No. 23-50067

IN THE
United States Court of Appeals
for the Fifth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MICHAEL ANGELO PADRON
Defendant-Appellant.

On Appeal from the
United States District Court for the Western District of Texas
No. 5:21-cr-124 (Hon. Xavier Rodriguez)

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STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant Michael Angelo Padron has not requested oral argument. The government believes that the facts and legal issues raised in this appeal are adequately presented in the briefs and record and that oral argument would not significantly assist the Court's decisional process. Fed. R. App. P. 34(a)(2)(C).

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GLOSSARY OF ABBREVIATIONS

The following abbreviations and acronyms are used in this brief:

FMS……..	Federal Management Solutions
MAPCO……..	Michael Angelo Padron Company
SBA…….....	The Small Business Administration
SDVOSB……...	The Service-Disabled Veteran-Owned Small Business Program
VA……...	The Department of Veterans Affairs

JURISDICTION

Padron appeals the final judgment in a criminal case. The district court (Xavier Rodriguez, J.) had jurisdiction under 18 U.S.C. § 3231. Judgment was entered on January 18, 2023, and Padron filed a timely notice of appeal on January 27, 2023. ROA.926, 936. This Court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STATEMENT OF THE ISSUES

1. Whether sufficient evidence supports Padron's convictions for (1) conspiracy to commit wire fraud and defraud the United States and (2) six counts of wire fraud.

2. Whether Padron has shown that his above-Guidelines fine is plainly substantively unreasonable.

STATEMENT OF THE CASE

I. Procedural History

A grand jury in the Western District of Texas returned a nine-count indictment against Padron, charging him with conspiracy to commit wire fraud and defraud the United States, in violation of 18 U.S.C. § 371 (Count 1); and eight counts of wire fraud, in violation of 18 U.S.C. § 1343 (Counts 2-9). ROA.30-40. After a six-day trial, a petit jury found Padron guilty of the conspiracy charge and of six of the wire-fraud charges; the petit jury found him not guilty of the remaining wire-fraud charges (Counts 2 and 3). ROA.779-80. The district court sentenced Padron to concurrent terms of 27 months' imprisonment, to be followed by three years' supervised release, on each count of conviction. The court also ordered Padron to pay a fine of $1,750,000.00 ($250,000 per count). ROA.926-31.[1]

[1] "ROA" refers to the record on appeal. "GX" refers to a government exhibit, "DX" to a defense exhibit.

II. Statement of Facts

A. The Set-Aside Program

Created by Congress in 2003, the Service-Disabled Veteran-Owned Small Business (SDVOSB) program sets aside certain federal contracts for small businesses owned and controlled by service-disabled veterans. ROA.1829-31. The goal of the program is to help such businesses become viable. ROA.1830. The program is administered by the Small Business Administration (SBA), which sets the rules and determines eligibility for the SDVOSB program, including adjudicating eligibility protests. *Id.*

To participate in the SDVOSB program, a business must be both small (the size limit depends on the industry) and owned and controlled by a service-disabled veteran. ROA.1831, 1838-39. Specifically, as to ownership, a service-disabled veteran must own at least 51% of the business. ROA.1832, 1294, 1335-36, 1341, 1551-53, 1719, 1854-55; *see* 13 C.F.R. § 125.9 (2005), 38 C.F.R. § 74.3 (2010), 38 C.F.R. § 74.3 (2014). As to control, the service-disabled veteran must conduct "both the long-term decision[] making and the day-to-day management and administration of the business operations," 13 C.F.R. § 125.10 (2005),

38 C.F.R. § 74.4 (2010), 38 C.F.R. § 74.4 (2014); *see* ROA.1831-33, 1290-91, 1812, 1854. Long-term decisionmaking refers to "planning" what the business should do in the future, whereas day-to-day management refers to "[n]ormal decision-making functions," such as "hiring, firing," and what types of projects to bid on. ROA.1833. The purpose of the control requirement is to ensure that a service-disabled veteran "personally benefit[s]" from the program. ROA.1833-34.

To obtain SDVOSB contracts through the Department of Veterans Affairs, businesses must obtain an eligibility certification from that department. ROA.1830-31. For all other agencies, businesses "self-certif[y]" their eligibility. ROA.1831. They must do so both annually, through a federal contracting website, and in their proposals for particular contracts. ROA.1834-35.

B. The Conspiracy

From approximately 2004 to 2017, Padron and his business partners conspired to obtain SDVOSB contracts for which they were not eligible. Specifically, although Padron and his business partners were not service-disabled veterans, they created a San Antonio construction company, Blackhawk Ventures, LLC, to access SDVOSB contracts—

installing service-disabled veterans as figurehead owners to make it appear that Blackhawk was eligible for those contracts when, in reality, Padron and his business partners both controlled and benefited from the company. As part of the scheme, the conspirators repeatedly misrepresented to the government that a service-disabled veteran controlled Blackhawk.

1. The Dudley era

Padron is a business owner who has been in the federal contracting business "all his adult life." ROA.1329. He owns various ventures, including a construction company, the Michael Angelo Padron Company (MAPCO)—named after himself. ROA.1323-24. MAPCO participated in a federal set-aside program: the SBA's "8(a) program," which sets aside contracting opportunities for economically and socially disadvantaged minorities. ROA.1330, 1354, 1716-17, 1829, 1855-57.

In 2001, Michael Wibracht became Padron's business partner, joining MAPCO to assist with its finances. ROA.1323-24, 1332. Wibracht's brother, Steven (hereafter "Steven"), later joined MAPCO as well. ROA.1410-11. In 2003, Wibracht learned of the newly created SDVOSB program, whose ownership and control regulations were

modeled on those of the 8(a) program. ROA.1412, 1335, 1829-32. Seeing an opportunity to obtain valuable federal contracts although he was not a veteran himself, ROA.1334-35, Wibracht persuaded his childhood friend, Brian Dudley—a service-disabled veteran living in California, ROA.1290-91, 1337—to join him in founding a San Antonio-based construction company to "pursue" such contracts. ROA.1325, 1336; ROA.1290-91, 1295, 1298. Padron—likewise not a veteran, much less a service-disabled one, ROA.1334-35—"wanted to be a part of it," ROA.1337, and Dudley envisioned leveraging Padron's construction expertise, ROA.1295. Thus, in 2004, Padron, Wibracht, and Dudley incorporated Blackhawk, giving Dudley 51% ownership (Padron had 19%, Wibracht 30%) and naming him the company's "sole manager." ROA.1292-95; GX 2 (ROA.2737, 2769-70).

Initially, Blackhawk did not have its own employees. ROA.1298. It also did not have its own office, *id.*; instead, Blackhawk operated out of MAPCO's office, *id.*, and MAPCO employees "bid[] the work, wr[o]t[e] the proposals, [and] so forth" on Blackhawk's behalf. ROA.1337-38, 1298. MAPCO also "financially support[ed]" Blackhawk, ROA.1337-38. Dudley, who continued to live in California, was not involved in either

the day-to-day management or the long-term decisionmaking. ROA.1296-1300, 1337-39. Although Dudley and Wibracht initially had agreed to have weekly calls, those calls "quickly turned" into "monthly call[s]," which involved Wibracht's briefing Dudley after the fact instead of discussing "what's down the pipeline." ROA.1296. As Dudley put it, it felt as if he was "being back-briefed," rather than "having a say or [being] asked [his] opinion on how to do things." ROA.1296. In fact, Dudley never bid for a federal contract, ROA.1299-1300; never supervised a construction project, ROA.1299; rarely visited Blackhawk's office, ROA.1298; did not have access to the company's checkbooks, ROA.1300; and never made any personnel decisions, including hiring or setting salaries for employees shared with MAPCO, ROA.1298-99. Instead, Padron and Wibracht ran Blackhawk. *E.g.*, ROA.1297, 1337.

In 2007, when Dudley was planning to move to Texas after getting married, he called Wibracht to "talk about [his] joining physically the team" and becoming a true partner at Blackhawk. ROA.1296-97. But Wibracht informed him that Padron did not want Dudley to be "in charge of the day-to-day." ROA.1296-1301, 1338-39. As Wibracht put it at trial, "[Dudley] and [Padron] didn't get along and [Padron] didn't

want Mr. Dudley in there." ROA.1338. With Padron unwilling "to budge" on this, ROA.1297, 1301, Dudley soon left Blackhawk, dissatisfied with serving as a mere figurehead and concerned that he was putting himself "at risk" of committing fraud, ROA.1297-1302.

2. The 2007 disqualification and the Villarreal era

In October 2007, near the end of Dudley's tenure as the figurehead owner of Blackhawk, the SBA disqualified Blackhawk from the SDVOSB program after discovering that (1) Dudley was "geographically distant" from the company; (2) Dudley was "not in control" of Blackhawk because "he lacked sufficient experience and expertise"; and (3) Blackhawk "was too interconnected" with Padron's company MAPCO because Blackhawk "did not have its own facilities." GX 6 (ROA.2779); ROA.1339-40. To regain Blackhawk's eligibility, Wibracht signed a lease for separate office space for Blackhawk, GX 10 (ROA.2797); ROA.1369-70; Padron transferred his 19% ownership share in Blackhawk to Wibracht, ROA.1294, 1369; and Padron and Wibracht found a new service-disabled veteran, ROA.1301. As Dudley recounted, shortly before Dudley left the company, Wibracht asked him to stay on briefly to allow them time to "find another service-disabled veteran."

Id. Within a week, Padron had "handpicked" a replacement: MAPCO employee Ruben Villarreal. ROA.1300-01, 1343-44, 1541-44.

Villarreal had been a car salesman before he joined MAPCO to do administrative tasks. ROA.1541-42. And, at Padron's and Wibracht's urging, he had obtained a veteran's disability rating. ROA.1544-45, 1414; GX 122 (ROA.3341). One day, Padron and Wibracht called him into MAPCO's office and gave him an ultimatum: "[T]ake [the position as owner of Blackhawk] or hit the road." ROA.1542-43. To "keep [his] job," Villarreal agreed. ROA.1383.

