

No. 14-30131

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

DELYLE SHANNY AUGARE,

Defendant - Appellant

APPELLANT'S OPENING BRIEF

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
D.C. No. CR-13-00065-BMM-2

APPEARANCE:

COLIN M. STEPHENS
Smith & Stephens, P.C.
315 W. Pine
Missoula, MT 59802
Phone: (406) 721-0300
colin@smithstephens.com

Attorney for Defendant - Appellant

SUBMITTED: September 29, 2014.

TABLE OF CONTENTS

Table of Contents. -i-

Table of Authorities. -ii-

Introduction. -1-

Statement of Jurisdiction. -2-

Statement of the Issue. -2-

Statement of the Case. -3-

Bail Status. -4-

Statement of Facts. -4-

Summary of the Argument. -11-

Argument. -11-

 I. The district court erred in imposing the
 U.S.S.G. § 2B1.1(b)(10)(C) sophisticated means
 enhancement. -?-

Conclusion. -26-

Certificate of Compliance. -28-

Statement of Related Cases. -29-

Certificate of Service. -30-

TABLE OF AUTHORITIES

Cases:

Gall v. United States, 552 U.S. 38, 128 S.Ct. 586 (2007).. 12

Stinson v. United States, 508 U.S. 36, 113 S. Ct. 1913 (1993). 19

United States v. Aragbaye, 234 F.3d 1101 (9th Cir. 2000). 17-18

United States v. Calderon Espinosa, 569 F.3d 1005 (9th Cir. 2009).. . 12

United States v. Cantrell, 433 F.3d 1269 (9th Cir. 2006). 12

United States v. Garro, 517 F.3d 1163 (9th Cir. 2008). 17

United States v. Hance, 501 F.3d 900 (8th Cir. 2007).. 18

United States v. Hart, 324 F.3d 575 (8th Cir. 2003). 19

United States v. Jennings711 F.3d 1144 (9th Cir. 2013).. 15-16

United States v. Kimbrew, 406 F.3d 1149 (9th Cir. 2005).. 12

United States v. Kontny, 238 F.3d 815 (7th Cir. 2001). 14

United States v. Landwer, 640 F.3d 772 (7th Cir. 2011).. 20, 26

United States v. Lewis, 93 F.3d 1075 (2d Cir. 1996). 19, 25-26

United States v. McEnry, 659 F.3d 893 (9th Cir. 2011).. 18

United States v. Mendoza-Morales, 347 F.3d 772 (9th Cir. 2003). 19, 25

United States v. Montano, 250 F.3d 709 (9th Cir. 2001).. 20-21, 26

United States v. Snow, 663 F.3d 1156 (10th Cir. 2012)..... 14

United States v. Thornton, 444 F.3d 1163 (9th Cir. 2006). 19, 25

United States v. Zolp, 479 F.3d 715 (9th Cir. 2007).. 12

Statutes

18 U.S.C. § 286. 8

18 U.S.C. § 3231. 2

28 U.S.C. § 1291. 2

Other Authorities

Black’s Law Dictionary (9th Ed. 2009).. 14, 20

U.S.S.G. § 1B1.3. 8

U.S.S.G. § 2B1.1, App. Note 8(B). 11, 13, 18, 24-25

U.S.S.G. § 2B1.1(a)(2).. 8

U.S.S.G. § 2B1.1(b)(10). 1-2, 3, 8, 11-13

U.S.S.G. § 2T3.1(b)(1). 21

U.S.S.G. § 3B1.1(c). 8

U.S.S.G. § 3B1.3. 8

U.S.S.G. § 3E1.1(a). 8

INTRODUCTION

Delyle Shanny Augare (Augare) appeals the district court's imposition of the two-level enhancement set forth in Section 2B1.1(b)(10)(C) of the United States Sentencing Guidelines. This enhancement allows a sentencing court to impose an additional two offense levels if the court finds the offense of conviction "otherwise involved sophisticated means. . . ." *U.S.S.G. § 2B1.1(b)(10)(C)*.

