PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4396

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

ANDREW B. POWERS,

Defendant – Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Rossie David Alston, Jr., District Judge. (1:19-cr-00213-RDA-1)

Argued: May 5, 2022 Decided: July 6, 2022

Before WYNN, HARRIS, and RUSHING, Circuit Judges.

Affirmed by published opinion. Judge Rushing wrote the opinion, in which Judge Wynn and Judge Harris joined.

ARGUED: William Lee Drake, STEPTOE & JOHNSON PLLC, Washington, D.C., for Appellant. Joseph Attias, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellee. **ON BRIEF:** Jessica D. Maneval, STEPTOE & JOHNSON LLP, Washington, D.C., for Appellant. G. Zachary Terwilliger, United States Attorney, Kimberly M. Shartar, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

RUSHING, Circuit Judge:

A jury in the Eastern District of Virginia convicted Andrew Powers of defrauding investors in his technology company out of millions of dollars. The district court sentenced him to 151 months in prison, the bottom of the applicable Sentencing Guidelines range. Powers now appeals, raising two issues. First, Powers claims that the indictment against him did not adequately allege venue in the Eastern District of Virginia, requiring us to vacate his convictions for wire and mail fraud. Second, Powers contends that we must vacate his sentence because the district court did not address his argument for a downward variance. Finding both the indictment and the district court's sentencing explanation sufficient, we affirm.

I.

Powers created and operated CommuniClique, a company that he said provided a software application to facilitate internet communications for businesses and other users. He funded the business by selling stock to individual investors and, eventually, by seeking loans that were to be converted into stock. Within a few years of CommuniClique's inception, Powers began making misrepresentations to investors. Deception predictably overtook the business, and Powers fueled his operation with lies for a decade. Powers misled investors about CommuniClique's annual revenue, eventually claiming it was making hundreds of millions. He falsely represented that CommuniClique had large corporate clients and partners like FedEx, Intel, The Harford, Airbnb, Uber, and Staples, when in reality it did not even collect revenue from customers. He lied about CommuniClique's objective valuation, giving investors doctored documents portraying the

company as worth millions. When investors' money came pouring in, Powers used it to buy cars, pay his credit card bills, and rent posh housing.

In 2019, the Government charged Powers with four counts of wire fraud in violation of 18 U.S.C. § 1343, one count of mail fraud in violation of 18 U.S.C. § 1341, one count of inducing interstate travel with intent to defraud in violation of 18 U.S.C. § 2314, and two counts of conducting unlawful monetary transactions in violation of 18 U.S.C. § 1957. Powers moved to dismiss the wire and mail fraud counts for failure to allege venue in the Eastern District of Virginia. The district court denied that motion, and the case proceeded to trial. The jury convicted Powers of three counts of wire fraud, one count of mail fraud, and two counts of conducting unlawful monetary transactions.

The Probation Office calculated an applicable Guidelines range of 151 to 188 months in prison. In a presentencing memorandum, Powers urged the district court to impose a below-Guidelines sentence. First, Powers took issue with the Guidelines calculation, objecting that the Government had not proven certain enhancements that increased his sentencing range, such as the amount of loss and the use of sophisticated means. Second, Powers argued that the district court should reject the fraud Guidelines more generally because they lack an empirical basis and call for sentences that are too long. Regarding U.S.S.G. § 2B1.1(b)(1), which increases a defendant's offense level based on the amount of loss caused by the fraud, Powers argued that "the amount of loss is a poor proxy for the seriousness of the offense and the moral culpability of the defendant." J.A. 221 (capitalization omitted). In support, he charged that the Sentencing Commission, rather than basing the fraud Guidelines on sentencing trends, intentionally assigned higher

penalties to deter white-collar crime. As for the other fraud enhancements—including the number of victims and the use of sophisticated means—Powers generally contended that their application was unfairly cumulative. Third, Powers argued that the 18 U.S.C. § 3553(a) factors counseled a downward variance because of his difficult childhood, his devotion to his family, his intent to build a company rather than defraud, the need to avoid unwarranted sentencing disparities, and the purposes of sentencing. Powers repeated many of these arguments at the sentencing hearing. The Government requested a sentence at or near the low end of the Guidelines range.