Around this time, Padron and Wibracht had a closed-door meeting with Betty Butler, MAPCO's comptroller. ROA.1493-94, 1497-98. Butler had heard rumors that Villarreal was going to be "put in charge of Blackhawk," and she told Padron and Wibracht that she "had concerns" because Villarreal "had no business background." ROA.1498. Wibracht responded that Villarreal "would have no decision-making powers"; Padron responded that Villarreal "was the token disabled veteran . . . because they were trying to get set-aside contracts." *Id.* When Butler reiterated her concern, they told her that "it wasn't [her] business." ROA.1498-99.

In January 2008, Dudley transferred his 51% ownership interest in Blackhawk—for which he had paid $510, GX 2 (ROA.2770)—to Villarreal for $60,000. GX 7 (ROA.2781-82). Dudley negotiated the transfer with Wibracht, not Villarreal; and Blackhawk, not Villarreal, paid Dudley for his shares. ROA.1302.

Shortly thereafter, Jonathan Bailey, an attorney who represented both MAPCO and Blackhawk, submitted a letter to the SBA at Padron's and Wibracht's behest. GX 6 (ROA.2777); ROA.1340-42. Based on Padron's and Wibracht's representations, Bailey asserted that a new, qualified service-disabled veteran, Villarreal, had "assumed control of Blackhawk"; that Villarreal had "separated Blackhawk from [MAPCO] physically and functionally," including by moving Blackhawk to a new address; and that, going forward, Blackhawk and MAPCO would "work independently" of each other. GX 6 (ROA.2780); ROA.1365-67, 1870, 1873-75. In connection with the submission, Bailey warned Padron and Wibracht that Villarreal must in fact control Blackhawk, ROA.1355, 1384-85, and that Padron "could not be involved in Blackhawk under any circumstances or visit jobs or projects," ROA.1355.

Based on Bailey's letter, in July 2008 the SBA readmitted Blackhawk to the SDVOSB program, concluding that "Blackhawk is now owned and controlled by a Service Disabled Veteran." GX 13 (ROA.2804-05); ROA.1818-19, 1873-74; GX 6 (ROA.2777). But the assertions in Bailey's letter were false. ROA.1365-67, 1375-76; *see also* ROA.1870, 1875-78, 1881-83. Blackhawk had not relocated to the address specified in Bailey's letter, ROA.1549-50; instead, in June 2008, Blackhawk leased office space in the building "right next to MAPCO." ROA.1371-72; GX 108 (ROA.3250-54). MAPCO and Blackhawk also had not separated functionally. ROA.1366-67. As Wibracht put it, "all the check[] writing remained at MAPCO's facility, and what jobs were bid, what bills were paid was the decision of [Padron]." *Id.* And Villarreal had not assumed control over Blackhawk. ROA.1366. Although he did work there—occasionally consulting with lawyers or accountants, ROA.2420, 1919, or showing up for contract solicitations when government employees were present, ROA.1560-62, for instance—Villarreal (again in Wibracht's words) "was never in control of Blackhawk. And [Villarreal's being in control] was not [Padron's] intention," ROA.1366.

Indeed, Villarreal's status as a figurehead was no secret within Padron's circle. Padron's employees knew that he had chosen Villarreal to be Blackhawk's owner because Villarreal was a "doormat" easily "controlled by" Padron. ROA.1343-44, 1350, 1492; *see* ROA.1723. They described Villarreal as a "figurehead," a "strawman," a "signature," or merely a "face" for Blackhawk. ROA.1497-500, 1322, 1771, 1561-63. Butler, who did Blackhawk's bookkeeping for three years, "d[id]n't know what [Villarreal] did" during that period. ROA.1499. Brian Taylor, MAPCO's Operations Manager, often saw Villarreal "playing guitar" at work; Villarreal told Taylor "multiple" times that he "wasn't the owner" and that "Mike [Padron] owned [Blackhawk]." ROA.1717-21; *see also* ROA.1809 (agreeing that Villarreal owned Blackhawk only "on paper"). Blackhawk's own project manager viewed Villarreal as "not really" involved in daily operations at Blackhawk. ROA.1688-89. Accordingly, it was "very seldom that anything was run through [Villarreal]," ROA.2061, 2068, and some Blackhawk employees would even bypass him to tender resignations directly to Padron, ROA.1726; GX 83 (ROA.3101).

Villarreal himself recognized that Padron and Wibracht "called the shots" at Blackhawk. ROA.1566. When Villarreal tried to provide input, including about negotiating contracts or which bills Blackhawk should pay, his "input was never taken seriously." ROA.1556, 1558-59. As Villarreal put it:

> I was regarded as yet another employee. I was never given authority. And anytime [*sic*] that I exerted any authority, it was always circumvented and/or countermanded by Mr. Wibracht and Mr. Padron. Regardless of the position or the point that was being made[,] . . . I was just basically rendered mute, you know. I just had no authority whatsoever.

ROA.1579.

Instead, Padron and Wibracht ran Blackhawk—deciding which projects to bid on, ROA.1349-50, 2062, 1690-91; whom to hire or fire, ROA.1559-60, 2066; which subcontractors to involve, ROA.1559, 2060; how much to pay Blackhawk employees, ROA.1590, 2062, including how much to pay Villarreal, the supposed controlling owner of the company, ROA.1590, 1622;[2] which bills to prioritize, ROA.1558, 1693-

[2] For several years, Villarreal made a modest salary of up to mid-$50,000—until an SBA inspector asked Villarreal whether he was aware that he needed to be Blackhawk's highest-paid employee. When Villarreal relayed this to Padron and Wibracht, the two were "very irate." ROA.1588-89. Only then did Padron and Wibracht increase

94; and even which bank accounts Blackhawk used, ROA.1558, *see also* ROA.1842-43.

And Padron himself was the ultimate authority. In late 2008, when Wibracht became a 2% owner of MAPCO, at Padron's "instruct[ion]" Wibracht transferred his 49% share of Blackhawk to his brother Steven to avoid the appearance of common ownership between MAPCO and Blackhawk. ROA.1377-78; GX 14 (ROA.2806-08). Within less than a year, also at Padron's command, Steven transferred those same shares to Villarreal, making Villarreal the 100% owner of Blackhawk on paper, so that Padron could "control [Villarreal] 100 percent." ROA.1378-80, 1419-20; GX 60 (ROA.3034-35). As Wibracht explained, Blackhawk had become "too big and successful," and Padron "didn't want any other owners" who might dilute his control. ROA.1379.

3. Federal Management Solutions

In 2010, Padron, Wibracht, and another business partner created Federal Management Solutions (FMS), GX 17 (ROA.2826), to provide

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Villarreal's salary to $110,000. By contrast, Padron made "significantly more" through Blackhawk, ROA.1363—by Villarreal's estimate, "millions," ROA.1590-91.

consulting services—"[a]nything from accounting, [to] project management, [to] estimating, [to] technical writing"—to small-business contractors. ROA.1325-26. Padron and Wibracht each owned 40% of FMS, but Padron received a 50%, and eventually 60%, profit distribution. ROA.1325-26, 1379-83; GX 17 (ROA.2826, 2863); GX 20 (ROA.2869). Padron was FMS's Chief Executive Officer, Wibracht its Chief Financial Officer, and Steven its comptroller. ROA.1737, 2087, 1625. In 2011, Blackhawk became one of FMS's "clients." ROA.1326; GX 26 (ROA.2882).

In helping Padron and Wibracht create FMS, Bailey (who now represented Blackhawk, MAPCO, and FMS, ROA.1744, 1856-59) discussed with them at length "what was permissible" regarding SDVOSB requirements and "how to keep that relationship [between FMS and Blackhawk] at the arm's length that SBA expects." ROA.1885-89. As Bailey explained, "[t]he number one thing that SBA is looking for is the independence of the companies that are participating in its programs," and the "SBA's primary concern is that at all times those companies stay in control of themselves, that they don't become . . . a puppet to somebody else." ROA.1886. To this end,

Bailey added language to the FMS-Blackhawk contract specifying that Blackhawk would "retain[] complete control over all vital aspects of its business operations." ROA.1887; *see also* ROA.1356, 1384, 1856-60, 1885-89.

Despite this language, FMS effectively controlled Blackhawk, ROA.1555, in part through staffing. Several people who worked for Blackhawk actually were employed only by MAPCO or FMS, which were "one [and] the same compan[y]," and Padron and the Wibracht brothers determined "who worked for which company when." ROA.1494-97, 1299, 1715-17, 1768, 2006-09, 2052-53. Wibracht and other FMS employees—all of whom reported to Padron as the "overall boss," ROA.1727, 2054, 2087—also conducted Blackhawk's business operations. For example, Villarreal and a Blackhawk project manager met with Padron and Wibracht every Monday morning at FMS's office to "go over the pending jobs" and have Padron and Wibracht decide "which company," among FMS's various "clients," "was going to bid on which jobs," ROA.1690-92; FMS and MAPCO indemnified all of Blackhawk's construction bonds, ROA.1556-62; and MAPCO, FMS, and Padron provided extensive loans to Blackhawk, ROA.1570-71, 1654-55,

1751-52, 1756, 1794, 1895-99, 2016-18, 2102-03. Butler (who was then the comptroller for both MAPCO and FMS), at Padron's direction, maintained Blackhawk's checks in a locked cabinet to which Villarreal did not have a key and could not issue checks to Villarreal for signature without Padron's approval. ROA.1496, 1500-02, 1514. Villarreal could not even access Blackhawk's petty cash without Padron's approval. ROA.1502.

Blackhawk also was expected to support FMS financially. ROA.2013-14, 2017-20; ROA.1733-34, 1746-47. For example, when other FMS "clients" were unable to pay FMS's outstanding consulting fees, FMS required Blackhawk to cover the shortfall. ROA.2015; GX 86 (ROA.3109). And when Blackhawk encountered difficulties paying its subcontractors, Padron and Wibracht commanded Villarreal to prioritize payments to FMS. ROA.1693-98; *see also* GX 81 (ROA.3096).

Padron persisted in controlling Blackhawk through FMS even after Taylor (who was then Operations Manager for both MAPCO and FMS) told him that FMS "needed to operate solely as a consulting firm" rather than in ways that exhibited "too much control over Blackhawk." ROA.1747.