Augare objected to the enhancement in the draft presentence report and in the sentencing memorandum. (Dkt. No. 230)¹. The objection was addressed at sentencing. The district court overruled Augare's objection and imposed the enhancement. (ER 38-46). Augare filed a timely notice of appeal. (Dkt. No. 247).

Augare's conviction was obtained pursuant to a plea agreement. (Dkt. No. 116). Augare's plea agreement contained a conditional waiver of his right to appeal. (Dkt. No. 116, pg. 14). Relevant to this appeal is the following language:

By this agreement the defendant waives his right to appeal the reasonableness of the sentence, including conditions of

¹District Court Docket No.

probation or supervised release, if the defendant has no objection to the calculation of the guidelines and the sentence imposed is within or below the range provided by that calculation.

(Dkt. No. 116, pg. 14). Augare is not appealing the reasonableness of his sentence. Rather, he is appealing the district court's ruling on his objection to the imposition under section § 2B1.1(b)(10)(C) of the Guidelines. Thus, Augare has not waived his right to appeal this particular issue.

STATEMENT OF JURISDICTION

The district court had jurisdiction under *18 U.S.C. § 3231*. This Court has jurisdiction under *28 U.S.C. § 1291*. Judgment was entered on June 30, 2014. (Dkt. No. 251). Augare filed his Notice of Appeal on June 30, 2014, (Dkt. No. 247), in compliance with Rule 4(b) of the Federal Rules of Appellate Procedure. An Amended Judgment, which corrected a technical error relating to Augare's self-surrender requirement, was filed June 21, 2014. (Dkt. No. 265).

STATEMENT OF THE ISSUE

1. The district court erred in imposing the U.S.S.G. § 2B1.1(b)(10)(C) sophisticated means enhancement.

STATEMENT OF THE CASE

I. Summary of Proceedings

On July 18, 2013, the grand jury indicted Augare and five other individuals on thirty-seven counts.² (ER 1-33). Specifically, Augare was charged with one count of conspiracy to Defraud the United States, twenty-three counts of Scheme to Defraud the United States and Blackfeet Tribe by Wire, one count of conspiracy under the Federal False Claims Act, one count of Theft of Federal Property by Fraud, one count of Theft from an Indian Tribal Government Receiving Federal Grants, one count of Money Laundering, one count of Willful Failure to File a Tax Return, and two counts of Income Tax Evasion. (ER 1-33) (Counts I-XXVIII, XXXIV-XXXVII). Upon his appearance, Augare entered pleas of “not guilty” to all counts. (Dkt. No. 20).

On February 28, 2014, pursuant to a plea agreement, Augare entered pleas of guilty to counts I (Conspiracy to Defraud the United States), XXIII (Federal False Claims Act Conspiracy), XXVI (Theft From an Indian Tribal Government), and XXXIV (Income Tax Evasion).

²Not all counts were applicable to all six defendants.

(Dkt. No. 138). Augare appeared before the Honorable Brian M. Morris on June 30, 2014. (Dkt. No. 240) (ER 34-89). Augare was sentenced to a term of imprisonment for 44 months on each count, with all sentences running concurrently. (Dkt. Nos. 240, 251) (ER 82).

II. Nature of the Appeal

Augare challenges the district court's imposition of the two-level enhancement under U.S.S.G. § 2B1.1(b)(10) for sophisticated means. That enhancement increased Augare's advisory guideline range from 37-46 months to 46-57 months.

BAIL STATUS

Augare is in the custody of the Bureau of Prisons, as denoted on the Certificate of Service.

STATEMENT OF THE FACTS

I. Summary of Allegations

All allegations and convictions arise from Augare's role in the "Po'Ka Program." Po'Ka was a program designed to provide a "better, stronger safety net for at-risk Blackfeet youth." (Dkt. No. 226, pgs. 15-16). Essentially, it was supposed to provide care, support, and cultural

education for seriously emotionally disturbed children of the Blackfeet Tribe. It was initially funded by a complex grant through the U.S. Department of Health and Human Services and the Substance Abuse and Mental Health Services Administration. (ER 3-4).

The Po’Ka Project was designed to provide significant federal funding, matched in part by inputs of value from the Blackfeet Tribe – called in-kind contributions – that would allow the program to transition to a sustainable, ongoing community program operated and supported entirely by the Blackfeet Tribe with a funding arc that required increasing the amounts of in-kind commitments from the Tribe as the program progressed.