The district court sentenced Powers to 151 months of imprisonment and three years of supervised release; the court also ordered forfeiture and restitution, which Powers does not challenge on appeal. At the sentencing hearing, the district court adopted the Guidelines range calculated by the Probation Office. Acknowledging that the Guidelines are only advisory and that Powers had requested a downward variance, the court addressed the Section 3553(a) factors. The court summarized the Government's view of Powers as a "relentless" fraudster who "betrayed" his victims, J.A. 1276, and it acknowledged Powers's evidence about his past trauma, his love for his family, and his attempt to improve his life. The court commended Powers for providing for his family but also noted that Powers had taken what would otherwise be mitigating factors—his knowledge, skills, and personal relationships—and "weaponized" them to advance his fraud. J.A. 1280. Ultimately, the court refused to "ignore the fact that [Powers] defrauded individuals out of more than $20 million, and that there were at least 41, if not more, [victims] involved." J.A. 1281. The

court concluded that a term of 151 months was "appropriate" for Powers's crimes and promised to provide a more exhaustive written opinion later. J.A. 1281–1282.

In a 39-page order, the district court elaborated on the reasons for the sentence. It acknowledged that the Guidelines are advisory and that it should consider the Section 3553(a) factors and other relevant information to create a sentence tailored to the offender. For each sentencing enhancement it applied, the district court discussed the parties' arguments, resolved any factual disputes, and found the enhancement justified based on the evidence. Then the court walked through the Section 3553(a) factors in great detail. The court reiterated its concern about the tension between Powers's positive care and provision for his family and his ruthless deception to steal from others. The court found "significant" the "staggering" scope of Powers's fraud, emphasizing that he "defrauded *at least 41 individuals out of $23,233,803.18*," and that the amount of money was "astounding" not only "collectively, but also individually" per victim. J.A. 1614. Regarding sentencing disparities, the district court discussed and distinguished every case Powers identified as a comparator. The court noted that Powers's fraud caused more loss, continued longer, or resulted in more counts of conviction than those cases; additionally, all the defendants in the comparator cases pleaded guilty, whereas even at sentencing Powers refused to acknowledge "the tremendous impact that his actions had on anyone besides himself and those within his circle." J.A. 1617. Finally, the court explained the need for restitution and forfeiture and calculated those amounts, reducing the Government's proposed figures.

Powers appealed. We now have jurisdiction pursuant to 28 U.S.C. § 1291.

II.

We first consider Powers's argument that the district court erred by denying his pretrial motion to dismiss the mail and wire fraud counts for failure to adequately allege venue. We review this issue de novo. *United States v. Engle*, 676 F.3d 405, 412 (4th Cir. 2012).

The Constitution entitles a criminal defendant in federal court to be tried in the State and district where the alleged crime was committed. *See* U.S. Const. art. III, § 2, cl. 3; U.S. Const. amend. VI; *see also* Fed. R. Crim. P. 18 ("Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed."). These venue provisions "are meant to act as safeguards, protecting the defendant from bias, disadvantage, and inconvenience in the adjudication of the charges against him." *United States v. Ebersole*, 411 F.3d 517, 524 (4th Cir. 2005). Although venue is not an element of the crime, it is a question of fact that the Government must prove by a preponderance of the evidence at trial for each count charged. *See id.*; *United States v. Griley*, 814 F.2d 967, 973 (4th Cir. 1987).

If a venue defect is apparent from the face of an indictment, the defendant must challenge it before trial on pain of waiving the objection. *See Engle*, 676 F.3d at 413; Fed. R. Crim. P. 12(b)(3)(A)(i). When deciding a pretrial motion to dismiss an indictment for improper venue, the district court assesses only whether the allegations of the indictment, if true, would suffice to establish venue. *Engle*, 676 F.3d at 415. The court may not, at this stage, consider evidence beyond the indictment. *See id.* Likewise, in this appeal from the denial of a pretrial motion to dismiss the indictment, we do not consider the evidence

at trial. Powers has not contested on appeal that the Government did, in fact, prove to the jury that venue was proper as to each count of conviction.