4. Padron's use of Blackhawk as a personal piggybank

Although Padron had no formal ownership of Blackhawk after 2007, he regularly provided it funds and financial backing. Among other things, Padron loaned Blackhawk hundreds of thousands of dollars, ROA.1557; *see also* ROA.1841-42; personally guaranteed Blackhawk's rent payments, ROA.1373, GX 108 (ROA.3257); pledged his own, MAPCO's, and FMS's assets to permit Blackhawk to obtain construction bonding, a requirement for federal construction contracts, ROA.1353-54; ROA.1730-31, 1760-64, 1375; ROA.1556-57; ROA.1882; GX 15 (ROA.2813); GX 68 (ROA.3060); and paid $4,250,000 to settle a lawsuit Traveler's Casualty Insurance brought against Blackhawk and others for losses incurred on Blackhawk's bonds, ROA.1661-63; GX 95 (ROA.3130).

But Padron also helped himself to Blackhawk's funds. When Blackhawk received a tax refund of over $200,000, Padron had Villarreal withdraw this sum—in increments of less than $10,000—and give it to Padron in the form of "cash or check." ROA.1578-79, 1698-99,

1358.[3] Padron received multiple cashier's checks from Villarreal and Blackhawk, totaling at least $300,000. GX 21 (ROA.2874) ($100,000 from Villarreal); GX 142 (ROA.3570) ($150,000 from Blackhawk); GX 143 (ROA.3571) ($50,000 from Blackhawk). And Padron pocketed Blackhawk's bond-insurance dividends—rewards paid to a construction company for completing a job—by having his long-time executive assistant endorse the checks to him. ROA.2075-80; ROA.1359-60; GX 135-139 (ROA.3563-67). When Wibracht confronted Padron about the bond dividends, Padron said: "This is my money. I started these companies." ROA.1360.

After Padron discovered that Wibracht (a licensed insurance agent) was earning commissions on Blackhawk's insurance bonds, Padron confronted Wibracht because he "felt like that was too much money for [Wibracht] to be receiving." ROA.1360-61. Padron thereafter had Blackhawk's insurance broker give "part of the commission" to Padron, even though Padron could not legally receive commissions

[3] Padron had so much sway over Villarreal that Villarreal once gave Padron $400,000 from Villarreal's company retirement fund—draining the account. ROA.1579-80. Villarreal never saw the money again and did not believe it went to Blackhawk. ROA.1580.

because he was not an insurance agent. *Id.*; ROA.2328. Padron received such payments in "sacks of cash"—that is, "brown paper bags full of cash, like a lunch bag." ROA.1360-61, 1737-40.

To prevent Padron from appropriating Wibracht's bond commissions, in June 2013 Wibracht instructed Blackhawk to switch to a new insurance broker. ROA.1388; GX 39 (ROA.2955). When Padron learned of this, he became "extremely angry" and was "ready to become violent" with Wibracht. ROA.1386-89, 2364. Around this time, Padron "threatened to break [Wibracht's] legs" when Wibracht again confronted him about taking part of the commissions on Blackhawk's bonds. ROA.1361-62.[4] In August 2013, Wibracht and Steven separated from MAPCO/FMS. GX 48 (ROA.2971); ROA.1446-47, 1532. Padron then switched Blackhawk back to the prior insurance broker so that Padron could continue receiving the bond commissions. ROA.1389-90, 1460; GX 48 (ROA.2975).

[4] Similarly, Padron once told Villarreal that, "if [Villarreal] didn't comply with his wishes" about "money," he could "have [Villarreal] hurt." ROA.1584-85.

After Wibracht left, Taylor assumed his roles—both at FMS and in the conspiracy. ROA.1391, 1532-34, 1718, 1786; GX 83 (ROA.3101); ROA.1759-60.

5. The Dallas Parking Garage contract and the 2013 size protest

In around August 2013, Blackhawk's qualification for the SDVOSB program was again challenged after Blackhawk obtained a $24 million SDVOSB contract, GX 116 (ROA.3326-28), to construct a parking garage for the Department of Veterans Affairs (VA) in Dallas. The losing company for the bid lodged an official "size protest" with the SBA, complaining that Blackhawk was not eligible for the SDVOSB program because it was not a "small business" due to Blackhawk's close ties to other individuals and entities—namely, Padron and his companies, including MAPCO and FMS. GX 43 (ROA.2958-59); ROA.1567-68.

The Dallas Parking Garage was the largest contract Blackhawk had ever won, ROA.1565, 1712-13, 1741, and Padron maintained oversight over the project, including attending the project's kick-off meeting, ROA.1765; visiting the construction site, ROA.1765; and transferring his nephew, Ethan Padron, from MAPCO to Blackhawk,

where Ethan worked on the project, ROA.1769.[5] Padron was frustrated by the size protest—concerned about the cost of defending against it and the disclosures it might require. ROA.2080-81; GX 45 (ROA.2965); ROA.1565.

Villarreal and Taylor initially sought Bailey's help with the size protest. ROA.1893, GX 50 (ROA.3002). In a September 12, 2013 email, Bailey warned them that FMS was loaning Blackhawk so much money that the SBA could find that FMS, rather than Villarreal, controlled Blackhawk. GX 55 (ROA.3014); *see* ROA.1841-42; ROA.1557. As Bailey explained, FMS's loans were "outside the scope of the FMS [consulting] agreement and they add up to a very large amount of money," such that, "if FMS were to call all the loans for nonpayment[,] that could drive Blackhawk out of business. These are the factors that the SBA would jump on in a size protest."

The next day, Villarreal submitted through another attorney, William Bruckner, Blackhawk's response to the size protest. ROA.1570-73, 1756, 1893, 1927; GX 57 (ROA.3018-19); GX 59

[5] Ethan was listed as "contact person" on two of the invoices submitted on the project, GX 112, 114 (ROA.3314, 3320), and as "project manager" on a third, GX 116 (ROA.3328).

(ROA.3032). As in 2007 when Blackhawk was first disqualified from the SDVOSB program, Blackhawk's response was replete with falsehoods about Blackhawk's relationship with Padron and his companies. For example, the response denied that "any owner[]" had "ever been employed by" MAPCO, even though Villarreal previously worked for MAPCO; denied that Blackhawk shared facilities, equipment, or personnel with MAPCO, when in fact it did; denied that there were "any current financial obligations" between Blackhawk and Padron and his companies, despite MAPCO's, FMS's, and Padron's outstanding loans to Blackhawk (and despite Villarreal's and Taylor's awareness that these loans would be relevant to a size protest based on Bailey's email to them the day before, GX 55 (ROA.3014-16)); denied that anyone who was not an owner or partner of Blackhawk had "sign[ed] documents to facilitate the ability of [Blackhawk] to receive indemnification," even though Padron had signed documents to help Blackhawk obtain bonding; denied that MAPCO, FMS, or Padron had "assisted in arranging for any of the subcontractors" for Blackhawk, even though MAPCO, FMS, and Padron had assisted Blackhawk in hiring subcontractors; and denied that, if the parking-garage contract

were terminated, there would be any financial impact on MAPCO, FMS, or Padron, even though MAPCO, FMS, and Padron, as indemnitors, would have been financially impacted by a termination. ROA.1754-65, 1569-75, 1637-40; GX 59 (ROA.3026, 3032). Padron or Wibracht had someone deliver just the signature page of this document to Villarreal, and Villarreal signed it, under penalty of perjury, without having read the document itself. ROA.1574-75; GX 59 (ROA.3027).

With Taylor's review and approval, Bruckner sent the SBA a follow-on letter a few days later, specifying that "[n]o entity or person" has "actual control and/or the power to control Ruben Villarreal or Blackhawk." GX 60 (ROA.3035); ROA.1759-60.

Once again relying on these false assertions, in September 2013 the SBA rejected the size protest, concluding that Blackhawk qualified as a "small business," in large part because "Villarreal solely has the power to control Blackhawk," which is "not economically dependent upon any of the alleged affiliates." ROA.1961-65; GX 65 (ROA.3049, 3055-57).

Blackhawk's work on the Dallas Parking Garage project continued through November 2017, when Blackhawk submitted its final invoice to

the VA. ROA.1468, 1644, 1766; GX 116 (ROA.3326, 3333). Consistent with its standard practice on government contracts, Blackhawk submitted its invoices for the parking-garage project, and received payments thereon, electronically. ROA.1766, 1331; *see also* ROA.2016-17.[6] Padron was aware that Blackhawk was receiving payments from the parking-garage contract. Indeed, an email on which Padron was copied shows that one of those payments was used to repay a loan from his company, FMS. GX 89 (ROA.3114); ROA.2016-17.

6. Gains from the conspiracy

Defrauding federal agencies through the SDVOSB program was lucrative. ROA.1347. From 2010 to 2017 alone, Padron and his coconspirators won over $240 million in SDVOSB contracts through Blackhawk. GX 157 (ROA.3601); ROA.2002-03, 1347, 1718. Had the SBA known that Blackhawk was controlled by Padron rather than a service-disabled veteran, it would have declared Blackhawk ineligible

[6] Counts 4-6 of the indictment were based on electronic invoices Blackhawk submitted to the VA for work performed on this contract—respectively, GX 112 (ROA.3314), 114 (ROA.3320), and 116 (ROA.3326). Counts 7-9 were based on the corresponding electronic payments to Blackhawk—respectively, GX 118 (ROA.3335), 119 (ROA.3336) (which provides payment for multiple invoices, ROA.2044), and 120 (ROA.3338). ROA.1331, 1766, 2016-17.

for the SDVOSB program, and Blackhawk would not have been able to obtain any of these contracts. *See* ROA.1830; ROA.1988-89 (SBA official would have referred false representations to the Office of the Inspector General); ROA.1963-65, 1837.