(ER 4).

The grant was awarded in 2005 and, being a six-year grant, was to run until 2011. (ER 4). Augare and his co-defendant Frances Onstad (Onstad) were the initial applicants for the grant. However, the grant was ultimately awarded to the Blackfeet Tribe (Tribe). The Tribe then assigned Onstad and Augare to administer the Po’Ka program. (ER 5).

According to the government, the fraud began almost immediately. (ER 74). The district court classified the fraud that occurred early as “relatively petty.” (ER 74).

The essence of the scheme, according to the government, was to fabricate in-kind contributions to satisfy the requirements of the grant and as a result, the monies from the grant would continue. Then the plan was for certain members of the upper echelon of Po’Ka, including Augare, to embezzle those monies for their own personal use. (ER 8-13). The first part of the activity involved the creation of false invoices attributing large amounts of in-kind donations (typically a time or service commitment attributed a certain financial value) to the Po’Ka program when no such contribution occurred. These false in-kind contributions were then reported to the grant authorities as if they were real, and the requirement of the grant appeared satisfied. As a result, Po’Ka would receive further monies from the government. (ER 8-11).

The second aspect of the scheme involved Onstad, Augare, and another co-defendant, Gary Conti (Conti). During the times relevant to the offense, Onstad served as the Director of the Po’Ka project; Augare was the Assistant Director and; Conti was contracted as “a national technical assistance provider, or outside evaluator.” (ER 5).

Between 2008 and 2011, Po’Ka distributed a \$475,078 to Conti.

(ER 11). Also between 2008 and 2011, Conti transferred \$231,550 to the Child Family Advocacy Fund (CFAF). (ER 11). CFAF was a charitable program started by Onstad and Augare long before the Po’Ka program was established. (ER 40).

Although Augare disputes it, the government’s contention was that each of Conti’s contributions to CFAF were actually kick-backs. (ER 7). According to the government, every time Conti got paid by Po’Ka “[h]e sent half of it to CFAF, or roughly half of it.” (ER 71). Onstad and Augare, who had joint control over the CFAF account, would then each withdraw half of those monies from the CFAF account. (ER 72).

The government also alleged other incidental occurrence of theft of federal funds by Augare, Onstad, and other co-defendants. (ER 12-13). One example of such a theft would be Augare receiving “mileage compensation for the use of his personal vehicle and also us[ing] the Po’Ka credit card to fuel the same vehicle for the same trip.” (ER 12 ¶ 16).

Based on the apparent sophistication, the Presentence Investigation Report (PSR) recommended the following Guideline

calculations.

46.	Base Offense Level: The Guideline for Federal Claims Act Conspiracy in violation of 18 U.S.C. § 286 is found in U.S.S.G. § 2B1.1(a)(2). The base offense level is 6.	<u>6</u>
47.	Specific Offense Characteristic: Pursuant to U.S.S.G. §§ 2B1.1(b)(1)(H) and 1B1.3 the offense level is increased 14 levels since the estimated loss is at least \$400,000, but less than \$1,000,000.	<u>+14</u>
48.	Specific Offense Characteristic: Pursuant to U.S.S.G. § 2B1.1(b)(10)(C) since the fraud scheme involved an otherwise sophisticated means, two (2) levels are added.	<u>+2</u>
49.	Victim Related Adjustments: None	<u>0</u>
50.	Adjustments for Role in this Offense: Pursuant to U.S.S.G. § 3B1.1(c), <u>Aggravating Role</u> , the offense level is increased two (2) levels since the defendant was the Assistant Director of Po’Ka and exercised management responsibility over property, assets, employees, exercised financial approval and was responsible for the day-to-day operations of the program.	<u>+2</u>
51.	Adjustments for Role in this Offense: Pursuant to U.S.S.G. § 3B1.3, the offense level is increased two (2) levels since the defendant was in a position of trust as Assistant Director.	<u>+2</u>
52.	Adjustments for Obstruction of Justice: None	<u>0</u>
53.	Adjusted Offense Level (Subtotal)	<u>26</u>

54.	Adjustment for Acceptance of Responsibility	<u>-2</u>
	Pursuant to U.S.S.G. § 3E1.1(a), as the defendant has demonstrated acceptance of responsibility for his conduct, the offense level is reduced by two (2) levels.	
55.	Upon motion of the Government, the offense level is decreased by one level for timely notification of plea.	<u>-1</u>
56.	Chapter Four Enhancements: None	<u>0</u>
57.	Total OffenseLevel	<u>23</u>

PSR ¶¶ 46-57. The PSR has been filed under seal with the Court.