Locating the scene of the crime sounds straightforward, and in many cases it is. But for some offenses, determining where the crime was committed for venue purposes can be complicated. Mail and wire fraud are "continuing offense[s]," which may be prosecuted anywhere the offense "was begun, continued, or completed," including "any district from, through, or into which" the mail or wire communication moved. 18 U.S.C. § 3237(a); *see Ebersole*, 411 F.3d at 525, 527; *see also United States v. Bowens*, 224 F.3d 302, 309 (4th Cir. 2000) (noting that, for some offenses, there may be "more than one appropriate venue, or even a venue in which the defendant has never set foot" (citations omitted)). Mail and wire fraud are defined by two essential elements: "(1) the existence of a scheme to defraud and (2) the use of the mails or wire communication in furtherance of the scheme." *United States v. Curry*, 461 F.3d 452, 457 (4th Cir. 2006); *see also* 18 U.S.C. §§ 1341, 1343. But only the second element constitutes the "essential *conduct* element" for purposes of determining venue. *United States v. Jefferson*, 674 F.3d 332, 366 (4th Cir. 2012). In other words, venue will not lie everywhere the fraudster schemed, but venue is proper in any district associated with misuse of the mail or wires in furtherance of the scheme or "any acts that cause such misuse." *Id.* (internal quotation marks omitted).

The superseding indictment against Powers alleged four counts of wire fraud in one paragraph. It said:

> On or about the following dates, within the Eastern District of Virginia and elsewhere; having devised and intended to devise the scheme and artifice to defraud and to obtain money and property by means of false and fraudulent

> pretenses, representations, and promises, as more fully described above in paragraphs 4 through 9 of this indictment, ANDREW B. POWERS, knowingly transmitted and caused to be transmitted by means of wire and radio communication in interstate commerce certain writings, signs, signals, pictures, and sounds for the purpose of executing such scheme and artifice; that is, ANDREW B. POWERS caused money from the following investors to be sent to ANDREW B. POWERS and CommuniClique:

Count	**Date**	**Investor**	**Type of Communication**
1	February 17, 2016	J.G.	Wire for $1,000,011.00
2	August 8, 2016	J.C.	Wire for $115,200.00
3	September 6, 2017	W.B.J.	Wire for $100,005.12
4	September 1, 2017	S.N.	Check deposit and wire for $440,000.00

> (In violation of Title 18, United States Code, Sections 1343 and 2)

J.A. 34. Because these allegations "clearly designate 'the Eastern District of Virginia and elsewhere' as the location of [Powers's] illegal acts" for all four counts, the district court correctly denied his pretrial motion to dismiss the wire fraud counts on venue grounds. *Engle*, 676 F.3d at 416. The indictment specifies that, in the Eastern District of Virginia and elsewhere, Powers (1) "transmitted and caused to be transmitted" (2) "by means of wire" (3) certain communications "for the purpose of executing" the scheme to defraud. J.A. 34. The table then identifies the pertinent communication for each count. That is sufficient. These allegations, if true, would establish venue in the Eastern District of Virginia for each count of wire fraud charged. *See Engle*, 676 F.3d at 415.

Regarding mail fraud, the superseding indictment against Powers similarly charged:

> On or about April 4, 2017, within the Eastern District of Virginia and elsewhere, having devised and intended to devise the scheme and artifice to defraud, and to obtain money and property by means of false and fraudulent pretenses, representations, and promises, as more fully described above in

> paragraphs 4 through 9 of this indictment, ANDREW B. POWERS, for the purpose of executing such scheme and artifice, knowingly caused to be placed in an authorized depository for mail matter to be sent and delivered by the Postal Service and a commercial interstate carrier and delivered according to the direction thereon by the Postal [S]ervice and a commercial interstate carrier, matter, that is, a CommuniClique stock certificate issued to A.S.
>
> (In violation of Title 18, United States Code, Sections 1341 and 2)

J.A. 35. These allegations also plainly designate the Eastern District of Virginia as one location where Powers committed an illegal act—namely, he "caused to be placed" in the mail a stock certificate in furtherance of his scheme to defraud. J.A. 35. This is sufficient to allege venue in the Eastern District of Virginia for the mail fraud charged.

