omitting the word "willfully" from its jury instructions).

Even if this issue were amenable to plain error review, Grow cannot establish substantial prejudice. Grow does not dispute that the jury was properly instructed regarding the elements of health care fraud. Whether or not the jury also agreed that Grow conspired to commit wire fraud, it necessarily agreed that Grow conspired to commit the substantive health care fraud count of conviction (Count 5) involving Blair Von Letkemann, one of co-conspirator Ginger Lay's survey patients. Whatever effect the omission of the elements of wire fraud had, it had no effect on the jury's conclusion that Grow committed substantive health care fraud with respect to a patient recruited by his co-conspirator. Grow's post-trial motion footnote argues that if the jury was not instructed about wire fraud, "it must be concluded that the guilty verdict returned on Count 1 was for the health care fraud object" (DE:165:3 n.1).

That the jury was properly instructed on the health care fraud object, and the evidence supports its guilty verdicts, is all that is necessary to affirm Grow's Count 1 conspiracy conviction. *See Medina*, 485 F.3d at 1301 ("where there is a conviction for a multi-object conspiracy, the evidence must only be sufficient to sustain a conviction for any one of the charged objectives").

As to his sentence, even if Grow is correct that the district court erred by not instructing the jury or requiring a special verdict finding that Grow conspired to achieve the wire fraud object, such error does not require resentencing. Grow is

correct that conspiracy to commit health care fraud results in a 10-year statutory maximum imprisonment term, while conspiracy to commit wire fraud results in a 20-year statutory maximum imprisonment term. *See* 18 U.S.C. § 1343 and § 1347(a). However, this Court has held that a defendant cannot establish plain error from the district court's failure to obtain a jury finding on an element that raises the resulting statutory sentencing range, under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), where the conviction necessarily included the undisputed element. *United States v. Cromartie*, 267 F.3d 1293, 1296-97 (11th Cir. 2001).

In *Cromartie*, the only evidence concerning the defendant's alleged drug conspiracy involved a 581-kilogram shipment of cocaine. *Id.* at 1296. Because the defendant did not dispute that the shipment at issue involved that drug amount, the failure to allege and obtaining a finding that his conspiracy involved that drug amount did not affect his substantial rights. *Id.* at 1296-97.

Similarly, here, Grow does not dispute that wire transmissions of the prescriptions and fund transfers were used "for the purpose of executing" his business. *See Hasson*, 333 F.3d at 1272-73 ("it is not necessary that the transmitted information include any misrepresentation" so long as "it is incident to an essential part of the scheme" (citations omitted)). Grow merely disputes that his business perpetrated a fraud. By finding that he conspired to defraud Tricare, "the jury

necessarily had to find" that the fraud involved the undisputed wire transmissions Grow used to carry out his business.[8] *See Cromartie*, 267 F.3d at 1296-97; *United States v. Carrie*, 138 F. App'x 275, 277 n.2 (11th Cir. 2005) (unpublished) ("verdict finding Carrie guilty of the straw purchase on that date necessarily included a finding that the offense included the AK-47 semi-automatic assault rifle").

IV. The District Court Did Not Abuse Its Discretion In Managing the Jury's Deliberations.

Grow argues (Br. at 48) that the district court abused its discretion when it informed the jury that it could return any partial verdicts it had reached, which Grow asserts amounted to prodding the jury to reach a compromise verdict. The record does not support Grow's characterization and shows no abuse of the district court's discretion to manage its courtroom and schedule.

Deliberations began on Wednesday morning, January 31 (DE:236:11). Before excusing the jury to begin deliberations, the district court instructed the jurors: "There's no minimum time, no maximum time. Now you are in control of how long

[8] Indeed, Grow had no objection to the government's closing argument that the "wire fraud conspiracy charge in this count" was "a simple one"—"[i]f you find he committed the health care fraud conspiracy and he used the wires to do so, he is also guilty of committing wire fraud" (DE:235:74). Grow's post-trial motion acknowledged that "[t]he wire fraud object in Count 1 was entirely derivative of the same allegations of a scheme to defraud Tricare through knowing and willful false and fraudulent representations" (DE:165:3 n.1).

you work" (DE:236:7). During the following three days of deliberations, in which time other communications between the trial judge and the jury took place (none at issue on appeal), the judge again reminded the jury to "[t]ake as long as you want … to decide, and we'll see you whenever you want to be seen" (DE:237:18). On Friday afternoon, the trial judge advised the parties about what he was going to tell the jury about coming back on Monday. The context reflects that the judge was not giving them a supplemental charge, merely advising them of the schedule and that they could report verdicts on some counts, if any, they had reached so far:

> THE COURT: I think what we can do is bring out the jurors, ask them, how are you doing? Today we're going to work till five. They can come back Monday; see what their reaction is. And then I thought about telling them, if you have reached any decision on any count, you can take partial verdicts. That's certainly acceptable. I don't know if they have or not. They could be hung on all the counts. I don't know.