Augare objected to those calculations, as detailed in the Sentencing Memorandum he filed with the district court as well as the addendum to the PSR. (Dkt. Nos. 230, 255). Augare further elucidated his objection during the sentencing hearing. (ER 38-44).

The district court Socratically responded to Augare's objection.

COURT: Well, Mr. Stephens, as you know, it's a pretty low standard for the sophisticated means enhancement. Now, we have a situation here where Mr. Augare used gas cards for unauthorized purposes, and I believe he also took travel for which he was reimbursed, and then submitted a reimbursement form. Is that accurate?

COUNSEL: That's correct, Judge.

COURT: Okay. So that's – that's fraudulent conduct.

COUNSEL: Yeah. Per se, yeah.

COURT: Okay. So, a fairly unsophisticated means of fraud.

COUNSEL: I would agree.

COURT: All right. Now, here we have a situation where Mr. Conti didn't simply write a check to Mr. Augare and Ms. Onstad, instead Mr. Augare and Ms. Onstad authorized Po'Ka to cut a check to Mr. Conti. Mr. Conti then, in turn, cut a check to CFAF.

COUNSEL: That's correct, Your Honor.

COURT: And, then, CFAF, in turn, cut checks to Mr. Augare and Mr. [sic] Onstad. Is that accurate?

COUNSEL: Yes, Your Honor. Yes.

COURT: And then the - - each of them, then, in turn, took the money through cash withdrawals.

COUNSEL: Yes.

COURT: So, what was the purpose of the trail? Wasn't that to hide the fraud, as opposed to a simple travel fraud or misuse of a gas card.

COUNSEL: And, I mean, I guess that's going to depend on who you ask, Judge, but I'm surely certain that Mr. Conti would tell you something else.³ In this particular case, the - - that money - - Mr. - - that money was - - I don't think there was any complexity to that. I was just, at worst

³Both Conti and Augare maintained that Conti's contributions to CFAF were charitable contributions.

a kick back of what Mr. Conti would call a generous donation.

(ER 41-42).

Ultimately, the district court denied Augare's objection. (ER 46). Augare was sentenced to 44 months in the Bureau of Prisons and three years supervised release (Dkt. No. 251) (ER 91). He was also subjected to a restitution of \$1,000,000 joint and several with Ms. Onstad. (Dkt. No. 251) (ER 95). This appeal followed.

SUMMARY OF THE ARUGMENT

Neither the fraud perpetrated through Po'Ka nor Augare's conduct involve sophisticated means. It was not an "especially complex or especially intricate offense[.]" U.S.S.G. § 2B1.1, App. Note 8(B). Augare's sentence should be vacated and remanded for resentencing without the sophisticated means enhancement included in the Guidelines calculation.

ARGUMENT

The district court erred in imposing the U.S.S.G. § 2B1.1(b)(10)(C) sophisticated means enhancement.

Standard of Review

This Court “review[s] a district court’s interpretation and application of the Sentencing Guidelines de novo.” *United States v. Calderon Espinosa*, 569 F. 3d 1005, 1007 (9th Cir. 2009) (citing *United States v. Kimbrew*, 406 F.3d 1149, 1151 (9th Cir. 2005)).

Reviewability

Augare objected to the sophisticated means enhancement thus preserving full review. (Dkt. No. 230) (ER 38).