SUMMARY OF ARGUMENT

1. The evidence readily suffices to support Padron's convictions.

a. As for conspiracy to commit wire fraud and defraud the United States, the government adduced overwhelming evidence that Padron and his coconspirators used service-disabled veterans as figurehead owners of Blackhawk to allow Padron and his coconspirators to access set-aside contracts for which they were not eligible. Although Brian Dudley and Ruben Villarreal were named as Blackhawk's controlling owners, the evidence showed that Padron and his coconspirators conducted the day-to-day management and long-term decisionmaking. That evidence included extensive testimony and documentation that Padron and his coconspirators—not Dudley or Villarreal—decided which projects Blackhawk should bid on, which subcontractors to involve, whom to hire and fire and what salaries to pay (including what salary to pay Villarreal), which bills to pay, which

insurance broker to use, which bank accounts to use, and who was permitted to own shares in Blackhawk. Dudley testified that he left Blackhawk when Padron would not allow him to be "in charge of the day-to-day." Villarreal testified that he had "no authority whatsoever."

b. The same is true for the wire-fraud convictions, each of which related to invoicing or payment on the Dallas Parking Garage project. Because the purpose of the scheme was to fraudulently obtain payments on SDVOSB contracts, and because it was standard practice for invoices and payments on those contracts to be transmitted electronically, the evidence readily showed that the Dallas Parking Garage electronic invoices and payments were reasonably foreseeable to Padron as part of the scheme—an inference only reinforced by the evidence that Padron maintained oversight over the project and was aware of the payments Blackhawk received on it.

In the alternative, Padron's wire-fraud convictions also stand on a *Pinkerton* theory. A rational jury readily could have found that Padron's coconspirators caused the transmission of the wires in question because obtaining payments on SDVOSB contracts was the

aim of the fraud scheme, and it was standard practice for Blackhawk's invoicing and payments to be done electronically.

2. Padron failed to preserve a substantive-reasonableness challenge to his fine—an upward variance from the advisory Guidelines range—and he cannot meet any of the four prongs of the plain-error test. The district court chose the fine after carefully addressing the relevant sentencing factors, and Padron's suggestion that the court should have given more weight to the lack of monetary loss is no more than a request for this Court to reweigh the sentencing factors. Padron shows no abuse of discretion, much less a clear or obvious one. Nor is there a reasonable probability that the court would have imposed a lesser fine absent the supposed error; the record shows that the court sought to make Padron's fine sufficiently financially punitive to address the inequity of Padron's getting to "keep"—because of the unavailability of restitution—the scheme's $6.3 million in "ill-gotten gains." Padron thus shows neither prejudice nor good cause for this Court to exercise its fourth-prong discretion.

ARGUMENT

I. Sufficient Evidence Supports Padron's Convictions

Padron challenges the sufficiency of the evidence as to both his conviction for conspiracy to commit wire fraud and defraud the United States (Count 1) and his convictions for substantive wire fraud (Counts 4-9). His arguments lack merit.

A. Standard of Review

"This court reviews preserved challenges to the sufficiency of the evidence de novo." *United States v. Alaniz*, 726 F.3d 586, 600 (5th Cir. 2013) (internal quotation marks omitted). "When reviewing the sufficiency of the evidence, [this Court] view[s] all evidence, whether circumstantial or direct, in the light most favorable to the government, with all reasonable inferences and credibility choices to be made in support of the jury's verdict." *Id.* (internal quotation marks omitted). The evidence need not exclude every reasonable hypothesis of innocence. *United States v. Loe*, 262 F.3d 427, 432 (5th Cir. 2001). Rather, "[t]he jury's verdict will be affirmed unless no rational jury, viewing the evidence in the light most favorable to the prosecution, could have found the essential elements of the offense to be satisfied

beyond a reasonable doubt." *United Sates v. Bowen*, 818 F.3d 179, 186 (5th Cir. 2016); *see also United States v. Cabello*, 33 F.4th 281, 288 (5th Cir. 2022) (describing "heavy thumb on the scale in favor of the verdict").

B. The Conspiracy Conviction

To prove the charged conspiracy, the government had to show: (1) an agreement between Padron and another person to commit wire fraud or defraud the United States; (2) that Padron knew the unlawful purpose of the agreement and joined in it with the intent to further the unlawful purpose; and (3) that at least one of the coconspirators knowingly committed at least one overt act in furtherance of the conspiracy. *United States v. Sharpe*, 193 F.3d 852, 863 (5th Cir. 1999) (conspiracy to commit wire fraud); *United States v. Green*, 47 F.4th 279, 289 (5th Cir. 2022) (conspiracy to defraud United States); ROA.726-29 (Jury Instructions).[7]

Without identifying a deficiency as to any particular element, Padron argues that the "dispositive question" is whether Dudley and

[7] Padron's brief appears to set forth the elements of conspiracy to commit healthcare fraud, which lacks an overt-act element. *See* Br. 39 (citing *United States v. Grant*, 683 F.3d 639, 643 (5th Cir. 2012)).

Villarreal "were mere 'figureheads' at Blackhawk" or instead "*did* control decision making and operations at Blackhawk." Br. 40. Padron thus concedes that, if the evidence sufficed to permit a rational jury to find that he and his business partners, rather than Dudley or Villarreal, controlled Blackhawk, then the evidence sufficed on all elements of the conspiracy charge. The government's evidence amply sufficed to permit such a finding.

1. Control during the Dudley era

Abundant evidence showed that Padron and Wibracht, rather than Dudley, controlled Blackhawk. Dudley, who lived in California during the time he was listed as Blackhawk's owner and "sole manager," ROA.1293, denied at trial that he ever conducted either the long-term decisionmaking or the day-to-day management at Blackhawk. ROA.1300. He did not opine on future plans; never bid for any federal contracts; never supervised a construction project; rarely visited Blackhawk's office; did not have access to Blackhawk's checkbooks; and never made personnel decisions. ROA.1296, 1298-300. Wibracht, too, testified that he and Padron, rather than Dudley, ran Blackhawk. ROA.1337. And, tellingly, as both Dudley and Wibracht

described, when Dudley sought to become a true business partner, Padron would not allow it, which resulted in Dudley's leaving. ROA.1297-1301, 1338-39. From this evidence alone, a rational jury readily could have found that Padron and Wibracht, not Dudley, controlled Blackhawk.[8]

Padron's arguments to the contrary are unavailing. *First*, Padron is incorrect in asserting (Br. 40) that Blackhawk did not operate between 2004 and 2006. Dudley testified that Blackhawk was awarded federal construction projects during the period of his ownership, 2004 through 2007, ROA.1299; he acknowledged on cross-examination that that Blackhawk did not do "much" business in the first two years, ROA.1311. But the point is orthogonal. He left because Padron would not allow him to be "in charge." ROA.1296-1301, 1338-39. And, by then, Blackhawk was busy enough that Dudley considered his $60,000 buy-out to be a poor return on his $510 investment. ROA.1312-13.

[8] A rational jury also could have inferred Padron's control based on Blackhawk's close ties with Padron's namesake company, MAPCO, which financed Blackhawk, ROA.1337-38; served as Blackhawk's office, ROA.1298; and provided employees to bid on projects and write proposals on Blackhawk's behalf, ROA.1298, 1337-38.

Second, Padron's suggestion (Br. 40-41) that it was Wibracht, rather than Padron, who controlled Blackhawk during the Dudley era does not help him. Either way, *Dudley* was not in control. In any event, the suggestion ignores the overwhelming evidence of Padron's own control of the company—most notably, Dudley's and Wibracht's testimony that it was Padron who, in 2007, refused to allow Dudley to be "in charge of the day-to-day." ROA.1296-1301, 1338-39.

Finally, Padron's conclusory assertion that Dudley had "every ability to 'take any action that [he] deem[ed] to be necessary, convenient or advisable in connection with the management of the Company'" (Br. 40 (quoting Blackhawk's Articles of Organization)) also does not help him. The jury could reasonably infer that Dudley's authority, on paper, differed from his actual authority; indeed, as the parties' jury arguments confirm, the central question of the trial was precisely whether the papers reflected reality. ROA.1274-75, 2539-40, 2567. The government's evidence, including (*inter alia*) Dudley's own testimony that, in practice, his managerial rights "were nonexistent," ROA.1319 ("I had these rights on paper. It didn't pan out that way"), readily

permitted a rational jury to conclude that Dudley did not, in fact, control Blackhawk.

2. Control during the Villarreal era

Abundant evidence likewise showed that Padron and his business partners controlled Blackhawk while Villarreal was the nominal owner. At the outset, Wibracht testified that Padron "handpicked" Villarreal because Villarreal was a longtime MAPCO employee who could be "easily controlled," ROA.1343-44, 1350, 1492; and Butler testified that, when she raised concerns about Villarreal's lack of business background, Wibracht assured her that Villarreal "would have no decision-making powers," and Padron assured her that Villarreal "was the token disabled veteran," ROA.1498. These and other Blackhawk, MAPCO, and FMS employees testified that Padron and Wibracht were good to their word: First Padron and Wibracht, and then Padron and Taylor—whether directly or through MAPCO and FMS—decided (*inter alia*) which projects Blackhawk should bid on, ROA.1349-50, 2062, 1690-92; which subcontractors to involve, ROA.1559, 2060; whom to hire and fire and what salaries to pay, including what salary to pay Villarreal, ROA.1559-60, 1590, 1622, 2062, 2066; which bills to pay,

ROA.1558, 1693-94; which insurance broker to use, ROA.1387-90, 1460; which bank accounts to use, ROA.1558, *see* 1842-43; and even—in Padron's sole discretion—who was permitted to own Blackhawk, ROA.1377-80. These employees thus viewed Villarreal as a mere "figurehead" or "signature," ROA.1497-500, 1771.

Villarreal himself confirmed this. For example, he testified that he obtained his veterans' disability rating at Padron's and Wibracht's urging, ROA.1544-45, 1414; became Blackhawk's majority owner only after Padron and Wibracht gave him an ultimatum, ROA.1543, and without paying a dime for his shares, ROA.1302, GX 7 (ROA.2781-82); was often overruled by Padron and Wibracht on key decisions, ROA.1556, 1558-59, 1579; and could not even access Blackhawk's checkbooks or petty cash without Padron's approval, ROA.1300. As Villarreal put it, Wibracht and Padron "called the shots," and Villarreal "had no authority whatsoever." ROA.1566, 1579.