(DE:238:9). After Grow's counsel objected, arguing that doing so would be "giving some of these jurors the opportunity to say, we give up, we're going to compromise, and we're going to give verdicts on certain counts and not on other counts," the trial judge clarified that "that is not what I'm doing. I'm merely saying there is that possibility…. I'm not going to give them an Allen charge. I'm just telling them, if you've reached decisions on some counts and not others, that's perfect" (DE:238:11-12).

After bringing the jury in, the district court stated:

> THE COURT: I told you when we selected you as jurors, and even now, there's no minimum time and there's no maximum time. So I don't want you to think that anybody, certainly not the judge, is interfering. Remember, I said I'm a judge of the law, you're the judges of the facts. You take as long as you want or as little as you want.

(DE:238:15). The court then explained that, as had happened earlier during the trial (DE:231:19, 133-34), there was a conflict that would affect the schedule that afternoon and on Monday:

> THE COURT: I wanted to tell you because of a scheduling conflict that I have at the end of the day, though some days we have worked till 6:30 and thereabouts, today we are going to work only until around 5:00. Okay? *That doesn't mean that you have to reach a decision by 5:00 on any count or on all the counts. You can decide how many counts you want to reach decisions on, what counts you cannot reach decisions on, reach decision on all, one way or another.* That's your business, not the judge's business. There's never any minimum. But out of courtesy, then I'll bring you back. Like I told you, now you're the decision-makers of your time, not just of the very important thing of deciding whether the Government has proven its allegations on each count. You'll come back on Monday and I have another jury trial, but we'll let you use the same jury room and we'll figure out what to do. We've done that already in this case….
>
> But out of courtesy, I thought I would let you know, because we have worked till 6:30 sometimes, that today it will be 5:00. *Again, that's not an indication that you should reach a decision on all counts before then.* You

> decide what you want to do, when you want to do it and how you want to do it. All right?
>
> So I'm going to be doing other things. So you keep working. We won't interfere with you. All right?
>
> Thank you very much. We'll see you whenever you want to be seen.

(DE:238:15-16) (emphasis added). The jury resumed deliberating at 3:37 p.m. (DE:238:16). Two-and-a-half-hours later, they were excused for the weekend at 6:08 p.m., Friday, and told to report back at 8:30 a.m., Monday (DE:238:23-25).

The jurors understood they could continue deliberating on Monday, because that is what they did. Rather than feeling pressured to give up by the district court's Friday afternoon statements, they reported back Monday morning, deliberated, and were reminded by the judge at 11:57 a.m., Monday, that there would be no lunch break because they would be excused for the day at 1:00 p.m. (DE:239:4-5). The judge reiterated that there was no time limit.

> THE COURT: [N]o minimum time, obviously, and no maximum time either. You take as long as you want to reach whatever decisions you think the law and the facts dictate that you should. So at 1:00, if you haven't reached a decision on anything yet, then we'll just send you home with the same instructions not to read anything, watch anything, talk about anything, and come back tomorrow, Tuesday.

(DE:239:5). The jury was excused to continue deliberating at 12:01 p.m. (DE:239:7). Almost an hour later, the jury reported that it had a verdict at 12:48 pm. (DE:239:14). The jury did not come back with its verdict until approximately 6 hours and 45 minutes of deliberation time after hearing the district court's Friday afternoon statement.[9]

The record does not support Grow's argument that the trial judge invited a compromise partial verdict. None of the totality of circumstances indicating a coerced verdict were present in this case. *Compare Brewster v. Hetzel*, 913 F.3d 1042, 153 (11th Cir. 2019). "[T]he length of time of jury deliberations is a matter of trial court discretion." *United States v. White*, 589 F.2d 1283, 1290 (5th Cir. 1979) (citation omitted).[10] "Absent some other circumstances, mere length of time cannot constitute coercion." *Id.*

Given what had happened earlier, when the trial had to convene in a different courtroom because of a courtroom scheduling conflict (DE:231:19, 133-34), the jury understood that they would be perfectly free to continue their deliberations and were

[9] The transcript of Monday's session does not record when the jury began deliberating that morning, but Friday's transcript indicates they were to begin that morning at 8:30 a.m. (DE:237:25).

[10] *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981).

not being told they had to finish because another trial needed the courtroom. The judge made it clear they could continue deliberating for as long as they wished but could, if they wished, deliver any verdicts they had already reached before the weekend.

As this Court recognized in *United States v. Johnson*, 645 F. App'x 954 (11th Cir. 2016): "The language of the instruction here did not suggest that the jury had to reach a verdict; rather, by the use of the past tense, it informed the jury to report decisions it had previously made." *Id.* at 964 (rejecting a challenge to the court's instruction that "you do not have to reach a unanimous agreement on all of the charges before returning a verdict on some of them").

The record reflects that the district court appropriately informed the jurors that they could take as long as it wished to reach whatever verdicts they wished and that the jurors did so. There was no abuse of discretion requiring a new trial.

Conclusion

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

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Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,473 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Certificate of Service

I hereby certify that seven copies of the foregoing Brief for the United States were mailed to the Court of Appeals via Federal Express this 15th day of March, 2019, and that, on the same day, the foregoing brief was filed using CM/ECF and served via CM/ECF on David Oscar Markus, Counsel for Monty Ray Grow.

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