Argument

A sentencing court must “begin all sentencing proceedings by correctly calculating the applicable Guidelines range.” *Gall v. United States*, 552 U.S. 38, 49, 128 S. Ct. 586, 596 (2007). “If the district court makes a material miscalculation in the advisory guideline range, even after *Booker*, we must vacate the sentence and remand for resentencing.” *United States v. Zolp*, 479 F.3d 715, 721 (9th Cir. 2007) (citing *United States v. Cantrell*, 433 F.3d 1269, 1280 (9th Cir. 2006)).

Section 2B1.1(b)(10) of the Guidelines provides:

**§ 2B1.1. Larceny, Embezzlement, and Other
Forms of Theft; Offenses Involving Stolen
Property; Property Damage or Destruction;
Fraud and Deceit; Forgery; Offenses**

**Involving Altered or Counterfeit
Instruments Other than Counterfeit Bearer
Obligations of the United States**

....

(b) Specific Offense Characteristics

....

(10) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

U.S.S.G. § 2B1.1(b)(10) (underlines added).

To warrant a two-level upward adjustment for “Sophisticated Means” pursuant to U.S.S.G. § 2B1.1(b)(10)(C), the conduct must have

especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means.

U.S.S.G. §2B1.1, App. Note 8(B). Put another way, to warrant the

two-level upward adjustment, the conduct must be especially complex or especially intricate relative to the conduct in the average case. *See e.g. United States v. Kontny*, 238 F.3d 815, 820-22 (7th Cir. 2001) (“the concealment that is inherent in criminal tax fraud . . . must be distinguished from efforts over and above that concealment to prevent detection. Only the latter permit the sentencing enhancement.”).

The language of the Guideline does not require mere deception, complexity or intricacy; the offense conduct must be “especially complex” or “especially intricate.” Fraud offense conduct will necessarily involve deceit or deception. *See Black’s Law Dictionary* (9th ed. 2009) (fraud involves “knowing misrepresentation of the truth or concealment of a material fact”). The enhancement requirement of “especially complex” or “especially intricate” offense conduct is absent here. *See United States v. Snow*, 663 F.3d 1156, 1164 (10th Cir. 2012) (conduct must be especially complex or especially intricate).

The offense conduct here is far less sophisticated than in other cases in which this Court affirmed the sophisticated means enhancement. For example, the author of the PSR relied on *United*

States v. Jennings, 711 F.3d 1144 (9th Cir. 2013). In *Jennings*, this Court clarified that “[c]onduct need not involve highly complex schemes or exhibit exceptional brilliance to justify the sophisticated means enhancement.” *Jennings*, 711 F.3d at 1145. The Court found the “Defendants’ effort to conceal income by suing a bank account with a deceptive name was sufficiently sophisticated to support” the sophisticated means enhancement. *Id.*

At its heart, the sophisticated means enhancement is a factual analysis. Both *Jennings* and the district court make the point that the conduct need not be highly complex or, in the words of the district court, “a pretty low standard.” (ER 41). However, the plain language of the Guideline and the Commission Comments demonstrate that the standard must not become so low as to swallow the entire rule thereby allowing any type of conduct to warrant classification as sophisticated.

Jennings and his co-defendant owned and operated Environmental Soil Services, Inc. (ESS). They solicited money from investors. ESS hired a vendor, Eco-Logic Environmental Engineering, to develop machinery. ESS paid Eco-Logic approximately \$2.5 million

dollars. *Jennings* 711 F.3d at 1145-46. Defendants also created a separate bank account under the name Ecologic (a similar name to their vendor Eco-Logic). Defendants would then write checks from the ESS account and deposit them in their own Ecologic bank account. The amounts and days of the checks would “often contemporaneously mirror legitimate payment to Eco-Logic Engineering.” *Jennings*, 711 F.3d at 1146. The Defendants never told the investors of the Ecologic account.

On appeal, the Defendants argued their scheme was not sophisticated enough to warrant an enhancement under the guidelines. In upholding the district court’s application of the enhancement, this Court stated:

[The Defendants] syphoned money from ESS to themselves through a bank account they named “Ecologic.” The use of that name was no accident. It mimicked the name of the company’s primary vendor, Eco-Logic Environmental Engineering. Payments to the Ecologic account thus appeared to be payments to Eco-Logic Engineering for legitimate business expenses. No legitimate reason for Defendant’s use of an account with the name “Ecologic” was established.