Powers contends that the indictment's mail and wire fraud counts fail to adequately allege venue because they do not include "the location from which the mailing or wires were sent or received." Reply Br. 6; *see* Opening Br. 20. This contention misses the mark. First of all, the premise is wrong. Venue for a mail or wire fraud prosecution is not limited to the districts where the communication originated and terminated. For example, these offenses can be prosecuted in any district the wire communication or mail passed through in furtherance of the fraudulent scheme. *See Ebersole*, 411 F.3d at 527; 18 U.S.C. 3237(a); *see also United States v. Goldberg*, 830 F.2d 459, 465 (3d Cir. 1987) (recognizing that offenses were triable in the Eastern District of Pennsylvania because "wire transfer of funds from New York to Wilmington . . . passed through the Federal Reserve Bank in Philadelphia"). Prosecution is also proper in the district where the defendant commits an act that "causes" misuse of the mail or wires, even if the mail deposit or the electric impulses that initiate the wire communication occur elsewhere. 18 U.S.C. §§ 1341, 1343.

As we have previously explained, "the essential conduct prohibited by § 1343 is the misuse of wires *as well as any acts that cause such misuse*." *Jefferson*, 674 F.3d at 366 (emphasis added) (brackets omitted) (quoting *United States v. Pace*, 314 F.3d 344, 349 (9th Cir. 2002)).

Second, and in any event, the indictment was not required to allege venue with greater specificity. Our inquiry when assessing a challenge to the adequacy of the indictment is whether the Government has alleged that a crime was committed in the district, not whether or how the Government will prove that fact at trial. As explained above, the indictment here was sufficient because it alleged that Powers's illegal acts occurred in the Eastern District of Virginia and elsewhere. *See Engle*, 676 F.3d at 416. A defendant who needs evidentiary details beyond those provided in the indictment to prepare his defense may seek a bill of particulars. *United States v. Am. Waste Fibers Co.*, 809 F.2d 1044, 1047 (4th Cir. 1987); *see* Fed. R. Crim. P. 7(f). Notably, Powers moved for a bill of particulars (which the district court granted), but he did not request any additional details about the Government's venue allegations.

In sum, the superseding indictment adequately alleged venue because it identified the Eastern District of Virginia as one place where the illegal conduct for each count of mail and wire fraud occurred. It was not required to allege the sending and receiving jurisdiction for each mailing and wire communication; indeed, in some cases doing so would be beside the point, as venue can be proven by other acts within the district. Because the indictment sufficiently alleged venue for Counts One through Five, we affirm the district court's denial of the motion to dismiss.

III.

We next consider Powers's contention that the district court failed to address one of his arguments for a below-Guidelines sentence. Specifically, Powers avers that the district court did not explain why it rejected his urging to disregard the fraud Guidelines because they lack an empirical basis, resulting in sentences that do not reflect culpability and are unfairly cumulative.

We review a criminal sentence for reasonableness "under a deferential abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 41 (2007). A sentencing court must state "the reasons for its imposition of the particular sentence," 18 U.S.C. § 3553(c), and "adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing," *Gall*, 552 U.S. at 50. "The appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends upon the circumstances," and the law leaves much to "the judge's own professional judgment." *Rita v. United States*, 551 U.S. 338, 356 (2007). The key is that the sentencing judge "should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." *Id.*

Where a defendant (or prosecutor) presents nonfrivolous reasons for imposing a sentence outside the Guidelines, the sentencing judge must "address or consider" those arguments and "explain why he has rejected" them. *United States v. Ross*, 912 F.3d 740, 744 (4th Cir. 2019). "[T]his admonition focuses on the whole of a defendant's argument and does not require the court to address every argument a defendant makes." *United States v. Arbaugh*, 951 F.3d 167, 174 (4th Cir. 2020). Appellate review is not a game of

"Gotcha!" where we tally up the number of distinguishable arguments a defendant mentioned in the district court and then comb the sentencing transcript for proof the district court mentioned each one by name. *See United States v. Nance*, 957 F.3d 204, 214–215 (4th Cir. 2020) (citing *United States v. Mendoza-Mendoza*, 597 F.3d 212, 218 (4th Cir. 2010)). Rather, when a district court addresses a defendant's "central thesis," it need not address separately every "*specific* claim[] made in support." *Id.* at 214.