In addition, Padron exercised total financial control over Blackhawk. On the one hand, he provided substantial financial support, including "personal[ly] guarantee[ing]" Blackhawk's rent, ROA.1373, GX 108 (ROA.3257); loaning Blackhawk "hundreds of

thousands of dollars" during Villarreal's tenure alone, ROA.1557; and indemnifying Blackhawk's bonds, which Wibracht testified represents the "ultimate control," ROA.1353, because bonding is a prerequisite to securing federal construction contracts, ROA.1331. *See also* ROA.1733-34, 1759-60. As the SBA expert put it, "critical financial or bonding support" can be a factor leading to outside "control[]" if the service-disabled veteran owner "can't make independent decisions" out of fear that "go[ing] against" the wishes of the person providing the support will result in the person's "pull[ing] the loan back or caus[ing] the firm some severe hardship." ROA.1842, 1850.

At the same time, Padron treated Blackhawk's money as his own. For example, as Villarreal and Wibracht testified, Padron helped himself to a Blackhawk tax refund of over $200,000. ROA.1358, 1578-79, 1698-99. And, as Padron's executive assistant and Wibracht testified, Padron had Blackhawk's bond-insurance dividends endorsed to him. ROA.2075-80; ROA.1359-60; GX 135-139 (ROA.3563-67). When Wibracht confronted Padron about the bond dividends, Padron said: "This is my money." ROA.1360.

This overwhelming evidence readily permitted a rational jury to find that Padron and his business partners, not Villarreal, controlled Blackhawk.

Padron's arguments to the contrary rely on a selective (and sometimes strained) reading of the record. *First*, Padron cites portions of the record he says show that Villarreal (1) "selected subcontractors, gave direction on how to bid projects, and decided whether Blackhawk was interested in bidding jobs"; (2) worked with lawyers and accountants; and (3) attended site visits and preconstruction meetings. Br. 41. As to (1), Padron overstates. The two emails he relies on involved isolated instances of Villarreal's telling *FMS* employees that Blackhawk "w[as] interested" in a bid. DX 256 (ROA.5224) and DX 258 (ROA.5226). This is entirely consistent with FMS's and Padron's ultimately determining which projects Blackhawk bid on. As to (2), that Villarreal worked with lawyers and accountants likewise is consistent with his having been a Blackhawk *employee*. Similarly, as to (3), that Villarreal participated in some site visits—at least when government representatives were present, *see* ROA.1561—and preconstruction meetings was consistent both with his status a

figurehead owner and with the conspirators' desire to avoid raising suspicion that someone other than Villarreal controlled Blackhawk.

But even if this scant evidence permitted a conflicting inference, the jury was entitled to believe Villarreal's own testimony that he was "regarded as yet another employee" and "was always circumvented and/or countermanded" by Padron and Wibracht, rendering him "mute" and with "no authority whatsoever." ROA.1579. *See United States v. (Chad) Scott*, 70 F.4th 846, 854 (5th Cir. 2023) ("We must accept 'all credibility choices and reasonable inferences made by the trier of fact which tend to support the verdict.'"); *United States v. Cannon*, 750 F.3d 492, 506 (5th Cir. 2014) ("[A]ny conflicts in the evidence must be resolved in favor of the verdict.") (quotation omitted); *United States v. Mitchell*, 484 F.3d 762, 768 (5th Cir. 2007) ("[T]he jury is free to choose among reasonable constructions of the evidence"). And Villarreal's testimony, of course, was thoroughly corroborated by, *inter alia*:

- Wibracht's testimony that he and Padron, not Villarreal, ran Blackhawk, ROA.1343-45, 1349-50, 1353-54, 1358-61, 1366, 1378-80, 1389-90, 1492;
- Butler's testimony that Padron told her Villarreal was "the token disabled veteran" who would allow the company to "get set-aside contracts," ROA.1498; that Wibracht told her Villarreal "would have no decision-making powers," *id.*; and

that Villarreal needed Padron's approval to access Blackhawk's checkbooks (which were locked away) and even petty cash, ROA.1500-02, 1514; *see also* 1493-1500;

- Taylor's testimony that (1) Villarreal told him Padron "owned" Blackhawk, ROA.1721; and (2) Blackhawk employees understood that Padron was the "overall boss", ROA.1727; *see also* ROA.1693-98, 1717-21, 1726, 1733-34, 1746-47, 1771, 1788;
- Padron's executive assistant's testimony that "very seldom" was anything "run through [Villarreal]," ROA.2061; and that Padron "decide[d] what work Blackhawk would bid on" and was involved in hiring and "setting salaries," ROA.2060-65; *see also* 2052-53, 2066-68, 2075-80, 2087;
- Blackhawk's project manager's testimony that Villarreal was "not really" involved in daily operations, ROA.1688-89; *see also* ROA.1690-94, 1698-99, 1712-17;
- FMS's Vice President of Finance's testimony that Blackhawk did not function independently of FMS, ROA.2017; *see also* ROA.2006-09, 2014-16; and
- Voluminous documentary evidence, including (*inter alia*), the 2008 Travelers Indemnity Agreement, GX 15 (ROA.2813), and the 2013 Hanover Indemnity Agreement, GX 68 (ROA.3067), through which Padron and others indemnified Blackhawk's bonds; an email to Padron and Taylor (on which Villarreal was not copied) from a Blackhawk employee tendering his resignation, GX 83 (ROA.3101); a commercial lease for Blackhawk with Padron's personal guarantee, GX 108 (ROA.3257); and five Blackhawk bond-dividend checks endorsed to Padron, GX 135-139 (ROA.3563-67).

Second, Padron attempts to discount evidence of his financial assistance to Blackhawk—specifically, his providing crucial loans and bonding indemnification—on the theory that this assistance "*merely* shows Padron had an interest in Blackhawk's success" as a financial guarantor. Br. 41 (emphasis added). But this argument turns the standard of review on its head. This Court draws all reasonable inferences in favor of *upholding* the verdict, *(Chad) Scott*, 70 F.4th at 854; *Cannon*, 750 F.3d at 506, and it is reasonable to infer that Padron's massive financial assistance—which also included paying a $4.25 million settlement and personally guaranteeing Blackhawk's rent—showed his control of Blackhawk. As the SBA expert witness testified, financial affiliation relates "to the same basic requirements as control," because such affiliation risks undermining the independence of the (putative) service-disabled owner. ROA.1841-42. Similarly, because (as Wibracht testified) bonding is the "lifeblood" of federal contractors—"You can't secure a project with the federal government in construction without a bond," ROA.1331—the indemnification Padron provided for Blackhawk's bonding "was the ultimate control," ROA.1353. As Wibracht put it, "If you turned off the bonding support, the company

couldn't bid work." ROA.1353-54. *See also* ROA.1849-50 (SBA expert explaining that SBA considers "critical financial or bonding support" in determining whether a company qualifies for the SDVOSB program).[9]

In addition, Padron's theory completely ignores the other side of the ledger: his treating Blackhawk as his personal piggybank—repeatedly appropriating its funds, *supra* at 18-20, and frankly acknowledging that he viewed those funds as "[his] money," ROA.1360. Padron has no answer for any of that evidence, which powerfully confirmed his utter domination of Blackhawk.

Similarly unavailing is Padron's alternative effort to minimize the significance of certain of the loans: his suggestion that, based on "legal advice," Blackhawk made a "business decision to risk a potential size protest over the loans to stay afloat." Br. 42 (citing GX 55 (ROA.3014-16), ROA.1929-30). The loans in question were $750,000 in loans FMS

[9] Padron asserts that Blackhawk's indemnity support from third parties, "including, *but not limited to MAPCO*," "was disclosed via letter to the SBA *each time Blackhawk bid on a project*. Br. 41-42 (citing DX 291 (ROA.5294) and 293 (ROA.5297, 302)) (emphases added). But the one letter in question—DX 291 is an unsigned version of DX 293, ROA.2352—mentions indemnity support only from MAPCO; the letter makes no mention of Padron's or FMS's indemnity support. ROA.1491-92, 2357-59.

had made to Blackhawk around the time of the August 2013 size protest. GX 155-C to 155-H (ROA.3592-99); ROA.1750-52. Padron does not articulate the logic of this argument, but the evidence he cites—primarily a September 12, 2013 email Bailey sent Villarreal and Taylor when they asked about the propriety of those loans—belies any suggestion that Blackhawk declined to divest itself of the loans on Bailey's advice or that the loans were not indicative of Padron's control. To the contrary, as Bailey stated in the email, he viewed the loans as problematic because they "add up to a very large amount of money"; they "have no stated interest and no repayment schedules[,] which makes them appear less than arm's length"; and, "[i]f hypothetically FMS were to call all the loans for nonpayment[,] that could drive Blackhawk out of business." GX 55 (ROA.3014). Bailey thus concluded that the loans created "a significant risk" that the "SBA could find Blackhawk is unduly reliant on FMS to such an extent that FMS has the ability to control Blackhawk[,] which threatens both your small business size and [your] SDVOB status." *Id.*

Tellingly, on the very next day, Blackhawk (through Attorney Bruckner) submitted its Form 355 response to the SBA, which omitted

any mention of the loans in answering the question whether there were "any current financial obligations" between Blackhawk and FMS. ROA.1752-56, GX 59 (ROA.3032); *see also* GX 56-59 (ROA.3017-3033); ROA.1893-98. In short, far from undermining the significance of these and other loans, Bailey's email, and Blackhawk's contemporaneous failure to mention the FMS loans in the Form 355, show that the loans in fact were strongly probative of Padron's control.

The one case on which Padron relies, *United States v. Grossman*, 117 F.3d 255 (5th Cir. 1997), does not assist him. Contrary to Padron's suggestion (Br. 43), *Grossman* does not stand for the proposition that "some evidence" of fraud is insufficient to support a fraud conviction. Instead, *Grossman* reversed convictions for conspiracy and wire fraud because (1) "[t]he government did not prove that Michael Grossman submitted false and fraudulent documents . . . in connection with the subject loans"; and (2) given "Grossman's lack of concealment"—he had made "full disclosure to [the bank's] personnel"—"the evidence [was] insufficient to support the mens rea element of conspiracy or wire fraud." *Id.* at 261-62. By contrast, the evidence here showed that Padron and his coconspirators submitted multiple false statements to

the government to conceal Padron's control of Blackhawk. *See supra* at 10-11, 22-24. Nor, in any event, is Padron correct (Br. 43) that the government here produced only "some evidence that Padron had control over Blackhawk." As shown *supra*, the government produced overwhelming evidence of that fact.