Jennings, 711 F.3d at 1147.

Unlike the illusory difference between “Ecologic” and “Eco-Logic,”

there is large difference between “Po’Ka System of Care” and “Child Family Advocacy Fund.” The name difference is readily apparent and would not have mislead anyone into assuming one was the other. Also, CFAF was created long before Po’Ka came into existence. (ER 40). The simplicity here, as contrasted with other cases in which this Court has affirmed the sophisticated means enhancement, borders on the comedic. *See e.g. United States v. Garro*, 517 F.3d 1163 (9th Cir. 2008) (Garro had “used and incorporated numerous shell corporations, many of which he incorporated during this scheme,” by holding himself out to be a self-employed financial consultant for foreign countries wanting to stimulate their economies; raised \$37.5 million dollars from five investors who entered into written contracts for a “Leveraged Investment Program,” which would buy and resell “medium term bank notes” in foreign markets; intentionally “left behind numerous confusing and misleading documents” regarding the investors’ funds; had forged signatures on real estate transactions; and made “other associates sign for him for other real estate purchases, to avoid having his name appear on the transaction or assets.”); *United States v.*

Aragbaye, 234 F.3d 1101, 1107 (9th Cir. 2000), superseded by statute on other grounds; *United States v. McEnry*, 659 F.3d 893 (9th Cir. 2011) (finding appellant's scheme “sufficiently more complex” than routine tax evasion where appellant went to tax school; applied for an electronic filing identification number with the IRS using a false name and social security number; set up tax preparation businesses through which he perpetrated his fraud; convinced Precision Payroll to prepare W-2 forms for fictitious employees by providing names, social security numbers, and hours worked; opened numerous post office boxes ultimately employing 141 different addresses at which to receive the fraudulently obtained tax refunds; and opened a check cashing business in order to deposit the fraudulently obtained refunds).

Other courts have emphasized that the conduct must be “especially complex or especially intricate,” as required by the Guidelines at § 2B1.1, App. Note 8(B). *See e.g. United States v. Hance*, 501 F.3d 900, 909-10 (8th Cir. 2007) (reversing application of enhancement because “these acts, when measured for their complexity and intricacy, do not distinguish themselves from the multitude of

other mail fraud cases”); *United States v. Hart*, 324 F.3d 575, 578-79 (8th Cir. 2003) (reversing enhancement because alleged sophistication merely part and parcel of the tax evasion crime itself).

The language of the Guidelines, particularly the application notes, indicates that the enhancement targets especially complex or intricate sophistication designed to escape criminal or regulatory enforcement. See, e.g., *United States v. Thornton*, 444 F.3d 1163, 1165 n. 3 (9th Cir. 2006) (“Commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.” (quoting *United States v. Mendoza-Morales*, 347 F.3d 772, 775 n. 3 (9th Cir. 2003) (alteration in original) (quoting *Stinson v. United States*, 508 U.S. 36, 38, 113 S.Ct. 1913, 123 L.Ed. 2d 598 (1993))).

The enhancement reflects the common sense concept that offenses “might be harder to detect” “because of their sophistication” and “therefore require additional punishment for heightened deterrence.” *United States v. Lewis*, 93 F.3d 1075, 1081 (2nd Cir. 1996). The

enhancement targets “elaborate efforts to avoid detection.” *United States v. Landwer*, 640 F.3d 769, 772 (7th Cir. 2011). *See also United States v. Montano*, 250 F.3d 709, 715 (9th Cir. 2001) (equating sophisticated means with concealment).

Fraud, by its very nature involves some type of deception, some type of lie or misrepresentation. Here the fraud involved the embezzlement of government monies. Like fraud, embezzlement involves purloining personal property, typically money, that belongs to another. *See Black’s Law Dictionary* (7th ed. 1999) (embezzlement involves “the fraudulent taking of personal property with which one has been entrusted, esp. as a fiduciary.”) Simple logic dictates that once the personal property is taken from the rightful owner, the embezzler must put the property somewhere else. Thus, what differentiates sophisticated embezzlement or sophisticated means becomes a matter of degree. On one end of the spectrum is the elementary sophistication necessary simply to commit the crime itself. On the other end is the above-and-beyond sophistication, the extraordinary sophistication, contemplated by the Guidelines.