The district court here rejected the core premise of Powers's argument that the enhancements of the fraud Guidelines—including the amount of loss and number of victims—were "a poor proxy for the seriousness of the offense and the moral culpability of the defendant" and would result in an "unfairly cumulative" and excessive sentence. J.A. 221, 225 (capitalization omitted) (Powers's presentencing memorandum). At the sentencing hearing and in its written opinion, the court emphasized the scope of the fraud and the harm it caused, as reflected both in the amount of loss and the number of victims. *See*, *e.g.*, J.A. 1281 ("I cannot ignore the fact that you defrauded individuals out of more than $20 million, and that there were at least 41, if not more, individuals involved."). As the court explained:

> [N]o matter whether Defendant appreciates this, the circumstances of his actions were grave. Defendant did not just defraud one or two people out of a few dollars. Defendant defrauded *at least 41 individuals out of $23,233,803.18*. The number of individuals that Defendant victimized financially and otherwise is both staggering and significant. Equally astounding is the sum of money that Defendant fraudulently deprived his victims of, particularly collectively, but also individually. At bottom, these are facts that simply cannot, have not, and will not be ignored.

J.A. 1613–1614 (citations omitted). We are not left to speculate: The district court plainly concluded that the amount of loss and number of victims were both relevant metrics that accurately reflected Powers's culpability for his crimes. The court also found each of the other enhancements that it applied to be justified by the facts and circumstances of this case. *See*, *e.g.*, J.A. 1604–1605 (concluding that "the intricacies of deception that Defendant engaged in were sufficient" to warrant application of the "sophisticated means" enhancement). Comparing Powers with other fraud defendants who received shorter sentences, the court found Powers more culpable because of the length of his fraud, the amount stolen, and his unwillingness to acknowledge the consequences of his actions. The court ultimately concluded that 151 months' imprisonment was appropriate, sufficient, and no more than necessary to comply with the statutory purposes of sentencing.

The district court's individualized determination that the Guidelines yield an appropriate sentence in this case sufficiently addressed Powers's argument, rendering it unnecessary to separately address whether the district court would disagree with the policy of the fraud Guidelines in the abstract. The court was not required to answer the policy debate about whether the fraud Guidelines are based on adequate data in order to find the Guidelines factors and resulting sentencing range appropriate for this defendant and this case. As we have previously acknowledged, district courts have discretion "'to consider policy decisions underlying the Guidelines, including the presence or absence of empirical data'" and may even reject Guidelines on that basis, but they are "'under no obligation to do so.'" *United States v. Williams*, 19 F.4th 374, 378 (4th Cir. 2021) (quoting *United States v. Rivera-Santana*, 668 F.3d 95, 101 (4th Cir. 2012)). When considering a defendant's

argument that a particular Guideline lacks empirical justification, a district court may choose to adhere to the Guidelines because they "represent the institutional authority of the [Sentencing] Commission and Congress." *United States v. Lopez-Reyes*, 589 F.3d 667, 671 (3d Cir. 2009). Or the district court may follow the Guidelines because the court agrees that the sentencing range they recommend suits the instant offense and offender. The district court is not obligated to assure itself that the relevant Guideline rests on sufficient data or empirical justifications before it may conclude that the sentencing range the Guidelines recommend is appropriate in a particular case. Here, the district court rejected Powers's "central thesis" that the fraud Guidelines enhancements overstated his culpability; it was not required to resolve the broader policy debate Powers marshalled in support of that argument. *Nance*, 957 F.3d at 214.

Powers suggests that the district court "was not sure whether it could base its sentencing decision" on the policy grounds he raised, Reply Br. 12, as evidenced by the court's question during the sentencing hearing about whether the basis for the fraud Guidelines was "a question for this Court to answer, or is that a question for the [S]entencing [C]ommission," J.A. 1248. We think Powers stretches this comment too far. The district court never indicated that it lacked discretion to vary from the Guidelines or disagree with them on policy grounds; indeed, the court repeatedly acknowledged that the Guidelines are merely advisory. Rather, the court appears to have been suggesting that questions about why the Commission drafted the fraud Guidelines as it did should be asked of the Commission, not the court. We note, however, that this exchange further illustrates that the district court heard and considered Powers's argument. *See Nance*, 957 F.3d at

213 ("Where a sentencing court hears a defendant's arguments and engages with them at a hearing, we may infer from that discussion that specific attention has been given to those arguments.").

In sum, although the district court did not address Powers's specific contention about the alleged policy failings of the fraud Guidelines, it did address and reject his argument that the fraud enhancements consequently overstated his culpability. Powers does not raise any other objection to his sentence, and the record reveals that the district court provided a thorough and individualized explanation for its sentencing decision. We therefore conclude that Powers's sentence is procedurally reasonable.

IV.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.