C. The Wire-Fraud Convictions

To prove each of the charged counts of wire fraud, the government had to show "(1) a scheme to defraud that employed false material representations, (2) the use of . . . interstate wires in furtherance of the scheme, and (3) the specific intent to defraud." *United States v. Hoffman*, 901 F.3d 523, 545 (5th Cir. 2018); ROA.731-33 (Jury Instructions).[10]

Padron does not dispute that the government adduced sufficient evidence to establish the first and third elements. He argues only that the government failed to show the second element: that he transmitted or caused to be transmitted an interstate wire in furtherance of the fraud scheme. According to Padron, (1) the wire-fraud charges ostensibly hinged on *Pinkerton* liability because the government did not

[10] The jury instruction broke the first element into two. ROA.731.

show that he himself was "involved in the submission of invoices," Br. 34-35; *id.* at 29, 37; and (2) the government ostensibly did not establish *Pinkerton* liability because it did not show that one of Padron's coconspirators personally "participated in the transmission of the invoices," Br. 35-36; *id.* at 29, 36. Padron does not dispute that, if the government proved wire fraud by any of the coconspirators, it likewise proved Padron's guilt under *Pinkerton*.

Padron's argument fails for two reasons. *First*, the wire-fraud charges did not depend on *Pinkerton* liability. As the government argued, ROA.2516-17 (Gov't Closing), it proved that Padron was directly liable for the wires in question—the three invoices submitted to the VA for work on the Dallas Parking Garage project (Counts 4-6), and the three corresponding payments from the VA (Counts 7-9)—because those wires were a reasonably foreseeable result of the scheme to defraud he devised and orchestrated. The government was not required to prove that Padron personally transmitted the wires or directed them to be transmitted. *Second*, the government also established Padron's guilt under a *Pinkerton* theory, ROA.2513-14 (Gov't Closing), by showing that the wires were reasonably foreseeable to the

coconspirators as part of the scheme to defraud. Like Padron, the coconspirators need not have personally transmitted the wires or directed them to be transmitted.

1. Direct liability

The second element of wire fraud—the use of interstate wires in furtherance of the scheme—is established if "the defendant could reasonably have foreseen the use of the wires." *United States v. Richards*, 204 F.3d 177, 207 (5th Cir. 2000). Contrary to Padron's suggestion (Br. 34-35, 37), "[a] defendant need not personally have made the communication on which the wire fraud count is based, nor have directed that it be made." *Id.*; *see also id.* ("The test to determine whether a defendant caused [interstate wire facilities] to be used is whether the use was reasonably foreseeable.") (internal quotation marks omitted); *United States v. Johnson*, 700 F.2d 163, 177 (5th Cir. 1983) ("statute requires only that the [wires] be the 'foreseeable result' of the accused's actions"), *vacated in other part on rehearing en banc*, 718 F.2d 1317, 1325 n.23 (5th Cir. 1983); *United States v. Snyder*, 505 F.2d 595, 601 (5th Cir. 1974) (defendant "is guilty of the substantive offense even if he made no calls himself," as long as the wires "were the

foreseeable result of the scheme in which [the defendant] participated").[11]

The government's evidence amply sufficed to show that the Dallas Parking Garage wires were reasonably foreseeable to Padron. As shown *supra* (at 4-26), over the course of at least 13 years, he successfully schemed to defraud the United States of hundreds of millions of dollars in payments on SDVOSB contracts, for which his company, Blackhawk, was not eligible. And, as Wibracht and Taylor testified, it was standard practice for Blackhawk to electronically invoice for work performed on SDVOSB contracts and to electronically receive payments on those invoices. ROA.1766; ROA.1331; *see also* ROA.2016-17. A rational jury, then, readily could have found that all the electronic invoices sent and electronic payments received on Blackhawk's SDVOSB contracts, including those for the Dallas Parking

[11] Consistent with this precedent, the jury instruction described the required showing as follows: "That the defendant transmitted or caused to be transmitted by way of wire communications, in interstate commerce, any writing, sign, signal, picture, or sound for the purpose of executing such scheme [to defraud]." ROA.731. The instruction explained: "To 'cause' interstate wire communications facilities to be used is to do an act with knowledge that the use of the wire communications facilities will follow in the ordinary course of business or where such use can reasonably be foreseen." ROA.733.

Garage contract, were a reasonably foreseeable result of Padron's fraud scheme. Indeed, as the government argued in closing, given that "[t]he whole point of the scheme was to win contracts, submit invoices, and get paid," the wires were not only reasonably foreseeable but "an inevitable part of the fraud scheme." ROA.2516-17; *see, e.g.*, *United States v. Leahy*, 82 F.3d 624, 634 (5th Cir. 1996) (upholding wire-fraud conviction where, "[t]o achieve the goals" of scheme that sought to pocket VA contract proceeds, defendants submitted fraudulent invoices and VA wired payments "in accordance with [the defendants'] wishes"); *United States v. Mann*, 493 F.3d 484, 493 (5th Cir. 2007) (upholding wire-fraud conviction where, as part of scheme to misappropriate grant money, defendant received grant money by wire transfer—which was "reasonably foreseeable" because "money is commonly paid" by wire).

Although this evidence alone suffices to support the jury's finding, Padron's employees testified that he maintained oversight over the Dallas Parking Garage project, including attending the kick-off meeting, ROA.1765; visiting the construction site, *id.*; and transferring his nephew, Ethan, from MAPCO to Blackhawk, where Ethan worked on the project, ROA.1769, GX 116 (ROA.3328). And documentary

evidence permitted an inference that Padron knew that Blackhawk was, as expected, both invoicing and receiving payments for work on this project. *See* GX 112, 114, and 116 (ROA.3320, 3314, 3328: the three charged electronic invoices, on which Ethan Padron is listed as "contact person" on first two and "project manager" on third); GX 89 (ROA.3114: email, on which Padron is copied, reflecting that one of those payments was used to repay a loan from FMS); ROA.2016-17. This evidence only reinforced the government's showing that Blackhawk's electronic invoicing and receipt of payments on the Dallas Parking Garage contract were a reasonably foreseeable result of Padron's fraud scheme.

The government thus proved Padron's direct liability for the wire-fraud counts. For this reason alone, his wire-fraud sufficiency claim fails.

2. *Pinkerton* liability

Padron's wire-fraud sufficiency claim fails for a separate reason: The government also proved his guilt of the wire-fraud counts under a *Pinkerton* theory.

Under *Pinkerton*, a defendant can be found guilty of a crime committed by a coconspirator that was committed "in furtherance of the conspiracy" and was "reasonably foresee[able] as a necessary or natural consequence of the unlawful agreement." *Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946); *see also United States v. Sanjar*, 876 F.3d 725, 743 (5th Cir. 2017). Ignoring the "in furtherance of" and "reasonably foresee[able]" requirements, Padron challenges only the government's showing that at least one of his coconspirators—including Wibracht, Villarreal, and Taylor, who admitted at trial that they were members of the conspiracy, ROA.1322, 1540, 1715-16, 1808—committed the wire-fraud offenses (Br. 35-36). But a rational jury readily could have found that any, or all, of these coconspirators caused the transmission of the wires in question because, as shown *supra* (at 4-26), obtaining payments on SDVOSB contracts was the aim of the scheme to

defraud, and it was standard practice for the invoicing and payments to be done electronically. ROA.1331, 1766.

The evidence was particularly strong as to Villarreal and Taylor. Specifically, both Villarreal and Taylor testified that they submitted false statements to the SBA to retain the Dallas Parking Garage contract in the face of the size challenge. *See* GX 59 (ROA.3025: SBA Form 355), *supra* at 22-24; *see also* ROA.1759. And the SBA representative testified that their false statements worked: The size protest was rejected. ROA.1961-65; GX 65 (ROA.3049). A rational jury, then, readily could have found that, with Villarreal's and Taylor's having fraudulently ensured Blackhawk's continued participation in the Dallas Parking Garage project, they would have reasonably foreseen that electronic invoicing and payments on that contract would ensue. And, under *Richards*, 204 F.3d at 207, such conduct equates to causing the wires to be transmitted.[12]

[12] Padron does not explain, and thus has abandoned, *see United States v. Scroggins*, 599 F.3d 433, 446-47 (5th Cir. 2010), his one-sentence assertion that the acquittals on Counts 2 and 3 demonstrate an "inconsistent verdict." Br. 36-37. In any event, inconsistency in verdict is not a basis for reversal, "even where the inconsistency is the result of mistake or compromise," because an acquittal "does not necessarily

II. Padron Shows No Plain Error in His Fine

For the first time on appeal, Padron challenges the district court's imposition of a $250,000 per-count fine—an upward variance from the advisory Guidelines range—as substantively unreasonable.[13] Br. 30-32. But Padron shows no error, much less plain error.

A. Background

In the presentence investigation report (PSR), the probation officer calculated an offense level of 31 and a criminal history category of I, which yielded an advisory imprisonment range of 108 to 135 months, and an advisory fine range of $30,000 to $250,000, per count. PSR ¶¶ 34, 39, 64, 76 (ROA.5312, 5317, 5319). The offense level included an 18-point enhancement for a monetary loss of between $3.5

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equate with a finding that the defendant was innocent." *United States v. Scurlock*, 52 F.3d 531, 537 (5th Cir. 1995) (internal quotation marks omitted); *see also Dunn v. United States*, 284 U.S. 390, 393 (1932) ("Consistency in the verdict is not necessary.").