This Court recognized these degrees in *United States v. Montano*, 250 F.3d 709 (9th Cir. 2001). *Montano* analyzed the sophistication of a particular smuggling scheme and U.S.S.G. § 2T3.1(b)(1), a two-level enhancement for sophisticated concealment in a smuggling operation. In overturning the imposition of the enhancement, the Court opined the following:

Here, Montano's activities represent a crude and very basic smuggling operation. Webster's dictionary defines "sophisticated" as "derived of native or original simplicity: as (a) highly complicated: many sided: COMPLEX." Webster's Third New Int'l Dictionary at 2174 (1993). This scheme was neither many sided or complex. *Furthermore, Montano's concealment activities were all inherent in the activity of smuggling. Smuggling by its nature, involves active steps to avoid detection.* Therefore, applying the sophisticated concealment enhancement to a smuggling charge requires the conceptually difficult task of separating out those concealment activities that represent more 'sophisticated' concealment.

Montano, 250 F.3d at 715 (emphasis added). In analyzing the district court's analysis of Montano's case, this Court concluded "[T]he factors the district court relied on are common, not especially sophisticated, and were employed, not to conceal, but simply to carry out the smuggling scheme." *Id.*

Similar parsing should occur here. Again, both fraud and theft by their very nature require deception and misrepresentations on the part of the perpetrator. In this case, that deception came in three general and crude forms. First, false in-kind reports. Second, the kick-back embezzlement scheme. Third, the double-dipping-type of theft involving such things as claiming mileage and also using the Po’Ka credit card to pay for gas.

Of these schemes, the in-kind reporting was so unsophisticated it smacks of farce. For example, in 2011 Conti sent an email to Onstad and another defendant in which he provided previously created invoices. These previous invoices had already been submitted to the Government. The only change between the invoices Conti emailed and the previous ones were the date they were purported to have been created. (Dkt. No. 1) (ER 8). In another instance, a false invoice was created representing an in-kind contribution from an individual between July 2010 and August, 2010. Unfortunately, the individual had suffered a “debilitating stroke in May 2010, and was incapable of providing the services to Po’Ka.” (Dkt. No. 1) (ER 9).

Although this comedy of error certainly amounted to fraud, it does

not give rise to a fraud by sophisticated means as contemplated by the Guidelines. Rather than being some type of sophisticated rouse to disguise the fraud, the false in-kind invoices *are* the fraud.

The district court also pointed to Conti creating legal entities called “NAB [and] C&C New Horizons.” Both of which were involved in the Po’Ka project. The district court, who had presided over two criminal trials involving Conti, determined that those legal entities were “[f]or the purposes of submitting invoices that wouldn’t be detected by auditors to keep the money flowing to Po’Ka. That money, in turn, was paid to Mr. Conti, who made - - sent a check to CFAF, who [sic] then sent checks to Mr. Augare and Ms. Onstad. That’s getting close to sophisticated, I would think.” (ER 44). Notably, that the activity got “close” to sophisticated, does not make it sophisticated.

The next aspect of the scheme, the Conti/CFAF alleged kick-back scheme, is also not worthy of the sophisticated means enhancement. As noted in the record, the district court determined that this aspect of the scheme justified the sophisticated means enhancement. (ER 41-42). The district court believed that the kick-back scheme was designed to

hide the fraud. “Wasn’t that to hide the fraud, as opposed to a simple travel fraud or misuse of a gas card?” (ER 41).

To distinguish between a sophisticated means and the conduct in this case, the Application Note to U.S.S.G. § 2B1.1(b)(10) is helpful.

For the purposes of subsection (b)(10)(C), “sophisticated means” means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating the soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also indicates sophisticated means.

§ 2B1.1, App. Note 8(B). From the plain text of the Application Note, it is not enough that the scheme be complex or intricate. Rather, the Commission sought to modify the conduct through the adverb “especially.” Thus, simple complexity or intricacy is insufficient to trigger the enhancement; either predicate activity must be “especially” so.

Here, the financial transactions between the parties are numerous but are neither complex nor intricate. The money came to Po’Ka, sums were transferred to Conti. Conti would then send part of

the money to CFAF. Finally, Onstad and Augare would withdraw the money from CFAF. As for the CFAF, it was not a hidden account, it was not a “fictitious entity,” a “corporate shell,” or an “offshore financial account.” § 2B1.1, App. Note 8(B). The entity CFAF preexisted Po’Ka, and the CFAF account was located in a bank in Cut Bank, Montana.

The language of the Guideline, particularly the application notes, indicate that the enhancements targets especially complex or intricate sophistication designed to escape criminal or regulatory enforcement. *See, e.g., United States v. Thorton*, 444 F.3d 1163, 1165 n. 3 (9th Cir. 2006) (“Commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or plainly erroneous reading of, that guideline.” (*quoting United States v. Mendoza-Morales*, 347 F.3d 772, 775 n. 3 (9th Cir. 2003)).

The U.S.S.G. § 2B1.1(b)(10) enhancement reflects the common sense concept that offenses that “might be harder to detect” . . . “because of their sophistication” . . . “therefore require additional punishment for heightened deterrence.” *United States v. Lewis*, 93

F.3d 1075, 1081 (2d Cir. 1996). The enhancement targets “elaborate efforts to avoid detection.” *United States v. Landwer*, 640 F.3d 769, 772 (7th Cir. 2011). *See also United States v. Montano*, 250 F.3d 709, 715 (9th Cir. 2001).

This scheme lacked sophistication, as does Augare. He has a 9th grade education. (PSR at. 2). The Po’Ka program was frequently audited, especially the in-kind donations. (ER 10, 45). Nothing about this fraud was complex or sophisticated. It was simply a fraud on the United States Government. The defendants made fraudulent statements to the government. The government relied on that. Money was paid out to the Po’Ka and the defendants, including Augare, Onstad, and Conti embezzled a portion of that money. That they had to put their embezzled funds somewhere, i.e., the CFAF account, does not qualify as sophisticated. It was simply an available bank account to which Augare and Onstad already had joint access.

CONCLUSION

The Court should vacate Augare’s sentence and remand for resentencing.

Respectfully submitted this 29th day of September, 2014.

/s/ Colin M. Stephens
Colin M. Stephens
SMITH & STEPHENS, P.C.
Attorney for Augare

CERTIFICATE OF COMPLIANCE

I, certify that pursuant to Fed. R. App. 32(a)(7)(C) and Ninth Circuit Rule 32-1, this Opening Brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 5,477 words, including parts of the brief exempted by Fed. R. App. P. 32(a)(5)(B)(iii). (An Opening Brief must not exceed 14,000 words, excluding tables and certificates).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced type face using Word Perfect, Version X3, in the Century Schoolbook 14.

Dated this 29th day of September, 2014.

/s/ Colin M. Stephens
Colin M. Stephens
SMITH & STEPHENS, P.C.
Attorney for Augare

STATEMENT OF RELATED CASES

The undersigned, counsel of record for the Defendant-Appellant, certifies pursuant to Rule 28-2.6 of the Rules of the United States Court of Appeals for the Ninth Circuit that there is one related case.

United States v. Katheryn Elizabeth Sherman, Ninth Circuit
No. 14-30135.

Katheryn Sherman was a co-defendant of the Appellant.

Dated this 29th day of September, 2014.

/s/ Colin M. Stephens
Colin M. Stephens
SMITH & STEPHENS, P.C.
Attorney for Augare

CERTIFICATE OF SERVICE

I, Colin M. Stephens, do hereby certify that a copy of this Appellant's Opening Brief was delivered to the following individuals via the means indicated below.

Carl Rostad. CM/ECF
Assistant United States Attorney

Delyle Shanny Aguare.. . . . CM/ECF
12677-046
Sheridan FCI
27072 Ballston Road
Sheridan, OR 97378

Dated this 29th day of September, 2014.

/s/ Colin M. Stephens
Colin M. Stephens
SMITH & STEPHENS, P.C.
Attorney for Augare