[13] In his Statement of Issues, Padron suggests that the district court erred when it "did not give notice" of the upward variance. Br. 11. But Padron has abandoned any such issue by failing to provide supporting argument. *Ard v. Rushing*, 597 F. App'x 213, 217 (5th Cir. 2014) (argument merely "mention[ed]" in the "statement of the issues" is abandoned); *see United States v. Scroggins*, 599 F.3d 433, 446 (5th Cir. 2010). Anyway, any such argument would fail because a variance is not subject to Rule 32(h)'s notice requirement. *Irizarry v. United States*, 553 U.S. 708, 716 (2008).

and $9.5 million; a two-level enhancement for use of sophisticated means; and a four-level enhancement for Padron's role as an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive. PSR ¶¶ 26-27, 29 (ROA.5311). The probation officer calculated the fraud-loss amount based on financial statements produced by Padron's accounting firm, which showed that, from 2009 to 2014 alone, Blackhawk earned $202,329,454 in construction revenue and incurred $196,029,688 in construction costs (which the officer viewed as the fair market value of the services rendered), resulting in a "conservative and underinclusive" estimate of $6,299,766 in loss to the government. PSR ¶¶ 14, 16 (ROA.5309-5310). The probation officer likewise calculated a restitution amount of $6,299,766—owed to nine separate agencies, including the Department of the Navy, the U.S. Army Corps of Engineers, and the VA. PSR ¶¶ 78-79 (ROA.5319-20).

Padron objected to the PSR's fraud-loss calculation based on *Harris v. United States*, 821 F.3d 589 (5th Cir. 2016), which held that loss is "the contract price less the fair market value of services rendered . . . to the procuring agencies," *id.* at 605. ROA.7936. Padron argued that, here, the fair market value of the services rendered equaled the

contract price because Blackhawk built the facilities it bid on. Thus, according to him, the defrauded agencies "got exactly what [they] bargained for" and suffered "no loss." ROA.7936-37. Based on this objection, and objections to the sophisticated-means and organizer/leader enhancements, Padron objected to "the Guidelines calculation in the PSR" and "the fine range because the underlying Guidelines calculation is incorrect." ROA.7944-45, 7947.

In its sentencing memorandum, the government sought a term of imprisonment within the advisory Guidelines range of 108–135 months, ROA.7753-54, and $6.3 million in restitution, ROA.7755-57. Padron sought a sentence of "probation or . . . home detention," ROA.7915, and $0 in restitution, ROA.7910-12. Padron's sentencing memorandum made no mention of fines, neither requesting a particular fine nor requesting that no fine be imposed. ROA.7902-26.

At sentencing, the district court heard argument from both parties and "reluctant[ly]" concluded that, despite Padron's scheme's having generated at least $6.3 million in profits, *Harris* constrained the court to find both a loss and a restitution amount of zero. ROA.2636-49. As the court explained:

> "So the difficulty I'm having with [Padron's] position now is so if we agree with you that there was . . . no loss to the government, at least from a financial sense, [that] substantially bring[s] down the range of suggested punishment, but then you're also asking that Mr. Padron and Blackhawk keep the $6.3 million when we talk about restitution. So you want it all. . . .
>
> So even though Blackhawk wasn't supposed to be bidding on these contracts, shouldn't have received these contracts, . . . you want it all and still keep the money, and so how does that make sense? . . .
>
> I'm afraid that I'm disagreeing with [the government], as . . . inequitable as the result is. . . .
>
> The law is very unsatisfactory here as prescribed by . . . *Harris*, and so you apply that same logic to what you would do in the mandatory restitution amount . . . . So that said, I'm being required by law, as much as I disagree with this law, to say that the loss amount is zero and the restitution is zero.

ROA.2644-45, 2648-49.

The district court overruled Padron's objection to the sophisticated-means enhancement because the evidence was "unequivocal" that Padron "used lawyers" to prevent the SBA from discovering his scheme. ROA.2650-55. The court likewise overruled Padron's objection to the organizer/leader enhancement, finding that Padron "controlled the operations at Blackhawk." ROA.2651. These

determinations, along with the fraud-loss determination, resulted in a total offense level of 16. ROA.2653-55; *see* U.S.S.G. §§ 2B1.1(a)(1) (base-offense level of 7); 2B1.1(b)(10)(C) (for use of sophisticated means, "increase by 2 levels," but if "resulting offense level is less than level 12, increase to level 12"); 3B1.1(a) (increase by four levels for organizer/leader role). Given Padron's criminal-history category of I, the court calculated an advisory imprisonment range of "21 to 27 months[']" and an advisory fine range of "between 10,000 and $95,000." ROA.2655.

After Padron's allocution, ROA.2656-62, the district court sentenced him to concurrent terms of 27 months' imprisonment, to be followed by three years' supervised release, ROA.2665; and ordered him to pay a fine of $250,000 per count of conviction, totaling $1,750,000, ROA.2665-66. As the court explained, having reviewed the PSR and considered "the [18 U.S.C. §] 3553(a) factors," the court found most significant "the seriousness of the offense"—that Padron "scam[med]" contracts Congress had set aside for "veterans who are service-disabled"; Padron's "lack of remorse," as evidenced by his refusal to acknowledge that he had done "anything wrong" and his continuing to

"blame others"; and "the necessity for deterrence." ROA.2664-65. As to the last factor, the court explained that it had seen "numerous fraud scams in the set-aside contract systems" for over 20 years and wished to impose a sentence that would "deter others from committing these same kind of frauds upon the government that [Padron] committed." ROA.2665. The court specified that it had rejected Padron's request for probation because "probation, even under home confinement[,] with you still having access to all the ill-gotten gains[,]" would be "no punishment at all." ROA.2666.

Although Padron's counsel made other requests after the district court pronounced sentence, counsel did not object either to the adequacy of the court's explanation of the $250,000-per-count fine or to the amount of the fine. ROA.2666-67.

B. Standard of Review

Appellate review of sentencing is "limited to determining whether [sentencing decisions] are 'reasonable.'" *Gall v. United States*, 552 U.S. 38, 46 (2007). Reasonableness review generally proceeds in two steps. The court first assesses whether the sentence is procedurally correct and then assesses the sentence's substantive reasonableness. *United*

States v. (Jose) Rodriguez, 660 F.3d 231, 233 (5th Cir. 2011). But where, as here, an appellant "does not contend that the district court's decision is procedurally unsound," *id.* at 233, this Court will confine its review to substantive reasonableness. *United States v. Hudgens*, 4 F.4th 352, 357 (5th Cir. 2021).

This Court "reviews a properly preserved claim of substantive unreasonableness for abuse of discretion." *United States v. Zarco-Beiza*, 24 F.4th 477, 480–81 (5th Cir. 2022). Such review "is highly deferential, because the sentencing court is in a better position to find facts and judge their import under the [Section] 3553(a) factors with respect to a particular defendant." *United States v. (Antonio) Scott*, 654 F.3d 552, 555 (5th Cir. 2011); *see also Gall*, 552 U.S. at 56 (reversing appellate decision that "failed to demonstrate the requisite deference"). A sentence within a properly calculated guidelines range is presumptively reasonable. *United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009). But "if the sentence is outside the Guidelines range, the [reviewing] court may not apply a presumption of unreasonableness." *Gall*, 552 U.S. at 51. Instead, although the reviewing court may "consider the extent of the deviation," it "must give due deference to the

district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *Id.* That the reviewing court might have reached a different sentence "is insufficient to justify reversal." *Id.*

Unpreserved claims of substantive unreasonableness are reviewed for plain error only. *Zarco-Beiza*, 24 F.4th at 482. To establish plain error, an appellant "bears the burden to show (1) error (2) that is plain and (3) that affects his substantial rights." *United States v. Warren*, 720 F.3d 321, 326 (5th Cir. 2013) (internal quotation marks omitted). If the appellant shows that "all three conditions are met," an appellate court "*may* then exercise its discretion to notice a forfeited error, *but only if* (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson v. United States*, 520 U.S. 461, 467 (1997) (cleaned up and emphases added); *Warren*, 720 F.3d at 327 (same). "Meeting all four prongs is difficult, as it should be." *Puckett v. United States*, 556 U.S. 129, 135 (2009) (internal quotation marks omitted).

To preserve a claim of substantive unreasonableness, a defendant must, at minimum, "request a lower . . . sentence or object to the sentence imposed" in the district court. *United States v. Napper*, 978

F.3d 118, 124 (5th Cir. 2020). When a substantive-reasonableness challenge presents a "'particular'" claim of "legal error," a defendant must have "'informed the [sentencing] court of the legal error at issue.'" *Zarco-Beiza*, 24 F.4th at 481-82 (quoting *Holguin-Hernandez v. United States*, 140 S. Ct. 762, 766 (2020), and *id.* at 767 (Alito, J., concurring)).

Padron's substantive-reasonableness claim is as follows: "With no explanation, imposing $1,750,000 in fines in a case with 'zero loss' was not reasonable and must be reversed and remanded." Br. 31. This claim appears to be a "particular" claim of legal error. *See Zarco-Beiza*, 24 F.4th at 482 (claim that sentence was unreasonable because of court's "improper reliance on a bare arrest record" was "particular" claim of legal error); *Holguin-Hernandez*, 140 S. Ct. at 767 (Alito, J., concurring) (describing as "particular substantive-reasonableness arguments" claims that defendant "did not pose a danger to the public" and that "a 12-month sentence would not serve deterrence purposes"). But whether particular or general, Padron did not preserve it. In his papers, ROA.7902-8030, as at sentencing, ROA.2635-68, he neither requested a particular fine nor asked that no fine be imposed. And when the court pronounced sentence, he neither objected to the

adequacy of its explanation, nor objected that the fine was too high. ROA.2666-67. He thus failed to "inform[] the court," *Zarco-Beiza*, 24 F.4th at 482 (internal quotation marks omitted), of any "action [he] wishe[d] the court to take" or of any "objection to the court's action and the grounds for that objection," Fed. R. Crim. P. 51(b). Accordingly, his claim may be reviewed, if at all, for plain error only. *See* Fed. R. Crim. P. 52(b); *cf. Zarco-Beiza*, 24 F.4th at 482 n.4 (written objections to PSR stating that defendant should be presumed innocent of any arrests not resulting in conviction was "insufficient to bring the specific bare arrest record claim to the district court's attention," because "[t]he problem of a bare arrest record is the lack of indicia of reliability, not merely the presumption of innocence").

C. Discussion

Padron meets none of the four prongs of the plain-error test.

1. Padron shows no error, much less obvious error

Padron's claim fails at prong one. Perhaps recognizing that the district court considered all the § 3553(a) factors and exercised reasoned discretion in choosing a sentence it deemed sufficient but not greater than necessary to achieve the goals of sentencing, Padron focuses his

attack on (1) the court's supposed lack of explanation for varying upward; and (2) the fact that the court imposed a statutory-maximum fine "in a case with 'zero loss.'" Br. 31; *see also id.* at 31-32 (reciting court's reasoning for calculating a zero fraud-loss under U.S.S.G. § 2B1.1(b)(1): "'Blackhawk built for the government everything the government contracted for . . . [so] there was no loss.'"). But a failure to adequately explain a sentence would be a procedural error, not a substantive one, *see Gall*, 552 U.S. at 51, and, anyway, the court adequately explained the sentence, specifying that it sought to address the seriousness of the crime, the need for general deterrence, Padron's lack of remorse, and the inequity of Padron's being able to "keep" the $6.3 million in "ill-gotten gains" because of the unavailability of restitution. *Supra* at 56-57; ROA.2644, 2665-66.[14]

[14] Padron claims no procedural error and so has abandoned any such claim. *United States v. Chisholm*, 697 F. App'x 835, 836 (5th Cir. 2017) (unpublished) (claim that "district court failed to adequately explain" was "inadequately briefed" and thus "waived") (citing *Scroggins*, 599 F.3d at 446-47). Regardless, such a claim would be reviewed for plain error only, *United States v. Coto-Mendoza*, 986 F.3d 583, 585-86 (5th Cir. 2021), and Padron cannot satisfy that test. The court explained in detail the reasons for the sentence (*supra* at 54-57), and Padron makes no showing that the explanation was inadequate, much less plainly so. Padron also cannot show that a greater "explanation would have

The zero-loss argument fares no better. Though Padron provides little to go on, his argument amounts to a claim that the district court failed to take into account a factor that should have received significant weight—namely, the zero-loss finding, which he implies mitigated the seriousness of the offense. *See Napper*, 978 F.3d at 124 (so construing claim that 37-month revocation sentence was "'plainly excessive' when considered with the consecutive 240-month prison term the district court imposed for the new drug offense"). But the premise of the claim is incorrect. As shown *supra* (at 56), the district court explicitly considered "the seriousness of the offense." ROA.2664. The court simply found that the offense remained serious, notwithstanding the lack of *monetary* loss, because Padron "scam[med]" contracts that Congress had set aside for "veterans who are service-disabled." ROA.2665; *see also* ROA.2644 (specifying that government's lack of loss

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changed his sentence," *United States v. Whitelaw*, 580 F.3d 256, 263 (5th Cir. 2009), and so cannot show prejudice, much less good cause for this Court to exercise its fourth-prong discretion. As shown *infra* (at 67-69), the court had a higher fine "in mind and would have imposed it" regardless of any procedural error, *United States v. Hamilton*, 37 F.4th 246, 263-64 (5th Cir. 2022) (internal quotations omitted). *See also, e.g.*, *United States v. Tang*, 718 F.3d 476, 483 (5th Cir. 2013) (no prejudice where defendant "does not explain how compliance . . . would have changed his sentence").

was only "from a financial sense"). Indeed, the court explained the seriousness of the offense, which likewise implicated the need for general deterrence, in terms independent of any monetary loss. As the court put it: "I've seen these kind of scams for now 20 years in this job, contracts that should be going to women-owned businesses, and I look at the table and there's not a single woman sitting at that business, contracts that are set aside on the basis of minority-owned status and there was no minority running the business. . . . [A]nd here's yet another scam." ROA.2664-65; *see also* ROA.2649 (emphasizing that there is, in fact, "harm to the government when non-legitimate businesses receive contracts that . . . should have gone to the appropriate set-aside, in this case, service-disabled veterans, which Mr. Padron was neither a veteran, much less service disabled"). The court, then, did consider the factor Padron claims it ignored, and so Padron's challenge is "no more than a request for this [C]ourt to reweigh the statutory sentencing factors" in a way that gives greater weight to the lack of monetary loss—an exercise this Court will not undertake "because the district court is 'in a better position to find facts and judge their import under the § 3553(a) factors.'" *United States v. Garcia-*

Servin, 846 F. App'x 294, 296 (5th Cir. 2021) (unpublished) (quoting *United States v. Fraga*, 704 F.3d 432, 439 (5th Cir. 2013)).

Padron likewise provides no case-law support for his claim. The one case he cites (Br. 31), *United States v. Painter*, 375 F.3d 336 (5th Cir. 2004), involved a challenge to an upward *departure*, not a variance, in which the district court departed based on factors the Guidelines proscribed, *id.* at 339. *Painter*, then, is irrelevant to the reasonableness of a variance. *See United States v. Teel*, 691 F.3d 578, 591 (5th Cir. 2012) (finding *Painter* inapposite for this reason).

In sum, Padron's argument falls well short of demonstrating that the district court abused its broad discretion, much less that the court did so in a "clear or obvious" manner. *See, e.g.*, *Napper*, 978 F.3d at 127 ("[T]his [C]ourt will not ordinarily find clear or obvious error when it has not previously addressed an issue."); *United States v. Miller,* 406 F.3d 323, 330 (5th Cir. 2005) (stating that it would be a "stretch" to "dub the district court's decision obvious[ly], clear[ly], or readily apparent[ly]" erroneous without "any precedent directly supporting [the defendant's] contention"); *cf. United States v. McAfee*, 831 F. App'x 726, 727 (5th Cir. 2020) (unpublished) (finding no plain error in part because

"the district court was allowed to impose any sentence within the appropriate statutory maximum term of imprisonment").

2. Padron shows no prejudice, much less good cause for this Court to exercise its fourth-prong discretion

To show that a plain error affected his substantial rights, an appellant normally must make "a specific showing of prejudice." *United States v. (Johnny) Rodriguez*, 15 F.3d 408, 415 (5th Cir. 1994) (quoting *United States v. Olano*, 507 U.S. 725, 735, (1993)). In the sentencing context, he must "demonstrate[] a reasonable probability that he would have received a lesser sentence but for the court's [error]." *Zarco-Beiza*, 24 F.4th at 483. Padron does not acknowledge that he failed to preserve his claim, and so he has not even attempted to make such a showing. He likewise has not attempted the required fourth-prong showing. He thus has abandoned any such arguments, and his claim should fail for that reason alone. *See United States v. Scroggins*, 599 F.3d 433, 446-47 (5th Cir. 2010); *United States v. Torres*, 467 F. App'x 324, 326 (5th Cir. 2012) (unpublished) (because appellant "offers no argument" on third prong, "he has not met his burden of demonstrating that there is a reasonable probability that he would have received a lower sentence");

cf. United States v. Williams, 620 F.3d 483, 496 (5th Cir. 2010) (rejecting challenge to upward variance; appellant's "single sentence of argument" did "not satisf[y] the last factor of the plain-error-review inquiry").

In any event, Padron cannot show a reasonable probability that, but for the district court's ostensible error, he would have received a lesser fine. As shown *supra* (at 54-57), the district court sought to impose a sentence that would be sufficiently punitive to account for the seriousness of the offense, the need for general deterrence, and Padron's lack of remorse. ROA.2664-65. Consistent with that objective, the court sentenced him to a term of imprisonment, 27 months, at the top of the advisory Guidelines range. ROA.2665. But the court also sought to make the sentence sufficiently punitive financially. Indeed, the court was deeply concerned that *Harris*, with which the court "disagree[d]," provided Padron a windfall: The "mandate[d]" zero-loss finding not only produced a dramatic reduction in Padron's advisory imprisonment and fine ranges, but it also foreclosed restitution despite the fact that Padron's fraud scheme had generated (a conservatively estimated) $6.3 million in profits—a result the court deemed "very unsatisfactory" and

"inequitable." ROA.2644-49. As the court put it, in one of the *four* instances in which the court mentioned Padron's being permitted to retain the fraudulently obtained profits: "[S]o if we agree . . . there was . . . no loss to the government, . . . [that] . . . substantially bring[s] down the range of suggested punishment, but then you're also asking that Mr. Padron and Blackhawk keep the $6.3 million when we talk about restitution. So you want it all." ROA.2644; *see also id*. ("[Y]our position is you want it all and still keep the money, and so how does that make sense?"); ROA.2645 ("So how do you still get to keep that $6.2 [sic] million?"); ROA.2666 (rejecting probation because, "even under home confinement[,] with you still having access to all the ill-gotten gains," probation would be "no punishment at all").

Under these circumstances, Padron cannot show a reasonable probability that the court would have acted differently absent the ostensible error. The court was determined to alleviate the financial inequity, and it is reasonable to infer that it did so by imposing the statutory-maximum fine, thereby reducing—albeit by less than a third—Padron's windfall. *Cf. Zarco-Beiza*, 24 F.4th at 483-84 (despite sentencing court's obvious error in considering defendant's bare arrest

record, finding no prejudice where "a review of the sentencing hearing as a whole makes clear that the district court's primary motivation for imposing the upward variance was [defendant]'s history of re-entering the United States after being deported").

And, of course, the absence of prejudice likewise precludes any fourth-prong showing. As the Supreme Court observed in *Johnson*, where an error does not affect the judgment, it "would be the *reversal* of [such] a conviction" that would seriously affect the fairness, integrity, and public reputation of judicial proceedings. 520 U.S. at 470; *see also id.* ("Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.") (internal quotation marks omitted).

For all these reasons, Padron's unpreserved substantive-reasonableness challenge must fail.

CONCLUSION

Based upon the foregoing, this Court should affirm Padron's convictions and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 6, 2023, I filed this brief through this Court's electronic case-filing system, which will serve it on all registered counsel.

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* * *

CERTIFICATE OF COMPLIANCE

I certify that

(1) this brief complies with the word limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 12,925 words, excluding the parts of the brief exempted by Rule 32(f); and

(2) this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Office Word 365 in size 14 Century Schoolbook font.

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